



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNR MNSD FF

Introduction

This hearing was convened in response to an application by the landlord under the *Residential Tenancy Act* (the Act) for a Monetary Order to recover unpaid rent and loss under the Tenancy Agreement (liquidated damages) inclusive of recovery of the filing fee associated with this application and to retain the security deposit in partial satisfaction of the monetary claims.

Both parties participated in the hearing with their submissions, document evidence and testimony during the hearing. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. Both parties acknowledged receiving the evidence of the other.

Issue(s) to be Decided

Is the landlord entitled to the monetary amount claimed due to the tenant's non-compliance with the Act, regulations or tenancy agreement?

Is the landlord entitled to the monetary amount claimed?

Background and Evidence

The following is undisputed. The landlord and tenant entered into a written fixed-term tenancy agreement on September 11, 2012 – effectively, to rent the rental unit starting October 15, 2012, with a date of October 31, 2013 as the end of the tenancy. Rent in the amount of \$1625.00 was agreed payable in advance on the first day of each month. At the outset of the tenancy the landlord collected a security deposit from the tenant in the amount of \$812.50, which the landlord holds in trust. On September 28, 2012 the tenant informed the landlord via e-mail they would not be occupying the unit. On October 01, 2012 the tenant followed up with a written Notice to End the tenancy. The

tenant determined not to move into the rental unit, but ultimately satisfied the rent for October 15 - 31, 2012.

The landlord claims they tried to mitigate losses of revenue. The landlord provided evidence they began looking for a new tenant on the day they received the tenant's notice to end in writing on October 01, 2012. The landlord testified they considered a quantum of applicants resulting from their recruiting/advertisement efforts, as well as from the tenant, but that eventually the only qualified / confirmed applicant rented the unit for November 15, 2013. The landlord testified that they attribute the late time of year and the nature of the rental market season as the primary cause for being unable to re-rent it sooner as there is a smaller pool of prospective renters for that season. The tenant claims the landlord did not employ sufficient diligence in securing a new tenant sooner.

The landlord also seeks the amount of \$554.40 in liquidated damages, which the landlord describes in the tenancy agreement as the minimum amount of \$495.00 + tax for liquidated damages – but, *“not including any re-renting costs, such as advertising, credit checks & vacancies*. The landlord argues this amount is a strict liability contractual provision to which the tenant agreed. The tenant disputes this cost.

Analysis

On the preponderance of the evidence and on the undisputed testimony of the landlord and tenant I have reached a decision.

Section 16 of the Act states as follows:

Start of rights and obligations under tenancy agreement

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.

I find the tenancy started October 15, 2012 as a fixed term agreement.

Section 45, of the Act, in part, states as follows: emphasis mine

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.

(4) A notice to end a tenancy given under this section must comply with section 52 [*form and content of notice to end tenancy*].

Clearly the tenant did not provide Notice to End in compliance with the Act. However, Section 7 of the Act also provides as follows:

7. Liability for not complying with this Act or a tenancy agreement

- 7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
- 7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

In this case, despite the lack of Notice to end as prescribed, the landlord had a duty to mitigate their potential losses. I find that in this matter, the landlord made reasonable efforts to minimize their losses by re-advertising the rental unit and accommodate the needs of the tenant, with a view to minimizing losses for both parties thereby meeting the first and second part of the test established in section 7. As a result, the portion of the landlord's claim for loss of revenue for November 01 - 15, 2013 is granted in the claimed amount of **\$812.50**, without leave to reapply.

I find the landlord's clause (34) in their tenancy agreement associating their claim for Liquidated Damages, in the amount of \$495.00 + tax, clearly states the amount does *not include any re-renting costs, such as advertising, credit checks & (or) vacancies*. While this clause is generally less than clear, it fails to state how the amount claimed is a genuine pre-estimate of the landlord's costs associated with re-renting the unit – rather, it specifically excludes re-renting costs. Residential Tenancy Policy Guidelines (RTPG) respecting *Liquidated Damages* state that in order for a landlord's claim of *Liquidated Damages* to be enforceable, their claim in the Tenancy Agreement must be a *genuine pre-estimate of loss at the time the contract is entered into*. I find that by definition this means the landlord must reflect in their pre-estimate what costs they foresee they could incur following a breach of the Agreement. If on claim the clause is determined to be a penalty it will not be enforceable. Given the ambiguity of this clause

I find that the landlord's liquidated damages clause is a penalty rather than an agreed genuine pre-estimate of re-renting costs. As a result, **I dismiss** this portion of the landlord's claim, without leave to reapply. Therefore; I find that the landlord has established a monetary claim for **\$812.50** in unpaid rent. The landlord is also entitled to recovery of the \$50 filing fee, for a total entitlement of **\$862.50**. The security deposit will be off-set from the award made herein.

Calculation for Monetary Order.

Unpaid rent	\$812.50
Filing Fees for the cost of this application	50.00
Less Security Deposit	-812.50
Total Monetary Award to landlord	\$50.00

Conclusion

I Order that the landlord retain the security deposit of \$812.50 in partial satisfaction of the claim and I grant the landlord an Order under Section 67 of the Act for the balance due of **\$50.00**. If necessary, this Order may be filed in the Small Claims Court and enforced as an Order of that Court.

This Decision is final and binding on both parties.

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: February 18, 2013

Residential Tenancy Branch

