



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LEHOMES REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL., FFL

Introduction

The landlord filed an application for Dispute Resolution (the “Application”) on February 13, 2020 seeking an order to recover monetary loss and other money owed. The matter proceeded by way of a hearing on March 20, 2020 pursuant to section 74(2) of the *Residential Tenancy Act* (the “Act”). In the conference call hearing I explained the process and provided the attending party the opportunity to ask questions.

The tenant and the landlord both attended the hearing, and I provided each with the opportunity to present oral testimony. In the hearing, the tenant confirmed they received the notice of this hearing and the landlord’s evidence via registered mail. The landlord’s evidence contains a Canada Post registered mail receipt for February 25, 2020 verifying that the information was sent to the tenant. The tenant did not submit or serve documents as evidence for this hearing.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for loss or compensation pursuant to section 67 of the *Act*?

Is the landlord entitled to recover the filing fee for this Application pursuant to section 72 of the *Act*?

Background and Evidence

I have reviewed all written submissions and evidence before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this section.

The landlord applied for a monetary order for \$5,500.00 as set out in the completed 'Monetary Order Worksheet' dated February 12, 2020. This is, as claimed by the landlord: \$2,500.00 for violation of a 'liquidated damage clause' as it appears in the tenancy agreement addendum; and \$3,000 for loss of rent for the months of tenancy that remained.

The landlord summarized the terms of the signed tenancy agreement, referring to the copy included, and the tenant confirmed the details therein. The tenancy began on August 1, 2019 for a fixed term ending July 31, 2020. The rent amount was \$5,000.00 per month, payable on the 1st of each month. There was a payment of a security deposit in the amount of \$2,500.00 on July 11, 2019.

The agreement has a 3-page addendum attached. The landlord referred to item #3 of the addendum that addresses a break of the lease agreement: "If the tenant breaches the fixed term tenancy before the end of the original term. . . the tenant agrees to pay the landlord half-month rent as the administrative cost to re-renting the unit."

The landlord stated the main object of this scheme is to re-rent the unit. This is an agreement between the landlord and the owner, where this amount of half the rental fee returns to the owner. Part of this fee is the cost of "finding new tenants, signing new tenants, and processing documents." The landlord stated they are holding the security deposit to offset the monetary claim stemming from item #3. Damage, or other matters to which a landlord would normally apply a security deposit, is not the issue here; rather, this clause is for liquidated damages. On page 4 of the Application, the landlord indicated 'yes' to request to apply the security deposit amount to this claim.

The landlord provided details on the efforts typically undertaken to rent the unit to new tenants. These are: advertising on Craigslist; scheduled showings which are communicated to the current tenant in advance; the screening of tenants for credit and reference checks; the signing of a new lease; a new condition inspection meeting and report; and directing the move-in.

Additionally, item #3 provides that the landlord has the right to pursue a claim for "damages incurred as a result of lost rental income." For this the landlord claims \$3,000.00, as the sum of 6 months' rent for \$500.00 per month. This is due to the subsequent rental agreement entered after this tenancy, with new tenants who are paying rent at \$4,500.00 per month.

The landlord provided the subsequent tenancy agreement. This document shows that the signatures were provided on January 9, 2020 with the tenants' names redacted. The agreement shows a monthly rent of \$4,500.00, for the tenancy starting on February 1, 2020.

The tenant did not provide documentary evidence for this hearing. They stated that the amount of \$2,500.00, as they understood it, was for a security deposit, and they would

either receive that back after a completed Condition Inspection Report, or they would forego this “before the lease ends”. The tenant stated this was their experience with other landlords and rental agreements in the past.

Regarding the landlord’s claim for compensation due to the loss of future rent, the tenant stated this claimed amount was “not specific”. They feel this is not a reasonable expense to incur where they notified the landlord in advance of their intention to end the tenancy at the end of January 2020. These notifications, by the tenant’s statement, were on November 27, December 3, and December 27, 2019. An email in the landlord’s evidence shows one message from the tenant on December 27 giving such notice. The tenant also pointed to the landlord’s evidence that shows the unit was newly rented in January 2020.

Analysis

Section 38(1) of the *Act* provides that a landlord must either repay a security deposit or apply for dispute resolution to make a claim against that deposit. This must occur within 15 days after the later of the end of tenancy or the tenant giving a forwarding address.

Section 38(4) provides that a landlord may retain a security deposit or pet deposit if the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant. This subsection specifies this written agreement must occur at the end of a tenancy.

Section 38(6) sets out the consequences where the landlord does not comply with the requirements of section 38(1). These are: the landlord may not make a claim against the security deposit; and the landlord must pay double the amount of that deposit.

To examine the applicability of the *Act*, I look to the relevant policy guideline developed by the Residential Tenancy Branch to set out a statement of the policy intent of the legislation. Policy Guideline 4 deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages. A definition is provided within:

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 the facts before me, the landlord applied to make a claim against the security deposit within the timeframe delineated by the *Act*. The landlord referred to addendum clause 3 as a “liquidated damages clause”. This clause states it is the “administrative cost of re-renting the unit.”

When considering the amount in question – one half months' rent – as a *genuine pre-estimate of loss*, I find defining the clause in question as 'liquidated damages' comes up short. I appreciate the landlord is giving a definition to this clause as a legitimate term of the agreement, as a form of guarantee against a broken tenancy and to ensure the cycle of having renters in place remains unbroken. However, as an *estimate* of the loss incurred in terms of expenses, the amount stipulated in the addendum appears arbitrary.

I find the term, as stated, does not encapsulate the concept of liquidated damages. First, the estimates provided on the worksheet – after the fact of a broken tenancy – are not fully arrived at in terms of actual expenses, or estimates. The form asks for "Receipt/Estimate From" – I find these are sources of information to arrive at a legitimate estimate of costs a landlord would anticipate incurring. A source or common approximation of these costs is not provided in the evidence. Secondly, there is no record provided by the landlord to show this effort was undertaken prior to the undertaking of establishing a tenancy agreement; as such, it is not a genuine 'pre-estimate'. Thirdly, the cost of re-renting is not established where the landlord described use of Craigslist, a free ad server, and the true costs associated with showings to prospective tenants, the labour costs of screening new tenants and completing a new tenancy. The monetary amounts for these efforts are not accounted for in what the landlord presents here. I find the determination by the landlord that one-half months' rent is equal to these costs is not well supported.

Therefore, I find the foundation for a liquidated damages clause is not in place; as such, this claim is not allowed. It is a penalty which is not enforceable under the *Act*.

The *Act* section 7(2) provides that a party claiming damages from a breach of a tenancy agreement has a duty to minimize loss arising as a result of the breach. In terms of a loss of rental income, the Residential Tenancy Policy Guideline 5 provides detail on the landlord's duties in this situation. That is making a reasonable effort to re-rent the unit.

Here, I find as fact that the landlord effectively minimized the loss of having the tenancy end halfway through the fixed term. The landlord immediately advertised for a new tenant: the tenant's first notice to the landlord was on November 27, 2019, and the copy of the Craigslist ad provided by the landlord shows that it was posted on December 2, 2019. The availability date shown in the ad is for February 1, 2020. Consequently, a new tenant occupied the unit immediately after the end of this tenancy.

Residential Tenancy Policy Guideline 3 delineates a reasonable cost for the landlord to claim in these circumstances. Monetary damages should be an amount "sufficient to put the landlord in the same position as if the tenant had not breached the agreement."

I find the monetary loss to the landlord – accepting a reduced rent necessitated by the end of this tenancy – is a significant loss given its occurrence halfway through this fixed

tenancy. The claim is for the six-month remainder, to the earliest time tenancy could legally end as per the agreement.

I grant the amount claimed by the landlord for this breach of the tenancy agreement. The amount \$3,000.00 is fair compensation for the difference between what the landlord would have received without the breach, and what they were able to accept as rent moving forward.

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

Pursuant to section 67 and 72 of the *Act* I grant the landlord a Monetary Order in the amount of \$3,100.00 for the damages for the loss of rent and a recovery of the filing fee for this hearing application. The landlord is provided with this Order in the above terms and the tenant must be served with **this Order** as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial 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 14, 2020

Residential Tenancy Branch