



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNDCL-S, FFL

Introduction

The Application for Dispute Resolution filed by the landlord seeks the following:

- a. A Monetary Order in the sum of \$1200 pursuant to a liquidated damage clause for breaking a fixed term lease.
- b. An Order to recover the cost of the filing fee.

A hearing was conducted by conference call in the presence of a representative of the applicant and in the absence of the respondent although duly served. 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.

I find that the Application for Dispute Resolution and Notice of Dispute Resolution Hearing was served on the Tenants by mailing, by registered mail to the forwarding address provided by the Tenants on May 1, 2019. 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 recover the cost of the filing fee?

Background and Evidence:

The parties entered into a written tenancy agreement that provided that the tenancy would start on December 15, 2018 and end on December 31, 2019. The tenant was \$2400 per month plus two parking spots of \$75 each. The tenants paid a security

deposit of \$1200, a pet damage deposit of \$1200 and a FOB deposit of \$100 at the start of the tenancy.

On March 18, 2019 the tenants gave the landlord a letter ending the tenancy at the end of April and offering to help find another tenant. The tenant testified they had found a job in the interior and decided that it was appropriate to move.

The tenants vacated the rental unit on April 19, 2019. The landlord found another tenant who moved in on that date. The landlord did not suffer a rent loss. The tenant testified that she was not able to find an advertisement for their rental unit although she saw advertisements for others. The landlord returned the pet damage deposit and the \$100 Fob deposit.

The landlord claim \$1200 pursuant to the following liquidated damage clause:

5. LIQUIDATED DAMAGES: 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 fixed term as set out in (B) above, or any subsequent fixed term, the tenant will pay to the Landlord the equivalent of their security deposit amount as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the Landlord's cost of re-renting the 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 Residential Property."

The landlord testified the \$1200 was the estimated cost of re-renting the rental unit but failed to provide evidence to support this allegation. The landlord testified he estimated it would take 3 to 4 showings of one half hour to an hour each. He would have to process the application and get approval from head office. He would have to conduct credit checks. They needed to advertise on the landlord's website.

The tenants testified that the landlord did not accept their offer to help re-rent the rental unit. They believe they had at most one to two showings. She was not able to find the advertisement for this unit on any website. The tenants vacated the rental unit on April 19, 2019 and a new tenant moved in that day.

Analysis:

Section 6(3) of the Act provides as follows:

Enforcing rights and obligations of landlords and tenants

6(3) A term of a tenancy agreement is not enforceable if

- (a) the term is inconsistent with this Act or the regulations,
- (b) the term is unconscionable, or
- (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Section 15 of the Act provides as follows:

Application and processing fees prohibited

15 A landlord must not charge a person anything for

- (a) accepting an application for a tenancy,
- (b) processing the application,
- (c) investigating the applicant's suitability as a tenant, or
- (d) accepting the person as a tenant.

Policy Guideline #4 includes the following:

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** (my emphasis). 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. (my emphasis)

....”

Analysis - Monetary Order and Cost of Filing fee

After carefully considering all of the evidence I determined the landlord failed to prove that the liquidated damage clause of “the equivalent of their security deposit” (in this case \$1200) is a genuine pre-estimation of the loss. I determined the clause is oppressive to the party have to pay the stipulated sum and is unenforceable. I determined the amount is extravagant. The reasons for this determination are as follows:

- The clause is ambiguous. Clause 5 states it is to cover “costs of re-renting the rental unit” but does not state what those costs are

- The landlord failed to provide evidence to prove the landlord has made an estimation of costs of re-renting at the time the tenancy agreement was entered into or what factors this is supposed to cover.
- The landlord suggested that the cost of advertising must be included. However, the landlord failed to provide evidence to establish how much is amounts to.
- I determined the failure to provide evidence is significant when one considers costs of advertising have been reduced given the use of electronic media rather than paying for advertisements in newspapers.
- The landlord submitted that cost of considering new tenants must be considered. The landlord failed to present evidence to show this has been estimated. This appears to conflict with section 15 prohibits the landlord from charging a fee for processing an application. In my view the wording is broad enough to prohibit the landlord attempting to recover these amounts from a tenant who is leaving prior to the end of the fixed term.
- I determined the amount claimed is oppressive and unreasonable.
- Policy Guideline #4 provides that “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.” The effect of the wording of this clause is an automatic forfeiture of the security. Insufficient evidence has been presented by the landlord to prove the sum of \$1200 is a genuine pre-estimation of the loss.

In summary I determined the liquidated damage clause which requires the tenant to pay the equivalent of their security deposit in the sum of \$1200 is not a genuine pre-estimation of the loss and is a penalty. I determined it is unenforceable.

As a result I ordered that the application of the landlord for a monetary order and to keep the security deposit be dismissed without liberty to re-apply. The application to recover the cost of the filing fee is dismissed without liberty to re-apply.

Security Deposit

Policy Guideline 17 provides that an arbitrator will order the return of the security deposit less any deductions required by law on a landlord's application even where the tenants have not filed an Application for Dispute Resolution unless the tenants' right to the return of the deposit has been extinguished by the Act. I determined there is no

evidence to establish that the tenant's right to the return of the deposit have been extinguished.

As a result I ordered that the landlord pay to the Tenants the sum of \$1200.

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

Should the Applicant 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 is final and binding on the 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: July 29, 2019

Residential Tenancy Branch