



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNRL-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 tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for money owed under the tenancy agreement in the amount of \$2,200 pursuant to section 67;
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

Both tenants attended the hearing. The landlord attending the hearing and was represented at the hearing by his property manager ("**MM**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

MM testified, and the tenants confirmed, that the landlord served the tenants with the notice of dispute resolution form and supporting evidence package. The tenants testified that they did not submit any evidence of their own in response to the landlord's application. I find that the tenants have been served with the required documents in accordance with the Act.

Preliminary Issue – Amendment of Tenant's Surname

At the outset of the hearing, the tenants advised me that the second-named respondent (tenant "**KKi**") married the first-named respondent (tenant "**KKe**") and has adopted his surname. By consent of all parties, I order that this application be amended to replace the surname of the second-named respondent with the surname of the first-named respondent.

Issues to be Decided

Is the landlord entitled to:

- 1) a monetary order for \$2,220;
- 2) recover his filing fee from the tenants; and
- 3) retain the balance of the security deposit in partial satisfaction of any monetary order 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.

The parties entered into a written fixed term tenancy agreement starting November 1, 2018 and ending February 28, 2020. Monthly rent is \$2,200 and is payable on the first of each month. The tenant paid the landlord a security deposit of \$1,100. The landlord still retains this deposit.

The tenancy agreement contains an addendum which contains the following term:

Breaking the lease / Liquidated Damages; If the tenant breaches a material term of this agreement that causes the landlord to end the 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 the landlord the sum of \$2200 (TWENTY TWO HUNDRED DOLLARS) as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.

(the "**Liquidated Damages Clause**")

Both tenants and an agent of the landlord signed the addendum. The tenants testified that it was signed on a date after the tenancy agreement was signed. The landlord did not dispute this. The tenants, however, argued that this caused the addendum not to form part of the tenancy agreement or be binding upon them.

On June 12, 2019, the tenants emailed MM advising her that they would be moving out of the rental unit on July 31, 2019 and provided the landlord with their forwarding address. The tenants testified that the reason for moving out was due to the tenants securing a job in another city. Following receipt of the tenants' notice to vacate, MM advised them of the Liquidated Damages Clause (which she repeated characterized as a "penalty" in her emails) and asked that they pay the landlord \$2,200.

On June 13, 2019, the tenants emailed MM stating that they would pay the landlord "\$1,100 due according to our contract". MM testified that she understood this to mean that the landlord could keep the security deposit and that the tenants agreed to pay a further \$1,100 in full satisfaction of the Liquidated Damages Clause.

At the hearing, tenant KKe testified that he did agree that the June 13, 2019 email meant that the landlord could keep the security deposit but testified that it was not as compensation for any loss of income their vacating the rental unit prior to the end of the tenancy caused the landlord, or in satisfaction of the Liquidated Damages Clause, but rather as "a token of appreciation". I am unclear for what the tenants were appreciative of.

The tenants vacated the rental unit on July 24, 2019. The landlord did not rent the rental unit out on September 1, 2019. MM testified that she did not start marketing the rental unit until July 1, 2019.

The tenants did not pay a further \$1,100 to the landlord. Tenant KKe testified this was because the landlord was not diligent attempting to get a renter in the rental unit for August 1, 2019, as can be seen by the landlord not starting to market the rental unit until July 1, 2019.

The landlord made this application, relying on the Liquidated Damages Clause as a basis for his claim. At the hearing, I asked MM what the Liquidated Damages Clause was meant to provide compensation for. She initially responded that it was a penalty for the tenants' breaching the tenancy agreement. I referred her to the language of the Liquidated Damages Clause which explicitly states that the amount owing under the cause is payable "not as a penalty". She testified that she misspoke, and testified, at multiple points during the hearing, that the purpose of the Liquidated Damages Clause is to guarantee compensation to the landlord in the amount of one month's rent in the event that a tenant breaches the fixed-term lease by vacating before the end of the tenancy's term.

Neither the landlord nor MM gave any evidence as to damages the landlord suffered as a result of the tenants vacating the rental unit prior to the end of the term of the tenancy agreement (although the landlord did say that he built a fence on the rental property that “needed to be built anyway” at the request of the tenants a few months prior to their giving notice to vacate.)

At the hearing, the tenants argued that they should not pay anything pursuant to the Liquidated Damages Clause as the landlord did not promptly market the rental unit after receiving the notice of the tenant’s intention to vacate, and had the landlord done so, he likely would have obtained a new renter for August 1, 2019.

MM denied that the landlord should have marketed the rental unit sooner than July 1, 2019. She argued that she acted reasonably in marketing the rental unit, and that the landlord rented the rental unit to the first acceptable candidate who applied.

Analysis

Based on the tenancy agreement and the testimony of the parties, I find that the tenants agreed to rent the rental unit February 28, 2020. I find that by purporting to end the tenancy on July 31, 2019, the tenants breached the tenancy agreement.

Based on the testimony of the parties, I find that the addendum to the tenancy agreement properly forms a part of the tenancy agreement. I find that the tenants signed the addendum, and by signing it they consented to be bound by its terms. I do not find it relevant that they signed it at a later date than the tenancy agreement itself. If the tenants did not wish to be bound by its terms, the tenants could have refused to sign the addendum.

As such, I find that the Liquidated Damages Clause properly forms a part of the tenancy agreement, and that the tenants may be liable to pay the amount set out therein, provided that the landlord can prove it applies to the case at hand.

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.

Based on the testimony of MM, I find that the landlord understood the Liquidated Damages Clause to act as form of guaranteed compensation for loss of rent in the event that a tenant vacates the tenancy prior to the end date of the tenancy.

The Liquidated Damages Clause states that “payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.” As such, I find that the loss the landlord is claiming to recover is not liquidated damage; rather it is loss of “future rental income” which is “unliquidated”.

As set out in Policy Guideline 4, liquidated damages are a “genuine pre-estimate of loss” caused by a breach of the tenancy agreement. I do not find that \$2,200 is a genuine pre-estimate of loss of rental income resulting from a tenant’s breach, as the Liquidated Damages Clause explicitly states that the landlord may apply to recover “future rental revenue losses” in addition to the amount stipulated in the Liquidated Damages Claim.

Rather, liquidated damages are meant to encapsulate fixed, one-time expenses, such as:

- 1) advertising costs,
- 2) compensation for property management company staff’s time spent:

- a. advertising the rental unit;
 - b. communicating with and showing it to prospective renters;
 - c. reviewing applications;
 - d. contacting references; and
 - e. drafting tenancy agreements; and
- 3) fees associated with credit and background checks.

Such expenses are to be expected at the end of any tenancy, and their costs is predictable.

The landlord provided no evidence as to how much the services listed above might be estimated to cost him or the property management company. Indeed, the landlord's and MM's testimony was that the amount stipulated to be paid by the Liquidated Damages Clause was *not* a pre-estimate of such expenses but was related to loss of rental income.

Based on the foregoing, I find that the amount stipulated to be paid in the Liquidated Damages Clause is not a "genuine pre-estimate of loss" caused by the breach. As such, I find that the Liquidated Damages Clause is not enforceable.

Accordingly, I dismiss the landlord's claim, without leave to reapply.

However, based on the testimony of the parties, I find that the tenants agreed, in writing, that the landlord could retain the security deposit. As such, I order that the landlord may retain the security deposit. I decline to determine what amount owing (if any) the tenants intended the security deposit to be credited towards.

As the landlord was largely unsuccessful in his claim, I decline to order that the tenants reimburse him the filing fee.

I note that the application before me related solely to compensation owing pursuant to the Liquidated Damages Clause. The landlord did not make a claim for damages resulting from the tenants' breach of the tenancy agreement. Neither party requested that an amendment be made to this application to include such a claim. As such, I make no determination as to whether the landlord suffered damages as the result of the tenants' breach of the tenancy agreement.

Nothing in this decision prevents the landlord from making a claim for damages on any basis other than that of the Liquidated Damages Clause.

Conclusion

The landlord may retain the security deposit.

I dismiss the balance of the landlord's claim, without leave to reapply.

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: December 18, 2019

Residential Tenancy Branch