



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Ministry of Housing

## **DECISION**

Dispute Codes      Landlord: MNRL-S, MNDCL-S, FFL  
Tenant: MNSDS-DR, FFT

### Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear a cross application regarding the above-noted tenancy.

The landlord's application pursuant to the Act is for:

- a monetary order for unpaid rent, pursuant to section 26;
- a monetary order for compensation for damage and loss under the Act, the Residential Tenancy Regulation (the Regulation) or tenancy agreement, pursuant to section 67;
- an authorization to retain the security deposit, under section 38; and
- an authorization to recover the filing fee for this application, under section 72.

The tenant's application pursuant to the Act is for:

- an order for the landlord to return the security deposit, under section 38; and
- an authorization to recover the filing fee for this application, under section 72.

Tenant JS (the tenant) and landlord FC, represented by agent HL (the landlord), attended the hearing. The tenant was assisted by interpreter SH. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

This decision should be read with the interim decision dated March 06, 2023.

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that

each party was served with the respective materials in accordance with section 89(1) of the Act.

### Issues to be Decided

Is the landlord entitled to:

1. a monetary order for unpaid rent?
2. a monetary order for loss?
3. an authorization to retain the security deposit?
4. an authorization to recover the filing fee?

Is the tenant entitled to:

1. an order for the landlord to return the security deposit?
2. an authorization to recover the filing fee?

### Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the landlord's and tenant's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the applicants' obligation to present the evidence to substantiate their application.

Both parties agreed they signed a tenancy agreement in March 2022 for a fixed-term tenancy from May 1, 2022 to April 30, 2023. Monthly rent of \$2,300.00 was due on the first day of the month. The landlord collected and holds in trust a security deposit of \$1,150.00 and a fob deposit of \$200.00. The parties submitted the signed tenancy agreement dated March 24, 2022. It states: "If the tenant vacates prior to the expiration of the lease the tenant will be responsible for liquidates damages of \$1,150.00. This amount does not include loss of rent. The landlord has a duty to mitigate loss by acting in a prompt manner to re-rent the premise."

The parties emailed on April 24, 2022:

TENANT: Now I officially demand a cancellation of lease contractor [rental unit's address] due to your misconduct as a rental agency because you keep to refuse to show me the flood situation before my moving in even if I ask you several times. [...] Please make a deposit of \$1,350.00 back to me until April 24<sup>th</sup>, 2022. Email [redacted]

LANDLORD: Unfortunately, you have no right to breach the lease agreement without the landlord's consent. You have to pay May rent till we find a new tenant. I have emphasized several times, there is a water leak but the problem has been solved by

the restoration company and the current tenants are living there. [...] The current status of the unit is livable without any problem, otherwise the current tenants will move out to hotel, but they are still living inside. Your decision violates the lease agreement. You should seriously consider your decision again, if you insist to breach the lease, there are the cost you have to pay. Lease breachment fee: \$1,150.00 plus 5% GST, on-going loss of rent from the landlord starting from May 1, 2022, \$2,300.00 per month (till we find new tenants). If you don't pay rent on May 1, 2022, I will go to legal process to make a claim to you. Please advise. And I also need your forwarding address to deliver all the legal documents. Again, if you owe the landlord's rent, you have to pay otherwise we will go after you.

The tenant did not move in and did not pay May 2022 rent because she learned there was water damage in the rental unit. The landlord affirmed the rental unit did not have water damage on April 24, 2022.

The landlord stated that he advertised the rental unit on April 25, 2022, asking for \$2,200.00. The landlord was able to re-rent the unit for a tenancy starting on June 01, 2022 for \$2,200.00.

The landlord testified that he paid \$1,150.00 to the rental agent to find a new tenant.

The landlord said he only received the forwarding address on September 4, 2022 via email. The tenant affirmed she emailed the forwarding address on June 3, 2022. The tenant submitted the email dated June 3, 2022 containing her forwarding address. The landlord applied for dispute resolution on June 16 and the tenant on October 17, 2022.

The landlord is seeking compensation for loss of income for May 2022 rent in the amount of \$2,200.00 and the liquidated damages of \$1,150.00. The tenant is seeking double the return of the security deposit.

### Analysis

Section 7 of the Act states that if a party does not comply with the Act, the Regulations or the tenancy agreement, the non-complying party must compensate the other party for damage or loss that results and that the who claims compensation must minimize the losses.

Residential Tenancy Branch (RTB) Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act or the tenancy agreement is due. It states the applicant has to prove the respondent failed to

comply with the Act or the agreement, the applicant suffered a loss resulting from the respondent's non-compliance, and the applicant proves the amount of the loss and reasonably minimized the loss suffered.

Pursuant to Rule of Procedure 6.6, the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove the case is on the person making the claim.

#### End of tenancy

In accordance with section 16 of the Act, "The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit."

I accept the uncontested testimony that the parties entered into a fixed-term tenancy agreement from May 1, 2022 to April 30, 2023, the tenant informed the landlord on April 24 that she would not occupy the rental unit and the landlord advertised it on April 25, 2022.

I find the tenancy ended on April 25, 2022, as the landlord was aware the tenant would not move to the rental unit and advertised the rental unit to re-rent it, per section 44(1)(f) of the Act.

I am not finding if there was or not water damage in the rental unit. Tenants are not authorized to end a tenancy by emailing the landlord if there is water damage in the rental unit.

#### Loss of rental income

Based on the landlord's undisputed testimony, I find the landlord suffered a loss of rental income from May 1 to 31, 2022 because the tenant failed to pay rent due on May 1, 2022.

RTB Policy Guideline 3 sets conditions for loss of rental income claims. It states:

The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and

what he was able to re-rent the premises for the balance of the un-expired term of the tenancy.

[...]

In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.

Further to that, Policy Guideline 5 states:

When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:

1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
2. re-rent the unit as soon as possible.

For example, if on September 30, a tenant gives notice to a landlord they are ending a fixed term tenancy agreement early due to unforeseen circumstances (such as taking a new job out of town) and will be vacating the rental unit on October 31, it would be reasonable to expect the landlord to try and rent the rental unit for the month of November. Reasonable effort may include advertising the rental unit for rent at a rent that the market will bear.

If the landlord waited until April to try and rent the rental unit out because that is when seasonal demand for rental housing peaks and higher rent or better terms can be secured, a claim for lost rent for the period of November to April may be reduced or denied.

I find the landlord acted to minimize his losses by advertising the rental unit one day after the tenant informed the landlord that she would not move to the rental unit and asking for a lower monthly rent. The landlord clearly warned the tenant in writing on April 24, 2022 that the tenant is liable for loss of rental income.

I note the landlord claimed for May 2022 loss of rental income of \$2,200.00 instead of the agreed rent of \$2,300.00.

In accordance with section 7 of the Act, I order the tenant to pay the landlord the amount of \$2,200.00.

#### Liquidated damages

The tenancy agreement provides for liquidated damages of \$1,150.00 if the tenant ends the tenancy before the end of the fixed term.

RTB Policy Guideline 4 states the following about liquidated damages:

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.

(emphasis added)

In this matter, I find that \$1,150.00 is a reasonable pre-estimate of the cost of re-renting the property and I do not find that this provision is a penalty, as this amount is only half of the monthly rent. Accordingly, I find that the liquidated damages clause is valid.

The tenant ended the tenancy early. Accordingly, I award the landlord \$1,150.00 in liquidated damages.

#### Security deposit

Based on the tenant's convincing testimony and the email dated June 3, I find the tenant emailed her forwarding address to the landlord on June 3, 2022. Per Regulation 44, I deem the landlord received the June 3, 2022 email on June 6, 2022.

Considering the tenancy ended on April 25, I deemed the landlord received the forwarding address on June 6 and the landlord submitted this application on June 16, 2022, I find the landlord applied for an authorization to retain the security deposit within the timeframe of section 38(1) of the Act.

According to the deposit interest calculator (available at <http://www.housing.gov.bc.ca/rtb/WebTools/InterestOnDepositCalculator.html>), the interest accrued on the deposit is \$12.29.

As explained in section D.2 of Policy Guideline #17, the Residential Tenancy Act provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord and the monetary amount or cost awarded to a tenant may be deducted from any rent due to the landlord.

Considering the above, I dismiss the tenant's application for an order for the return of the security deposit and order the landlord to retain the security deposit and interest in the total amount of \$1,362.29 in partial satisfaction of the monetary award.

For the purpose of educating the landlord, I note that under section 19(1) of the Act, a landlord is not permitted to accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement. The value of the security deposit accepted by the landlord was unlawful.

#### Filing fee and summary

The landlord is entitled to recover the \$100.00 filing fee, as the landlord was successful.

The tenant must bear the cost of the filing fee, as the tenant was not successful.

In summary, the landlord is awarded:

<b>Expenses</b>	<b>\$</b>
Loss of May 2022 rent	2,200.00
Liquidated damages	1,150.00
Filing fee	100.00
Subtotal	3,450.00
Minus security deposit	1,362.29
<b>Total</b>	<b>2,087.71</b>

Conclusion

Pursuant to sections 7, 38, 67 and 72 of the Act, I authorize the landlord to retain the \$1,362.29 security deposit and grant the landlord a monetary order in the amount of \$2,087.71.

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: June 22, 2023

---

Residential Tenancy Branch