Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

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

- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid utilities and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $3,573.74 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

Tenant AV attended the hearing on behalf of both tenants. The landlord was represented at the hearing by its Building Manager ("**ML**"), Property Manager ("**DD**"), and Assistant Community Manager ("**CD**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The ML testified, and AV confirmed, that the landlord served the tenants with the notice of dispute resolution form and supporting evidence package. AV testified, and ML confirmed, that the tenants served the landlord with their evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Preliminary Issue – Unpaid Utilities

AT the hearing, ML indicated that the tenants owed $128.74 for unpaid utilities. AV agreed that this was the case and consented to pay the full amount for utilities owing. Accordingly, and by consent of the parties, I order the tenants to pay the landlord $128.74.

Issues to be Decided

Is the landlord entitled to:

1) a monetary order for $3,345;
2) recover the filing fee; and
3) retain the security deposit in partial satisfaction of the monetary orders made?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

Prior to moving into the rental unit, the tenants occupied a different rental unit, managed by the landlord, in the same residential property. That tenancy started on April 1, 2019. It was ended by way of a Mutual Agreement to End Tenancy (form #RTB - 8) signed by the parties effective August 31, 2020 (the "**First Tenancy Agreement**"). AV testified the tenants ended this tenancy because they wanted a bigger unit.

The parties entered into a new written, fixed term tenancy agreement starting September 1, 2020 and ending August 31, 2021. Monthly rent was $2,595 and was payable on the first of each month (the "**Second Tenancy Agreement**"). The tenants paid the landlord a security deposit of $1,297.50, which it continues to hold in trust for the tenants.

The Second Tenancy Agreement contains the following clause:

> **6. LIQUIDATED DAMAGES**
> If Tenant ends the fixed term tenancy before the original term as set out in this Agreement, or if the Tenant is in breach of the *Act* or a material term of this Agreement that causes the Landlord to end the tenancy before the end of the original fixed term or any subsequent fixed term (the "Early Termination"), the Landlord may treat this Agreement as being at an end. In such an event, an equivalent of up to one month's rent must be paid by the Tenant to the Landlord as liquidated damages, and not as a penalty, to cover the Landlords cost of re-renting the rental suite and must be paid in addition to any other amounts owed by the Tenant, such as unpaid rent or for damage to the rental suite and/or residential premises. The liquidated damages amount is an agreed preestimate of the Landlord's administrative costs of advertising and re-renting the rental suite as a result of the Early Termination. Payment of Liquidated Damages does not preclude the Landlord from exercising any further right to recovering other damages or remedies from the Tenant, including but not limited to compensation for damage to the rental suite or residential premises, loss of rental income, or any other recoverable damage or loss under the *Act*, this Agreement, or otherwise available at law.

On January 31, 2021, AV emailed the landlord stating the tenants' intention to "break the lease" by moving out before the end of the term. In the email, he referred to verbal representations allegedly made by the landlord's agent prior to his signing the First Tenancy Agreement, that fees and penalties were "commonly waived" by the landlord, but acknowledged that this was not put in writing in either the First or the Second Tenancy Agreements.

In an email sent February 1, 2021, DD wrote that the First Tenancy Agreement would not apply to the current rental unit, and stated:

> Our standards lease break charges are as follows:
> - $750 Liquidated Damages (this is our cost to find a new tenant for your suite), and
> - Any applicable lost rent.

Later that day, AV replied:

> Since I did submit the notice yesterday then I'm still good on leaving at the end of this month paying the damages and hoping for a rental from March. I hope you add this apartment to your listings and actively advertise it as with any other units.
>
> Regarding the validity or not of what I was told. I did sign a second lease and what you are describing is just a technicality on where the word goes and ends based on [the landlord's] interest alone. I think you can make an extra effort to understand that what I was told was still valid for me regardless since my conversation wasn't regarding the apartment but [landlord] stats in general. There isn't much I can do aside from asking for legal assistance.
>
> Whatever happens I'm still leaving at the end of the month and given the one calendar month notice was respected.

DD replied, cc'ing ML:

> We can accept notice to end for the end of Feb. [ML] please accept [AV's] notice (provided we have a forwarding address) for the end of February.
>
> I'll also forward to our leasing team and ask them to show the suite as soon as possible.

AV testified that for the entirety of February 2021, the rental unit was not shown to any perspective renters. He testified that on February 18, 2021 he attempted to determine whether or not the rental unit had been listed for rent.

AV testified that he was unable to find any listing on a third-party website advertising the rental unit for rent. He was able to find a posting for it on the landlord's own website.

AV submitted a number of screenshots from websites such as Craigslist, Zumper, Padmapper, Kijiji, and Trovit, which he stated did not show the rental unit being listed.

The Craigslist screenshots (which show 38 postings over four pages) show search results for the neighborhood in which the rental unit is located. While it shows two units

located in the residential property posted by the landlord, neither of these is for the rental unit (one posting is for a two bedroom with a flex room, and the other is for a two bedroom, two bathroom unit).

The screenshot from Padmapper is a map of the area where the rental unit is located, apparently showing locations of units for rent. The map does not show, according to AV, any rental units listed for rent in the building where the rental unit is located. I note that there appear to be units for rent in the same block as the residential property. I am unsure as to how accurate the placement of the units on the map is, and cannot tell with any degree of certainty that the units on the map are not that rental unit.

The Kijiji screenshot shows two listings, neither of which are for the rental unit.

The Trovit screenshot shows five properties for rent, two of which appeared to be for the rental unit (each located in the residential property and having two bedrooms and one bathroom). The tenant had not noticed this prior to the hearing.

The Zumper screenshot shows a general advertisement posted by the landlord for rental units located in the residential property available at a range of prices. I cannot tell if the rental unit is among those units listed for rent in this post.

ML testified that within three days from receiving the tenants' notice that they would be vacating the rental unit at the end of February 2021, the landlord posted the rental unit for rent on a variety of websites, including Craigslist and Padmapper. Additionally, ML testified that the landlord provided the listing to a number of post-secondary schools to market the rental unit to their students. ML testified that it is the practice of the landlord to make large group advertisements on various websites for each building they manage, offering a number of rental units in that building for rent. The advertisement then directs the user to the landlord's website where more information about each individual unit can be found.

ML testified that the landlord received between 15 and 20 applicants for the rental unit in February 2021, but that none were suitable. He did not provide any information as to why these individuals were not suitable. He testified that the landlord was able to secure a new tenant for April 1, 2021. He testified that the landlord dropped the monthly rent from $2,595 to $2,550 in an effort to attract tenants after it was unable to rent it in February.

DD argued that this drop in rent indicates that the landlord undertook its due diligence to rent the rental unit as soon as possible and to mitigate its losses. The landlord did not provide any documentary evidence corroborating ML's testimony as to the steps the landlord took to re-rent the rental unit or as to the number of quality of applications it received in February 2021.

ML testified that the liquidated damages the landlord is seeking are for $750. He testified that this is the average amount of expenses that the landlord's leasing team incurs when it re-rents a rental unit. These costs include staffing, administrative costs, paperwork, showings, and advertising costs. ML acknowledged that the figure of $750 is not listed in the tenancy agreement but stated that the tenancy agreement did allow liquidated damages up to an amount equal to one month's rent. He testified that the landlord has since altered its standard form tenancy agreement to better specify the amount of liquidated damages sought.

The landlord seeks a monetary order of $3,345, representing $750 in liquidated damages plus $2,595 for the loss of ability to earn income from the rental unit for March 2021.

AV argued that the landlord failed to mitigate its losses by failing to properly market the rental unit. He argued that the rental unit ought to have been rented for March 1, 2021, but that the landlord did make adequate efforts to do so. Additionally, AV argued that, for $750 of liquidated damages, he expected the rental unit to have its own individual postings on various websites, rather than being included in a group of postings.

Analysis

1. Liquidated Damages

Policy Guideline 4 addresses liquidated damages. It states:

> 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.

It is undisputed that the tenants vacated the rental unit prior to the end of the fixed term of the Second Tenancy Agreement. I do not find that a verbal representation (for which no corroborating evidence has been produced) made to the tenants prior to signing the First Tenancy Agreement relives the tenants of their obligation to comply with the notice provisions of the Act or gives them the ability to terminate the Second Tenancy Agreement before the end of the fixed term without financial consequence. As such, I do not find that the landlord is precluded from claiming for liquidated damages.

The Second Tenancy Agreement does not set out the specific amount of liquidated damages that would be payable upon the tenant ending the tenancy prior to the fixed term. Rather, it allows for the "equivalent of up to one month's rent" to be claimed as liquidated damages. The liquidated damages clause asserts that the amount is "an agreed pre-estimate of the Landlord's administrative costs of advertising and re-renting the rental suite".

I cannot see how an amount "up to one month's rent" would be a pre-estimate. An estimate requires that an actual figure be given, and not simply an upper limit placed on the amount that might be claimed. That being said, if the tenancy agreement had removed the words "up to", and simply said that the liquidated damages would be equal to an amount of one month's rent, I would have found that this is a permissible amount for liquidated damages. It is not so extravagant a cost compared to the costs that are regularly incurred in marketing a property for rent, particularly when the marketing process is as involved as the landlord's is.

The documentary evidence shows that the landlord maintains its own website to market its properties, it employs a "leasing team" to market the properties, and it places advertisements on multiple websites (Trovit, with rental unit-specific advertisements, and Zumper, with a general advertisement for the whole residential property). Applications must be reviewed, credit checks must be done, and showings must be conducted. These costs add up.

Despite the Second Tenancy Agreement not containing an express pre-estimate of the costs for renting in it, I find that by providing an upper limit on the amount of liquidated damages (the amount of which is not unreasonable) the landlord is entitled to enforce the liquidated damages clause.

The landlord has only sought $750 in liquidated damages. This is an amount less that the upper limit of liquidated damages contained in the rental agreement. I find this amount to be well-below the level of "extravagant" and a reasonable amount to have

incurred in re-renting the rental unit. The landlord has revised the amount of liquidated damages downwards (to the benefit of the tenant).

I disagree with the tenant's submissions that, for $750, the landlord should have posted rental unit-specific advertisements. There is no requirement for a specific form of advertising be used to be able to collect liquidated damages. The landlord's advertising efforts are not unreasonable, and the cost for these efforts, as stated above, is not extravagant.

I order the tenant to pay the landlord liquidated damages of $750 in accordance with the Act.

2. Loss of Rent

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
>
> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.
>
> (the "**Four-Part Test**")

Section 45(2) sets out how a tenant may end a fixed term tenancy. It states:

> **Tenant's notice**
> **45**(2) 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.

Rule of Procedure 6.6 states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

As this is the landlord's application, it bears the onus to show it is more likely than not that the tenant breached the Act, that this breach caused the landlord quantifiable loss, and that it acted reasonable to minimize the loss

It is undisputed that the tenants failed to end the tenancy in accordance with section 45(2) of the Act. As stated above, I do not find that a verbal representation made at the time the First Tenancy Agreement was signed relieves the tenants of their obligation to comply with this section of the Act. As such, the first part of the Four-Part Test is satisfied.

It is also undisputed that the landlord did not generate rent in the amount of $2,595 (the amount of rent the tenant was required to pay) from the rental unit for March 2021. As such, the second and third parts of the Four-Part Test are satisfied.

The tenants argued that the landlord did not take adequate steps to market the rental unit in February 2021, and that, had it taken adequate steps, the rental unit would have been rented as of March 1, 2021. I agree.

As of February 1, 2021, the landlord was aware of the tenants' intention to vacate the rental unit at the end of February. During this four-week period of time, I would have expected the landlord to show the rental unit to a prospective renter at least once. I accept the tenant's testimony that this did not happen. Based on the documentary evidence provided by the tenants, I accept that the landlord posted the rental unit for rent on its own website and on Trovit. I also accept that, on Zumper, it posted a general advertisement for rental units in the residential property, which directed interested parties to the landlord's website (on which the rental unit was posted).

However, I am not persuaded that the landlord posted the rental unit on Craigslist or any other website. The tenants' evidence does not show listings for the rental unit on these sites, and that landlord has not submitted any documentary evidence showing such postings (screenshots of the advertisement or invoices for their posting should have been relatively easy to produce).

Additionally, I cannot say why, if the landlord received between 15 and 20 applicants in February 2021 as stated by ML, none of them were deemed "suitable" by the landlord. There is no documentary evidence to support the number of applications received, what the required criteria were for being a "suitable" applicant in the eyes of the landlord, or

why each of these applicants failed to meet these standards. Without knowledge of why these applicants were rejected without even being provided a showing, I cannot determine whether the landlord was reasonable in rejecting them.

As such, I do not find that the landlord acted reasonably to minimize its loss caused by the tenant vacating the rental unit prior to the end of the fixed term. The landlord received between 15 and 20 applications to rent the rental unit in February 2021, but the landlord rejected all of them. The landlord has failed to explain why they were rejected, and as such I find that it has failed to discharge its evidentiary burden to show that it acted reasonably to minimize it loss. It may be that it was reasonable to reject each of these applicants. However, if this were case, the landlord must prove it on a balance of probabilities. It has failed to do that.

Accordingly, I find that the landlord has failed the fourth part of the Four-Part Test.

As such, I decline to order the tenant to pay any amount in compensation to the landlord for its inability to generate income from the rental unit for the month of March 2021.

As the tenants have been mostly successful in their defense of the landlord's application, I decline to order that the tenants reimburse the landlord its filing fee.

Pursuant to section 72(2) of the Act, the landlord may retain the $878.74 of the security deposit in full satisfaction of the monetary orders made. It must return the balance of the security deposit to the tenant.

Conclusion

Pursuant to section 65 and 72 of the Act, I order that the landlord may withhold $878.74 of the security deposit, representing the liquidated damages plus the amount the tenants have agreed to pay for outstanding utilities.

I order the landlord to return the balance of the security deposit ($418.76) to the tenants. I have attached a monetary order to this decision in this amount.

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 1, 2021

Residential Tenancy Branch