



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, FF

Introduction

This hearing dealt with an application by the Landlord pursuant to the *Residential Tenancy Act* for a monetary order for liquidated damages and the filing fee. Both parties attended the hearing and were given full opportunity to present evidence and make submissions.

Issues to be decided

Is the landlord entitled to a monetary order for liquidated damages and for the filing fee?

Background and Evidence

Both parties agree that this tenancy started on May 01, 2011 for a three month fixed term. Another tenancy agreement was entered into on September 01, 2011 which was due to expire on February 28, 2012. The monthly rent was \$2,200.00 per month and was due on the first day of each month. The tenant paid a security deposit of \$1,100.00 on May 01, 2011.

The tenant testified that there was a verbal agreement between the tenants residing in the unit and the landlord to end the tenancy at the end of January, 2012, which was one month prior to the end of the fixed term. If the unit could not be re-rented the tenants would remain responsible for the rent for February, 2012. The tenant testified that the unit was re-rented for February 01, 2012.

The landlord stated that upon receiving the tenant's notice to end the tenancy in December 2011, she advertised the availability on a popular website at no cost and had multiple showings. The landlord agreed that the unit was re-rented on February 01, 2012 and therefore did not suffer a loss of income.

The landlord testified that there is a clause in the tenancy agreement that informs the tenants that they have to pay a service charge of \$1,100.00 for a change over of tenants, if the tenants end the tenancy before the end of the fixed term.

The landlord filed a copy of the tenancy agreement. The service charge provision provides as follows.

If the tenant terminates the tenancy in less than the term as prescribed on Term 1, a sum of \$1,100, which equals to the security deposit, will be charged by the Landlord and the Tenant will pay this amount as a service charge for tenancy change-over costs; such as, advertising, interviewing, administration, and re-renting for this short term tenancy period. This is not a penalty.

Analysis

In the tenancy agreement the landlord records the amount of the liquidated damages to be paid in the event the tenant ends the tenancy prior to the end date, as \$1,100.00 and equal to the amount of the security deposit. The landlord also refers to this charge as a “service charge”.

Section 4 of the *Residential Tenancy Policy Guideline* addresses liquidated damages and states that 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.

One of the tests to determine if the clause is a penalty clause or a liquidated damages clause is that the sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. In this case, I find that \$1,100.00 is extravagant compared to the cost that the landlord would incur to re rent the unit and therefore I have determined that the liquidated damages clause is a penalty and accordingly is not valid.

In addition, a clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss. In this case, the tenancy agreement stipulates that if the tenant terminates the tenancy prior to the end date of the fixed term a sum equal to the security deposit will be charged to the tenant.

Clauses of this nature can also be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

I find the sum of \$1,100.00 to be extravagant when compared to what it would cost the landlord to re rent the unit. I find the amount of the clause to be invalid and I therefore interpret the liquidated damages provision to be a penalty and unenforceable. Accordingly, the landlord's claim for \$1,100.00 is dismissed.

The landlord has not proven her case and therefore must bear the cost of filing her application.

Conclusion

The landlord application is dismissed in its entirety.

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: October 03, 2012.

Residential Tenancy Branch