



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

In this dispute, the landlord seeks liquidated damages against their former tenant, pursuant to section 67 of the *Residential Tenancy Act* (the “Act”), and, recovery of the application filing fee under section 72 of the Act.

The landlord filed an application for dispute resolution on April 8, 2020 and a dispute resolution hearing was held, by teleconference, on August 13, 2020. The landlord’s agent, the tenant, and a translator for the tenant attended the hearing and were given a full opportunity to be heard, present testimony, make submissions, and call witnesses. No issues of service were raised by the parties.

I have only reviewed and considered oral and documentary evidence submitted meeting the requirements of the *Rules of Procedure*, to which I was referred, and which was relevant to determining the issues of this application.

Issues

1. Is the landlord entitled to liquidated damages?
2. Is the landlord entitled to recovery of the filing fee?

Background and Evidence

By way of background, the tenancy started on June 22, 2019 and ended on March 28, 2020. The tenancy was a fixed-term tenancy that was to end on June 30, 2020. Monthly rent was \$1,250.00 and the tenant paid a security deposit of \$625.00, the latter of which is currently held in trust by the landlord. There was also a pet damage deposit and a key fob deposit, both of which were returned to the tenant. A copy of the written Residential Tenancy Agreement (the “Agreement”) was submitted into evidence.

In this application, the landlord seeks compensation for liquidated damages, which are referred to on page 2 of the Agreement under the clause entitled "LIQUIDATED DAMAGES." The clause references the tenant's obligation to forfeit \$625.00 should they breach a material term of the tenancy or end the fixed-term tenancy early. Both parties initialed and signed the Agreement.

The landlord's agent (the "landlord") testified that the tenant did not give notice to end the tenancy until March 24, 2020. The tenant vacated the rental unit on March 28, 2020, and a new tenant moved into the rental unit that same day.

The landlord argued that the liquidated damages sought is not a penalty, and that it is a reasonable amount that (as stated in the Agreement) "are an agreed pre-estimate of the Landlord's costs of re-letting the rental and must be paid in addition to any other amounts owed by the tenant." Liquidated damages are, further argued the landlord, a pre-estimated cost to re-rent the rental unit out, and are to cover such costs as advertising, processing new tenants' applications, and related paperwork. Finally, the landlord reiterated that it was the tenant who broke the fixed-term tenancy.

The tenant, through her translator, testified and argued that the liquidated damages are more along the lines of a penalty primarily because the landlord did not, in fact, suffer any loss. The tenant found a new tenant for the landlord, and they volunteered their time and efforts in trying to minimize the loss for all parties.

Regarding the claim for advertising, the tenant argued that the invoice submitted into evidence (\$327.00) was for advertising for the entire property (which consists of multiple rental units) for a period of March 5 to 26, 2020. Therefore, if the landlord did claim any costs related to advertising for the rental unit – which the tenant submits was not a loss incurred by the landlord – then it would be but a fraction of the amount claimed.

As for credit checks and the other paperwork, the tenant argued that these are costs that are ordinarily associated with a landlord finding and obtaining a new tenant in any event, regardless of when a tenant ends a tenancy.

In their summation, the tenant argued that the liquidated damages claimed is not justified, because the tenant found a new tenant and the landlord did not ultimately suffer any monetary loss. In their closing, the landlord understood the reason behind the tenant ending the tenancy (due to job loss), but argued the amount claimed is reasonable, and that the tenant was fully aware of the potential for liquidated damages when she signed the Agreement.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

In this case, the landlord seeks compensation by way of a liquidated damages clause in the tenancy agreement. *Residential Tenancy Policy Guideline 4. Liquidated Damages*, address this unique form of loss; portions of the guideline are reproduced below.

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.

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.

The landlord argued that the liquidated damage amount of \$625.00 is “the average cost by the landlord to re-rent the rental unit.” In other words, \$625.00 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.

And what is a “genuine pre-estimate of the loss”? It is an amount that a landlord must prove, by way of convincing, documentary evidence, to establish that this is the estimated amount of a loss that results from a tenant breaching a tenancy agreement.

In this case, the landlord provided no evidence to establish how \$625.00 was a genuine pre-estimate. No breakdown of the *average* costs of credit checks, no documentary evidence of the cost of running an advertising for a single rental unit (versus for multiple units over a period of three weeks), and no documentary evidence of the amount of time

(labour hours) the landlord expends on finding new tenants and re-renting a rental unit of the type that the tenant occupied, was submitted into evidence.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has not met the onus of proving that \$625.00 is a genuine pre-estimate of the loss that would be borne by the landlord should the tenant break the tenancy, and as such I find that the liquidated damages clause to be invalid. For these reasons, I dismiss the landlord's application, in its entirety, without leave to apply.

The landlord is hereby ordered to return the tenant's security deposit of \$625.00, pursuant to section 67 of the Act. A monetary order for the tenant is issued in conjunction with this Decision.

Conclusion

I dismiss the landlord's application, without leave to reapply.

I grant the tenant a monetary order in the amount of \$625.00, which must be served on the landlord. If the landlord fails to pay the tenant the amount owed, the tenant may file and enforce the order in the Provincial Court of British Columbia (Small Claims).

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: August 13, 2020

Residential Tenancy Branch