Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PACIFIC QUORUM PROPERTIES INC. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S, FFL

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act") for a monetary order for rent and/or utilities for the Landlord, retaining the security deposit to apply to this claim; and to recover the $100.00 cost of their filing fee.

An agent for the Landlord ("Agent") appeared at the teleconference hearing and gave affirmed testimony, but no one attended on behalf of the Tenant. The teleconference phone line remained open for over 15 minutes and was monitored throughout this time. The only person to call into the hearing was the Agent, who indicated that he was ready to proceed. I confirmed that the teleconference codes provided to the Parties were correct and that the only person on the call, besides me, was the Agent.

I explained the hearing process to the Agent and gave him an opportunity to ask questions about the hearing process. During the hearing the Agent was given the opportunity to provide his evidence orally and to respond to my questions. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

As the Tenant did not attend the hearing, I considered service of the Notice of Dispute Resolution Hearing. Section 59 of the Act states that each respondent must be served with a copy of the Application for Dispute Resolution and Notice of Hearing. The Agent testified that he served the Tenant with the Notice of Hearing documents by Canada Post registered mail, sent on December 15, 2019. The Agent provided a Canada Post tracking number as evidence of service. I find that the Tenant was deemed served with the Notice of Hearing documents in accordance with the Act. I, therefore, admitted the Application and evidentiary documents, and I continued to hear from the Landlord in the

absence of the Tenant.

Preliminary and Procedural Matters

The Agent provided the Parties' email addresses in the Application and he confirmed his understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

Issue(s) to be Decided

- Is the Landlord entitled to a monetary order, and if so, in what amount?
- Is the Landlord entitled to recovery of the Application filing fee?

Background and Evidence

The Agent submitted a tenancy agreement, which indicated that the fixed term tenancy began on April 1, 2019 running to March 31, 2020, and then operating on a month-to-month basis. The Agent said that this tenancy agreement was a renewal of a prior agreement from 2018. He said the monthly rent was $1,435.00 in the latest tenancy agreement, which was due on the first day of each month. The Agent said that the Tenant paid the Landlord a security deposit of $700.00, and no pet damage deposit.

The Agent said that the Tenant served him with a notice to end tenancy on October 1, 2019, with an effective vacancy date of November 30, 2019. The Landlord said that he was able to re-rent the rental unit starting on December 1, 2019, and therefore, he did not lose any rental income from the early termination of the Tenant's tenancy.

The Agent said he advertised for new tenants on a nationally known advertising website. He submitted copies of the advertisement, as well as copies of emails he exchanged with the Tenant about the showings that resulted. The Agent also submitted a copy of the "calendar detailing schedule of showings and number of persons" who attended the showing. This information indicates that the Agent had four people view the rental unit on October 12, 2019, one of whom was accepted as the new tenant.

In an email to the Tenant dated October 12, 2019, the Agent said:

> FYI, I have found a tenant who can move-in on Dec. 1st. Consequently, we can schedule your move-out condition inspection either Nov. 29th (Friday) or Nov. 30th (Saturday). We can discuss this later.

Separately while we have now resolved concerns on your responsibility for rent on the remaining months of your fixed term tenancy should we fail to re-rent it, the liquidated damages, however, remains as your accountability. Despite this, we can off-set your security deposit to the total amount of liquidated damages. The remaining amount, therefore is what you will need to settle.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

RTB Policy Guideline #4 ("PG #4"), "Liquidated Damages", is a guideline for dealing with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages.

PG #4 states the following:

> 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.
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> There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:
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> - 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.
>
> If a liquidated damages clause if struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.
>
> A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.
>
> [emphasis added]

The evidence before me is that the Landlord did not lose any rental income, as a result of the Tenant ending the fixed term tenancy early. Further, the Landlord used a free online advertising service to find a new tenant for the rental unit. Even if there were a nominal fee for the advertising, it would be well below the liquidated damages claimed in this regard. I find that the Landlord did not incur advertising costs associated with finding a new tenant in proportion to the amount claimed in this Application.

Based on the evidence and authorities before me, overall, I find that the liquidated damages clause in this case served as a penalty, rather than representing a pre-estimate of any loss the Landlord incurred in this matter. I find that the Landlord is using the clause as an automatic forfeiture of the equivalent to one month's rent, turning to the security deposit in order to partially satisfy this penalty.

As a result, I strike down the liquidated damages clause in this tenancy agreement as a penalty clause, and I dismiss the Landlord's Application wholly without leave to reapply. Given that the Landlord is unsuccessful in this matter, I decline to award them recovery of the $100.00 Application filing fee.

Conclusion

The Landlord is unsuccessful in this Application. The liquidated damages clause served as a penalty, rather than a genuine pre-estimate of loss in this matter. The Landlord's Application is dismissed without leave to reapply.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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: May 12, 2020

Residential Tenancy Branch