Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNDL-S, MNDCL-S, FFL

Introduction

In this dispute, the landlord seeks compensation for various matters against their former tenant, pursuant to section 67 of the *Residential Tenancy Act* (the "Act"), and, recovery of the filing fee under section 72 of the Act.

The landlord filed an application for dispute resolution on May 13, 2020 and a dispute resolution hearing was held on September 17, 2020. The landlord's agent (the "landlord") and the tenant attended the hearing and were given a full opportunity to be heard, present affirmed 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 compensation as claimed in their application?
2. Is the landlord entitled to recovery of the filing fee?

Background and Evidence

By way of background, the tenancy began on October 1, 2019 and it was to be a fixed term tenancy ending September 30, 2020. However, due to changing personal and financial circumstances, the tenant gave notice on March 2, 2020 to end the tenancy early, effective April 30, 2020. Monthly rent on the rental unit was $2,060.00 and the tenant paid a security deposit of $1,030.00. A copy of the written tenancy agreement was submitted into evidence. The above-noted facts were undisputed by the parties.

The landlord seeks the following amounts from the tenant (and seeks to retain the tenant's security deposit in partial or full satisfaction of any award granted):

1.	rent for May 2020	$2,060.00
2.	rent for June 2020	2,060.00
3.	rent for July 2020	2,060.00
4.	partial rent for August 2020	1,030.00
5.	liquidated damages	2,060.00
6.	touch-up paint	75.00

In addition, the landlord seeks the $100.00 application filing fee, for a total claim of $7,385.00. It should be noted that the tenant conceded to the $75.00 claim.

The landlord gave evidence that they seek the loss of rent revenue which came about from the tenant ending the tenancy before the end of the fixed term. He testified that the landlord took out various digital advertisements, but that these ads were not specifically for the rental unit, but for approximately 100 rental units in the newly constructed apartment building. The building, which is purpose-built for rental accommodations, has a full-time leasing staff and who are showing rental units to prospective renters on a continuous basis. He explained that given the high number of available rental units, they cannot advertise for each unit lest they get prevented from doing so for spam reasons. The landlord could not recall or did not know the number of showings of the rental unit after the tenant vacated and until a new tenant was found. (A new tenant took possession on August 15, 2020, hence the claim for only half a month's rent.)

As for the second aspect of the landlord's claim, the liquidated damages, the landlord referred me to page 8, clause 16 and 16.1 of the tenancy agreement. The Clause reads, in its entirety, as follows:

> In the event the Tenant terminates this Tenancy Agreement prior to the Fixed-Term End Date or otherwise contrary to the Act, the Tenant shall pay to the Landlord, as liquidated damages for loss of rent and additional expenses that would be incurred by the Landlord in connection with re-letting the Premises to a new tenant, the following amount: $2060.00 (the "Liquidated Damages Amount")
>
> The Landlord and the Tenant acknowledge and agree that the Liquidated Damages Amount is a genuine pre-estimate of such loss of rent and additional expenses that would be incurred by the Landlord in connection with re-letting the Premises to a new tenant.

> For greater certainty and without limiting the foregoing, the Landlord and the Tenant acknowledge and agree that:
>
> (a) the Liquidated Damages Amount does not, in any way, relate to damages other than those relating to such loss of rent and additional expenses that would be incurred by the Landlord in connection with re-letting the Premises to a new tenant; and
>
> (b) this Section does not affect or otherwise limit, in any way, the rights of the Landlord, at law or in equity, to make a claim for or otherwise seek any other damages from the Tenant in connection with the tenancy coming to an end, including without limitation, any losses or damages relating to physical damage to the Premises.

In the final segment of his testimony, the landlord explained that due to the unique global situation between March and the end of August 2020, he would permit tenants who were financially affected by the pandemic to provide certain documents, such as bank statements and proof of COVID-related loss or losses. He would then work with the affected tenant to try to "work out an agreeable amount" when the tenant wanted to terminate a lease early. However, the landlord explained that the tenant never (or could not) provided those documents, and thus he could not make, or work out, a special exception.

The tenant testified that when he signed the tenancy agreement before taking occupancy, he fully understood the liquidated damages clause. However, he had, at that time, no intention to leave. Everything was going fine, but it was not until the pandemic arrived that his situation changed. He was told by his employer that he would be facing a reduction in work hours. So, he made the decision to terminate the lease and reside with his parents until things improved.

He explained that while he was willing to pay the liquidated damages, he does not believe he is liable for any amounts over and above this amount. (I asked the landlord whether they were willing to consider settling for the liquidated damages amount, which they said there unable to do so.)

Analysis

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria before compensation may be awarded:

1. has the respondent party to a tenancy agreement failed to comply with the Act, regulations, or the tenancy agreement?
2. if yes, did the loss or damage result from the non-compliance?
3. has the applicant proven the amount or value of their damage or loss?
4. has the applicant done whatever is reasonable to minimize the damage or loss?

The above-noted criteria are based on sections 7 and 67 of the Act, which state:

> 7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
>
> (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.
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> . . .
>
> 67 Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

1. Claim for $75.00 Touch-Up Paint

As the tenant did not dispute, but rather accepted, this claim, I thus award the landlord $75.00 in respect of this aspect of their application.

2. Claim for Loss of Rent

Section 45(2) of the Act states that

> A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
>
> (a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In the dispute before me, the tenant ended the fixed-term tenancy well before the effective end date of the tenancy, and he was thus in breach of section 45(2) of the Act. As such, the landlord has proven the first criteria required to be awarded compensation, namely, the tenant breached the Act, the tenancy agreement, or the regulations.

Having found that the tenant breached the Act, I must next determine whether the landlord's loss resulted from that breach. This is known as *cause-in-fact,* and which focusses on the factual issue of the sufficiency of the connection between the respondent's wrongful act and the applicant's loss. It is this connection that justifies the imposition of responsibility on the negligent respondent.

The conventional test to determine cause-in-fact is the *but for* test: would the applicant's loss or damage have occurred *but for* the respondent's negligence or breach? If the answer is "no," the respondent's breach of the Act is a cause-in-fact of the loss or damage. If the answer is "yes," indicating that the loss or damage would have occurred whether or not the respondent was negligent, their negligence is not a cause-in-fact.

In this case, but for the tenant's terminating the lease, the landlord would not have suffered a loss rent revenue from April 30, 2020 until a new tenant was found for August 15, 2020. Thus, the landlord has proven the second criteria, and in establishing rent at $2,060.00, has proven that the entire loss for this period to be $7,210.00.

The final, and fourth, criteria that must be proven is, has the applicant done whatever is reasonable to minimize the damage or loss? I find that the landlord has not.

While the landlord testified that they had multiple advertisements both before and after the tenant ended the tenancy, none of those advertisements were for specifically for the rental unit in question. When the tenant gave notice, there were, according to the landlord, approximately 100 rental units left. None of those rental unit were, it must be inferred, providing rental revenue, whereas the rental unit in this dispute was providing revenue, and would have continued to provide revenue had the tenant not broken the tenancy. By advertising for the entire building, and not any one rental unit (or, in the alternative, by not focussing on trying to re-rent the rental unit specifically), the landlord has not, I must conclude, done whatever was reasonable in minimizing its losses.

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 not has met the onus of proving their claim for the loss of rent. This aspect of their claim is accordingly dismissed, without leave to reapply.

However, the landlord is entitled to nominal damages of $1.00. Nominal damages are a minimal award where there has been no significant loss or no significant loss has been proven, or where the applicant has not proven that it took reasonable steps to mitigate loss, but where it has been proven that there has been an infraction of a legal right.

3. Claim for Liquidated Damages

In this application, the landlord also 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 $2,060.00 is clearly stated in the tenancy agreement, and that the tenant agreed to this amount. Even the tenant acknowledged that he accepted this term of the agreement. For clarity, I reproduce an important section of the tenancy agreement’s clause relating to liquidated damages:

> The Landlord and the Tenant acknowledge and agree that the Liquidated Damages Amount is a genuine pre-estimate of such loss of rent and additional expenses that would be incurred by the Landlord in connection with re-letting the Premises to a new tenant.

In this dispute, the rent was $2,060.00. Thus, $2,060.00 is a genuine, acceptable, and reasonable pre-estimate of such loss of rent that the landlord would incur if the tenant breached the lease and, by inference, was unable to find a new tenant right away.

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 met the onus of proving that $2,060.00 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 valid. Accordingly, I award the landlord compensation in the amount of $2,060.00 in respect of their claim for liquidated damages.

4. Claim for Filing Fee

Section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee. As the landlord was partly successful in its application, I grant a partial award of $50.00.

Summary of Award and Monetary Order

I award the landlord compensation in the amount of $2,186.00 ($75.00 for touch-up paint + $1.00 nominal damage award + $2,060.00 for liquidated damages + $50.00 filing fee).

Section 38(4)(b) of the Act permits a landlord to retain an amount from a security or pet damage deposit if “after the end of the tenancy, the director orders that the landlord may retain the amount.” As the tenancy ended some time ago, I order that the landlord may retain the tenant’s security deposit of $1,030.00 in partial satisfaction of the above-noted award.

A monetary order for the balance, in the amount of $1,156.00, is issued in conjunction with this Decision, to the landlord.

Conclusion

I grant the landlord a monetary order in the amount of $1,156.00, which must be served on the tenant. Should the tenant fail to pay the landlord the amount owed, the landlord may file, and enforce, the order in the Provincial Court of British Columbia (Small Claims Court).

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

Dated: September 18, 2020

Residential Tenancy Branch