



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with two related applications. One file was the landlord's application for an order permitting retention of the security deposit. The other file was the tenant's application for return of the security deposit. Both parties appeared and had an opportunity to be heard. As the parties and circumstances are the same for both applications, one decision will be rendered for both.

Issue(s) to be Decided

Is either party entitled to a monetary order and, if so, in what amount?

Background and Evidence

This one year fixed term tenancy commenced September 1, 2013. The monthly rent of \$2200.00 was due on the first day of the month. The tenant paid a security deposit of \$1100.00. The parties signed a standard Residential Tenancy Branch tenancy agreement. A move-in inspection was conducted and a move-in condition inspection report was completed.

When the tenant agreed to rent this unit she had an agreement to sell her home in place. The closing date of the sale was to be September 28. Less than two weeks before the closing date the purchasers were involved in a serious car accident and the husband/father was killed. As a result of these tragic circumstances the vendors and the purchasers decided not to proceed with the sale. This meant that the tenant was again responsible for the mortgage payment and other expenses associated with her home. The tenant testified that it was financial necessity that caused her to move out of the rental unit and back to her house.

The tenant advised the landlord of her decision to move out of the rental unit by e-mail in mid September.

The landlord's efforts to find a new tenant as soon as possible were complicated by the fact that she was going to be out of the country from October 11 to October 27. She has used a rental agent many times in the past so she hired an agent to find a new tenant.

The tenant cooperated with the agent and a new tenant was found for November 1 at the same rent.

The landlord testified that she had to pay the agent \$1100 for his services- an amount equal to one half month's rent - and this was the usual rate.

By the time the landlord returned to Canada the tenant had already moved out of the rental unit. The tenant provided her forwarding address to the landlord by e-mail sometime in October. The landlord filed her application for dispute resolution on October 31.

The tenant argues that the tenancy agreement did not contain a "liquidated damages" or "penalty" clause and therefore the landlord has no right to claim the cost of re-renting the unit.

Analysis

As explained in *Residential Tenancy Policy Guideline 16: Damages*, the purposes of an award of damages is to put the person who suffered the loss as a result of the other party's failure to comply with the contract in the same position as if the contract had been carried out. It is up to the person claiming to prove that the other party breached the contract and that the loss resulted from the breach. The loss must be a consequence that the parties, at the time the contract was entered into, could reasonably have expected would occur if the contract was breached. The party making the claim must also show that he/she took reasonable steps to ensure that the loss could not have been prevented, and is as low as reasonably possible.

As explained in *Residential Tenancy Policy Guideline 4: Liquidated Damages*, a liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages that will be 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. If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even if the actual damages are negligible or non-existent. On the other hand, if the damages are greater

than the stipulated sum the landlord's claim is restricted to the amount of the stipulated sum.

In other words, a "liquidated damages" clause in a tenancy agreement does not give the landlord the right to claim for damages when a fixed term tenancy agreement is breached – the law of contract gives that – it merely quantifies the amount at stake in advance.

The cost of re-renting the unit is a direct, and predictable, consequence of the tenant's breach of the contract. If the landlord had not found a new tenant quickly, the tenant would have been responsible for the rent until the end of the term or until the landlord did find a new tenant, whichever first occurred. Given the fact that the landlord was going to be out of the country during this time hiring a rental agent was a sensible step towards mitigating everyone's losses.

Finally, I accept the landlord's evidence that the fee was \$1100.00.

Accordingly, I allow the landlord's claim in full.

Conclusion

I find that the landlord has established a monetary claim in the amount of \$1150.00 comprised of damages in the amount of \$1100.00 and the \$50.00 fee the landlord paid to file her application. I order that the landlord may retain the security deposit of \$1100.00 and I grant the landlord an order pursuant to section 67 for the balance of \$50.00. If necessary, this order may be filed in the Provincial Court and enforced as an order of that court.

As the tenant was unsuccessful on her application no order for reimbursement of the filing fee she paid will be made.

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 20, 2014

Residential Tenancy Branch

