



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties under the *Residential Tenancy Act* (“the “Act”).

On May 19, 2020 the Landlords filed an application requesting a monetary order to recover unpaid rent and to recover the cost of the filing fee.

On August 14, 2020 the Tenants filed an application seeking the return of a security deposit and to recover the cost of the filing fee.

The matters were scheduled as a teleconference hearing. The Landlords and Tenants appeared at the hearing. The hearing process was explained, and the participants were asked if they had any questions. The parties testified that they exchanged the documentary evidence before me. The parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Are the Landlords entitled to the monetary relief sought for unpaid rent?
- Are the Landlords entitled to recover the cost of the filing fee?
- Are the Tenants entitled to the return of the security deposit?

Background and Evidence

The Parties provided testimony agreeing that the tenancy began on March 23, 2019, as a one-year fixed term tenancy. Rent in the amount of \$1,475.00 was due to be paid to the Landlords by the first day of each month. The Tenants paid the Landlords a security deposit of \$737.50. The Landlords and Tenants provided a copy of the tenancy agreement.

The Landlords testified that on November 29, 2019 they became aware that the Tenants were breaking the fixed term tenancy agreement by moving out of the rental unit early. The Landlords testified that they were out of the country when the Tenants vacated the rental unit on December 31, 2019.

The Landlords testified that the Tenants did not pay the January 2020 rent owing under the tenancy agreement. The Landlords testified that they returned home on January 15, 2020 and immediately advertised the rental unit on local websites. The Landlord testified that the advertisement expired at the end of February 2020.

The Landlord testified that they were unable to re-rent the unit for January and they suffered a loss of January 2020 rent. The Landlords testified that their mother moved into the rental unit in April 2020.

The Landlords are seeking \$1,475.00 for January 2020 rent and an additional \$737.50 as a re-rental levy. The Landlord testified that the levy is a term contained in the fixed term tenancy agreement.

In response, the Tenants submitted that they believe they gave the Landlords a month which they feel is enough time to re-rent the unit. They submitted that the Landlords did not attempt to rent the unit until January 15, 2020. They stated that the Landlords advertised the rental period for a four-month period. The Tenants stated that the Landlord could have used an agent to advertise the unit starting January 1, 2020.

In reply, the Landlords testified that they did not feel it was reasonable to list the rental unit prior to leaving the country.

Re-rental Levy \$737.50

The Landlords are seeking the amount of \$737.50 for the cost to clean and re-rent the unit. The Landlords testified that the tenancy agreement permits them to charge the levy.

When the Landlords were asked to explain how they determined the amount of the levy, the Landlord testified that the amount is half a months rent to cover the cost to re-rent the unit. The Landlords testified that at the end of the tenancy the Tenants permitted the Landlords to keep the security deposit towards the levy amount.

In reply the Tenants testified that they signed the tenancy agreement agreeing to the levy; however, the levy should be limited to the actual amount the Landlord would have to pay to re-rent the unit. The Tenants testified that there was no agreement that the Landlord could keep the security deposit towards the levy. The Tenants submitted that the amount of the levy is supposed to be a genuine estimate of the Landlord's costs to re-rent the unit.

In reply, the Landlord testified that she was new to being a Landlord and thought that half the rent was generous and that the levy is also to cover lost rent.

Security Deposit

The Tenants have applied for the return of double the amount of the security deposit.

The Tenants testified that the Landlord failed to arrange a move out condition inspection of the rental unit. The Tenants testified that the Landlords' father was present when they moved out; however, he did not conduct an inspection and complete a condition inspection report.

The Tenants testified that they provided the Landlords with their forwarding address in writing on January 3, 2020.

The Tenants testified that there was no written agreement permitting the Landlord to keep an amount of the security deposit and the Landlords have not returned any amount of the security deposit.

In reply the Landlords testified that they received the Tenants' forwarding address on January 16, 2020. The Landlords testified that they did not make a claim against the security deposit and have not returned the deposit because the Tenants told them they could keep it.

Analysis

The Residential Tenancy Branch Policy Guideline #3 Claims for Rent and Damages for Loss of Rent provides:

The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy.

In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent.

The Residential Tenancy Branch Policy Guideline #4 Liquidated Damages provides:

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.

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.

Section 7 of the Act states,

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. 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.

Based on all of the above, the evidence and testimony, and on a balance of probabilities, I find as follows:

Re-rental Levy

I have reviewed the tenancy agreement and I find that it contains the term that if the Tenant moves out prior to the natural expiration of the lease, a re-rent levy of \$737.50 will be charged to the Tenant.

Based on the Landlords testimony that the levy was also to cover lost rent, I find that the term is not a genuine pre-estimate for the costs to re-rent the unit. I find that the levy is not only for costs to re-rent the unit and it amounts to a penalty. I have considered the policy guideline and I find that the levy amount functions as an upper limit on the damages payable resulting from a breach of the fixed term tenancy agreement.

The Landlords are entitled to the amount of \$737.50.

January 2020 Rent

I find that the Tenants breached the tenancy agreement by moving out of the rental unit before the end of the fixed term tenancy. Pursuant to section 44 of the Act, the tenancy ended on December 31, 2019, when the Tenants vacated the rental unit. While I find that the tenancy ended, the Tenants were still responsible to pay the rent until the end of the fixed term tenancy, or until the Landlord found a new Tenant.

With respect to the Landlords requirement to minimize the loss of rent by advertising the rental unit, I do not find that the Landlord's actions to minimize the loss were entirely reasonable. The Landlord's knew the Tenants were vacating prior to leaving the country. The Landlords did not place the advertisement for the unit until January 15, 2020.

Since I have awarded the levy amount which functions as an upper limit on the damages payable for the breach of the fixed term agreement, the Landlords claim for a loss of January 2020 rent is dismissed.

Security Deposit

I find that the Landlords failed to conduct a move out inspection with the Tenant and have therefore extinguished the right to claim against the security deposit for damage.

The tenancy ended on December 31, 2019 and the Landlords' application on May 19, 2020 did not include a claim to keep the security deposit. The Landlords did not return

the deposit to the Tenants within 15 days of receiving the Tenants' forwarding address in writing.

I have considered the Landlords' testimony that the Tenants authorized them to keep the security deposit for the re-rental levy. The Act provides that a landlord may retain an amount from a security deposit at the end of a tenancy, if the tenant agrees in writing that the landlord may retain the amount. I have reviewed the documentary evidence and I find that the Tenants provided a copy of a letter addressed to the Landlords dated November 28, 2019. The letter states *"As per the agreement we will pay you the \$737.50 re-rental levy. Since the amount is the same as the damage deposit it can be used for the levy."*

I find that the Landlords had received written permission to keep the security deposit towards an obligation of the Tenants. I find that the Landlords were not required to return or make a claim against the deposit at the end of the tenancy.

The Tenants claim for the return of double the amount of the security deposit is not successful and is dismissed.

Monetary Awards

The Landlords are permitted to keep the security deposit of \$737.50 towards a re-rent levy contained within the tenancy agreement.

The Tenants claim for the return of double the security deposit is not successful.

As to the recovery of the filing fees the parties paid to make the applications for dispute resolution, I decline to award either party the cost of the filing fees.

Conclusion

The Landlords claim for a loss of January 2020 rent was not successful and is dismissed. The Landlords were authorized by the Tenants to keep the security deposit of \$737.50 towards an obligation of the Tenants. I find that the Landlords were not required to return or make a claim against the security deposit at the end of the tenancy.

The Tenants claim for the return of double the amount of the security deposit due to a breach on the part of the Landlord is not successful and is dismissed.

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, 2020

Residential Tenancy Branch