



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

This is a Review Hearing Granted where the landlord seeks a monetary order for money owed or compensation, to keep the security deposit and recovery of the filing fee.

Both parties attended the hearing by conference call and have confirmed receipt of the notice of hearing package. Both parties have also confirmed receipt of the submitted documentary evidence by the other party.

Issue(s) to be Decided

Is the landlord entitled to a monetary order?
Is the landlord entitled to retain the security deposit?

Background and Evidence

This tenancy began on June 1, 2013 on a fixed term tenancy ending on May 31, 2014. Both parties confirmed that the tenancy ended prematurely on November 29, 2013. The monthly rent was \$1,300.00 payable on the 1st of each month and security deposit of \$650.00 was paid.

Both parties have confirmed that the tenant prematurely vacated the rental unit as per their direct testimony. The tenant disputes the landlord's monetary claim stating that the \$650.00 amount sought is not a true amount of what it would cost to re-rent the unit. The landlord has provided a copy of an invoice for \$650.00 that a rental fee was charged to re-rent the unit. The tenant has disputed this claim stating that no advertising was done, except by craigslist (a free posting website), only a credit check fee of \$14.29 was incurred. The tenant states no other expense were incurred and that there was a tenant in possession immediately after he had vacated.

Analysis

Residential Tenancy Branch Policy Guideline #4 speaks to 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.

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

It is clear based upon the undisputed testimony of both parties that the tenant breached the fixed term tenancy by ending it prematurely. The clause reads, "In the event that the Lessee vacates the premises, or the Lease is terminated for cause, prior to the termination of the lease period herein, it is agreed that the Lessee will pay the Lessor's costs incurred thereby as liquidated damages and not as a penalty, including, but not limited to, a re-rental fee of one half a months rent, and the cost of advertising and credit check. Liquidated damages cover the Lessor's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit." Both parties have confirmed that there were no advertising costs and that there was credit check fee of \$14.20 for which the landlord was not claiming. The tenant has claimed that the one half a months rent equal of \$650.00 is excessive and should be considered a penalty. The landlord has claimed that this is a re-rental fee. The tenant has argued that the rental amount could be higher and that this agreement does not specify a true amount other than to specify "one half a months rent" I find that the tenancy agreement regarding the liquidated is ambiguous as it does not specify an exact amount, but a general term that would be

equal to the security deposit, whatever the monthly rent would be. The landlord has failed to provide any further details of the genuine pre-estimate of the liquidated damages for this claimed loss. As such, I find that this claim is denied as the liquidated damages clause is considered a penalty and not a true pre-estimate of loss. The landlord's application is dismissed.

Conclusion

The landlord's application is dismissed.

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: October 02, 2014

Residential Tenancy Branch

