



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

The Landlord finalized their Application for Dispute Resolution (the “Application”) on November 28, 2022 seeking compensation for unpaid rent and for other money owed, and to recover the filing fee for their Application.

The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the “Act”) on August 18, 2023. In the conference call hearing, I explained the process and provided the attending party, the Landlord, the opportunity to ask questions on the hearing procedure.

Preliminary Matter – Landlord’s service of Notice of Dispute Resolution Proceeding

To proceed with this hearing, I must be satisfied that the Landlord made reasonable attempts to serve the Tenant with the Notice of Dispute Resolution Proceeding for this hearing. This means the Landlord must provide proof that they served that document using a method allowed under s. 89 of the *Act*, and I must accept that evidence.

The Landlord’s evidence, as reviewed in the hearing with the Landlord, shows that they served this Notice of Dispute Resolution Proceeding to the Tenant using registered mail, sent on December 2, 2022. The image of the postal receipt in the Landlord’s evidence shows the registered mail tracking number. In the hearing, the Landlord provided that the address they used for this purpose was that provided to them by the Tenant when the Tenant applied for this tenancy with the Landlord, prior to signing a tenancy agreement.

The Landlord also provided an image of the envelope once it was returned to them by the postal service. This was “Refused” as indicated in that picture.

The Landlord also described attending to the Tenant's address in person to deliver the Notice of Dispute Resolution Proceeding. They described a family member of the Tenant present at that address not allowing the Landlord in to deliver the Notice of Dispute Resolution Proceeding. This occurred some time in December. They also tried to contact the Tenant via phone several times.

Based on the submissions of the Landlord, as well as the evidence of their registered mail, I find they served the Notice of Dispute Resolution Proceeding in a manner complying with s. 89(1)(c) of the *Act*. I proceeded with the hearing in the Tenant's absence.

Issue(s) to be Decided

Is the Landlord entitled to a monetary order for rent amounts owing, and/or other money owed, pursuant to s. 67 of the *Act*?

Is the Landlord entitled to recover the filing fee for this Application pursuant to s. 72 of the *Act*?

Background and Evidence

The Landlord provided testimony on this tenancy. They provided a copy of the tenancy agreement they had in place with the Tenant, signed by the Tenant on October 18, 2022. This set out a start to the tenancy for November 1, 2022. The set rent amount was \$2,500, and the Tenant paid a security deposit amount of \$1,250.

The agreement contains a provision for liquidated damages, in the event that the tenancy should end before the end of the fixed term. The set amount written into the agreement is \$926, as "liquidated damages and not as a penalty for all costs associated with re-renting the rental unit."

The agreement in paragraph 12 also provides for "an administration fee" of \$25 for late payment of rent, returned/NSF cheques, plus any service fees charged by the Landlord's financial institution.

The Landlord presented the handwritten note, signed by the Tenant, dated October 31, 2022. This sets out "I give notice for not moving into [rental unit address] on this day of October 31, 2022." The Landlord's notation on the letter is that they received this on November 1, 2022.

On their Application to the Residential Tenancy Branch, the Landlord wrote as follows:

Tenant signed a residential tenancy agreement commencing November 1, 2022. On November 1, 2022, the tenant notified us that they decided that they did not want to move into the rental unit. Tenant was notified that they were still responsible for the November rent as we already had a signed agreement. Unit was put back onto the market, but we were unable to re-rent the rental unit for the month of November leaving us with a loss for the unpaid rent

The Landlord, on a completed 'Monetary Order Worksheet', the Landlord listed the whole amount of unpaid rent for November 2022, at \$2,500. The Landlord also listed \$926, applying the liquidated damages clause set out in the tenancy agreement.

The Landlord added the amount of liquidated damages as set out in clause 6 of the tenancy agreement; this is the amount of \$926.

The Landlord added the NSF charge of \$30. This amount appears in the ledger provided by the Landlord in their evidence, as "Returned cheque charge" on November 10.

The Landlord also provided in their evidence (to the Residential Tenancy Branch on January 26, and to the Tenant via registered mail separately) for an unpaid utility amount of \$23.69. The invoice that the Landlord provided shows the account for the electrical utility closed on November 30.

In total, the Landlord's claim for compensation from the Tenant is \$3,479.69.

Analysis

I refer to the *Act* in order to determine each party's rights and obligations in this dispute. The *Act* s. 1 gives pertinent definitions:

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

"tenant" includes

- (a) the estate of a deceased tenant, and
- (b) when the context requires, a former or prospective tenant.

A tenancy agreement confers rights and obligations, by s. 16:

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.

A tenant has ability to end a tenancy, as set out in s. 45. The subsection (4) provides that a notice must comply with s 52, which provides a notice to end tenancy must be in writing, and must be signed and dated, state the effective date, as well as state the grounds for ending the tenancy.

More broadly, to be successful in a claim for monetary compensation for loss the Landlord has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

I note that for the purposes of this claim, the Landlord must provide sufficient evidence to establish any alleged loss stems from an existing tenancy.

I find the evidence shows the Tenant paid a security deposit amount of \$1,250. The evidence for that is plain in the copy of the tenancy agreement that the Landlord provided for this hearing. Additionally, the agreement sets out that the tenancy was for a 12-month fixed term.

With these points established in the evidence as fact, I find there was a tenancy agreement in place between the parties. I find the parties had a written agreement, and the landlord-tenant relation was established.

With reference to s. 16, I find the agreement conferred rights and obligations. Along with this comes the duty to give a proper notice to end the tenancy. There is no evidence the Tenant gave proper notice to the Landlord within the timelines set by the *Act*. Because of this, the Landlord suffered a significant loss in having to scramble to find a replacement tenant, which they accomplished within the initial intended month of this tenancy, the month of November 2022. With regard to the four points set out above, I find from this that a loss to the Landlord exists, and it was from the Tenant's violation of the *Act* in not giving sufficient notice to the Landlord.

With further regard to the four points set out above, I find the Landlord mitigated their loss both by obtaining a new tenant within a very short time frame and reducing the amount of rent.

I find the Landlord has established the amount of loss in the form of rent owing to them. This amount is \$2,500 as the Landlord claimed.

The Landlord claimed a set amount for liquidated damages; this is \$926 as set out in the tenancy agreement. The *Residential Tenancy Branch Policy Guidelines*, in particular 4: *Liquidated Damages*, is in place to provide a statement of the policy intent of the *Act*. It provides: "The amount of [damages payable] 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."

Here, the clause in question states:

If . . . the tenant provides the landlord with notice . . . 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 \$926 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit.

I find a framework for this clause is not place; the Landlord did not present the costs associated with re-renting the rental unit in actuality. Therefore, I find there is no approximation of the costs incurred by the Landlord that match to this amount listed in the tenancy agreement. The amount of \$926 appears arbitrary and is not a genuine pre-estimate of loss. As provided for in s. 6(3) of the *Act*, "A term of a tenancy agreement is not enforceable if . . . (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it."

In sum, I find the liquidated damages clause is invalid in that it is punitive in nature. I make no award for this amount claimed by the Landlord.

The Landlord claimed the NSF fee as shown in the Tenant ledger they provided for this hearing. This is \$30. I find as fact that this is the amount the Landlord's financial institution charged them for the return of the cheque, and the Landlord did not charge a separate administration fee to the Tenant for this, despite clause 12 as set out in the tenancy agreement.

The *Residential Tenancy Regulation* s. 7(1)(c) applies: this allows a landlord to charge for "a service fee charged by a financial institution to the landlord for the return of a tenant's cheque." Therefore, I grant the Landlord \$30 for the claimed NSF.

I find the Landlord provided sufficient proof of a utilities cost incurred by the Tenant for the time period in which there was an agreement in place. The tenancy agreement sets out that the Tenant is responsible for this utility. As shown in the Landlord's evidence, I grant the amount of \$23.69 to them.

The *Act* section 72(2) gives an arbitrator the authority to make a deduction from the security deposit held by the landlord. The Landlord has established a claim of \$2,553.69. After setting off the security deposit of \$1,250, there is a balance of \$1,303.69. I am authorizing the Landlord to keep the security deposit amount and award the balance of \$1,303.69. This is an application of s. 72(2)(b) of the *Act*.

As the landlord is successful in this application for compensation, I find that the Landlord is entitled to recover the \$100 filing fee.

Conclusion

Pursuant to s. 67 and s. 72 of the *Act*, I grant the Landlord a Monetary Order in the amount of \$1,403.69 for monetary loss. I provide the Landlord with this Order in the above terms, and they must serve the Tenant with **this Order** as soon as possible. Should the Tenant fail to comply with this Order, the Landlord may file this Order in the Small Claims Division of the Provincial Court where it will 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 s. 9.1(1) of the *Act*.

Dated: August 21, 2023

Residential Tenancy Branch