# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

The landlords seek the following relief under the *Residential Tenancy Act* (the "*Act*"):

- a monetary order pursuant to ss. 38 and 67 for unpaid rent by claiming against the deposits;
- a monetary order pursuant to ss. 38 and 67 for money owed or other loss by claiming against the deposits; and
- return of their filing fee pursuant to s. 72.

V.T. appeared as the Landlord. H.V. appeared as the Tenant.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other's application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other's application materials.

Issues to be Decided

1) Are the landlords entitled to claim against the deposits?
2) Are the landlords entitled to compensation for unpaid rent?
3) Are the landlords entitled to compensation for money owed or other loss?
4) Are the landlords entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant moved into the rental unit on October 1, 2021.
- The landlords obtained vacant possession of the rental unit on March 10, 2021.
- Rent of $3,500.00 was due on the first day of each month.
- The Tenant paid a security deposit of $1,750.00 and a pet damage deposit of $1,750.00 to the landlords.

A copy of the tenancy agreement was put into evidence by the parties, which indicates the tenancy was for a fixed term ending on September 30, 2022, after which point it would continue on a month-to-month basis.

The Landlord advises that on January 7, 2022 he received notice from the Tenant that he would be vacating the rental unit by March 15, 2022. Both parties provided copies of the email exchange in which notice was given, including an email sent by the Tenant to the Landlord on January 7, 2022, which I reproduce below:

> HI [Landlord], we are moving out no later then March-15-22
> I explained that our Daughter [redacted], who lives with us and who has Epilepsy cannot get the Medication called Brivlera under the BC provincial plan.
> [Our daughter], can't do without this Medication and if we stay longer then 6 months in BC, she would become BC resident and the medication would not be available.
> I am happy to offer the home for viewings with little notice most of the time, and I would be happy to sent you pictures now we have it all furnished.
> Let me know if there is anything else you want me to do in regards to getting it leased out.
> Regards
> [Tenant]

The Landlord responded by way of email sent to the Tenant on January 8, 2022, which I reproduce below:

> Hi [Tenant],
>
> I acknowledge your notice to terminate the lease contract. At the same time sorry to hear about your situation and your move for similar reason.
>
> We would take action in putting back our house for lease and hope we can get suitable tenant early.
>
> Yes if you already have internal and external pictures please send it over email or I can come and take pictures.
>
> Let's communicate through email

Finally, the Tenant responded to the Landlord's email of January 8, 2022 on the same date:

> [Landlord], yes I'll take the pictures and if they are suitable then fine, if you think you need other pictures then let me know and you can come anytime after 3PM today to take some Yourself no problem.
>
> If your management agent wants to show it, then a couple of hours in most cases with be enough.
>
> As you may know the house is kept spotless so that is how it will be during showings etc.
>
> Furthermore we will be gone no later then March-15-2022, however if you list it for rent as per March-1-2022 then that would be fine also, as we are able to be out before March-1-2022.
> Some people might want to start on March-1-2022
>
> My apologies to put you in this position, but our hands are tied.
> That does not mean that if my hands are tied that this becomes your problem, so we will work this out and I am able to step in your shoes as I've had many tenants so we can work this out.
>
> Thanks for your understanding, and please do no worry if you want to set the lease rate higher as it's your investment.

Regards
[Tenant]

I have redacted the personal identifying information from the emails in the interest of the parties' privacy. The spelling is original.

The Landlord advises that he is seeking one-half of a month's rent for March 2022 and seeking liquidated damages pursuant to clause 5 of the tenancy agreement, which states as follows:

> 5. **LIQUIDATED DAMAGES**. If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct, 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 $1,750 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.
>
> (Underline Added)

The Landlord testified that the Tenant put a stop order on the March 2022 rent cheque and did not pay rent at all in March 2022. Review of the mail correspondence provided by the parties indicates that the Tenant advised the Landlord on February 28, 2022 that he put a stop order for the March 2022 rent cheque and stated that "You have the one deposit and apply that to the rent, and other deposit we will deal with it as the time comes."

The Tenant acknowledged giving notice as alleged by the Landlord and acknowledged putting a stop order on the March 2022 rent cheque. The Tenant testified that there was a breakdown in trust between he and the Landlord at the end of the tenancy. The Tenant argued that the liquidated damages clause ought not apply as the tenancy was frustrated upon their discovery that their daughter's medication was not covered in BC. The Tenant also argued that the house was in a troubling state, though did not discuss this in detail.

There was some dispute between the parties on when the forwarding address was provided by the Tenant. The Tenant testified that he moved to the address specified in the rental application when the tenancy began and further stated that this was set out in the move-out condition inspection report. The Tenant further testified that he and his family purchased a home and moved into it on April 1, 2022. The Landlord denies receiving the forwarding address on March 10, 2022 when the move-out inspection was conducted and testified that he only learnt of the forwarding address some weeks later, near to the end of March 2022 when he was corresponding with the Tenant via email. Neither party provided a copy of move-out inspection report nor was I provided with the correspondence mentioned by the Landlord.

Analysis

The landlords seek compensation for unpaid rent and pursuant to a liquidated damages clause under the tenancy agreement.

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the Residential Tenancy Branch. A landlord may not claim against the security deposit if the application is made outside of the 15-day window established by s. 38(1).

Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that the landlords filed their application on March 18, 2022. I need not make a finding on when the Tenant provided his forwarding address as even if it were to have been provided on March 10, 2022, the landlords filed their application within the 15-day window imposed by s. 38(1) of the *Act*. The doubling provision under s. 38(6) of the *Act* does not apply.

Further, as the landlords are not claiming for damages to the rental unit, the issue of whether the condition inspection reports were properly completed in accordance with ss. 23 and 35 of the *Act* is not relevant. The question of extinguishment under ss. 24 and 36 of the *Act* are only relevant should a landlord claim against the deposits for damage to the rental unit, which is not the case here. This interpretation is in accordance with Policy Guideline #17, which provides guidance on security deposits and set-offs (see point 9 on page 2).

Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

In the present case, I have little difficulty finding that the Tenant failed to pay rent for March 2022 at all, which is in breach of his obligations under the tenancy agreement and in contravention of s. 26 of the *Act*. The Landlord submits that he seeks one-half a month's rent. Though in my view the landlords are entitled to rent in full on the first of each month, I accept the Landlord's submission and find that he has established a loss of $1,750.00 for one-half a month's rent for March 2022. The landlords could not have mitigated their damages under the circumstances as the Tenant still resided within the rental unit at the time. I find that the landlords are entitled to $1,750.00, which is the amount they claimed.

There is no dispute here that the tenancy agreement has a liquidated damages clause and that the tenancy ended before the end of the fixed term. I note that pursuant to s. 45(2) of the *Act*, the Tenant was not permitted to end the tenancy until September 30, 2022. By providing notice on January 7, 2022 to vacate by March 15, 2022, the Tenant breached the fixed term portion of the tenancy agreement and acted in contravention of s. 45 of the *Act*.

The Tenant argues that he should be excused of from the breach as the tenancy was frustrated upon his discovery that his daughter's medication was not covered in BC. As stated by s. 92 of the *Act*, the doctrine of frustration applies to tenancy agreements. Policy Guideline #34 provides the following definition of the doctrine of frustration:

> A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so

> radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.
>
> The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.
>
> (Underline Added)

Presently, there is no suggestion that the rental unit was destroyed or somehow rendered incapable of being occupied by the Tenant for residential purposes. I appreciate the difficulty faced by the Tenant, who had the unenviable decision of moving to ensure his daughter had access to medical care she required. However, Policy Guideline #34 is also clear that mere hardship, economic or otherwise, is insufficient on its own to argue a contract has been frustrated. There was nothing preventing the Tenant from continuing to rent the unit and the Landlord had every expectation that the Tenant would fulfill his end of the bargain. I find that the doctrine of frustration does not apply.

I have also considered whether the tenancy ended by way of mutual agreement and whether this permits the Tenant from escaping his obligations under the liquidated damages clause. It would hardly seem reasonable, in my view, for a landlord to insist on liquidated damages if they consented to end the tenancy before the end of its term. Upon review of the correspondence, however, it is not clear to me that the Landlord gave such consent. He was given notice in breach of the tenancy agreement and the *Act* and was left with little option other than to attempt to find a new tenant to mitigate his damages. The January 8, 2022 email from the Landlord to the Tenant merely acted as an acknowledgement that that the Landlord received the Tenant's notice to "terminate the lease". I find that this does not evidence consent on the part of the Landlord rising to the level that there was a mutual agreement to end the tenancy early.

Policy Guideline #4 provides guidance with respect to liquidated damages clauses, specifying that liquidated damages are enforceable so long as they are a genuine pre-estimate of damages of loss when the contract was entered into. If they are not, they may be deemed to be penalty clauses and would be unenforceable. Policy Guideline #4 states the following with respect to the tests for distinguishing between penalty and liquidated damages clauses:

> 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. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

I find that the sum requested, being $1,750.00, is not extravagant given that rent was payable in the amount of $3,500.00 per month. Further, clause 5 does include multiple bases upon which it would be triggered, though I do not find any of them to be trivial as they all relate to serious breaches of the tenancy agreement. I find that clause 5 is not a penalty clause as it does not act as a threat to enforce compliance with the agreement. I further find that the sum is a genuine pre-estimate of damages. It is enforceable.

I find that the liquidated damages clause under clause 5 of the tenancy agreement is triggered resulting in damages of $1,750.00 owed to the landlords. This amount has not been paid nor is mitigation relevant under the circumstances. I find that the landlords are entitled to this amount.

I find that the landlords have established a monetary claim totalling $3,500.00 ($1,750.00 + $1,750.00) pursuant to s. 67 of the *Act*. Pursuant to s. 72(2) of the *Act*, I direct that the landlords retain the security deposit and pet damage deposit in full satisfaction of their monetary claim.

Conclusion

The landlords have established a total monetary claim of $3,500.00. Pursuant to s. 72(2) of the *Act*, I direct that the landlords retain the security deposit and pet damage deposit in full satisfaction of this amount.

The landlords were successful in their application. I find they are entitled to the return of their filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Tenant pay the landlords $100.00 filing fee.

Considering the amounts above, the net monetary order to be paid by the Tenant to the landlords is $100.00.

It is the landlords' obligation to serve the monetary order on the Tenant. If the Tenant does not comply with the monetary order, it may be filed by the landlords with 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: November 22, 2022

Residential Tenancy Branch