



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

A matter regarding NEST PROPERTY MANAGEMENT AND REAL ESTATE
SERVICE and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held, by teleconference, on February 23, 2023. The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for damage or loss under the Act; and,
- authorization to retain all or a portion of the Tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38.

The Landlord and the Tenant both attended the hearing and provided affirmed testimony. The Tenant confirmed receipt of the Landlord's Notice of Dispute Resolution Proceeding and evidence package. The Tenant did not submit any documentary evidence. No service issues were raised. I find the Landlord sufficiently served the required documents, and evidence.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Is the Landlord entitled to a monetary order for damage or loss under the Act?
- Is the Landlord authorized to retain all or a portion of the Tenant's security and pet deposit in partial satisfaction of the monetary order requested pursuant to section 38?

Background and Evidence

Both parties agree that:

- monthly rent was \$1,750.00 and was due on the first of the month and the tenancy started February 25, 2022, and was for a 1 year fixed term spanning until February 28, 2023.
- The Landlord holds a security deposit in the amount of \$875.00 and a pet deposit in the amount of \$875.00.
- The Tenant moved out on May 31, 2022.

As per the email provided into evidence, the Tenant provided her forwarding address to the Landlord via email on June 7, 2022. A copy of the move-in and move-out inspection report was provided.

The Landlord is seeking the following items:

- 1) \$1,837.50 – “re-leasing fee” based on liquidated damages clause

The Landlord stated that since the Tenant was under a fixed term tenancy for one year, she was not entitled to break the lease early, without liability. The Landlord pointed to the tenancy agreement, whereby the parties agreed to the following term:

3. **LIQUIDATED DAMAGES** - If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this agreement and end the tenancy by vacating and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of \$ 1,750.00 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.

The Landlord provided a copy of the invoice showing what they paid to their agent to re-rent the unit, which was \$1,750.00, plus GST. This is the amount the Landlord is seeking, as this was a direct cost the Landlord incurred in order to procure new tenants and pay their agent accordingly.

The Tenant does not agree she should have to pay for this, since she referred several people to the Landlord's agent as prospective renters. The Tenant stated that the Landlord can't include a term in the tenancy agreement which provides for the automatic forfeiture of the deposits.

2) \$120.00 – Cleaning Costs

The Landlord stated that this is the amount they are seeking for “touch up” cleaning that was required at the end of the tenancy. A copy of the invoice was provided into evidence. The Landlord loosely referred to some garbage left behind, and some touch ups in the kitchen and bathroom.

The Tenant denies that she left the unit dirty or that she left garbage behind.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Tenant. Once that has been established, the Landlord must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord did everything possible to minimize the damage or losses that were incurred.

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

Security and Pet Deposit

Pursuant to sections 24 and 36 of the *Act*, landlords and tenants can extinguish their rights in relation to the security and pet damage deposits if they do not comply with the *Act* and *Residential Tenancy Regulation* (the “*Regulations*”). Further, section 38 of the *Act* sets out specific requirements for dealing with security and pet damage deposits at the end of a tenancy.

Based on the condition inspection report and testimony of the parties, I find the Tenants appear to have participated in the move-in and move-out inspections and therefore did not extinguish their rights in relation to the security or pet damage deposits pursuant to sections 24 or 36 of the *Act*.

It is not necessary to determine whether the Landlord extinguished their rights in relation to the security or pet damage deposits pursuant to sections 24 or 36 of the *Act* because extinguishment only relates to claims for damage and the

Landlord has claimed for cleaning as well as liquidated damages.

Pursuant to section 38(1) of the Act, the Landlord had 15 days from the later of the end of the tenancy or the date the Landlord received the Tenants' forwarding address in writing to repay the security and pet damage deposits or file a claim against them. In this case, the later of those dates is the date the Landlord received the Tenant's forwarding address in writing, by email, on June 7, 2022.

The Landlord filed the application against the deposits on June 8, 2022. This application was filed in time, and I find the Tenant is not entitled to double the deposits.

The Landlord is seeking:

- 1) \$1,837.50 – "re-leasing fee" based on liquidated damages clause

I turn to the Landlords claim to recover liquidated damages from the Tenant. Residential Tenancy Policy Guideline 4 provides for liquidated damages as follows:

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- *A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.*
- *If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- *If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

In this case, I find that the liquidated damages clause in the tenancy agreement is an enforceable term, as it is not extravagant compared to what rental losses could have been incurred following premature termination of the agreement (costs to re-rent). I note the Landlord provided direct evidence corroborating that they paid \$1,837.50 to their agent as a fee to re-rent the unit following the early end to the fixed term tenancy agreement.

I find the amount of 1 month's worth of rent is not punitive, such that the clause is not enforceable. This term was agreed to up front. I award the Landlord \$1,750.00, which is the amount agreed to in the tenancy agreement. I decline to award \$1,837.50, as this is more than what the liquidated damages clause provides for.

2) \$120.00 – Cleaning Costs

I find the Landlord's statements on this matter were somewhat vague and poorly substantiated. The photos provided lacked clarity and I do not find they sufficiently demonstrate that the Tenants failed to leave the unit in a reasonably clean state. The Tenant denies she left it dirty. I dismiss this item, in full.

Further, section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. As the Landlord was partially successful with his application, I order the Tenant to repay the \$100.00 fee that the Landlord paid to make application for dispute resolution.

Also, pursuant to sections 72 of the Act, I authorize that the security and pet deposit, currently held by the Landlord, be kept and used to offset the amount owed by the Tenant. In summary, I grant the monetary order based on the following:

Claim	Amount
Liquidated damages	\$1,750.00
Filing fee	\$100.00
Less: Security and pet Deposit currently held by Landlord	(\$1,750.00)
TOTAL:	\$100.00

Conclusion

The Landlord is granted a monetary order in the amount of **\$100.00**, as specified above. This order must be served on the Tenant. If the Tenant fails to comply with this order the Landlord may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: February 24, 2023

Residential Tenancy Branch