Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Vancouver Luxury Realty
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes   **MNRL-S, FFL**

Introduction

This hearing dealt with a landlord's application for compensation against the tenant for unpaid and/or loss of rent, liquidated damages; and, authorization to retain the tenant's security deposit.

Agents for the property management company appeared for the hearing; however, there was no appearance on part of the tenant.

Since the tenant did not appear, I explored service of hearing materials upon the tenant.

The landlord had applied for a Substituted Service Order and the application was granted pursuant to a decision issued by an Adjudicator on November 3, 2020. Pursuant to the Substituted Service Order, the landlord was granted permission to serve the tenant with the hearing documents by way of a particular email address the tenant had instructed the landlord to use to communicate with him.

The landlord's agent testified that the hearing materials were sent to the tenant on November 6, 2020 using the email address authorized in the Substituted Service Order. The landlord provided a copy of the sent email that shows the email address used to send the email to the tenant, the date of sending the email, and the files attached to the email. I was satisfied the landlord complied with the Substituted Service Order and the tenant was served with notification of this proceeding in a manner that complies with section 89(1)(e) of the Act. Therefore, I continued to hear from the landlord's claims without the tenant present.

Issue(s) to be Decided

1. Have the landlords established an entitlement to compensation from the tenant for unpaid and/or loss of rent and liquidated damages, as claimed?
2. Are the landlords authorized to retain the tenant's security deposit?
3. Award of the filing fee.

Background and Evidence

The tenant and an agent for the owner's property management company executed a tenancy agreement for a tenancy that commenced on January 15, 2018. The tenant was originally set to be for a fixed term expiring on January 31, 2019. On September 24, 2018 the parties agreed to modify the fixed term expiry date to January 31, 2020 and did so by amending the original tenancy agreement and initialling the change. On January 23, 2020 the parties agreed to change the fixed term expiry date to read January 31, 2021 and did so by amending the tenancy agreement and initialling the change on the original tenancy agreement.

The tenancy agreement provides that the monthly rent was $2850.00 payable on the first day of every month and payment of a $1425.00 security deposit, which was collected by the landlord.

The landlord increased the monthly rent twice, by way of Notices of Rent Increase. Effective February 1, 2019 the rent was increased to $2921.25 and effective March 1, 2020 the rent was increased to $2997.50.

The tenant had paid rent up as required until the month of April 2020 when he paid only $1000.00. No rent was paid for May 2020. On May 25, 2020 the tenant emailed the landlord to inform the landlord that he had moved out of the rental unit and left the keys with the building concierge.

The property management company commenced advertising efforts on May 25, 2020 and advertised the unit for $2950.00 per month. The landlord's agents testified that it showed the rental unit a number of times but submitted the rental market was relatively slow at the time due to the Covid-19 pandemic. The landlord was successful in securing a replacement tenant on July 16, 2020 for a tenancy set to commence July 20, 2020 at the monthly rent of $2950.00.

By way of this application, the landlord is seeking to recover the following amounts for unpaid and/or loss of rent:

Month	Rent owing per ledger	Payment received	Rent owing
April 2020	$2997.20	$1000.00	$1997.20
May 2020	$2997.20	Nil	$2997.20
June 2020	$2997.20	Nil	$2997.20
July 2020 pro-rated for 19 days	$2997.20 x 19/31 days = $1836.99	Nil	$1836.99
Total rent owing			$9828.59
Monetary Order worksheet			$9829.49
Difference			$0.90

The landlord's Monetary Order worksheet refers to the tenant's ledger but there is a $0.90 discrepancy that was likely a mathematical error in completing the Monetary Order worksheet and I consider the claim for $9828.59 which is the sum of lesser amount reflected in the ledger.

In addition to recovery of the unpaid and/or loss of rent, the landlord seeks liquidated damages from the tenant. The landlord had claimed liquidated damages of $1498.75 but, during the hearing, the landlord's agents acknowledged this was overstated and in keeping with the liquidated damages clause, it should read $1425.00. I amended the claim to the lesser amount of $1425.00 as this is one-half of the monthly rent set out in the tenancy agreement.

Term 8 in the Addendum to the tenancy agreement provides for liquidated damages, as reproduced below:

8. LIQUIDATED DAMAGES IN THE EVENT OF BREAKING THE LEASE: If the Tenant(s) repudiates or breaches the fixed term tenancy before the end of the original term, the Landlord may, at the Landlord's option, treat this Agreement as being at an end. In such event, the sum of half month's rent (as of this contract) will be paid by the Tenant(s) to the Landlord or Vancouver Luxury Realty (VLR) as damages, and not as a penalty, toward the administration costs of re-renting the Rental Unit. The Landlord and Tenant(s) acknowledge and agree that the payment of such damages will not preclude the Landlord from exercising any right of pursuing any remedy available in law or in equity for breach of this Agreement, including, but not limited to, claims for loss or damage pertaining to the Rental Unit or its appliances, furniture, furnishings or finishes, and damages incurred as a result of lost rental income, or any other costs or losses arising from or related to the Tenant(s) repudiation or breach of any term of this Agreement. The Landlord or VLR shall have no obligation to accept any repudiation or breach of the lease by the Tenant(s), and payment of the said sum of half month's rent shall not limit the Landlord's rights, remedies or claims in any way.

The landlord's agent testified that the cost to the owner to re-rent the unit was greater than liquidated damages provided in the tenancy agreement; however, the landlord limited the claim losses to re-rent to the amount provided in the liquidated damages clause. Similarly, the landlord's agent also pointed out that entitlement to recover an NSF charge and the rent differential (the difference between the tenant's rent obligation and the amount the new tenant is required to pay) for the remainder of the fixed term was waived with a view to reasonableness in consideration of the financial difficulties related to the Covid-19 pandemic.

Documentary evidence provided by the landlord included a copy of: the tenancy agreement; Notices of Rent Increase; the tenant's ledger; advertisements that commenced May 25, 2020; the tenancy agreement for the subsequent tenant; and, the owner's fee schedule with the property management company.

Analysis

Upon consideration of all of the unopposed evidence before me, I provide the following findings and reasons with respect to the landlord's claims against the tenant.

Unpaid and/or loss of rent

Under section 26 of the Act, a tenant is required to pay rent when due under their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right under the Act to withhold or otherwise not pay the rent due to the landlord.

I accept the unopposed evidence before me that the tenant was required to pay rent of $2997.20 on the first day of every month for the duration of the tenancy and he failed to meet that obligation for the months of April 2020 and May 2020. At that time, landlords were precluded from evicting a tenant for unpaid rent due to a moratorium on evictions

due to the Covid-19 pandemic. However, the tenant's liability was not waived or extinguished due to the pandemic and the tenant remains liable to pay the landlord for the unpaid rent now that the tenancy has been ended. I was not provided any evidence to suggest any legal basis for the tenant to not otherwise pay the landlord for the rent. Therefore, I award the landlord unpaid rent of $4994.40 [$2997.20 x 2 less $1000.00 payment] for the months of April 2020 and May 2020.

The tenant brought the tenancy to an end on May 25, 2020 when he vacated the rental unit and notified the landlord of such; however, I find the tenant was bound by a fixed term tenancy agreement that was set to continue until January 31, 2021. Where a tenant ends a fixed term tenancy early, the tenant may be held responsible for compensating the landlord rent for the remainder of the fixed term, so long as the landlord mitigates rental losses. Therefore, I find the tenant breached his tenancy agreement by ending the tenancy early and I proceed to consider whether the landlord mitigated rental losses.

The landlord provided evidence that advertising efforts commenced on May 25, 2020 which is the same day the tenant notified the landlord that he had vacated the rental unit. The advertisements show the rental unit in a positive light and the advertised rental rate is $2950.00 which is slightly less than the rent the tenant had been paying. The landlord provided evidence to demonstrate that it secured a replacement tenant on July 16, 2020 for a new tenancy set to commence on July 20, 2020. Considering all of these things, I am satisfied by the landlord's evidence that the landlord undertook reasonable steps to minimize rental losses. Therefore, I find the landlord has established an entitlement to recover loss of rent from the tenant for the month of June 2020 and the pro-rated rent for July 2020 in the amounts of $2997.20 plus $1836.99, respectively, and I award those amounts to the landlord.

Liquidated damages

Residential Tenancy Branch Policy Guideline 4: *Liquidated damages* provides the following information and policy statements with respect to liquidated damages, in part:

> 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 tenancy agreement provides that liquidated damages apply where the tenant repudiates or breaches the fixed term tenancy agreement before the end of the "original term."   Considering the parties modified the original tenancy agreement to change the fixed term expiry date, by agreement that was initialled by both parties, before the expiry of the previously indicated fixed term expiry dates, I am satisfied that reference to original term includes the fixed term expiry date(s) as amended by mutual agreement. Since the fixed term expiry date was amended by agreement of both parties to read January 31, 2021, I find it am satisfied that the tenant breached the "original term" and the liquidated damages clause was triggered.

As for the amount of the liquidated damages, I find I am satisfied that it was equivalent to the amount payable by the owner to the property management company to secure a tenant and the amount stipulated in the liquidated damages clause was a genuine pre-estimate of the cost to re-rent and not a penalty or otherwise extravagant. Accordingly, I am satisfied the liquidated damages clause does not constitute a penalty and I find it enforceable against the tenant. Therefore, I grant the landlord's request to recover liquidated damages of $1425.00 from the tenant.

Filing fee, security deposit and Monetary Order

Given the landlord's success in this Application for Dispute Resolution, I further award the landlord recovery of the $100.00 filing fee.

I authorize the landlord to retain the tenant's security deposit in partial satisfaction of the amounts awarded to the landlord with this decision.

In keeping with all of the above, I provide the landlord with a Monetary Order to serve and enforce upon the tenant, calculated as follows:

Unpaid rent – April 2020	$1997.20
Unpaid rent – May 2020	2997.20
Loss of rent – June 2020	2997.20
Loss of rent – July 2020 (pro-rated)	1836.99
Liquidated damages	1425.00
Filing fee	100.00
Less: security deposit	(1425.00)
Monetary Order for landlord	$9928.59

Conclusion

The landlord has been authorized to retain the tenant's security deposit and is provided a Monetary Order for the balance of $9928.59 to serve and enforce upon the tenant.

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: February 03, 2021

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Residential Tenancy Branch