



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Brilliant Circle Group c/o Firstservice Residential
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNSD, FF
 MNSD, OLC, FF

Introduction

This hearing was convened by way of conference call concerning applications made by the landlord and by the tenants. The landlord has applied for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order permitting the landlord to keep all or part of the security deposit; and to recover the filing fee from the tenants for the cost of the application. The tenants have applied for a monetary order for return of the security deposit; for an order that the landlord comply with the *Act*, regulation or tenancy agreement; and to recover the filing fee from the landlord.

An agent for the landlord and one of the tenants attended the hearing, and the tenant also represented the other tenant. The parties each gave affirmed testimony, provided and exchanged evidentiary material, and were given the opportunity to question each other and give submissions. No issues with respect to service or delivery of documents or evidence were raised, and all evidence provided has been reviewed and is considered in this Decision.

Issue(s) to be Decided

- Has the landlord established a monetary claim as against the tenants for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for liquidated damages and recovery of the filing fee?
- Should the landlord be permitted to keep the security deposit in full or partial satisfaction of the claim?
- Have the tenants established a monetary claim as against the landlord for return of all or part of the security deposit and recovery of the filing fee?

- Should the landlord be ordered to comply with the *Act*, regulation or tenancy agreement with respect to return of the security deposit?

Background and Evidence

The landlord's agent testified that the tenant entered into a fixed term tenancy agreement with the previous landlord for one year commencing on July 1, 2015 and expiring on June 30, 2016, at which time the tenants were required to vacate the rental unit. The rental unit is an apartment within an apartment complex which was purchased by the current landlord, and a new tenancy agreement was entered into by the parties for a tenancy to begin on July 1, 2016 and expire on June 30, 2017 at which time the tenants were required to vacate the rental unit. A copy of each of the tenancy agreements have been provided as evidence for this hearing.

Rent in the amount of \$1,825.00 per month was payable on the 1st day of each month and there are no rental arrears. Rent was not increased from the first tenancy agreement to the second tenancy agreement. The landlord received a security deposit and a pet damage deposit from the tenants in the amount of \$912.50 each at the commencement of the first tenancy.

The first tenancy agreement contained a liquidated damages term:

"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 \$912.50 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."

The second tenancy agreement also provides for liquidated damages as follows:

"NOTE: 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 as set out in (b) above, or any subsequent fixed term, the tenant will pay to the landlord the sum of \$912.50 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or damage to the rental unit, or for residential property."

The landlord's agent further testified that the tenants gave notice to end the tenancy in an email dated March 6, 2017 effective March 25, 2017. A copy has been provided, and the tenants actually vacated the rental unit on March 28, 2017.

The landlord's agent testified that the term of the tenancy agreement is not a penalty but a pre-determined estimate of the costs associated with re-renting and an amount agreed to. Each year the tenants have an opportunity to move out or enter into a new fixed term, and the liquidated damages term remains in each new tenancy agreement regardless of the length of time a tenant actually resides in the rental unit or the number of new tenancy agreements made by the parties. Some fixed terms are for 6 months, and the landlord reminds tenants by way of a notice when tenancy agreements are expiring to give the tenants an opportunity to make that decision. The term is not a penalty, but a pre-determined cost at the commencement of the tenancy, the amount is reasonable, and it's a legal document.

The landlord's agent further testified that move-in and move-out condition inspection reports were completed, and the liquidated damages was noted on the move-out report which the tenant refused to sign.

The rental unit was re-rented for April 15, 2017 and the tenants paid rent for half of that month.

The landlord received the tenants' forwarding address in writing by email on March 29, 2017 and returned the \$912.50 pet damage deposit within the 15 days as required by the *Residential Tenancy Act*, and still hold the \$912.50 security deposit in trust. The landlord claims liquidated damages in the amount of \$912.50 and recovery of the \$100.00 filing fee, and an order permitting the landlord to keep the \$912.50 security deposit in partial satisfaction.

The tenant testified that the tenants had moved to the area from out-of-province and were not told until they arrived that they would have to move out in a year. The landlord said it was a way to get rid of bad tenants, but the landlord was also raising rents and used fixed term leases to do so. Forced moves are common place in the community, and in this tenancy, there was no flexibility. It was a very difficult situation for the tenants who never thought they would have to agree to fixed term dates. The landlords sent a notice to the tenants stating that the tenants had to sign the 2nd fixed-term tenancy agreement.

Vacancy rates in the area or .6% and the tenants had a cat so that reduced the possibilities to .3% vacancy rate. Month-to-month tenancies are not options.

The tenants vacated the rental unit 3 months early because they had paid some \$40,000.00 rent for the rental unit, and instead purchased a condominium. They could not negotiate a later possession date.

The tenant submits that staying for the first term is understandable for liquidated damages, but after the 2nd or 3rd fixed term it becomes a penalty.

The tenants seek an order that the landlord return the \$912.50 security deposit and \$100.00 filing fee.

Analysis

I think the tenant's question is a valid one: At what point does liquidated damages become a penalty considering the landlord's requirement that tenants enter into fixed terms that require the tenants to move out at the end of the fixed term, regardless of the number of fixed term agreements the parties enter into? That question has been dealt with in law on numerous occasions, and although the tenant may not agree that it is morally okay to continue to insist on fixed term tenancies which end, that has little to do with liquidated damages. Liquidated damages must be a pre-determined estimate of the costs of re-renting if a tenant fails to reside in the rental unit until the end of the fixed term. A landlord may incur such pre-determined costs at the end of each of the fixed terms.

I also refer to Residential Tenancy Policy Guideline #4 – Liquidated Damages, which states, in part:

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.

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.

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.

In this case, regardless of what other options the tenants may have had, the tenants entered into the tenancy agreement which contained a 1 year lease and liquidated damages of half a month's rent. The liquidated damages and the rent payable for each of the tenancy agreements was the same, and I find the amount of liquidated damages to be reasonable. I cannot conclude that the agreement provided for a penalty if the tenants didn't stay till the end of the second fixed term, and I find that the landlord has established the claim of \$912.50.

I order the landlord to keep the security deposit in partial satisfaction, and I grant a monetary order in favour of the landlord in the amount of \$100.00 as recovery of the filing fee.

The tenants' application is hereby dismissed.

Conclusion

For the reasons set out above, I hereby order the landlord to keep the \$912.50 security deposit and I grant a monetary order in favour of the landlord as against the tenants pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$100.00.

The tenants' application is hereby dismissed.

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: September 12, 2017

Residential Tenancy Branch