



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

A matter regarding Townline Ventures Hudson Mews
Inc. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND MNR 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 March 6, 2023. The Landlord applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "Act").

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

The Landlord was 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 unpaid rent, for damage to the unit and for damage or loss under the Act?
- Is the Landlord entitled to retain all or a portion of the Tenants' security deposit in partial satisfaction of the monetary order requested?
- Is the Landlord entitled to recover the cost of the filing fee?

Background and Evidence

As per the tenancy agreement provided into evidence, the tenancy start on September 1, 2021, and was set for a fixed term of one year, ending August 31, 2022. Rent was set at \$1,700.00, and which includes \$150.00 per month for parking. The Landlord collected a deposit of \$850.00 and still holds this amount. The Landlord stated that although D.L. is named as a tenant, she never lived there, and only M.K. lived in the unit.

The Landlord filed an application seeking the following items:

- 1) \$3,400.00 – Unpaid Rent (February and March)

The Landlord stated that the M.K. was very unclear about when he would be moving out of the rental unit, which made it difficult to mitigate lost rent. More specifically, the Landlord stated that the M.K. didn't tell them anything, formally or in writing, until February 28, 2022, when he sent them an email stating he would be moved out by the end of March 2022. The Landlord did not provide a copy of this email.

The Landlord stated that the Tenants failed to pay rent at all for February or March 2022. The Landlord stated that they tried to book a move-out inspection in early March but the M.K. didn't show up, so they tried again on March 14, 2022. The Landlord stated that the M.K. failed to show up on either occasion, and so they went ahead with the inspection on March 14, 2022. At that time, it was clear the M.K. had abandoned the unit, and had left behind a loveseat, a couple tables, garbage, and food.

D.L. asserts that M.K. got a new job in December 2021, and moved some of his belongings out at that time. D.L. also stated that M.K. told the Landlord at that time he was moving. However, D.L. had no evidence to support this. D.L. stated that M.K. told the Landlord several times he was no longer living in the rental unit after he came back in January and picked up most of his belongings. However, no documentary evidence was provided in support of this.

- 2) \$321.75 – Cleaning and Garbage disposal

The Landlord provided receipts for this and stated the Tenant left behind several items of furniture and garbage. The Tenant, D.L., acknowledged being responsible for this item.

- 3) \$1,550.00 – Liquidated Damages

The Landlord pointed to the following term in the tenancy agreement:

4. **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 as set out in clause 4 above, 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 \$ 1,550.00 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the Landlord's costs of re-letting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property.

DS
TFNANT/TFNANT/ LANDLORD

The Landlord stated that this amount is standard because the owner gets charged a re-rent fee which is comprised of commission, plus administrative and re-listing fees. The Landlord stated that these fees all amount to around one month's worth of rent, and was a pre-estimate of their costs to re-rent, if the lease was broken.

The Tenant, D.L., did not feel it is fair to have to pay this amount on top of the rent for February and March 2022.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

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 Tenants. Once that has been established, the Landlords 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.

I turn to the items, as laid out above:

- 1) \$3,400.00 – Unpaid Rent (February and March)

I note the following portion of the Act:

Tenant's notice

45 (2) *A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In this case, I note the Tenant was under a fixed term tenancy agreement, and was not legally entitled to end the tenancy, without liability, prior to the end of the term. I note the Tenant asserts that notice was given as early as December 2021. However, no documentary evidence was provided in support of this. The Tenant, D.L., did not dispute that no rent was paid for February or March 2022. The Landlord stated they did not received anything in writing, about ending the tenancy, until February 28, 2022, which was to end the tenancy for the end of March. Overall, I find there is insufficient evidence that the Tenants notified the Landlord, clearly, and in writing, prior to February 28, 2022. Further, D.L. acknowledged that when M.K. moved out he left behind several items, and some garbage. It does not appear the move-out inspection was completed until mid-March, and the invoice indicates that the rest of the Tenant's belongings were not cleared out until March 17/18, when the unit was cleared out and cleaned by the Landlord's cleaning company.

After reviewing the totality of evidence and testimony on this matter, I find the Tenants are liable for these two months, given no rent was paid for February or March 2022, and since the Tenant failed to clear his belongings out. Further, there is a lack of documentary evidence showing the Tenants clearly communicated that they had moved out before March. Also, this was a fixed term tenancy. Ultimately, I award this item in full, given the Tenant's breach of section 45(2) of the Act. I find this matter would have been difficult for the Landlord to mitigate given the unclear communication regarding move-out.

2) \$321.75 – Cleaning and Garbage disposal

I award this item in full, given the Tenant, D.L., acknowledged being responsible for this item.

3) \$1,550.00 – Liquidated Damages

I note the parties both signed to a liquidated damages amount of \$1,550.00, in the event that there was a breach of the fixed term tenancy agreement. 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. 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, and is tied to commissions and fees the Landlord has to pay to re-rent the unit. I award the full amount of this item, \$1,550.00.

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 substantially successful with the application, I order the Tenants to repay the \$100.00 fee that the Landlord paid to make application for dispute resolution. Also, I authorize the Landlord to retain the security deposit to offset the other money owed.

In summary, I find the Landlord is entitled to the following monetary order:

Item	Amount
Rent	\$3,400.00
Cleaning	\$321.75
Liquidated Damages	\$1,550.00
PLUS: Filing Fee	\$100.00
Subtotal:	\$5,371.75
LESS: Security Deposit	\$850.00
Total Amount	\$4,521.75

Conclusion

The Landlord is granted a monetary order in the amount of **\$4,521.75**, as specified above. This order must be served on the Tenants. If the Tenants fail 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: March 7, 2023

Residential Tenancy Branch