



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Decision Codes: FFL, MNDL-S

Introduction

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

- a. A monetary order in the sum of \$1150 for damages, the failure to clean and a liquidated damage clause.
- b. An order to keep 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 and Notice of Dispute Resolution Hearing was served on the tenant by mailing, by registered mail to the forwarding address provided by the tenant on May 17, 2019. With respect to each of the applicant's claims I find as follows:

Issues 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 fixed term written tenancy agreement that provided that the tenancy would start on July 1, 2019 and end on June 30, 2019 and become month to month after that. The tenancy agreement provided that the tenant(s) would pay rent of \$1000 per month payable in advance on the first day of each month.

The tenant gave the landlord one month written notice and vacated the rental unit on April 29, 2019.

The landlord claims \$675 pursuant to a liquidated damage clause in the tenancy agreement, the cost of cleaning and the cost of repainting.

The landlord testified the liquidated damage clause was to cover the following caused by the Tenant's breach of the fixed term tenancy agreement.

- The cost to get the rental unit ready for re-renting
- The cost of listing and advertising the rental unit
- The cost of the Building Manager's time in showing the rental unit
- The cost of the Building Manager in submitting tenancy application to the head office and checking references.

Landlord's Application - Analysis

Analysis:

With respect to each of the landlord's claims I find as follows:

- a. The liquidated damage clause included the following:

"...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(s) will pay to the Landlord the sum of \$675 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, as well as any other amounts owed by the Tenant(s), such as unpaid rent or for damage to the rental unit or residential property."

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.

...

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)**.

After carefully considering all of the evidence I determined that the liquidated damage clause is a penalty and therefore unenforceable for the following reasons:

- The clause states that it is “for all costs associated with re-renting” the rental unit. I determined this is ambiguous as exactly what is covered is not included. The loss of future rent or damages is excluded in the section of the clause that follows. I
- The landlord failed to provide evidence to show that it made a genuine attempt to pre-estimate the cost of the tenant’s breach at the time it entered into the tenancy

agreement. There is no evidence as to how much time it might take a Building Manager to show the rental unit, how is that cost determined, how much time it would take to consider other applications etc.

- In the past landlords would argue that a major component of liquidated damages was the cost of advertising. This is no longer the case as the cost of advertising has been significantly reduced because advertising is usually carried out by on-line advertisement which has reduced and even limited this significant cost. However, the liquidated damage clause in many standard form tenancy agreements remains the same being half of the rent.
- 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. While the clause does not specifically provide that the security deposit is to be forfeited, the effect is the same. The cost is set at \$675 which is the amount of the security deposit.
- 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.

- The Act prohibits a landlord from charging application and processing fees to “any person.” I determined this includes a past tenant.

In summary I determined based on the evidence presented in this case that the liquidated damage clause is a penalty and is not enforceable. .

The landlord claims the sum of \$125 for the cost of cleaning and \$350 for the cost of repainting. The Residential Tenancy Act provides the tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access. The tenant must repair damage to

the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant and is liable to compensate the landlord for failure to do so. In some instances the landlord's standards may be higher than what is required by the Act. The tenant is required to maintain the standards set out in the Act. The tenant is not required to make repairs for reasonable wear and tear. The applicant has the burden of proof to establish the claim on the evidence presented at the hearing.

The landlord produced 12 photos and the testimony of the Building Manager who completed the work. The tenant produced a large number of photographs and gave oral testimony disputing the testimony of the building manager. After considering the disputed evidence I determined

- a. I determined the landlord is entitled to the sum of \$125 for the cost of cleaning. I am satisfied the work was necessary and the amount claimed with reasonable.
- b. I determined the landlord is entitled to \$125 for the cost of re-painting. I have considered the Policy Guideline which provides that the expected life of an interior paint job is 4 years. The rental unit was painted prior to the start of the tenancy in June 2018. I determined that the re-painting in the kitchen was reasonable the landlord failed to prove that a full re-paint job was necessary because of the conduct of the tenant.

In summary I determined the landlord has established a monetary claim against the tenant(s) in the sum of \$250 plus the \$100 filing fee for a total of \$350.

Security Deposit

I determined the security deposit plus interest totals the sum of \$675. I determined the landlord is entitled to retain the sum of \$350 from the security deposit. I ordered the landlord shall pay the balance of the security deposit in the sum of \$325 to the tenant.

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: August 22, 2019

Residential Tenancy Branch