

BETWEEN

BW
APPLICANT

AND

YD LIMITED
RESPONDENT

Date of Order:

6 May 2014

Referee:

Referee Reuvecamp

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that YD Limited must pay the amount of \$436.19 to BW on or before 30 May 2014.

Facts

[1] BW engaged YD Ltd as property manager and agent for her rental property. AA, its director, and BB and CC represented that company. During the previous tenancy problems developed with the tenant and in October 2012 a 90 days' notice to leave the property was issued with an expiry date of 20 February 2013. BW claims that YD Limited overlooked the expiry of that notice and allowed the tenant to remain in the property until around 9 April 2013 when he appeared to have abandoned the property without paying the last month rent and leaving the property untidy and unclean causing her to incur irrecoverable costs. It then took another 4 weeks before a new tenant was found.

[2] BW claims that YD Limited acted in breach of its obligations under the property management agreement in not enforcing the rent and maintenance obligations of the tenant. She seeks compensation for 4 weeks of rent arrears and 4 weeks of missed rent while the property remained vacant at \$1,360 each and a further \$1,266.95 for maintenance costs incurred by her. After deduction of the \$1,360 of bond moneys received, her claim for compensation is stated to be \$2,626.95. YD Limited claims that it acted with reasonable care and skill in the performance of its obligations under the contract and declines liability.

Law

[3] Law of Contract, Consumer Guarantees Act 1993

Issue

[4] Did YD Limited act in breach of its property management agency contract by failing to take reasonable care and skill?

Findings

[5] The law of contract requires the parties to comply with their mutual promises, while the law of agency imposes on an agent, such as a property manager, a duty to act at all times in the interest of its principal (the owner of the property) and in accordance with its lawful instructions.

[6] The evidence before me shows that the expiry of the notice term was overlooked in February, possibly due to staff changes at YD Limited. YD Limited states that no loss was suffered because the rent for the additional month was covered by the bond moneys. That is correct in one sense, but overlooks its own submission that the bond moneys are to be used to cover the financial consequences of any default by the tenant. BW claims in fact that those costs to her are around \$3,987 but are covered to the extent of \$1,360 only.

[7] YD Limited submits that those (additional) costs in the appropriate circumstances may be recovered from the tenant, which it did not consider practical in the circumstances in view of the tenant's personal and financial position, and that non-recovery is a risk of the landlord/investor for which it, as her agent, is not liable. Although this may well be true provided the loss suffered by the landlord is not attributable to the agent's acts or omissions, BW claims the opposite.

[8] The issue becomes irrelevant (because of bond moneys of \$1,360 having been received), if YD Limited is not liable for (i) the additional 4 weeks the property remained vacant; and (ii) the actual additional costs claimed by BW.

Missed Rent

[9] YD Limited claims that BW's claim must fail in this regard because its contract provides that YD Limited does not guarantee the rent or the condition of the property. I find that this clause will need to be interpreted in accordance with its tenor. I find that a reasonable interpretation is that YD Limited is not liable for rent if there is no tenant or the tenant does not pay or damages the property. I do not accept that it would protect YD Limited if the landlord does not receive rent or property damage occurs by YD Limited not performing its obligations under the contract.

[10] Here a termination notice was given by YD Limited. It was not followed up on expiry. Rent was not collected for 4 weeks by YD Limited causing the bond moneys unnecessarily to become the backstop to the full extent of the rent due for that period with the consequence that the bond moneys were no longer available for other expenses for which the tenant may be liable. I find that YD Limited's submission that the landlord takes the risk and can sue the tenant for any shortfall does not satisfactorily rebut that argument.

[11] I find that if YD Limited had enforced the termination notice when that was possible on or about 2 February, as BW was advised and had agreed to, that rental loss would not

have been incurred and therefore there would not have been a need to resort to the bond moneys to cover the rental for those 4 weeks. I further find that the fact that the landlord may sue the tenant, although correct, is not an argument of which YD Limited may avail itself to cover its own deficiencies. It has its own obligations to the landlord as its principal under the agency agreement.

[12] YD Limited further claims that the additional 4 weeks delay before a new tenant was found is a market risk for which it is not responsible in terms of the contract. I find that that, in general terms, may be correct provided YD Limited has done everything it is required to do in terms of its agency obligations. However, as already stated, it did not enforce the termination notice which it had given in October 2012 in a timely manner.

[13] YD Limited says that things improved with the tenant and that matters were less urgent but I find that this was not communicated to BW, who had been involved in deciding on terminating the tenancy for valid reasons as discussed between the parties relating to the tenant's overall behaviour. It is not supported by the evidence either, which indicates that due to changes in staff the matter was overlooked. BW therefore continued to believe that the notice would be enforced and a new tenant would be arranged. However, she discovered in April on receipt of the March statement that this was not the case. Only then did YD Limited discover that the tenant had abandoned the property.

[14] I find that instead of commencing the search and advertising in October, when notice was given, YD Limited did not do so until early April, when the tenant was found to have abandoned the property. As a result, a new tenant was not found until early May I find that this indicates that YD Limited was not actively monitoring the property. I further find that the six months from October provided YD Limited with ample opportunity to find another tenant and that this refutes its argument that the market for tenants went through a temporary weak patch. I find that YD Limited in that regard was not providing its services with reasonable care and skill causing additional loss to BW.

[15] However, I accept YD Limited's submission that on a tenant abandoning or otherwise leaving a property, some time is needed for maintenance work and preparing the property for a new tenancy. I allow 2 weeks for maintenance and marketing of the property, in view of the work to be done, in reduction of the additional 4 weeks of rent claimed for the period that the property was vacant.

Additional Costs Incurred

[16] BW claims additional costs incurred which she believes should be for YD Limited's account because of its omission to follow up and enforce the tenant's obligations. YD Limited claims that those costs are either cost attributable to the tenant, or maintenance costs of the property, and that it is not liable for either in terms of its contract. For the former I refer to my paragraph 7. I will deal with the latter below.

[17] BW claims the cost of a tenancy check at \$14.89, general cleaning costs of \$54.60 and commercial cleaning of the carpet at \$207.48. YD Limited claims those are attributable to the tenant and further submits that commercial cleaning costs cannot generally be recovered from the tenant in the Tenancy Tribunal, as is also stated in its agency contract. As I noted at the hearing all the clause says is that it cannot be a condition of the tenancy agreement, which I am happy to accept in general terms, although factual circumstances may well make it acceptable in particular cases, such as in this case, where a dog was kept on the property contrary to the express conditions of the agency contract causing the difficulties which led to termination of the tenancy.

[18] I consider that the cost of the tenancy check would have been incurred by BW in any event and those costs are therefore for her account. General cleaning costs would be recoverable from the tenant and thus from the bond, if sufficient. If commercial cleaning is required then that is specifically covered in the agency contract as being for the account of the landlord.

[19] BW further claims the replacement costs of the locks at \$494.16. YD Limited claims that this was agreed to by BW and prudent in the circumstances of this particular tenant. I agree with that view and find this to be a maintenance matter needed to protect BW's interest in the property and therefore for her account. I do not however find that this applies for an additional claim of \$109.25 made necessary because a key to one (new) door was made available by YD Limited to a cleaning lady befriended by the former tenant who also absconded without returning the key. This was a less than prudent action by YD Limited for which it should take responsibility.

[20] A further claim for \$218.40 by BW relating to maintenance was abandoned by her. She claims however \$141.96 water charges for cleaning and filling the water tank as not in accordance with her instructions. I find that that claim is not justified since the tank cannot be cleaned without water as required in the contract and further because water was required for maintenance of the property and preparation for a new tenant. Finally BW claims the

advertising cost of the property on Trade-me. I find those costs entirely reasonable and necessary to market the property and they are therefore for the account of the landlord.

[21] I therefore find that on the basis of this BW would be entitled to payment by YD Limited of 4 weeks rental arrears at \$1,360 plus \$54.60 cleaning costs (all of which may be recoverable in the Tenancy Tribunal from the former tenant, as may be the case in respect of any damage to the property and the cost of commercial carpet cleaning) plus 2 weeks rental for the period the property was vacant at \$680.60, plus \$109.24 for the non-returned key, i.e. a total of \$2,204.44, because it failed to monitor the developments at the property and perform its services with reasonable care and skill in that regard. That amount is reduced by the \$1,360 already received by way of bond moneys to \$844.44.

[22] I find it reasonable to reduce this amount by a sum of \$408.25 for chemical house wash costs incurred by YD Limited for the benefit of the landlord in making the house marketable to new tenants in accordance with its obligations stated in the property management contract to present the property with a very high standard of cleanliness once a previous tenant has left.

[23] The amount payable by YD Limited therefore is \$ \$844.44 - \$408.25 = \$436.19. I order accordingly.