



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC-S, FF

Introduction

On August 2, 2019 a hearing was conducted via the conference call between these two parties. The landlord's agent (the landlord) attended, but the tenants did not. The landlord served the tenants by registered mail with the notice of hearing package seeking a monetary order for money owed or compensation for damage or loss, to retain all or part of the security deposit and recovery of the filing fee. The landlord was granted a monetary order and authorization to offset this claim against the combined security deposit. The tenants applied for a review of this decision. The arbitrator ordered the decision and accompanying order suspended pending a review hearing for the landlords' application.

This is a review hearing granted for the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order 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 its filing fee for this application from the tenants pursuant to section 72.

Both parties attended the hearing via conference call and provided testimony. Both parties confirmed the tenants served the landlord with the notice of a review hearing via Canada Post Registered Mail. Both parties confirmed the tenants served the submitted documentary evidence via Canada Post Registered Mail and that the landlord served the tenants with their submitted documentary evidence via Canada Post Registered Mail. Neither party raised any service issues. I accept the undisputed evidence of both

parties and find that both parties have been sufficiently served and are deemed served as per section 90 of the Act.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for money owed or compensation and recovery of the filing fee?

Is the landlord entitled to retain all or part of the security deposit?

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 applicant's claim and my findings are set out below.

This tenancy began on July 1, 2018 on a fixed term tenancy ending on June 30, 2019 and then thereafter on a month-to-month basis as per the submitted copy of the signed tenancy agreement dated April 21, 2018. The monthly rent was \$2,350.00 payable on the 1st day of each month. A security deposit of \$1,175.00 was paid on April 21, 2018.

The landlord seeks a monetary claim of \$1,175.00 for liquidated damages as per the signed lease agreement.

The landlord has referenced the signed tenancy agreement dated April 21, 2018, section 5, Liquidated Damages which states in part,

If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Branch Act, or a material term of this Agreement that causes the Landlord to end the tenancy before the end of the 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 costs of re-renting the unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or Residential Property.

Both parties confirmed the tenants gave notice to end the tenancy on March 17 or 18, 2019 in a letter for April 30, 2019. Both parties confirmed the tenancy ended on April 30, 2019.

The landlord claims that as a result of the tenants ending the tenancy early on April 30, 2019 instead of June 30, 2019, the tenants breached the fixed term tenancy and seek compensation under section 5 of the signed tenancy agreement for an amount equal to the \$1,175.00 security deposit.

The tenants dispute the claim arguing that they did not realize what section 5 of the signed tenancy agreement meant, but did confirm reading and signing the document. The tenants also argued that the landlord only showed the unit once to their knowledge.

The landlord relies upon a submitted "PDF" document which details the landlord's efforts in re-renting the unit. It lists a "showing history" for the unit from March 29, 2019 to May 3, 2019 for 13 showings. The landlord stated that the unit was successfully re-rented on June 1, 2019. The landlord claims that 50 hours of labour based upon the submitted details at \$20.00/ per hour, as well as advertising labour costs of 2 hours at \$20.00/ per hour were spent re-renting the unit. The landlord also lists 6 online advertisement venues to re-rent the unit. The landlord stated that the amount for each liquidated damage(s) amount is set based upon their security deposit in the signed tenancy agreement.

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.

In this case, both parties have confirmed that section 5 of the signed tenancy agreement dated April 21, 2018 does provide for a liquidated damage clause equal to the security deposit which is \$1,175.00 and that the tenants signed the tenancy agreement. Both parties confirmed that the tenants pre-maturely ended the tenancy on April 30, 2019 instead of at the end of the fixed term on June 30, 2019.

The tenants have argued the landlord's claim is contrary to the *Act* and has not provided any basis for this claim. The landlord stated that he spent 50 hours to re-rent the unit in 13 showings, but was not successful until June 1, 2019. The landlord also claims that

an estimated advertisement cost of 2 hours was spent using 6 online platforms. A review of this evidence shows that out of 13 “showings”, only 6 were done on different days. The remaining show the dates of April 23, 2019 and May 3, 2019 repeated 4 times each. I note no actual expenses were incurred by the landlord. The landlord provided testimony that he does not have access or is able to provide any details of the calculations used for the “agreed pre-estimate of the Landlord’s costs of re-renting the unit” when the tenancy agreement was signed. On this basis, I find that although the tenants breached the tenancy ending it pre-maturely, the landlord has failed to provide sufficient evidence of an agreed pre-estimate of the landlord’s cost of re-renting the unit. The landlord claimed that the amount is set based upon each individual tenant’s security deposit amount.

Residential Tenancy Branch Policy Guideline #4, 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.

In this case, I find that the landlord has failed to provide sufficient details of a genuine pre-estimate of costs of a loss at the time of entering into the tenancy agreement. On this basis, I find that the liquidated damages clause in the landlord's tenancy agreement to be unenforceable and unconscionable as I find it to be a penalty. The landlord's application is dismissed.

As the tenancy has ended, I order that the landlord return the original \$1,175.00 security deposit.

Conclusion

The tenants are granted a monetary order for \$1,175.00.

This order must be served upon the landlord. Should the landlord 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 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 21, 2019

Residential Tenancy Branch