



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNSD,MNDC , FF

Introduction

The hearing was to deal with an application by the landlord for \$810.00 for loss of rent for the month of December 2012, due to the tenant's premature termination of the fixed term tenancy, and a \$25.00 fee for the post-dated cheque for December that failed to clear. The landlord amended the application to claim \$133.83 in utility costs for the period from November 2012 to January 2013, additional loss of \$810.00 loss of revenue for the month of January 2013 and another NSF fee of \$25.00 for the returned post-dated rent cheque for January 2013.

Issues to be Decided

Is the landlord entitled to monetary compensation for loss of rent?

Background and Evidence

The tenancy originally began in June 2012 as a fixed term ending June 30, 2013. The monthly rent was \$795.00 plus \$15.00 for garbage collection. Although the tenancy was for a one-year fixed term, the tenant terminated the tenancy and moved out on October 31, 2012.

The tenant stated that she had given the landlord advanced written notice to vacate in August 2012 that was to be effective on September 30, 2012. A copy of the tenant's written notice dated August 24, 2012, was in evidence.

The landlord testified that the tenant gave official notification to terminate the tenancy on October 22, 2012. An undated copy of the tenant's written Notice was in evidence with confirmation that the Notice was faxed. The landlord testified that the parties then resolved the security deposit refund issue.

The landlord testified that he then sent the tenant a form acknowledging receipt of the tenant's Notice. This communication stated that the fixed term tenancy was ended prematurely by the tenant, and that it was not in compliance with the Residential Tenancy Act or the tenancy agreement. The form stated that the tenant will be

responsible for, *“any loss of rent that I incur”*. The landlord’s acknowledgement also informs the tenant that the communication:

“does not constitute a waiver of my right to claim liquidated damages for early termination of a fixed term tenancy.”

The landlord testified that, as soon as the tenant gave written notice to vacate, the landlord immediately began to advertise for a replacement renter.

The parties confirmed that, although the tenant ended the tenancy by vacating on October 31, 2012, the tenant paid \$810.00 for the month following her departure to cover the landlord's loss of rent for November 2012. In mid November, the tenant also paid \$750.00 liquidated damages to the landlord pursuant to a term in the tenancy agreement which required payment in the amount of \$750.00 if the tenant terminated the contract before the expiry date.

The landlord testified that he advertised for a replacement renter, but was not able to find anyone to take the rental unit until February 2013. According to the landlord, he incurred a \$835.00 loss of revenue for December 2012, \$133.83 utility costs for the period of November 30, 2012 to January 21, 2013, \$810, loss of revenue for January 2013 and an administrative fee of \$25.00 for the returned post-dated cheque for January 2013, which the landlord had apparently attempted to cash after the tenant already ended the tenancy.

The landlord submitted into evidence proof of advertising that was initiated on October 25, 2012 and continued during the month of November 2012 and possibly ran until mid December 2012.

The tenant stated that she was aware of the liquidated damages term in the contract, before signing the agreement and interpreted this term to mean that, if she permanently terminated the tenancy prior to the expiry of the fixed term, she would only have to pay the liquidated damages as compensation to the landlord for ending the agreement.

The tenant disputed the landlord’s claim for loss of rent, on the basis that the liquidated damages were paid on November 24, 2012 for permanently terminating the tenancy agreement as of October 31, 2012, which was prior to the expiry date of the fixed term. The tenant pointed out that she had also paid full rent for the month of November 2012.

The tenant testified that, as a pre-condition to paying and accepting liquidated damage funds, there had been an acknowledgement by both of the parties that the tenancy agreement had been mutually terminated. The tenant’s position is that the landlord is attempting to enforce the terms of an agreement that had already been ended as of October 31, 2012. The tenant believed that the landlord endorsed the termination of the

contract by accepting the liquidated damage payment, and therefore the tenant would not be liable to compensate the landlord for loss of revenue beyond November 2012.

The landlord argued that he is entitled to be compensated for loss of rent stemming from the tenant's breach of the contract because the tenant failed to remain until the fixed term of the agreement expired. The landlord stated that he was also legally entitled to collect the liquidated damages for pre-estimated costs of re-renting the unit. The landlord stated that a strict interpretation of the liquidated damages clause in the agreement makes this clear.

The landlord's position is that, in addition to the \$750.00 liquidated damages already paid and the \$810.00 he also received from the tenant for November's loss of revenue, he is also entitled to be compensated for additional loss of revenue of \$810.00 for December 2012 and \$810.00 for January 2013, NSF fees of \$25.00 for each returned post-dated cheques he tried to cash in December 2012 and January 2013, plus utility costs of \$133.00 incurred for the period from November 30 2012 to January 21, 2013. The total claim is for \$1,803.83.

Analysis: Does the Payment of Liquidated Damages Limit the Landlord's Claim for Loss?

Section 6 of the Act states, any rights, obligations and prohibitions established under the Act are enforceable between a landlord and tenant under a tenancy agreement. However, a term of a tenancy agreement is not enforceable if: (a) the term is inconsistent with the Act or the regulations, (b) the term is unconscionable, or; (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

In the case before me, the tenant is arguing that the liquidated damages term permitted her to end this tenancy upon payment of a \$750.00 fee, while the landlord pointed out that payment of the liquidated damages does not function to absolve the tenant from all liabilities to the end of the fixed term, including loss of revenue.

I find that under paragraph 5, titled "*LIQUIDATED DAMAGES*", the tenancy contract states:

"If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the landlord to end the tenancy before the end of the term.....the tenant will pay the landlord the sum of \$750.00 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the landlord's costs of re-renting the unit and must be paid in addition to any other amount owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property."(copied as written)

The parties signed consent of the agreement including this term. I find that this term clearly states that payment of the liquidated damages does not absolve the tenant of paying any unpaid rent that had previously been accrued during the tenancy, nor does it function to relieve the tenant of liability for cleaning and repairs to the premises caused by the tenant in violation of the Act.

However, I find that, under the Act, the landlord's claim is not for unpaid rent owed under section 26 of the Act, it is a claim for loss of revenue under section 7 and 67 of the Act. I find that the landlord's claim for compensation is only for losses that occurred *after* the tenant's termination of the tenancy on October 31, 2012. This is therefore a claim for damages and does not meet the definition of unpaid rent or rental arrears.

In this regard, I find that the liquidated damages clause is silent on the subject of whether or not the payment of the liquidated damages would free the tenant from compensating the landlord for loss of revenue after the premature termination of the contract by the tenant. I find that it is open to the subjective interpretation by each party to the agreement whether the liquidated damage term, as worded, would place a limitation on the landlord's ability to claim damages for loss of revenue incurred for the remainder of the fixed term. I find that, how the term is applied, would depend on the understanding of each party and their particular interpretation of the clause at the time that the agreement was signed.

The tenant alleged that verbal representations were made to her by the landlord that she could validly end the contract merely by paying the liquidated damages. The tenant alleged that she entered into the contract with that understanding. The landlord denies that this conversation ever took place and feels that the term clearly does not limit a claim for loss of revenue resulting from the tenant's noncompliance with the fixed term clause.

I find that, it is the tenant who is attempting to make the case that the liquidated damages clause should be interpreted to limit the landlord's statutory right under section 7 of the Act to claim losses, including loss of revenue, that stems from a violation of the contract. Therefore, I find that the tenant bears the burden of proof to prove her position.

In this instance, I find that the tenant has not sufficiently established that the landlord's statutory right to claim damages and loss under the Act have been limited by her payment and his acceptance of the liquidated damages. Accordingly, I find that the landlord's monetary claim for loss of revenue is governed by the Act, not this disputed term of the contract.

Analysis: Monetary Claim for Damages and Loss

An applicant's right to claim damages from another party is dealt with under section 7 of the Act which states that if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find it important to note that in a claim for damage or loss under the Act, the party making the claim bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage,
4. Proof that the claimant followed section 7(2) of the Act by taking reasonable steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the landlord to prove the existence and value of the damage/loss stemming directly from a violation of the agreement by the respondent and to verify that a reasonable attempt was made to mitigate the damage or losses incurred.

With respect to meeting element 4 of the test for damages, I find that the landlord is required to prove that he took reasonable steps to mitigate his loss of revenue. I find that, although evidence was submitted verifying that the tenant had given written notification of her intent to move in a communication dated August 24, 2012, no advertisements were submitted to document the landlord's efforts to attract a replacement tenant during August, or September 2012. In fact, the landlord's evidence only confirmed that he started to seek new renters through advertisements placed on October 25, 2012.

The landlord also submitted proof that the unit was advertised through November 2012 and, according to the invoice from the publication, the latest advertisement was scheduled to run from November 22, 2012 to December 18, 2012 and the landlord did not provide any evidence that advertisements were ever placed beyond that date. I find that all of the advertisements in evidence indicated that the start date for occupancy of the unit was November 1, 2012.

I find that, during the hearing, the landlord offered verbal testimony that he did not succeed in re-renting the rental unit until February 1, 2013. However, no evidentiary material was submitted to confirm the date that a new tenancy began.

Given the above, I find that element 4 of the test for damages has not been satisfied. I find that the landlord has also failed to sufficiently satisfy the burden of proof that a loss of revenue for the December 2012 and January 2013 were incurred. Accordingly, I find that elements 3 and 4 of the test were not met and the claim for \$1,620.00 for lost rent must be dismissed.

With respect to the landlord's claim for utility charges, that were apparently incurred after the tenant had moved out on October 31, 2012, I find that this claim does not meet the test for damages. Even though the landlord may have incurred a genuine expense, I find that this expenditure transpired after the tenant had already relinquished legal possession of the rental unit to the landlord. I find that the utility costs could not have been attributed to the tenant's usage and therefore the tenant cannot be charged for services never utilized during the tenancy. Accordingly, the claim for the landlord's cost of utilities must be dismissed.

In regard to the fees for two dishonoured cheques that the landlord attempted to deposit in December 2012 and January 2013, I find that, on October 31, 2012, the tenancy had already been terminated and, according to the Residential Regulation, in Paragraph 5(4) of the Schedule, a landlord is required to return all post-dated cheques to the tenant on the final day that the tenant is in possession of the rental unit or sent to the forwarding address left by the tenant. I find that a landlord is not permitted under the Act to retain and cash any post-dated cheques once either party has terminated the agreement. Accordingly, the landlord's claim for compensation for the \$50.00 NSF fee is dismissed as the charges resulted from the landlord's contravention of the Act.

In regard to the landlord's claim for the two late fees totaling \$50.00, that had been charged pursuant to a term in the tenancy agreement, I find that, once a tenancy is terminated by either party, no rent is owed under section 26 of the Act. I find that, all of the applicable terms contained within the contract, including late fees, would no longer be enforceable under the contract upon its termination.. Accordingly, I find that this portion of the landlord's claim must be dismissed.

Based on the evidence before me, I find that the landlord' is not entitled to any compensation for loss of revenue for December 2012 and January 2013, nor is the landlord entitled to utility fees after the end of the tenancy, late charges for December 2012 and January 2013 or fees for dishonoured cheques wrongfully presented to the financial institution beyond the end of the tenancy.

The landlord's application is dismissed in its entirety without leave to reapply.

Conclusion

The landlord's application seeking compensation for damages and losses is not successful and is dismissed in its entirety 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: March 12, 2013

Residential Tenancy Branch