



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, MNDL-S, MNDCL-S, FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for unpaid rent, pursuant to sections 26 and 67;
- a Monetary Order for damage or compensation, pursuant to section 67;
- a Monetary Order for damage, pursuant to section 67;
- authorization to retain the tenant's security and pet damage deposits, pursuant to section 38; and
- authorization to recover the filing fee from the tenant, pursuant to section 72.

An agent for the landlord (the "agent") and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Preliminary Issue- Service

The agent testified that the tenant was served the landlord's application for dispute resolution and evidence via e-mail on September 20, 2022. The agent entered into evidence and e-mail service agreement, RTB form 51, signed by the tenant. The tenant testified that she received the landlord's application for dispute resolution and evidence. I find that the landlord's application for dispute resolution and evidence were served in accordance with sections 88 and 89 of the *Act*.

The tenant testified that she served the landlord with her evidence on May 23, 2023 via regular mail. The agent testified that the landlord has not yet received the tenant's evidence. No proof of service documents pertaining to the alleged mailing were entered into evidence. I find that the tenant has not proved that her evidence was served on the landlord, and in any event, if the tenant mailed the landlord her evidence on May 23,

2023, the landlord would not be deemed served until May 28, 2023, one clear day before this hearing.

Section 3.15 of the Residential Tenancy Branch Rules of Procedure (the “*Rules*”) states that the respondent’s evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing. I find that even if the tenant’s evidence was mailed on May 23, 2023, it is excluded from consideration for breach of rule 3.15 of the *Rules*.

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to a Monetary Order for damage, pursuant to section 67 of the *Act*?
4. Is the landlord entitled to retain the tenant’s security and pet damage deposits, pursuant to section 38 of the *Act*?
5. Is the landlord entitled to recover the filing fee from the tenant, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant’s and landlord’s claims and my findings are set out below.

Both parties agreed to the following facts:

- This one-year fixed term tenancy began on December 1, 2021
- monthly rent in the amount of \$1,550.00 was payable on the first day of each month, and
- a security deposit of \$775.00 and a pet damage deposit of \$775.00 were paid by the tenant to the landlord.

A written tenancy agreement and addendum were signed by both parties and a copy was submitted for this application.

The tenant testified that on April 3, 2022 she provided the landlord with notice to end the tenancy effective April 30, 2022. The notice to end tenancy was entered into evidence and provides the landlord with the tenant's forwarding address and seeks the return of the security and pet damage deposits. The tenant testified that she moved out of the subject rental property on April 30, 2022, this was not disputed by the landlord. Both parties agree that the tenant returned the keys to the subject rental property on May 12, 2022.

The landlord filed this application for dispute resolution on September 5, 2022.

No documentary evidence showing that the tenant agreed in writing for the landlord to retain any portion of her deposits was presented in the hearing. The agent did not testify that the landlord received written authorization to retain any portion of the deposits.

Both parties agreed that they completed a joint move in condition inspection and inspection report at the start of this tenancy. The landlord testified that he gave the tenant two opportunities, at least one in writing, to complete the move out condition inspection report but the tenant refused to attend. The tenant testified that the landlord did not give her an opportunity in writing to attend the move out condition inspection report. No written request for the tenant to attend the move out condition inspection was entered into evidence.

The agent testified that the tenant flooded the subject rental property causing significant damage to the floors and drywall. The tenant testified that her pet caused the flood. The landlord entered into evidence a report from a flood restoration company (the "restoration report") which states that the date of loss was April 23, 2022.

The agent is claiming the following damages:

1. Loss of rental income: \$6,200.00,
2. Late fees: \$100.00,
3. Insurance deductible: \$1,000.00,
4. Move out clean: \$280.00,
5. Bylaw fine: \$50.00
6. Liquidated damages: \$775.00

The landlord's application for dispute resolution also claimed \$152.34 in interest; however, the agent withdrew this claim in the hearing.

Loss of rental income and late fees

The agent testified that the repairs to the subject rental property were mostly completed by the end of August 2022 and that the subject rental property was not rentable from May to August 2022. Photographs contained in the restoration report show extensive water damage. The agent testified that the landlord was able to rent the subject rental property out for September 1, 2022 and that the new tenant allowed the landlord to complete the last repairs during their tenancy including spot painting and the installation of baseboards. The agent testified that the landlord attempted to mitigate damages by having a new tenant move in as soon as possible, even though the repairs were not yet complete.

The tenant testified that she thought that since the landlord agreed that she could move out at the end of April 2022, she was not responsible for rent past April 2022.

The agent testified that he did not agree that the tenant could break the lease early and that the tenant is responsible for the loss of rental income caused by the damage to the subject rental property.

The agent testified that he viewed the tenancy as ongoing until September 2022 and so the tenant should have paid rent from May to August 2022. The landlord is seeking a late fee of \$25.00 per month from May to August 2022 because the tenant did not pay rent on time. The agent testified that the *Act* states that until a new tenant is found, the lease is valid.

The tenant testified that her insurance only covered damage to her personal belongings and did not cover the landlord for his loss.

Insurance deductible

The agent testified that he paid a \$1,000.00 insurance deductible for the repairs to the subject rental property. An invoice for same was entered into evidence.

The tenant testified that the landlord already has her security deposit and pet damage deposit and she should not have to pay for this twice.

Move out clean

Both parties agree that the tenant did not clean the subject rental property at the end of the tenancy. The tenant testified that she could not clean the subject rental property because the restoration work had already started.

The agent testified that the work primarily involved the flooring and drywall and that the tenant could have cleaned the kitchen and bathroom but did not do so. The agent entered into evidence a cleaning invoice in the amount of \$280.00.

Bylaw fine

The agent testified that he paid a \$50.00 bylaw fine issued to the tenant for smoking on the balcony of the subject rental property. The tenant agreed to pay the landlord the \$50.00 strata fine.

Liquidated damages

The agent testified that pursuant to the addendum, the tenant is required to pay liquidated damages in the amount of \$775.00 for breaking the fixed term tenancy. The agent testified that the liquidated damages are for the costs associated with re-renting the unit.

The tenant testified that she needs to check with her bank to see if she has already paid the landlord for liquidated damages. The tenant later testified that she already paid the landlord \$500.00 for liquidated damages. No evidence of same was accepted for consideration.

The landlord testified that the tenant has not sent him any money for liquidated damages.

Section K of the addendum to the tenancy agreement states:

Early termination is defined as ending the lease prior to the term dated on the RTB-1. Any request must be made in writing, with a minimum of 1 clear calendar month. If early termination is requested, the tenant agrees to pay a fee of 50% of 1 months rent to cover costs associated with advertising the property and finding a new tenant. This fee cannot be paid from the damage or pet deposits, is non-refundable, and must be paid prior to making an official request to end tenancy early.

Analysis

Under section 7 of the *Act* a landlord or tenant who does not comply with the *Act*, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Under section 67 of the *Act*, if damage or loss results from the tenant breaching the *Act*, regulations or tenancy agreement, I may order the tenant to pay compensation to the landlord.

Loss of rental income and late fees

I find that by way of the notice to end tenancy, the tenant ended the tenancy, contrary to the fixed term tenancy agreement and section 45 of the *Act*, on April 30, 2022. The *Act* does not state that when a tenant ends a tenancy early the tenancy continues until the tenant was legally permitted to end the tenancy. The *Act* and policy guidelines state that the tenant is responsible for loss of rental income caused by their breach up until the time the tenant could have ended the tenancy under section 45 of the *Act*, barring any mitigation issues. To be clear, this tenancy ended on April 30, 2022.

Policy Guideline 3 states that if a tenant causes damage to the subject rental property and the subject rental property is unrentable because of this, the landlord can seek compensation for loss of rent.

Based on the testimony of both parties and the restoration report entered into evidence, I find that the tenant or the tenant's pet caused a flood in the subject rental property

which resulted in considerable water damage that left the subject rental property un-rentable from May to August 2022.

I accept the agent's undisputed testimony that the majority of the repairs were completed by the end of August 2022 and the remaining repairs were completed thereafter while a new tenant resided in the subject rental property. I find that in finding a tenant willing to live at the subject rental property while repairs were ongoing, the landlord mitigated their damages.

In accordance with sections 7 and 67 and Policy Guideline #3, I find that the landlord is entitled to recover \$6,200.00 in loss of rental income from the tenant due to the flood damage caused by the tenant or the tenant's pet.

This tenancy ended on April 30, 2022. Rent is only due and payable while a tenancy is ongoing. Rent and loss of rental income caused by damage to the subject rental property are not the same thing. I find that the landlord is not entitled to recover late rent fees as the tenant's obligation to pay rent ended at the end of the tenancy.

Insurance deductible

Section 37(2)(a) of the *Act* states that when a tenant vacate a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Based on the testimony of both parties and the restoration report entered into evidence, I find that the tenant did not leave the subject rental property undamaged. The tenant or the tenant's pet caused a flood which caused significant damage which the tenant did not repair. I find that the tenant breached section 37(2) of the *Act* by leaving the subject rental property damaged.

I find that the landlord has proved that he paid a \$1,000.00 insurance deductible to his insurer for the flood related repair work completed at the subject rental property. I find that the tenant is required to compensate the landlord for the loss he suffered which resulted from the tenant's breach of the *Act*. I find that no mitigation issues were raised in the hearing. I award the landlord \$1,000.00.

Move out clean

Section 37(2)(a) of the *Act* states that when tenants vacate a rental unit, the tenants must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Based on the testimony of both parties, I find that the tenant did not clean the subject rental property at the end of the tenancy, contrary to section 37(2)(a) of the *Act*. I accept the tenant's testimony that she was not able to clean all areas of the subject rental property because of the restoration work occurring at the subject rental property; however, I also accept the agent's testimony that the tenant could have cleaned areas unaffected by the flood and failed to do so.

I find that the tenant is responsible of the cost of cleaning the subject rental property as set out in the invoice for \$280.00. I award the landlord \$280.00.

Bylaw fine

Under section 63 of the *Act* if the parties settle a portion of their dispute during the hearing I may record the settlement in the form of a decision or order.

In accordance with section 63 of the *Act*, I award the landlord \$50.00 for the bylaw fine as agreed by the parties in the hearing.

Liquidated damages

Policy Guideline #4 states that 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 tenant signed the tenancy agreement and addendum and is therefore liable to pay liquidated damages for causing the tenancy to end prematurely. I find that the liquidated damages clause was clearly and carefully laid out in the tenancy agreement addendum and detailed the consequences of breaking the fixed term tenancy agreement. I find that the tenant has not provided any documentary evidence to suggest that the landlord agreed to mutually end the tenancy and forgo his right to liquidated damages. The evidence shows that the tenant unilaterally ended the tenancy by way of a notice to end tenancy, before the end of the fixed term, contrary to section 45(2) of the *Act* and the tenancy agreement.

I find that the tenant has not provided any documentary evidence to substantiate her claim that she already paid the landlord \$500.00 towards the liquidated damages claim as no documentary evidence was provided and the tenant was not originally confident in whether or not the payment was made.

I find that the amount of ½ a month's rent stipulated to cover the administration costs that the landlord would have likely incurred at the time the tenancy agreement was entered into is reasonable and not extravagant or exorbitant in relation to the rent payable in this tenancy. I award the landlord \$787.50 in liquidated damages.

Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in

writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the Act, equivalent to double the value of the security deposit.

However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

No documentary evidence showing that the tenant agreed in writing for the landlord to retain any portion of her deposits were entered into evidence. The agent did not testify that the landlord received written authorization to retain any portion of the deposits. I find on a balance of probabilities that the tenant did not authorize the landlord in writing to retain any portion of her security or pet damage deposits.

I find that the landlord has not proved, on a balance of probabilities, that he provided the tenant with two opportunities, one in writing, to attend the move out condition inspection as no such written request was entered into evidence and the tenant denied receiving same. The tenant's right to the return of the deposits is therefore not extinguished under section 36(1) of the *Act*.

This tenancy ended on April 30, 2022. The tenant provided the landlord with her forwarding address in writing on April 3, 2022. The landlord filed this application for dispute resolution on September 5, 2022, more than 15 days after the tenancy ended. Under section 38(6)(b) of the Act, the tenant is entitled to the return of double her security and pet damage deposits. The tenant is awarded \$3,100.00. The tenant's monetary award will be offset against the landlord's monetary award.

Filing fee

As the landlord was successful in the majority of this application for dispute resolution, I find that the landlord is entitled to recover the \$100.00 filing fee from the tenant, under section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	Amount
Loss of rental income	\$6,200.00
Insurance deductible	\$1,000.00
Move out clean	\$280.00
Bylaw fine	\$50.00
Liquidated damages	\$775.00
Filing Fee	\$100.00
Less doubled security and pet damage deposits	-\$3,100.00
TOTAL	\$5,305.00

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and 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: May 31, 2023

Residential Tenancy Branch