Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VANCOUVER LUXURY REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC-S, MNR-S, FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

The tenants' applied for:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

The landlords' agents (the landlords) attended the hearing via conference call and provided testimony. The tenant, L.J. and his counsel attended the hearing via conference call and provided affirmed testimony on behalf of the tenant, M.J. Both parties confirmed receipt of the filed application, notice of hearing package(s) and the submitted documentary evidence from the other party. No service issues were raised. I accept the undisputed testimony of both parties and find that both parties have been sufficiently served as per section 90 of the Act.

Issue(s) to be Decided

Are the landlords entitled to a monetary order for money owed or compensation, for unpaid rent and recovery of the filing fee?
Are the landlords entitled to retain all or part of the security deposit?
Are the tenants entitled to a monetary order for money owed or compensation for damage or loss and recovery of the filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began on August 15, 2018 on a fixed term tenancy ending on August 30, 2020 and then thereafter on a month-to-month basis as per the submitted copy of the signed tenancy agreement dated July 26, 2018. The monthly rent was $4,100.00 payable on the 1st day of each month. A security deposit of $2,050.00 and a pet damage deposit of $2,050.00 were paid.

Both parties confirmed the tenants provided notice to vacate the rental unit on November 19, 2018 for December 31, 2018. Both parties confirmed the tenants vacated the rental unit on November 30, 2018 without notice.

The landlords seek a clarified monetary claim of $10,350.00 which consists of:

$4,100.00	Loss of Rental Income/Unpaid Rent, December 2018
$4,100.00	Loss of Rental Income/Unpaid Rent, January 2019
$2,050.00	Liquidated Damages, Pre-Mature End of Tenancy
$100.00	Filing Fee

The landlords stated that the tenants pre-maturely ended the tenancy on November 30, 2018 prior to the fixed ending term on August 31, 2020 as provided in the signed tenancy agreement. The landlords claim that the tenant provided notice to end the tenancy on November 19, 2018 for December 31, 2018 which was accepted. The landlord further stated that the tenants vacated the rental unit on November 30, 2018 without notice. The landlord claims as a result, a loss of rental income occurred for December 2018 of $4,100.00 and January 2019 of $4,100.00 as the unit was not successfully re-rented until February 1, 2019. The tenants dispute this claim stating that the landlord was in breach of a material term of the tenancy by not repairing the air conditioning in the unit was critical. The tenants confirmed that notice was given to end

the tenancy on November 19, 2018 for December 31, 2018, but vacated the rental unit on November 30, 2018 without notice.

The owner incurred an expense of $4,100.00 which is equal to one month's rent as per the "Property Management Agreement", Section 3 Listing Brokerage's Remuneration dated June 14, 2018 with the owner which states in part 9 of the Addendum to the Tenancy Agreement dated July 26, 2018,

Liquidated Damages in the event of Breaking the Lease: If the Tenant(s) repudiates or breaches the fixed term tenancy before he end of the original term, the Landlord may, at the Landlord's option, treat this Agreement as being at an end. In such event, the sum of half month's rent (as of this contract) will be paid by the Tenant(s) to the Landlord or Vancouver Luxury Realty (VLR) as damages, and not as a penalty, toward the administration costs of re-renting the Rental Unit. The Landlord and Tenant(s) acknowledge and agree that the payment of such damages will not preclude the Landlord from exercising any right of pursuing any remedy available in law or in equity for breach of this Agreement, including, but not limited to, clams for loss or damage pertaining to the Rental Unit or its appliances, furniture, furnishings or finishes, and damages incurred as a result of a lost renal income, or any other costs or losses arising from or related to the Tenant(s) repudiation or breach of any term of this Agreement. The Landlord or VLR shall have no obligation to accept any repudiation or breach of the lease by the Tenant(s), and ***payment of the said sum of half month's rent*** *shall not limit the Landlord's rights, remedies or claims in any way.*

The landlords stated that this clause calls for liquidated damages equal to ½ of monthly rent. The landlord clarified that no actual amount is stipulated as this is a standard term in the addendum to any of the tenancy agreements issued by the landlord's agents. The landlords referred to the "Property Management Agreement" made between the owner and the property management company dated June 14, 2018. It states in part,

Section 3. Listing Brokerage's Remuneration:

a) *Leasing Fee will be equivalent to ½ month's rent plus GST or 5% plus GST of the value of entire Contract signed, whoever is greater. The leasing fee will be collected from the first month's rent.*
b) *The monthly Management Fee equal to 5% of the monthly gross rental income plus GST collected or $125 plus GST per month whichever is greater for unfurnished rentals or 8% of the monthly gross rental income plus GST collected or $150 plus GST per month whichever is greater for furnished properties.*

c) *~~A 1.5% Performance Fee will apply to eases signed within twenty-one (21_ days from the day the Property was available to the Brokerage to market.~~*
d) *All fixed term renewals will have a Leasing Fee of 3% plus GST charged at the beginning of the lease.*
e) *All month-to-month renewals will have a leasing fee of 2% plus GST charged yearly or at the end of the existing term.*
f) *Property Coordination Fee or Vacant Properties: If any work is required to be undertaken to the Property that is the Owner's responsibility, then the Owner shall pay a fee of three percent (3%) plus GST of the gross rent (advertised rent) for VLR to coordinate such work [work/ improvement that is required to be done while the Property is vacant) this fee will be applied once per month until the Property is rented and VLR starts to collect rent.*

The tenants dispute this claim stating that no actual amount is listed in the signed tenancy agreement; no such calculations were provided by the landlords; the "Property Management Agreement" is between the landlord/owner and the landlord/property manager and that the tenant would not have notice or access to this agreement. The tenants argue that this liquidated damages claim was not a genuine pre-estimate of losses.

The tenants seek a monetary claim of $12,515.43 which consists of:

$2,911.65	Moving Costs
$1,536.28	Packing Costs
$892.50	Packing Costs
$7,175.00	Recovery of ½ of Monthly Rent, August 15 to November 30, 2018

The tenants stated that "Before entering into the tenancy agreement, we made it clear to the landlord's agent, R.D…, that air conditioning in the unit was critical to us in deciding to rent the unit. When the tenancy began on August 15, 2018, the air conditioning was not working in the two bedrooms and two bathrooms." The landlord was notified of the issue, but the air conditioning issue was never resolved. The tenant stated that as such, notice to end the tenancy was given to the landlord on November 19, 2018 to end the tenancy on December 31, 2018.
The tenants provided testimony that a technician attended to inspect the air conditioner on August 17, 2018 and realized that he was not an air conditioning technician. The tenants argued that they suffered the loss of enjoyment/use of ½ of the rental unit. The tenants stated that 1 person slept in the living room due to no air conditioning in the bedroom. The tenants stated that the other tenant would use the bedroom part-time.

The tenants stated that the monetary request was an arbitrary one not based on any actual losses or expenses, but for the loss of use/enjoyment as the landlord was in breach of a material term of the tenancy. The tenants also stated that at that time the temperature during the summer was very high. The tenants provided testimony that the landlord was trying to deal with the issue, but failed to do so until after the tenancy ended.

The landlords dispute the tenants' claims stating that upon being notified of the air conditioning issue, a contractor was contacted and a service inspection was arranged to attend within 2 days on August 17, 2018. The landlords stated that the matter was not resolved and a second contractor was retained and a service technician attended on October 16, 2018 and an estimate was received on October 20, 2018. The landlords learned that the old system was not repairable and that a new specialized system was ordered, but not available for installation until January 15, 2019. The landlords argue that they were diligent in responding to the tenants' issues, but were unable to have the new system installed before the tenants gave notice to end the tenancy.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. 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 of the *Act* 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.

On the landlord's claim for compensation of $8,200.00 for loss of rental income/unpaid rent (December 2018 and January 2019), I find that the landlords have established a claim. In this case, the breach occurred when the tenant gave notice to end the tenancy pre-maturely on November 19, 2018 for December 31, 2018, yet vacated on November 30, 2018 without notice. The signed fixed term tenancy agreement provides for an end of tenancy on August 31, 2019. The landlord upon being advised made reasonable steps to mitigate any losses by advertising the unit for rent. The landlord was not successful in re-renting the unit until February 1, 2019. As such, I find that the tenant was responsible for the landlord's loss of rental income for December 2018 and January 2019 at $4,100.00 per month. The landlord has been successful in this portion of the claim.

On the landlords' claim for liquidated damages of $2,050.00 equal to ½ of the monthly rent, I find that the landlords have failed. Residential Tenancy Branch Policy Guideline #4, Liquidated Damages states in part,

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.

In this case, the landlord seeks a $2,050.00 liquidated damages claim for the tenant pre-maturely ending the tenancy. Although this is undisputed, liquidated damages is an amount agreed to, is a genuine pre-estimate of the loss at the time the contract is entered into. The signed tenancy agreement does not provide for a specific amount; the landlord relies upon a "Property Management Agreement", which the tenant was not a party to and had no notice of; and the landlords have failed to provide sufficient particulars of the genuine pre-estimate for the liquidated damages. The landlords instead rely upon a standard contract term with no specifics for any of their tenancies. On this basis, I find that the liquidated damages clause in the signed tenancy agreement is a penalty clause and as such is unconscionable. The landlords request for liquidated damages is dismissed.

Subsection 32(1) of the Act requires a landlord to maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, makes it suitable for occupation by the tenant.

In this case, the tenants have sought compensation for the loss of quiet enjoyment/use due to a broken air conditioner. In this case, both parties confirmed that the tenants notified the landlords of the broken air conditioner and that the landlord responded by having a technician attend to repair it. I find based upon the submissions of both parties that the tenants have failed in their entire monetary claim. Although the tenants claim that the landlord was in breach of a material term of the tenancy agreement, I find that the landlord responded diligently in the circumstances. Upon being notified the landlord engaged a technician, when that did not resolve it a second technician was brought in who determined that the air conditioning unit was not repairable, but had to be replaced. This required a specialized air conditioning unit for the rental unit, which was ordered, but not available until January 2019. The tenants chose to vacate the premises by giving notice on November 19, 2018 for December 31, 2018, but vacated on November 30, 2018. The tenants are responsible for their own moving costs. This portion of the tenants' monetary claim is dismissed.

On the tenants' monetary claim for loss of quiet enjoyment/use due to a lack of air conditioning, I find that the tenants have failed to establish a claim as applied. Both parties have confirmed that the air conditioning was important to the tenants and that the tenants suffered the loss of use of the air conditioning. The tenants provided undisputed testimony that upon being notified the landlord had a contractor attend to inspect and repair the air conditioner. The landlord provided undisputed testimony that

the air conditioning unit was not repairable and was to be replaced with a specialized unit which was ordered, but not available until January 2019. The tenants did not suffer the loss of use which would be equal to ½ of the rental unit. However, both parties have confirmed that a loss of use did occur and on this basis, I find that the tenants are entitled to a nominal award of $2,500.00 for suffering the loss of air conditioning during the summer for the two bedrooms and bathrooms.

The landlords have established a total monetary claim of $8,200.00. The landlords having been successful are also entitled to recovery of the $100.00 filing fee. The tenants have established a total monetary claim of $2,500.00 and return of the combined $4,100.00 security and pet damage deposits. The tenants having been successful are entitled to recovery of the $100 filing fee.

In offsetting these claims, the landlords are entitled to $1,600.00.

Conclusion

The landlords are granted a monetary order for $1,600.00.

This order must be served upon the tenants. Should the tenants fail to comply with the 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 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: May 2, 2019

Residential Tenancy Branch