



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the tenants: MNSD FF O
For the landlord: OPC OPB MNSD MNDC FF

Introduction

This hearing was convened as a result of the cross applications of the parties for dispute resolution under the *Residential Tenancy Act* (the “Act”).

The tenants applied for a return of all or part of a security deposit; for the recovery of the filing fee; and to dismiss the monetary claim of the landlord.

The landlord applied for an order of possession for cause and due to a breach of an agreement with the landlord; authority to retain the tenants’ security deposit; a monetary order for money owed or compensation for damage or loss and damage to the rental unit; and for recovery of the filing fee.

The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally and in documentary form prior to the hearing, and 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.

Preliminary Matter(s)

The tenants applied for an adjournment on June 4, 2012 via faxed letter. The letter indicated that one of the tenants was unavailable to attend due to work abroad. The criteria for granting an adjournment are set out in the Rules of Procedure. The criteria that apply are:

1. the views of the parties;

2. whether the purpose for which the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1. Rule 1 notes that the objectives of the Rules of Procedure are to secure a consistent, efficient and just process for resolving disputes;
3. whether the adjournment is required to provide a fair opportunity to be heard, including whether a party has sufficient notice of the hearing;
4. the degree in which the need for an adjournment arises out of the intentional actions or the neglect of a party seeking the adjournment; and
5. the possible prejudice to each party.

The agents for the landlord stated that they did not support an adjournment as this matter had already been adjourned once before and that they wished to proceed. Given that one of the tenants was present, I dismissed the application for an adjournment and proceeded with the hearing given the possible prejudice to the landlord.

The agents for the landlord testified that they were not served with a copy of the tenants' application. Notice for both applications was considered. The tenant confirmed that service of their application was not completed in accordance with the *Act*. Accordingly, I dismiss the tenants' application without leave to reapply. Both parties agreed that notice of the landlord's application was completed and evidence was served in accordance with the *Act*, so the hearing proceeded with the landlord's application.

Both parties agreed that the tenancy ended on February 29, 2012 when the tenants vacated the rental unit. As the tenants no longer occupy the rental unit, the possession portion of the landlord's application is dismissed.

Issue(s) to be Decided

- Should the landlord be granted a monetary order to keep all or part of a security deposit?
- Should the landlord be granted a monetary order for money owed or compensation for damage or loss?
- Should the landlord recover the filing fee?

Background and Evidence

The landlord provided a copy of the signed tenancy agreement and the subsequent amendment as evidence. The tenancy agreement indicates the tenancy was a fixed term tenancy. An amendment to the original tenancy agreement was signed on August

31, 2011, indicating that the new fixed term tenancy began on September 1, 2011, and was scheduled to expire on August 31, 2012. Monthly rent in the amount of \$2,000.00 was due on the first day of each month. A security deposit of \$1,000.00 was paid to the landlord by the tenants at the start of the tenancy. The tenants were served with a 1 Month Notice to End a Tenancy for Cause and did not dispute that notice.

The landlord's application for a monetary claim of \$3,726.00 consisted of:

- \$1,500.00 for $\frac{3}{4}$ of March 2012 rent. This calculation is based on one week spent cleaning the rental unit which is not being claimed for, and the remaining three weeks the rental unit remained vacant at \$500.00 per week.
- \$2,000.00 in re-leasing costs pursuant to section 13 of the written tenancy agreement.
- \$30.00 for garbage collection (receipt provided).
- \$196.00 for carpet cleaning (receipt provided).

The tenant did not dispute the \$30.00 for garbage collection and \$196.00 for carpet cleaning. Therefore, I will focus on the evidence specific to the $\frac{3}{4}$ month rent owing for March 2012 and the re-leasing costs.

The agents for the landlord submitted documentary evidence of an internet advertisement posting dated March 5, 2012, in an attempt to find a new tenant for April 2012. The website indicated is a free internet website, therefore no cost was associated with posting the advertisement.

The agents for the landlord testified that they felt they could not advertise the rental unit sooner because they attempted to serve the tenants four times and were unsure when they would vacate the rental unit as they had not received a response from the tenants. The agents for the landlord stated that they also required time to repair laminate flooring but did not include that as part of their claim and was not considered in this Decision.

The agents for the landlord testified that the re-leasing cost of \$2,000.00 (one month's rent) is for costs associated with advertising, physically showing the rental unit, repairs, administration and other associated costs. An agent for the landlord indicated that he has been involved with prior decisions that have supported the re-leasing costs, but could not provide a specific case as an example.

The agents for the landlord testified that new tenants moved into the rental unit on April 1, 2012, and a new fixed term lease was submitted as documentary evidence of same.

The tenant testified that he finds the extra \$2,000.00 re-leasing cost as excessive and although the tenancy agreement states it is not a penalty, in his opinion, it is ultimately a penalty.

The landlord provided copies of the tenancy agreement; a faxed amendment; emails; 1 Month Notice to end Tenancy for Cause; pictures; advertisement of the rental unit; and a new lease which began on April 1, 2012, with new tenants, as evidence for this proceeding.

Analysis

Based on the oral testimony and documentary evidence before me, and on a balance of probabilities, I find the following.

The tenant confirmed that service of their application was not completed in accordance with the *Act* and, therefore, I dismiss the tenants' application without leave to reapply.

Regarding the landlord's application, the tenant agreed to pay the \$30.00 for garbage collection and \$196.00 for carpet cleaning.

I find that the landlord made reasonable attempts after cleaning the rental unit to minimize their loss as required under section 7 of the *Act* by finding new tenants who moved into the rental unit on April 1, 2012. Section 67 of the *Act* states that if damage or loss results from a party not complying with the *Act*, regulations or tenancy agreement, I may determine the amount of, and order that party to pay, compensation to the other party. The tenants did not comply with section 45 of the *Act*, which sets out the requirements to end a fixed term tenancy. I find that the tenants breached the fixed term tenancy, resulting in a loss to the landlord of March 2012 rent. The landlord, therefore, is claiming \$1,500.00 which is $\frac{3}{4}$ of March 2012 rent.

Section 13 of the written tenancy agreement states:

13. Re-Leasing Cost - The re-leasing of the premises as a result of early termination of lease or eviction is not to be construed as per Section 5 (15.1) or (19) of RTA but an agreed to point of lease. Early termination of lease or eviction will cause one month extra rent to be charged to tenant. This is not be construed as a penalty.

I find that the re-leasing cost section of the written tenancy agreement in this matter is both confusing and unreasonable for the following reasons:

1. Section 5 of the *Act* specifically states landlords and tenants may not avoid or contract out of the *Act* or the regulations.
2. Stating something is not a penalty, when it impacts the tenant or is oppressive to the tenant as a penalty would be, is the same as a penalty.
3. As the re-leasing cost appears to be a liquidated damages clause, then Policy Guideline 4 would apply.

Residential Tenancy Branch Policy Guideline 4 states 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.

Given the above, I find that \$2,000.00 re-leasing cost claimed is excessive compared to the actual costs associated with re-leasing the rental unit as described by the agents for the landlord. The advertisement was a free internet website posting and the rental until advertised in March 2012 was rented for April 1, 2012. There were no receipts for the physical showing of the rental unit or other associated costs. Therefore, I dismiss the \$2,000.00 re-leasing costs portion of the landlord's claim as I find it is a penalty and not enforceable. An agent for the landlord testified that other decisions have supported their re-leasing costs. Section 64(2) of the *Act* states that I must make each decision or order on the merits of the case as disclosed by the evidence admitted and that I am not bound to follow other decisions. I have made my finding in accordance with the evidence before me in this matter.

I find that the landlord is entitled to $\frac{3}{4}$ of March 2012 rent in the amount of \$1,500.00. As the landlord has proven a portion of their claim, I will grant the recovery of half of the filing fee.

Based on the above, I find that landlord has established a monetary claim as follows:

$\frac{3}{4}$ month rent for March 2012	\$1,500.00
Garbage collection	\$30.00
Carpet cleaning	\$196.00
$\frac{1}{2}$ of the filing fee	\$25.00
TOTAL	\$1,751.00

Conclusion

I find that the landlord is entitled to a monetary order for garbage collections; carpet cleaning and \$25.00 for partial return of the filing fee. I order that the landlord retain the deposit and interest of \$1,000.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of **\$751.00**. This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The \$2,000.00 re-leasing cost is dismissed as stated above.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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 8, 2012

Residential Tenancy Branch