



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MND, MNSD, FF

Introduction

This is an application filed by the landlord for a monetary claim for money owed or compensation for damage or loss, for damage to the unit, site or property, to keep all or part of the security deposit and recovery of the filing fee.

The landlord's agent attended the hearing by conference call and gave undisputed testimony. The tenant did not attend or submit any documentary evidence. The landlord states that the tenant was served with the notice of hearing package by Canada Post Registered Mail on August 7, 2014. The landlord has submitted a copy of the Canada Post Registered Mail Customer Receipt Tracking number as confirmation of service.

During the hearing the landlord's agent withdrew part of his monetary claim for damages of \$175.00, making the monetary claim total for \$1,525.00.

Issue(s) to be Decided

Is the landlord entitled to a monetary order?
Is the landlord entitled to retain the security deposit?

Background and Evidence

This tenancy began on April 15, 2014 on a fixed term tenancy ending on April 30, 2015. The monthly rent is \$950.00 payable on the 1st of each month and a security deposit of \$475.00 paid on March 31, 2014 as shown by the submitted copy of the signed tenancy agreement.

The landlord states that the tenant gave notice to vacate the rental on June 23, 2014 and moved out on July 15, 2014. The landlord is seeking a monetary claim of

\$1,525.00 which consists of \$1,450.00 for liquidated damages in breaching the tenancy agreement, \$75.00 for 2 late payments and 1 NSF cheque.

The landlord states that section #13 of the signed tenancy agreement provides for "...liquidated damages of one and one half months (1 1/2) rent to the Landlord for reletting expenses and rental loss."

The landlord also relies on section 2 (a) and (b) which provides for a \$25.00 NSF charge and 2 late rent charges of \$25.00 each.

The landlord clarified that the liquidated damages is made up of \$950.00 for loss of rental income and \$475.00 for the cost of the landlord's agent's agency fee.

The landlord's agent states that the owner has an agreement that he pays \$475.00 to his management company in this situation to find a new tenant. The landlord states that a new tenant was found and started their tenancy on October 1, 2014.

Analysis

Residential Tenancy Branch Policy Guidelines #4 speaks to liquidated damages and states,

This guideline deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages.

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. 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.

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.

If a liquidated damages clause is struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.

Residential Tenancy Branch Policy Guideline #5 speaks to duty to mitigate and states,

Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss¹. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation². Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is

located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed. The arbitrator may require evidence such as receipts and estimates for repairs or advertising receipts to prove mitigation.

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved. The landlord or tenant entitled to contract for repairs as a result of a breach by the other party, may choose to pay a service charge that exceeds what one would reasonably be required to pay for the service in the circumstances. In that case, the arbitrator may award a reduced claim based on the reasonable cost of the service. If partial mitigation occurs, the arbitrator may apportion the claim to cover the period during which mitigation occurred. The landlord who does not advertise for a new tenant within a reasonable time after the tenant vacates a rental unit or site prior to the expiry of a fixed term lease may not be entitled to claim loss of rent for the first month of vacancy;

I find that the landlord's liquidated damages clause constitutes as a penalty. The amount claimed is extravagant claiming an amount equal to 1 ½ months rent. The landlord's agent has not provided any supporting evidence of reletting costs to justify this amount claimed. The landlord's liquidated damages clause does not provide any specifics of what the genuine pre estimate costs for reletting would be. The landlord's agent has not provided any details of what mitigation or actions were taken. The landlord's claim for liquidated damages is dismissed.

The landlord's agent has only provided a statement that a new tenant was found beginning their tenancy on October 1, 2014 which is approximately 2 ½ months after the end of tenancy. I find that the landlord has failed to provide sufficient evidence to satisfy me that the duty to mitigate any possible losses took place, ie. Details of trying to re-rent the property.

The landlord has also made a claim of \$75.00 for 2 late rent payments and 1 NSF cheque. The landlord has failed to provide any details or evidence to justify this claim. The landlord's claim for the \$75.00 late payment fees and the 1 NSF cheque are dismissed for lack of sufficient evidence.

The landlord's monetary claim is dismissed.

I order that the landlord return the \$475.00 security deposit to the tenant. The tenant is granted a monetary order for \$475.00. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The landlord's application is dismissed.

The tenant is granted a monetary order of \$475.00 for the return of the security deposit.

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 26, 2015

Residential Tenancy Branch

