



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution (the “Application”) that was filed by the Landlords under the *Residential Tenancy Act* (the “Act”), seeking:

- Compensation for monetary loss or other money owed;
- Authorization to withhold the security deposit for money owed; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Landlord B.B., who provided affirmed testimony. Neither the Tenants nor an agent acting on their behalf attended. The Landlord was provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

The Residential Tenancy Branch Rules of Procedure (the “Rules of Procedure”) state that the respondents must be served with a copy of the Application and Notice of Hearing. As neither the Tenants nor an agent acting on their behalf attended the hearing, I confirmed service of these documents as explained below.

The Landlord testified that a Notice of Dispute Resolution Proceeding Package was sent to each respondent, including a copy of the Application, the Notice of Hearing, and the documentary evidence before me for review, by registered mail on March 26, 2020, at the forwarding address provided to them by the Tenants by email in July of 2019, prior to the end of the tenancy. The Landlord stated that the registered mail was returned as refused and although the Landlord stated that they mailed the returned envelopes and registered mail receipt to the Residential Tenancy Branch (the “Branch”) with the rest of their documentary evidence, a copy was not in the Branch records before me for review.

Section 90 (a) of the *Act* states that a document given or served in accordance with section 88 [*how to give or serve documents generally*] or 89 [*special rules for certain documents*], unless earlier received, is deemed to be received on the 5th day after it is mailed. Policy Guideline #12 states that where a document is served by registered mail,

the refusal of the party to accept or pick up the registered mail, does not override the deeming provision and that where the registered mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.

I am satisfied based on the Landlord's uncontested and affirmed testimony that the registered mail was sent to the forwarding address provided by the Tenants and returned as refused. As stated above, refusal of registered mail does not override the deeming provisions. Based on the above, I therefore find that the Tenants were each deemed served with the Notice of Dispute Resolution Proceeding Package, including a copy of the Application, the Notice of Hearing, and the documentary evidence before me for review from the Landlords, in the accordance with the *Act* and the Rules of Procedure on March 31, 2020, five days after the registered mail was sent. Based on the above and pursuant to rule 7.3 of the Rules of Procedure, I therefore accepted the Landlords' documentary evidence for consideration and the hearing proceeded as scheduled, despite the absence of the Tenants or an agent acting on their behalf.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure; however, I refer only to the relevant facts, evidence and issues in this decision.

At the request of the Landlord, copies of the decision and any orders issued in their favor will be emailed to the Landlords at the email addresses provided in the Application.

Preliminary Matters

Although the Application states that the Landlords are seeking authorization to withhold the Tenants' security deposit, during the hearing the Landlord stated that this is an error and they are not seeking any orders in relation to the security deposit as part of the Application.

Based on the above, I allowed the Landlords to withdraw this portion of their claim and the Application was amended accordingly. Should any of the parties wish to make a claim in relation to the security deposit, they remain at liberty to do so. This is not an extension of any statutory time limit.

Issue(s) to be Decided

- Are the Landlords entitled to compensation for monetary loss or other money owed?
- Are the Landlords entitled to recovery of the filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me states that the three year fixed-term tenancy began on December 1, 2017, that rent in the amount of \$4,250.00 is due on the first day of each month, and that the Tenants were to pay a security deposit in the amount of \$2,125.00. In the hearing the Landlord stated that the rental unit was originally advertised for rent at \$4,500.00 per month, and that they only reduced the rent on the condition that the Tenants sign a three year lease. The Landlord stated that the Tenants were also required to sign an addendum, a copy of which was submitted for consideration, in which the Tenants agreed to pay the Landlords compensation equivalent to three months rent upon early termination of the agreement.

The Landlord stated that the Tenant's gave written notice in June of 2019 to end their tenancy effective July 31, 2019, and that the tenancy subsequently ended on that date. The Landlord stated that although the Tenants gave them a rent cheque for July 2019, this cheque did not clear and as a result, the Tenants owe \$4,250.00 in unpaid rent for July 2019. The Landlord stated that although they attempted to reach a settlement with the Tenants regarding the \$4,250.00 outstanding rent owed for July 2019, and the \$12,750.00 owed as a penalty for breaking their lease early, including reducing the total amount owed and offering a payment plan, the Tenants refused to reach an agreement with them. As a result, the Landlord stated they are now seeking and order from the Branch that the Tenants pay them these amounts.

The Landlord stated that it took a significant amount of time (August 2019 – April 2020) to re-rent the unit, that there were significant advertising costs involved, and that they had specifically required a three year lease and the three month penalty clause because the rental unit was rented to the Tenants at several hundred dollars below the advertised rental price. In support of this testimony the Landlords provided documentary evidence such as the tenancy agreement and addendum, receipts of \$1,230.60 in advertising costs, copies of several communications with the Tenants, a statement of facts, a history of previous tenants of the rental unit and copies of their respective tenancy agreements.

Neither the Tenants nor an agent acting on their behalf attended the hearing to provide any evidence or testimony for my consideration.

Analysis

Section 26 (1) of the *Act* states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the *Act*, the regulations or the tenancy agreement, unless the tenant has a right under the *Act* to deduct all or a portion of the rent.

I accept the documentary evidence and uncontested and affirmed testimony of the Landlord that the Tenants July 2019 rent cheque did not clear. As there is no evidence before me that the Tenants had a right under the *Act* to withhold this rent, and pursuant to section 26 of the *Act*, I therefore find that the Tenants owe \$4,250.00 in outstanding rent for July 2019.

The Landlords also sought \$12,750.00 in early lease termination penalty payments as outlined in the addendum. Policy Guideline #4 states that 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. As a result, and although the Landlords did not use these specific words, I find that the clause in the addendum requiring the Tenants to pay three months rent for early termination of the tenancy agreement amounts to a liquidated damages clause.

However, Policy Guideline # 4 also states that the amount agreed to under a liquidated damages clause must be a genuine pre-estimate of the loss suffered as a result of the breach of the tenancy agreement 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.

Having heard the Landlord's testimony in the hearing and having read the Landlord's documentary evidence, including correspondence to the Tenants in which they refer to the three months rent due for breaking the tenancy agreement early as "\$12,750.00 in early lease termination penalty payments", I am satisfied that the term in the addendum requiring the Tenants to pay 3 months rent for terminating the tenancy early constitutes a penalty. Further to this, I am not satisfied that it is a genuine pre-estimate of the loss suffered as a result of the breach of the tenancy agreement at the time the contract was entered into, as the Landlords invoices for advertising costs totalled only \$1,230.60 and no further breakdown of costs incurred for re-renting the unit were provided.

Based on the above, I find that the liquidated damages clause is unenforceable as it constitutes a penalty and is not a genuine pre-estimate of the loss suffered as a result of the breach of the tenancy agreement. I therefore dismiss the Landlords' claim for \$12,750.00 in compensation. Although the Landlord stated that the rental unit sat vacant from August 2019 – April 2020, they did not seek lost rent for this period, as a result I have made no finding of fact in relation to lost rent. The Landlords therefore remain at liberty to file an Application for Dispute Resolution with the Branch seeking any lost rent over the balance of the fixed term tenancy agreement, or any other loss suffered, should they wish to do so.

As the Landlords were at least partially successful in their claims, I grant them recovery of the \$100.00 filing fee pursuant to section 72 of the *Act*.

Based on the above and pursuant to section 67 of the *Act*, I therefore grant the Landlords a Monetary Order in the amount of \$4,350.00; \$4,250.00 in unpaid rent and \$100.00 for recovery of the filing fee.

Conclusion

Pursuant to section 67 of the *Act*, I grant the Landlord a Monetary Order in the amount of **\$4,350.00**. The Landlords are provided with this Order in the above terms and the Tenants must be served with this Order as soon as possible. Should the Tenants fail to comply with this Order, this 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: July 21, 2020

Residential Tenancy Branch