



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding V7 PROPERTIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCLS, FFL

Introduction

This hearing dealt with the landlord's application pursuant to the Residential Tenancy Act (the "Act") for:

- A monetary award for damages and loss pursuant to section 67; and
- Authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The corporate landlord was represented by its agent JH (the "landlord"). The tenant was primarily represented by counsel SL (the "tenant").

As both parties were in attendance service was confirmed. The tenant confirmed receipt of the landlord's application for dispute resolution and evidence. The tenant said that they had not submitted any written evidence. Based on the undisputed testimony I find that the landlord's application package was served on the tenant in accordance with sections 88 and 89 of the Act.

Issue(s) to be Decided

Is the landlord entitled to a monetary award as claimed?

Is the landlord entitled to recover the filing fee for the application?

Background and Evidence

The parties agreed on the following facts. This fixed term tenancy began in September, 2017 and was scheduled to end in August, 2018. The monthly rent was \$1,400.00 payable on the first of each month. A security deposit of \$700 and pet damage deposit of \$250.00 was collected at the start of the tenancy. The landlord returned all but \$375.00 of the security deposit on November 14, 2017.

The tenant moved out of the rental unit on October 31, 2017. Prior to vacating the tenant discussed with the landlord about finding a new renter for the unit and the applicable damages they would be required to pay. The tenant was able to find a new renter whom the landlord reviewed and with whom they entered into a tenancy agreement. The tenant participated in a move out inspection with the landlord on October 31, 2017.

The landlord informed the tenant by email dated November 2, 2017 that they are charging the tenant a fee of \$275.00 for the cost of re-renting the suite. Among the items the landlord is seeking are the cost for checking the new renters' references, preparing a lease agreement, and conducting move-out and move-in inspections. The landlord provides that the process of re-renting took 5.5 hours.

Included in the addendum to the tenancy agreement signed by the parties on August 24, 2017 is a paragraph which states:

BREAKING THE LEASE TERM: If the tenant terminates the tenancy before the original term, the Landlord may, at the landlord's option, treat his Tenancy Agreement as being at an end. In such event the sum of up to \$1,400 (1 Month rent) shall 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 said premises.

The landlord submits that the above is an enforceable clause. As the tenant has terminated the fixed term tenancy agreement, the landlord submits that they are entitled to charge the cost of re-renting the suite, in this case in the amount of \$275.00.

The tenant submits that the tenancy was not terminated but assigned to a new renter. The tenant points to an email correspondence between the parties dated October 13, and October 16, 2017 as evidence. In the email exchange the tenant asks about the possibility of transferring the lease to someone else. The landlord responds by stating that if the tenant is able to find a suitable new tenant they would only be charged a lesser liquidated damage amount.

The landlord submits that the tenant's conduct in participating in a move-out inspection, inquiring about the amount of liquidated damage and requesting a return of the deposits is consistent with the tenancy ending rather than being assigned. The landlord notes that in the correspondence with the tenant's lawyer there is no reference made to the tenancy being assigned and the tenant's security deposit is requested to be returned as it would be at the end of a tenancy.

The tenant also submits that in the alternative, in the case that the tenancy was not assigned but ended, the liquidated damage clause in the addendum to the tenancy agreement is unenforceable. The tenant submits that the clause is not a genuine pre-estimate of the cost of re-renting as it provides that the landlord may charge any amount up to a full month's rent. The tenant submits that they were never provided with an estimated cost of re-renting the suite and

the agreement only gives an upper limit. In an earlier correspondence from tenant's counsel, the tenant said when they signed the tenancy agreement, they agreed to a \$75.00 moving fee but did not agree to general, unquantified liquidated damage.

Analysis

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the *Act*, regulations or a tenancy agreement. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. The claimant also has a duty to take reasonable steps to mitigate their loss.

The landlord submits that this fixed-term tenancy ended on October 31, 2017, 10 months earlier than the period specified in the fixed term tenancy agreement. The landlord submits that they incurred costs for ending the tenancy and beginning a new tenancy with another renter who was brought forth by the tenant.

The tenant submits that this was not a situation where the original tenancy ended and a new tenancy was started but an assignment of the original tenancy. Section 34 of the *Act* provides that:

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 has 6 months or more remaining in the term, 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.

The tenant submits that if this were an assignment the landlord is not permitted to charge the tenant for the cost of "considering, investigation or consenting to" the assignment.

I find that the evidence in this matter does not support the tenant's interpretation that this is an assignment. While there is one instance in an email of October 13, 2017 where the tenant enquires about the possibility of transferring the lease to someone else, the response from the landlord and the subsequent conduct of the parties is consistent with a tenancy ending.

The parties participated in a move-out inspection, the tenant provided a forwarding address and the tenant made a request for the return of the security and pet damage deposits. In her correspondence of October 24, 2017 the tenant does not dispute that she will be charged liquidated damages but simply asks for its breakdown. While a copy was not submitted into

written evidence, the landlord testified that they prepared a new tenancy agreement and conducted a move-in inspection for the new tenancy. Based on the evidence I find that this was not a case where a fixed term tenancy was assigned but one in which the tenancy was ended and a new tenancy started.

The tenant submits that the liquidated damage clause, as drafted in the addendum to the tenancy agreement is unenforceable as it does not provide a genuine pre-estimate of loss at the time the contract is entered. The tenant submits that the clause allows an upper limit of damages of \$1,400.00 but does not set an actual amount for damages in the case where a tenancy agreement is breached.

I find that the tenant's submission has merit. As outlined in Residential Tenancy Policy Guideline 4, a liquidated damage clause is an agreement in advance for the payment of a genuine pre-estimate of losses in the event of a breach of the tenancy agreement. It is not an opportunity for the landlord to claim any conceivable costs. I find the landlord's inclusion of items such as the attendance at the move-out inspection to not be covered under a genuine liquidated damage clause. The correspondence between the parties show that the exact amount of the loss was unknown until the new tenancy was entered. I find that this clause of the tenancy agreement is not a true liquidated damage clause as it does not provide a figure for the pre-estimate of damages. A clause which allows the landlord to calculate and claim damages is not a true liquidated damage clause as outlined in the Act and Policy Guideline. As a result, I find that this clause is unenforceable.

Nevertheless, I find that the landlord has shown on a balance of probabilities that the early termination of the fixed term tenancy agreement by the tenant has given rise to some losses. The landlord submits that the hours of additional work was 5.5 hours, which at a rate of \$50.00 per hour resulted in a total loss of \$275.00. I find that there is insufficient evidence in support of the full amount of the landlord's claim. As detailed above, I do not find that the time spent attending a move-out inspection to be a recoverable loss but simply the cost of a rental business. While the landlord gave some testimony about the time it takes to prepare for a new tenancy I find that there is insufficient evidence to fully support the hours claimed.

Under the circumstances, I find that a monetary award in the amount of \$150.00, the equivalent of 3 hours at \$50.00 per hour to be more appropriate. I issue a monetary award in the landlord's favour in that amount.

As the landlord's application was successful the landlord may recover the \$100.00 filing fee for their application from the tenant.

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit.

In this case the tenancy ended on October 31, 2017 and the landlord filed their application for dispute resolution on November 14, 2017, within the 15 days provided under the *Act*. As such, I find that the landlord is not required to pay a monetary award of double the deposit.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain \$250.00 of the \$375.00 security deposit currently held by the landlord. The landlord is ordered to return the remaining \$125.00 to the tenant.

Conclusion

I grant a monetary award in the landlord's favour in the amount of \$250.00. The landlord may retain this amount from the security deposit held for this tenancy. The landlord is ordered to return the remaining \$125.00 of the security deposit to the tenant.

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: June 27, 2018

Residential Tenancy Branch