



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Associa British Columbia, inc.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

MNDCL-S, MNDL-S, FFL

Introduction

The words tenant and landlord in this decision have the same meaning as in the Act, and the singular of these words includes the plural.

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- A monetary order for damages or compensation and authorization to retain a security deposit pursuant to sections 38 and 67;
- A monetary Order for Damages and authorization to retain a security deposit pursuant to sections 38 and 67; and
- Authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The landlord was represented at the hearing by building manager, AG ("landlord"). The tenants both attended the hearing and were represented by their agent/daughter NO. ("tenant"). As both parties were present, service of documents was confirmed. The tenant acknowledges service of the landlord's Application for Dispute Resolution and the landlord acknowledges service of the tenant's evidence. Neither party took issue with timely service of documents and both were prepared to have the merits of the landlord's application heard.

Preliminary Issue

In the landlord's application, the landlord seeks to retain the tenant's security deposit. In evidence, the tenant supplied a copy of a recent decision made by an arbitrator of the Residential Tenancy Branch who ordered the security deposit be returned (doubled) to the tenant. The file number of that previous decision is recorded on the cover page of this decision. As this issue has already been ruled upon, this decision will not determine whether the landlord has authority to retain the security deposit.

Issue(s) to be Decided

Is the landlord entitled to compensation for the liquidated damages claimed because the tenants ended the fixed term tenancy early?

Is the landlord entitled to compensation for carpet cleaning?

Can the landlord recover the filing fee?

Background and Evidence

A copy of the tenancy agreement was provided as evidence. The fixed one-year tenancy began on May 1, 2018, set to expire on April 30, 2019. Rent was set at \$1,375.00 per month payable on the first day of the month. The landlord notes paragraph 6 of the tenancy agreement signed by the tenant which reads:

Liquidated Damages

If the tenant breaches a material term of this agreement that causes the landlord to end tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral or by conduct, of an intention to breach this agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of \$1,375.00 as liquidated damages and not as a penalty for costs associated with re-renting the rental unit.

The landlord gave the following testimony. The tenants gave the landlord a notice to end tenancy by fax on September 24th. A copy of the fax was provided as evidence. A second fax was sent to the building manager on September 29th whereby the tenant acknowledges receiving a letter asking for payment of liquidated damages to 'cover the administrative costs for re-renting'. In that letter, the tenant states "if we are forced to pay Liquidated damages, we see no other choice but to sublet the apartment until the end of our lease in April 2019".

The landlord testified that she represents the property management company hired to manage the property owner's interests. Normally, they don't allow tenants to sublet or assign properties managed by them because doing so could cause problems for the landlord or their agency. Their company provides the property owner with a professional service of property management and they deal with hundreds of tenancies. It doesn't make sense for them as a business process to allow assignments or sublets. If the owner agrees, then they would consider an assignment, but as a general rule, they do not. The landlord further testified that her property management company is paid a set amount for managing the building, not on an hourly basis.

The landlord testified she advertised the rental unit on craigslist, her company's website and another online website after the tenant gave her the notice to end tenancy. Only the last website charges a fee for the advertising service, \$100.00 for the building.

The landlord testified that \$1,375.00 is a genuine pre-estimate of the cost to re-rent the unit and provided a breakdown of how that figure was arrived at. The landlord surmises that her company renews the online ads every 48 hours, taking an average of 2 hours each week for 2 to 4 weeks at \$75.00 per hour. Total cost: between \$300 to \$600.00.

An average of 5 credit checks at \$35.00 per credit check amounts to \$175.00. Additional paperwork of reference checks, credit check, setting up tenant ledger and pre-authorized payments take an additional 4 hours at \$75.00 per hour, for \$300.00. Additional work for the caretaker to show the unit at \$35.00 per hour for 5 hours: \$175.00.

The landlord testified that she doesn't recall how many times the tenant's unit was shown before it was re-rented but confirms the unit was never vacant between the time the tenant moved out and when the new tenant moved in. She does not have any record of how many showings were held, as they were done by a now-retired caretaker not called as a witness for this hearing. A new tenant was found 'quickly' though.

The landlord also testified she spent \$94.50 to have the carpets professionally cleaned and supplied an invoice for the carpet cleaning. Clause 49 of the tenancy agreement required the tenant to have this done and it was not done.

The landlord submits that the liquidated damages clause in the tenancy agreement is meant to protect both the landlord and the tenant when the tenant ends a fixed term tenancy early. It could cost significantly higher to find new tenant in these situations and the liquidated damages clause protects the tenant as well as the landlord by limiting the costs to the tenant. When there is turnover in tenancies, it costs the landlord both time and money.

The tenant gave the following testimony. She speaks on behalf of the actual tenants, her parents. There were undisclosed noise issues in the rental unit. The tenant testified the landlord did nothing to mitigate the noise coming from the unit above her, although the tenants gave the landlord multiple complaints in writing and verbally.

The tenants acknowledge, however that they did not retain any of the written correspondences. The tenants were forced to move out due to an inability to sleep, a situation they describes as 'unbearable'.

Before moving out, the tenants asked if they could sublet the unit but were told "No" by the landlord. The tenants asked if they could assist the landlord in finding a new tenant, to help minimize the landlord's potential losses in re-renting the unit but again were denied this opportunity by the landlord. The tenants testified that despite the landlord's denial of allowing them to find a new tenant, the eventual new tenant for the rental unit was one that was found by them. They know this because that new tenant wanted to purchase the tenant's furniture and negotiated that with them until the date he moved in.

The tenants testified the landlord charged them with the liquidated damages and sent the charge to collections without bringing it before the Residential Tenancy Branch for a hearing. The tenants submit that this has affected their credit rating and should be removed pending a decision by the arbitrator.

Lastly, the tenants testified that they acknowledge they did not hire a professional cleaner to clean the carpets at the end of the tenancy. Instead, they rented a steam cleaner to do it themselves but did not provide a receipt for that for the hearing.

Analysis

The tenants submit that the landlord's failure to allow them to sublet their tenancy agreement contravenes the *Residential Tenancy Act*.

Clause 20 of the tenancy agreement, signed by both the tenants and the landlord, states: *the tenant may assign or sublet the rental unit to another person with the written consent of the landlord.* It goes on to repeat section 34(2) of the Act which states: *If a fixed term tenancy agreement has 6 months or more remaining in the term, the landlord must not unreasonably withhold the consent required.*

The landlord clearly acknowledged she told the tenants they could not seek their own replacement tenant as it was her job as property manager. While I accept the landlord's reasoning for denying the tenants permission to find their own tenant, I find this position violates section 34 of the Act and clause 20 of the tenancy agreement. By denying the tenants the ability to find a replacement tenant for the remainder of their tenancy with more than 6 months remaining, the landlord has effectively withheld her consent to assign or sublet the tenancy.

Although the landlord breached section 34(2) of the Act, the tenants did not pursue any applications to force the landlord to comply while the tenancy was still active. While still bound by the tenancy agreement, the tenants had the opportunity to seek an order to determine if the landlord's consent to assign or sublet the tenancy was being unreasonably withheld. The tenants did not file this application but conceded to abide by the landlord's decision to disallow the assignment or sublease. Although the landlord has breached the Act and the tenancy agreement, it is not possible for me to now order the landlord allow the tenants' assignment or sublease after the tenancy has ended and a new tenant has been found. As the tenants did not seek a remedy while the opportunity existed, I find they cannot now rely on it to dispute the landlord's claim for liquidated damages because they ended the fixed term tenancy before the end date stated on the tenancy agreement.

Residential Tenancy Branch Policy Guideline PG-4 defines liquidated damages as follows: (*emphasis in bold added*)

*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.*

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- ***A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.***
- *If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- *If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

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 testified that her property management company is paid to manage the property by contract, not hourly. Although she testified that \$1,375.00 is a genuine pre-estimate of the cost to re-rent the unit, I find she has provided insufficient evidence to satisfy me that this is the case. The landlord testified that the estimate for the liquidated damages was based on an hourly rate of \$75.00 per hour to renew online advertisements, do credit checks, set up tenant ledgers and perform other related administrative jobs. Despite this, the landlord acknowledged there is no single person working for her company who makes \$75.00 per hour or is assigned to do these tasks outside of their regular duties. Secondly, she testified her company placed online advertisements to find new tenants on craigslist, her company's own website and another website that charges \$100.00 for advertising the entire building. Despite her testimony that somebody in her office would renew the ads every 48 hours, taking an average of 2 hours a week for up to 4 weeks, I do not find the landlord has provided sufficient evidence to satisfy me this happens regularly for vacancies in properties they manage. Lastly, the landlord acknowledged that showing the rental unit to prospective tenants is part of the building manager's duties and the building manager is not paid additional wages to show it. Based on the above findings, I find the landlord has not provided sufficient evidence to satisfy me that \$1,375.00 is an accurate reflection of the costs associated with re-renting the unit. I find the landlord's claim for an entire month's rent is extravagant in comparison to the greatest loss that could follow a breach. As such, I determine the landlord's claim to recover the liquidated damages amounts to a penalty and is therefore unenforceable.

Turning to PG-4, the policy guideline states:

If a liquidated damages clause is struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

The landlord acknowledges the rental unit was re-rented “quickly”. She doesn’t know how many times it was shown before being re-rented, stating it was a “few times”. The parties agree the rental unit was not left vacant during the time frame the tenants ended the tenancy and when the new tenant moved in. Based on these facts, I find the landlord has not suffered any loss of rental income. I find the landlord has not suffered any damages requiring compensation and I dismiss this portion of the landlord’s claim.

The landlord’s application sought to recover \$130.00 for carpet cleaning at the end of the tenancy. I find the tenants signed the tenancy agreement agreeing that the carpets be professionally cleaned and did not do so. I find the landlord paid a cleaner \$94.50 to have this work done and I award the landlord that amount in accordance with section 67 of the Act.

As the majority of the landlord’s claim was not successful, the filing fee will not be recovered.

Conclusion

I issue a monetary order in the landlord’s favour in the amount of **\$94.50**.

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: November 26, 2020

Residential Tenancy Branch