



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LANTERN PROPERTIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing convened as a result of the Landlord's Application for Dispute Resolution wherein the Landlord requested a Monetary Order for money owed under the tenancy agreement, authority to retain the security deposit and to recover the filing fee.

Both parties appeared at the hearing. The Landlord was represented by the Managing Director, J.H., and the Resident Manager, S.G. The Tenant appeared on her own behalf. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Landlord entitled to recover the \$400.00 in liquidated damages pursuant to the tenancy agreement?
2. What should happen with the Tenant's security deposit?
3. Is the Landlord entitled to recover the filing fee?

Background and Evidence

J.H. testified on behalf of the Landlord and provided background information as to the tenancy as follows: the tenancy began on October 1, 2014 for a fixed 1 year term; following the expiration of the one year term the tenancy was to continue on a month to month basis; monthly rent was payable in the amount of \$820.00; and the Tenant paid a security deposit of \$410.00.

Introduced in evidence was a copy of the tenancy agreement which provided at paragraph 4 as follows:

4. LIQUIDATED DAMAGES: *If the Tenant ends the fixed term tenancy before the end of the original term as set out in “3” above, the Landlord may, at the Landlord’s option, treat this Agreement as being at an end. In such event, the sum of \$400.00 will be paid by the Tenant to the Landlord as liquidated damages, and not as a penalty to cover the administration costs of re-renting the rental unit. The Landlord and Tenant acknowledge and agreed that the payment of liquidated damages will not preclude the Landlord from exercising any further right of pursuant another remedy available in law or equity, including, but not limited to, damage to the rental unit or residential property and damages as a result of lost rental income due to the Tenant’s [b]reach of any term of this Agreement.*

The Landlord sought to recover the \$400.00 in liquidated damages as the Tenant ended the fixed term tenancy before the original term.

The Landlord testified that the rental was re-rented on July 1, 2015, within days of the tenancy ending, such that only \$9.00 was spent doing a credit check on the new renter.

The Landlord argued that liquidated damages should be assessed at the time the contract is entered into, not at the time of the breach. The Landlord further argued that the proper approach is to compare the estimate of damages with the greatest possible loss. The Landlord further argued that although \$9.00 for a credit check was minimal, the greatest possible loss includes advertising costs, manager’s time, as well as potential lost rent revenue for the remainder of the fixed tenancy term.

The Landlord referred me to several decisions of the B.C. Supreme Court which are instructive on the issue of liquidated damages.

The Tenant took issue with the amount claimed by the Landlord and argued that it was a penalty, not an estimate of damages and that in any case, the rental was re-rented within four days such that the Landlord suffered minimal loss.

The Tenant also alleged that the contract was frustrated by a non-working refrigerator and that she broke the lease because the Landlord refused to deal with her refrigerator in a timely manner, or reimburse her for the cost of food she claims she lost. The Tenant confirmed she had made an application for dispute resolution wherein she sought monetary compensation from the Landlord for the cost of replacing her food; the hearing of her application is set to be held on June 9, 2016.

Analysis

The Landlord sought the sum of \$400.00 as liquidated damages pursuant to paragraph 4 of the residential tenancy agreement as a result of the Tenant ending the tenancy before the expiration of the fixed term.

Residential Tenancy Policy Guideline 4 – Liquidated Damages provides in part as follows:

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.

Judicial interference with a liquidated damages provision will be justified if enforcement of the term results in payment of a sum which is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach. Conversely, a liquidated damages provision is more likely to be enforced where the claim approximates the amount to which the claimant would otherwise have been entitled according to principles of general contract law (*Super Save Disposal Inc. v. Blazin Auto Ltd.* 2011 BCSC 1784).

The Court in *Super Save Disposal In. v. Blazin Auto Ltd.* further held that, the onus of establishing that a stipulated sum is a penalty rather than a genuine pre-estimate of damages that the parties have agreed in advance will be sustained in the event of a breach of the contract, rests on the party against whom the stipulated sum is claimed...

The Tenant argues that the tenancy was frustrated by the malfunctioning refrigerator and that she should therefore be relieved from any obligations under the tenancy agreement.

Residential Tenancy Policy Guideline 34—Frustration provides as follows:

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.

While an essential appliance, I do not accept that the alleged inoperable refrigerator frustrated the contract to the extent that the Tenant is relieved from her obligations under the tenancy agreement. She agreed to a fixed term, and agreed to pay liquidated damages in the event she ended the tenancy prior to the end of that term.

I find that the Tenant did break the lease. I accept the Landlord's able submissions that the liquidated damages are to be assessed at the time the parties entered into the contract and I find the \$400.00 sum to be neither extravagant nor unconscionable. I further find that the liquidated damages clause in paragraph 4 was a genuine pre-estimate of the administrative costs of re-renting the rental unit and those costs could have exceeded this amount had the rental unit remained vacant for any period of time. Accordingly, the Landlord is entitled to compensation in the amount of \$400.00 as liquidated damages as agreed upon at the outset of the tenancy.

Further as the Landlords' application had merit, they are entitled to recover the \$50.00 filing fee for a total of **\$450.00**. The Landlord is authorized to apply the \$410.00 security deposit against his amount and is awarded a Monetary Order for the balance due in the amount of **\$40.00**.

Conclusion

The Tenant ended the fixed term tenancy prior to the expiration of the term. The Landlords are entitled to the agreed upon liquidated damages in the amount of \$400.00 in addition to the \$50.00 filing fee. The Landlords may retain the \$410.00 security deposit and apply these funds towards the amount owing. The Landlords are entitled to a Monetary Order in the amount of \$40.00 for the balance due.

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: December 14, 2015

Residential Tenancy Branch

