



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: FFL MNDCL-S

Introduction

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

- a monetary order for money owed or compensation monetary loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The tenants confirmed receipt of the landlord's application for dispute resolution hearing which was served by way of registered mail on November 1, 2017. In accordance with section 89 of the *Act*, I find that the tenants were duly served with the landlord's application. Both parties acknowledged receipt of each other's evidence. Accordingly I find that both parties had served each other with their evidence package in accordance with section 88 of the *Act*.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for losses arising out of this tenancy?

Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

On October 6, 2017, the tenants and the landlord signed a written tenancy agreement for a fixed-term tenancy that was to commence on November 1, 2017. The monthly rent was set at \$1,550.00, and the tenants paid a security deposit in the amount of \$775.00 to the landlord, which the landlord still holds.

On October 12, 2017 the tenants emailed the landlord notifying the landlord that they will not be moving in. The landlord responded by way of a written letter to the tenants informing them that the tenancy agreement was still binding, and that the landlord would be seeking compensation

as set out in the tenancy agreement under a “liquidated damages” clause in the amount of \$775.00.

The landlord testified that they had mitigated the tenants’ exposure to their losses by advertising the unit for rent immediately. The landlord was able to find a new tenant on November 8, 2017, with the tenancy to begin on December 1, 2017 as the new tenant was relocating from out of town.

The landlord is seeking a monetary order for the losses associated with the tenants’ failure to abide by the Act. The landlord is seeking the loss of rental income for November 2017 in the amount of \$1,550.00, liquidated damages in the amount of \$775.00, and \$100.00 for the filing fee. The landlord submitted written evidence to support their application, including a copy of the tenancy agreement, the letter to the tenants warning them about their obligations and the liquidated damages clause, as well as documentation to support that they made efforts to fill the vacancy as soon as possible after being notified by the tenants that they would not be moving in.

The tenants do not dispute that they did not move in as required by the tenancy agreement, but dispute the monetary amount claimed by the landlord. The tenants testified that the \$775.00 liquidated damages claim is a penalty, and is not justified.

Analysis

Section 16 of the *Residential Tenancy Act* reads 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.

Section 44 of the *Residential Tenancy Act* reads in part as follows:

44 (1) A tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:...

(b) *the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;*

(c) the landlord and tenant agree in writing to end the tenancy;...

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

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.

It was undisputed by the tenants that they had never moved in despite signing a written tenancy agreement for a 12 month fixed term. The landlord did not mutually agree to end this tenancy in writing, nor did the tenants obtain an order from the Residential Tenancy Branch for an early termination of this fixed term tenancy. No applications for dispute resolution have been filed by the tenants in regards to this tenancy.

The evidence is clear that the tenants did not comply with the *Act* in breaking this fixed term tenancy, and I therefore, find that the tenants ended this tenancy contrary to Sections 44 and 45 of the *Act*. The evidence of the landlord's agent is that the landlord was able to re-rent the suite. I am satisfied that the landlord had made an effort to mitigate the tenants' exposure to the landlord's monetary loss of rent for November 2017 as is required by section 7(2) of the *Act*. I, therefore, allow the landlord's claim for a monetary order for rental differential loss in the sum of \$1,550.00 for the lost rental income due to the early termination of this tenancy.

The landlord requested, in their monetary application, \$775.00 as stated in their liquidated damages clause in the tenancy agreement.

Residential Tenancy Branch Policy Guideline #4 with respect to Liquidated Damages includes the following guidance with respect to the interpretation of such clauses:

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...

The landlord drafted the agreement calling for payment of \$775.00 as liquidated damages in the event that the tenants ended the tenancy before the end of the fixed term. This clause in the tenancy agreement specified that the amount was not a penalty. Whether or not an amount specified in a contract should be construed as liquidated damages or as a penalty is a question of law to be decided upon on the basis of a consideration of the whole agreement. The amount claimed in an agreement as liquidated damages is intended to be an estimate of the loss that may be suffered by the landlord if the tenant breaches the agreement by ending the tenancy early. In this case, the landlord has applied for a monetary order for loss of rental income as well as the pre-specified amount in the tenancy agreement.

I am not satisfied that the landlord had provided sufficient evidence to demonstrate that the pre-determined amount of \$775.00 was a genuine pre-estimate of the landlord's losses associated with the tenants' breach of the tenancy agreement. Although I find that the tenants' breach of the tenancy agreement to be a serious one as the tenants ended the 12 month agreement before it had even began, I am not satisfied that this amount constitutes an estimate of the losses associated with this breach rather than a penalty.

For these reasons, I consider the provision for liquidated damages constitutes a penalty, and accordingly this portion of the landlord's application is dismissed without leave to reapply.

As the landlord has been partially successful in this application, I allow the landlord to recover the \$50.00 filing fee for this application from the tenants. I allow the landlord to retain the tenants' security deposit plus applicable interest in partial satisfaction of the monetary award issued in this decision. No interest is payable over this period.

Conclusion

I issue a Monetary Order in the amount of \$825.00 in the landlord's favour under the following terms which allows the landlord to retain the security deposit in satisfaction of the monetary claim for losses, plus recover \$50.00 of the filing fee for this application.

Item	Amount
Loss of Rental Income for November 2017	1,550.00
Filing Fee	50.00
Security Deposit	-775.00
Total Monetary Order	\$825.00

The landlord is provided with this Order in the above terms and the tenant(s) must be served with a copy of this Order as soon as possible. Should the tenant(s) 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.

The landlord's application for liquidated damages is dismissed without leave to reapply.

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: July 5, 2018

Residential Tenancy Branch