Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FF, MND, MNSD

Introduction

The Application for Dispute Resolution filed by the landlord makes the following claims:

a. A monetary order in the sum of $1180
b. An Order to retain the security deposit.
c. An order to recover the cost of the filing fee

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The parties acknowledged they had received the documents of the other party.

I find that the Application for Dispute Resolution/Notice of Hearing filed by the landlord was sufficient served on each of the tenants by mailing, by registered mail to where the tenants reside on May 13, 2017. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided:

The issues to be decided are as follows:

a. Whether the landlord is entitled to A Monetary Order and if so how much?
b. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
c. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence:

The parties entered into a one year fixed term written tenancy agreement that provided that the tenancy would start on September 1, 2016 and end on August 31, 2017. The rent is $2300 per month payable on the first day of each month. The tenants paid a security deposit of $1087.50 at the start of the tenancy.

The tenancy agreement included a liquidated damage clause as follows:

> "If the lessee ends the tenancy before the end of the original term, the lessor may, at the lessor's option, treat this tenancy agreement as being at an end. In such an event, the lessee shall pay the sum of half a month's rent to the lessor as liquidated damages, and not as a penalty to cover the administration cost of re-renting the premises…"

On February 21, 2017 two of the tenants advised the landlords by e-mail they would be moving out at the end of April and requested to either end the lease early on April 30, 2017 or to sublet to a group of friends they knew including the third tenant.

The landlords responded saying the tenants could not end the lease and that they would need to sublet it to a new party for the remaining 4 months.

On March 7, 2017 the tenants confirmed by e-mail that they intended to move out on April 30, 2017.

On March 13, 2017 the tenant ES indicated she had found 2 friends who were prepared to take over the lease along with her. There is a clause in the tenancy agreement that provides that if two tenants want to sublet, all three tenants must move out.

The landlords replied saying they would not agree to the tenants ending the lease early and ES would not be able to stay and a new party would be required.

The tenants gave the landlord a written notice dated March 26, 2017 signed by all three tenants stating that "we intend to vacate the suite before May 1, 2017. We request that you proceed to find a new party to reassign the suite to, commencing May 1, 2017. "

The landlord testified 60 prospective tenants applied. Showings were set for 3 days. The landlords selected a two of the applicants and a document titled Assignment of Tenancy Agreement was executed where the respondents agreed to the assignment of the tenancy agreement dated July 25, 2017 and the new tenants agreed to assume all the obligations and privileges of the above tenants under the attached Tenancy Agreement dated July 25, 2016. The new tenants also signed a new fixed term tenancy agreement commencing August 1, 2017 for a higher rent.

The tenants vacated the rental unit prior to the end of April and the new tenants took possession on or before May 1, 2017. A Condition Inspection was conducted on April 29, 2017 with two of the tenants. They agreed to a $30 deduction for a broken fridge guard but did not agree to the $1150 administration charge for liquidated damages.

The Relevant Law

Section 34 of the Act provides as follows:

> Assignment and subletting
> 34 (1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.
> (2) If a fixed term tenancy agreement is for 6 months or more, the landlord must not unreasonably withhold the consent required under subsection (1).
> (3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

Policy Guideline 4 provides as follows

> 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 if 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.

Section 1 of the Residential Tenancy Act includes the following definitions:

"tenancy" means a tenant's right to possession of a rental unit under a tenancy agreement;

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

Policy Guideline #19 includes the following;

B. ASSIGNMENT

Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord. When either a manufactured home park tenancy or a residential tenancy is assigned, the new tenant takes on the obligations of the original tenancy agreement, and is usually not responsible for actions or failure of the original tenant to act prior to the assignment. It is possible that the original tenant may be liable to the landlord under the
original agreement. For example:

- the assignment to the new tenant was made without the landlord's consent; or
- the assignment agreement doesn't expressly address the assignment of the original tenant's obligations to the new tenant in order to ensure the original tenant does not remain liable under the original tenancy agreement.

Under s. 34 of the Residential Tenancy Act, a tenant must not assign a tenancy agreement unless the landlord consents in writing. A landlord must not unreasonably withhold consent if the tenancy agreement is for a fixed term of six months or more. (By implication a landlord has the discretion to withhold consent, without regard to reasonableness, in the case of a fixed-term tenancy with less than six months remaining).

The Act does not specifically refer to month-to-month (periodic) tenancies. An arbitrator may find that a landlord has acted reasonably for withholding consent to assign a periodic tenancy, unless the tenant can demonstrate a compelling reason why the landlord should agree to the assignment. The circumstances of each case would have to be examined.

In either a fixed-term or a periodic tenancy, failure to obtain the landlord's written consent prior to the assignment could result in the landlord serving a One Month Notice to End Tenancy (form RTB-33). Failure of a landlord to accept a reasonable assignment may interfere with the landlord's ability to claim for loss of rental income as it may be found that the landlord failed to mitigate that loss.
An assignment may take place in various circumstances, such as a tenant leaving town, but still having a period of time left on a fixed-term tenancy agreement. The original tenant may wish to assign the tenancy agreement to a new tenant who takes over the tenancy agreement for the remainder of the term.

Analysis:
After carefully considering all of the evidence and the submission of the parties I determined the landlords failed to prove they are entitled to the $1150 claimed pursuant to the liquidated damage clause for the following reasons:

- The liquidated damage clause relied on by the landlord was triggered where the tenants end the tenancy before the end of the original term. I do not accept the submission of the landlord who was relying on the Webster's Dictionary stating the tenancy means occupancy. Tenancy is defined in the Residential Tenancy Act to mean the tenant's right to possession.
- The tenancy and tenancy agreement did not come to an end on April 30, 2017 as the tenancy and tenancy agreement was assigned.
- While the right to possession was assigned to the new tenants, it was done under the July 25, 2017 tenancy agreement. Further, the old tenants still remained liable under the tenancy agreement if the new tenants failed to perform as perform there obligations. There is no

provision in the Assignment of Tenancy Agreement that would prevent the landlord from going after the old Tenants.

- The new tenants performed their obligations under Assignment of Tenancy Agreement and the rent was paid and the July 25, 2017 came to an end at the end of July 2017.
- A new tenancy agreement was signed between the landlord and the new Tenants and they continue to live in the rental unit for a higher rent.
- I determined there is no basis for awarding the landlord the amount set out in the liquidated damage clause on the merits. Had the tenants vacated at the end of the fixed term (July 31, 2017) the landlord would not have any claim under the liquidated damage clause and would have to incur the costs of advertising and re-renting. In my view the landlord is not entitled to recover this sum from the tenants were the landlord has obtained new tenants under and 4 month Assignment and the same new tenants under a new tenancy agreement.
- Further, the tenancy agreement provided that where two tenants leave, the first tenant was not entitled to remain in the rental unit even if she could find others to take the place of the departing tenants. The landlord chose not to consider the two possible replacement tenants proposed by the one remaining tenant. In my view the landlord failed to mitigate its loss in failing to consider the adequacy of the proposed replacement tenants.
- The liquidated damage clause provides that it is to compensate the landlord for administration costs. It is unclear exactly what that means. Section 34(3) provides that

> 34(3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section."

- I do not accept the landlord's submission that the landlord can avoid the provisions of section 34(3) by relying on a liquidated damage clause.
- Given my determination above it is not necessary for me to determine whether the liquidated damage clause is a genuine pre-estimation of the damage or whether it is a penalty.

Analysis - Monetary Order and Cost of Filing fee:
Policy Guideline 17 includes the following:

> **C. RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH DISPUTE RESOLUTION**
> 1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
> - a landlord's application to retain all or part of the security deposit; or
> - a tenant's application for the return of the deposit.

For the reasons set out above I dismissed the landlords' application for the amount set out in the liquidated damage clause. The evidence indicates the security deposit paid by the tenants amounted to 1087.50. The landlords are entitled to deduct the $30 agreed to from the security deposit as two of the tenants agreed to this in the Condition Inspection Report leaving a balance of $1057.50. The landlords have not been successful with the majority of their claims and I ordered that the claim for the cost of the filing fee be dismissed.

I ordered that the landlords shall deduct $30 from the security deposit. I further ordered that the landlords pay to the tenants the balance of the security deposit in the sum of $1057.50.

It is further Ordered that this sum be paid forthwith. The Tenants are given a formal Order in the above terms and the Landlords must be served with a copy of this Order as soon as possible.

Should the Landlords fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

This decision in final and binding on both parties.

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 19, 2017

Residential Tenancy Branch