



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, MNRL-S, FFL

Introduction

On September 18, 2020, the Landlord made an application for Dispute Resolution seeking a Monetary Order for Compensation in the amount of \$4,200.00, a Monetary Order for Rent in the amount of \$12,600.00, an order to retain the Security Deposit, and to recover the filing fee pursuant to section 72 of the *Act*.

Agent for the Landlord N.K (“Agent”) attended the hearing as did Tenant J.J. All participants in attendance provided a solemn affirmation.

All parties acknowledged the evidence submitted and were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Is the Landlord entitled to a Monetary Order for Compensation?
- Is the Landlord entitled to a Monetary Order for Rent?
- Is the Landlord entitled to retain the Security Deposit?
- Is the Landlord entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

The signed Tenancy Agreement shows, and the parties agree, that the tenancy commenced on October 19, 2019, for a twelve-month fixed term ending on October 31, 2020. Rent was established in the amount of \$4,200.00 per month, to be paid on the first day of each month. A security deposit was paid in the amount of \$2,100.00 on September 19, 2019. The Tenant L.J emailed notice to end tenancy on February 16, 2020; the Landlord took no issue with the form of notice and the Tenant vacated the rental on April 30, 2020.

The Residential Tenancy Agreement ("Tenancy Agreement") includes a 2-page 21 paragraph addendum inclusive of a Liquidated Damages clause at paragraph 1 of the addendum, which reads as follows:

LIQUIDATED DAMAGES. If the Tenant ends the fixed term tenancy before the end of the original term as set out in the Residential Tenancy Agreement, the sum of one month's rent shall be paid by the Tenant to the Landlord as liquidated damages, and not as a penalty to cover the administration costs of re-renting the rental unit. The Landlord and Tenant acknowledge and agree that the payment of the said liquidated damages shall not preclude the Landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damages to the rental unit and the residential property and damages as a result of loss of rental income due to The Tenant's breach of the terms of this Agreement.

The Landlord claims a Monetary Order for Compensation in the amount of \$4,200.00 pursuant to the Liquidated Damages clause in the addendum.

The Tenant argues the Liquidated Damages clause should not be applied, as the clause was clarified in a September 2019 email exchange (the "September email"), prior to execution of the Tenancy Agreement, to only apply if the Tenant vacated "with less than one months notice". The relevant portions of the email exchange are as follows:

"Hi [Agent],

I'm just sitting with [J.J] and we are going through the application together and noted two things we wanted to be clear on.

1. The Liquidated Damages clause; this seems quite unfair/unnecessary. One months rent seems like an awfully steep penalty. Especially if the tenant has given sufficient notice AND with a vacancy rate of approx 1% in Vancouver, there presumably would be little difficulty finding tenants. Further, the way it reads, even if I were to facilitate finding a suitable tenant, you would still be requesting \$4200 of my money. Additionally, the lease has no option for sublet thus backing the tenant into a corner should a legitimate personal tragedy occur and preclude them from living in the unit."

"Hi [L.J],

The liquidated damages clause is in place only that if you leave unexpectedly or with less than one months notice, that we as the landlord have rights to collect one month of rent in order to give ourselves time to re rent the unit, etc. If you give notice prior to your lease ending, then I am responsible to find a new tenant, within reason, to take your place. I think you are reading this wrong. Please call me tomorrow am if you want to discuss but this is a standard clause."

At the time of application, the Landlord also sought a Monetary Order for loss of rental income for May, June, and July of 2020 in the amount of \$12,600.00 due to an inability to re-rent the rental. The Agent testified that since applying for compensation, the Landlord was able to re-rent for July 1, 2020, and is instead claiming a \$8,400.00 Monetary Order for loss of rental income for May and June only.

The Tenant argues that the Landlord failed to do whatever was reasonable to minimize loss because the rental was listed at an unreasonable rate of \$4,500 per month, being \$300 more per month that the Tenant paid for the rental. The Agent denies intentionally listing the rental at \$4,500 per month and surmises any listing at \$4,500 for the rental was posted in error. The Agent testified she listed the rental at \$4,200 per month initially and then lowered the price; evidence submitted by the Agent shows the price was lowered to \$3995 after April 17, 2020, and evidence from the Tenant shows the price was lowered prior to April 24, 2020. The Agent submitted over 30 pages of evidence, consisting mostly of email to establish her efforts to re-rent the rental. The Agent testified and furnished evidence that the rental was successfully re-rented, and a new tenancy agreement was executed on May 22, 2020 for tenancy to commence July 1, 2020.

Analysis

Liquidated Damages

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance to payable damages in the event of a breach of the tenancy agreement.

The uncontroverted facts before me are that the liquidated damages clause found in the addendum of the Tenancy Agreement was modified, in writing, by way of email. I find the September email modifies paragraph 1 of the addendum to the Tenancy Agreement and that the Tenant's relied on the written assurances of the Agent, that the Liquidated Damages clause would only apply if the Tenant's gave "less than one months notice".

As the Tenant's provided more than one month's notice to end the tenancy I find the Liquidated Damages clause does not apply.

Further, I find the Liquidated Damages clause constitutes an unenforceable penalty. 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 the September email the Agent states the purpose of the Liquidated Damages clause is "to give ourselves time to re rent the unit, etc". I find that at the time the parties executed the Tenancy Agreement, the parties understood the Liquidated Damages clause was to give the Landlord time to re rent the unit. The Tenant expressed in the September email an understanding the vacancy rate was 1% and accordingly there would be "little difficulty finding tenants". The Agent does not dispute the vacancy rate in the email exchange and provided only an anecdotal opinion of vacancy rates at the time of re-renting in May 2020. I find that at the time the contract was entered into a month's loss of rent was not a genuine pre-estimate of loss, due to the fact vacancy rates were only at 1% and therefore loss of a month's rent was highly unlikely.

Loss of Rental Income

Pursuant to section 45 (2) of the *Act* a tenant may only end a fixed term tenancy by giving the landlord notice to end the tenancy 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.

The parties agree, and I find the Tenant ended the tenancy earlier than the date specified in the tenancy agreement, and therefore did not comply with the *Act*, section 45 (2)(b).

Under section 7 (1) of the *Act* a tenant is liable for non-compliance with the *Act*:

- (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.

However, section 7 also requires the party claiming compensation resulting from non-compliance to minimize the damage or loss:

- (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.

According to *Policy Guideline 5: Duty to Minimize Loss*, the landlord has a duty to minimize loss of rental income when a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA. This means a landlord must try to:

1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
2. re-rent the unit as soon as possible.

The Tenant provided testimony that the Landlord posted the rental on at least two online sites at the price of \$4,500 per month along with screen shot pictures from February, March, and the beginning of April 2020 of a Craigslist advertisement listing the rental at \$4,500 per month. The Agent for the Landlord denied intentionally listing the rental at \$4,500 stating the listing “may have been a clerical error” on the part of her assistant. The totality of the Landlord’s evidence shows the Agent’s assistant was responsible for listing the rental online. The Agent admitted errors may have been made, but also asserted she listed the rental at \$4,200 prior to lowering the price to \$3,995. However, the Landlord provides no advertisements for the rental prior to May 1, 2020 in support of the Agent’s affirmations that the rental was advertised for \$4,200.

I accept the Agent was not directly responsible for advertising the rental and left the task to her assistant; ultimately this delegation of responsibility to the assistant resulted in the Agent’s inability to credibly testify to advertising details. When given the opportunity to provide specifics, the Agent was unable to recall or point to dates in her evidence of when the price was lowered, which websites the rental was listed on for \$4,200 or \$4,500, or to provide certainty as to why or how an error would have occurred. While I find that the Agent was credible and that she instructed her assistant to list the rental at \$4,200, that nevertheless, at least, some of the advertisements listed the rental for \$4,500.

The Agent provided a substantial number of emails evidencing communications between the Agent and parties interested in the advertised rental. Approximately one quarter of the inquiries in evidence are between February 25, 2020, and March 24, 2020; the evidence shows most inquiries arose after April 30, 2020, when the price was lowered to \$3,995. I find this evidence weighs in favour a finding that the rental unit was not advertised at a rent that was reasonable for the unit prior to May 1, 2020.

I find the Landlord provided insufficient evidence to establish that the initial advertised price of \$4,500 and \$4,200 were reasonable rates for the rental in the location and time of listing.

Policy Guideline 3: Claims for Rent and Damages for Loss of Rent states that attempting to re-rent the premises at a greatly increased rent will not constitute mitigation. On the totality of the evidence, and in accordance with *Policy Guideline 3*, I find the Landlord initially advertised the rental unit at a rent that was unreasonable for the unit, as evidenced by the minimal inquiries prior to lowering the price on or about April 17, 2020, and that listing at \$4,500 does not constitute mitigation.

The uncontroverted evidence is that on May 22, 2020 the Landlord executed a new Residential Tenancy Agreement to re-rent the rental with tenancy to commence on July 1, 2020. Accordingly, I find that on May 22, 2020 the Landlord re-rented the rental unit at a rent that is reasonable for the unit. However, I also find the Landlord failed to re-rent the unit as soon as possible; by choosing to execute a Residential Tenancy Agreement that did not commence until July 1, 2020, the Landlord fully accepted a loss of rent for the month of June.

Accordingly, I find the Landlord took some reasonable steps to minimize their loss, such as lowering the advertised rent, and advertising the rental at a previously reasonable rate of \$4,200; however, I also find the Landlord took some less than reasonable steps, such as advertising the rent on some sites at \$4,500, failing to analyze the price of rent for similar units in the area at the time, failing to analyze vacancy rates prior to determining rental price, and accepting a loss of rent for the month of June.

Based on the foregoing I find the Landlord partially minimized or mitigated their loss. In accordance with *Policy Guideline 5: Duty to Minimize Loss* I may award a claim for some, but not all loss that occurred.

Award

Under section 67 of the *Act*, if damage or loss results from a party not complying with this *Act*, the regulations or a tenancy agreement, I may determine the amount of, and order that party to pay, compensation to the other party.

Pursuant to section 67 of the *Act*, I award the Landlord a Monetary Order in the amount of \$2,100.

On balance, prior to April 17, 2020, the Landlord did not take sufficient steps to minimize their loss; however, the Landlord did take sufficient steps on or about April 17, 2020 by lowering the rent. Resultantly, the Landlord left a very short window, being from April 17 to April 30, 2020 to re-rent the unit with possibility of a tenancy to commence by May 1, 2020; as such, I cannot accept the Tenant bears full responsibility for the loss of rent incurred by the Landlord for the month of May 2020. As I have previously found, the Landlord accepted their loss for the month of June 2020, and having successfully re-rented for the month of July 2020, the Agent for the landlord withdrew that portion of the Landlord's claim. Accordingly, half a month's rent, being \$2,100, representing half the responsibility of the Landlord's loss, in the month of May 2020, is proportionate to the responsibility each party bears.

Conclusion

The Landlord is entitled to a Monetary Order for unpaid Rent; the Landlord is granted a monetary award for unpaid rent in the amount of \$2,100.00.

I dismiss the Landlord's claim for a Monetary Order for Compensation.

I dismiss the Landlord's claim to retain the Security Deposit.

I dismiss the Landlord's application to recover the filing fee, as the Landlord has only realized partial success.

The Landlord is provided with a Monetary Order in the above terms. The Tenant must be served with this Order as soon as possible. Should the Tenant 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: September 29, 2020

Residential Tenancy Branch