



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNRL-S, MNDCL-S, FFL

Introduction

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss, for a monetary Order for unpaid rent, to keep all or part of the security deposit, and to recover the fee for filing this Application for Dispute Resolution.

Legal Counsel for the Landlord stated that on October 04, 2021 the Dispute Resolution Package and evidence submitted to the Residential Tenancy Branch in September of 2021 were sent to the Executor for the Estate of the Tenant, hereinafter referred to as the Executor.

Legal Counsel for the Landlord stated that a will search was completed after the Landlord learned of the Tenant's demise and that the Landlord contacted the notary public who was involved with the Tenant's will, who provided the Landlord with the Executor's name.

The Executor stated that the Tenant is deceased and that he was named as the executor of the Tenant's will. On the basis of this testimony and in the absence of evidence to the contrary, I accept that the Executor is representing the Tenant's estate at these proceedings.

The Executor stated that he received the aforementioned documents served by the Landlord. As the Executor received these documents, the evidence submitted in September of 2021 was accepted as evidence for these proceedings.

On April 10, 2022 the Landlord submitted evidence to the Residential Tenancy Branch. Legal Counsel for the Landlord stated that this evidence was sent to the service address for the Executor, via registered mail, on April 05, 2022.

The Executor stated that he received three notices from Canada Post which advised him that registered mail was sent to his address. He stated that the first notice was addressed to the Tenant's estate and the other two notices were addressed to the Tenant. He stated that he did not pick up this registered mail because he saw no point in it and he did not wish to pick it up.

On the basis of the testimony of these parties, I find that on April 05, 2022 the Landlord served evidence to the Executor in accordance with section 88 of the *Residential Tenancy Act (Act)*. As the evidence was properly served to the Executor and the Executor would have had ample time to consider the evidence if he had opted to retrieve it, I accepted this evidence as evidence for these proceedings. A party cannot avoid service by simply refusing to accept registered mail.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each participant, with the exception of legal counsel, affirmed that they would speak the truth, the whole truth, and nothing but the truth during these proceedings.

The participants were advised that the Residential Tenancy Branch Rules of Procedure prohibit private recording of these proceedings. The Agent for the Landlord and the Executor affirmed they would not record any portion of these proceedings. Legal Counsel for the Landlord stated that he is aware that recording is not permitted.

Preliminary Matter

Residential Tenancy Branch Guideline #43 reads, in part:

Where a party to an Application for Dispute Resolution is deceased, the personal representative of the deceased's estate must be named. If the deceased is a respondent to an application, the personal representative must be named and served. If the applicant does not know the name of the deceased's personal representative at the time of filing an Application for Dispute Resolution, the deceased's name can be filled in on the application (e.g. John Doe, deceased). At the hearing, the arbitrator may amend the application to reflect the proper name of the estate.

The personal representative may be the person named as executor in the deceased's will, or the person who has been approved by the court to administer the estate by way of an estate grant.

The proper manner of naming the estate is as follows: John Smith, Personal Representative of the Estate of Mary Jones, Deceased.

As I have accepted the Executor's testimony that he is named as the executor in the Tenant's will, I amend the Application for Dispute Resolution to identify the Respondent as recommended by Residential Tenancy Branch Policy Guideline #43.

Issue(s) to be Decided

Is the Landlord entitled to compensation for unpaid rent/lost revenue, liquidated damages, and legal fees?

Is the Landlord entitled to keep all or part of the security deposit?

Background and Evidence

Legal Counsel for the Landlord stated that:

- The tenancy began on May 08, 2019;
- The Landlord and the Tenant signed a fixed term tenancy agreement, the fixed term of which began on May 08, 2019 and ended on September 30, 2020;
- The Tenant agreed to pay monthly rent of \$4,100.00 by the first day of each month;
- The Tenant paid a security deposit of \$2,050.00;
- The Tenant did not give the Landlord written authority to retain the security deposit;
- The security deposit is still retained by the Landlord;
- Rent was not paid for March of 2020; and
- A forwarding address for the Tenant was not provided by, or on behalf of, the Tenant.

The Executor stated that he has no knowledge of any the aforementioned issues.

The Agent for the Landlord stated that:

- The Landlord learned of the Tenant's demise sometime during the first week of March of 2020;

- Known associates were contacted, who informed the Landlord that the rental unit had been cleaned out;
- The keys were left in the rental unit sometime during the first week of March of 2020;
- Sometime during the first week of March of 2020 the rental unit was advertised on several popular websites; and
- The unit was rented to a third party on August 15, 2020 for \$3,875.00 per month.

The Executor stated that:

- The Tenant died on February 14, 2020;
- He cleaned out the rental unit sometime in late February or early March of 2020;
- He left the keys to the unit in the unit in late February or early March of 2020; and
- He has no knowledge of efforts to re-rent the unit.

The Landlord is seeking \$22,550.00 in unpaid rent/lost revenue for the period between March 01, 2020 and August 14, 2020. The claim for lost revenue is based on the submission that the Landlord lost revenue as a result of the premature end to the fixed term of the tenancy.

The Landlord is also seeking \$337.50 in lost revenue for the period between August 15, 2020 and September 30, 2020. This claim is for the difference in the rent paid by the new tenant and the amount the Landlord would have collected if this tenancy had continued until the end of the fixed term of the tenancy.

The Landlord is seeking liquidated damages of \$2,034.38, which is also described as a fee for "Tenant Placement". Legal Counsel for the Landlord stated that this claim is based on section 17 of the addendum to the tenancy agreement.

The Agent for the Landlord stated that the Landlord was charged \$2,034.38 for placing the new tenant in the rental unit on August 15, 2020. He stated that the Executor was not offered the "exit clause" referred to in section 17 of the addendum to the tenancy agreement because they could not initially locate the Executor.

The Landlord is claiming compensation for legal fees. Legal Counsel for the Landlord stated that these costs include time spent identifying/locating the Executor, attempting to resolve the dispute with the Executor, and participating in the dispute resolution process.

In response to the claims being made by the Landlord, the Executor stated that there is no money in the Tenant's estate. The Executor submits that he did not hire a lawyer and should not be obligated to pay for the costs of the Landlord's legal representation.

Analysis

On the basis of the undisputed evidence, I find that the Landlord and the Tenant entered into a fixed term tenancy agreement, the fixed term of which ended on September 30, 2020.

On the basis of the undisputed evidence, I find that the Tenant agreed to pay monthly rent of \$4,100.00 by the first day of each month and that rent has not been paid for March of 2020. As the Tenant was obligated to pay rent when it was due on March 01, 2020, pursuant to section 26 of the *Act*, and rent for that month has not been paid, I find that the Landlord is entitled to \$4,100.00 in rent for March of 2020.

I find that neither the Agent for the Landlord nor the Executor know exactly when the unit was vacated and/or when the keys to the unit were returned to the Landlord. On the basis of their testimony, however, I find it reasonable to conclude that the unit was fully vacated sometime in the first week of March of 2020. I therefore find that this tenancy ended when the unit was vacated in the first week of March, pursuant to section of the 44(1)(d) of the *Act*.

Section 45(2) of the *Act* allows a tenant to end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and 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. Although clearly through no fault of this own, I find that the Tenant did not comply with section 45(2) of the *Act* when the rental unit was vacated on a date that was earlier than the end date specified in the fixed term tenancy agreement.

I am aware of nothing in the legislation that permits a tenant to end a fixed term tenancy prematurely in the event of a death.

As the Tenant breached section 45(2) of the *Act*, I find that the Tenant must compensate the Landlord for any losses the Landlord experienced as a result of the Tenant's non-compliance with the *Act*, pursuant to section 67 of the *Act*.

I find that the Landlord made reasonable efforts to re-rent the unit however, in spite of those efforts, the Landlord experienced lost revenue of \$18,450.00 for the period between April 01, 2020 and August 15, 2020. I therefore find that the Tenant must compensate the Landlord for that lost revenue.

I find that the Landlord lost revenue for the period between August 15, 2020 and August 30, 2020, in the amount of \$112.50. This is the difference between what the Landlord would have collected from the Tenant if the fixed term tenancy had continued until the end of August of 2020 and the amount the Landlord received from the new tenant for the latter portion of August of 2020. I therefore find that the Tenant must compensate the Landlord for that lost revenue.

I find that the Landlord lost revenue for the month of September of 2020, in the amount of \$225.00. This is the difference between what the Landlord would have collected from the Tenant if the fixed term tenancy had continued until the end of September of 2020 and the amount the Landlord received from the new tenant for September of 2020. I therefore find that the Tenant must compensate the Landlord for that lost revenue.

A liquidated damages clause is generally considered to be 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. I find that section 17 of the addendum to the tenancy agreement is a liquidated damages clause. This section of the addendum reads:

Where the tenancy agreement is a fixed term tenancy, the tenant is aware that they will be responsible to pay the rent for the full duration of the tenancy. Where the tenant, due to unforeseen circumstances is obliged to leave the unit, the landlord or property manager may at their discretion offer the tenant an exit clause whereby the tenant is only responsible to pay for those months until a new qualified tenant is found and moves into the unit. Where such an exit clause is offered to a tenant, it is understood that the tenant will be responsible to pay the landlord's agent half a month's rent plus GST as is their standard fee for placing a new tenant.

I find that section 17 of the addendum requires the Tenant to pay liquidated damages of ½ month's rent plus GST if the Tenant was offered an "exit clause". On the basis of the

Agent for the Landlord's testimony that an "exit clause" was not offered to the Tenant or his estate, I find that the Tenant is not obligated to pay the fee stipulated in section 17.

The Landlord retains the right to seek costs associated to re-renting the unit, given that liquidated damages were not awarded. On the basis of the undisputed testimony of the Agent for the Landlord, I find that the Landlord paid \$2,034.38 to place a new tenant in the rental unit on August 15, 2020. I find that the Landlord would not have incurred those costs in August of 2020 if the tenancy had not ended prematurely and I find the Landlord is entitled to compensation for this fee.

The *Act* allows a party to claim for compensation or loss as the result of a breach of *Act*. With the exception of compensation for filing the Application for Dispute Resolution, the *Act* does not allow a party to claim compensation for costs associated with participating in the dispute resolution process. I dismiss the Landlord's claim for legal fees, as they are not costs I have authority to award.

I find that the Landlord's Application for Dispute Resolution has merit and that the Landlord is entitled to recover the fee for filing this Application for Dispute Resolution.

Conclusion

The Landlord has established a monetary claim, in the amount of \$25,021.88, which includes \$4,100.00 in unpaid rent from March of 2020; \$18,450.00 for lost revenue for the period between April 01, 2020 and August 15, 2020; \$112.50 in lost revenue for the period between August 15, 2020 and August 30, 2020; \$225.00 for the month of September of 2020; \$2,034.38 for a tenant placement fee, and \$100.00 in compensation for the fee paid to file this Application for Dispute Resolution. Pursuant to section 72(2) of the *Act*, I authorize the Landlord to retain the Tenant's security deposit of \$2,050.00 in partial satisfaction of this monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the balance \$22,971.88. In the event the Tenant does not voluntarily comply with this Order, it may be served on the Tenant, filed with the Province of British Columbia Small Claims 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 *Act*.

Dated: April 26, 2022