



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION AND REASONS

Dispute Codes

OPR, MNR, MNSD, & FF

Introduction

This hearing dealt with an application by the landlord seeking an Order of Possession and monetary claim due to non-payment of rent by the tenant. Although the tenant was served with notice of the landlord's application and this hearing by registered mail on April 21, 2009, she did not appear for the hearing. I deem the tenant as having been served with notice of this proceeding in accordance with section 89 of the *Act* and proceeded with the hearing in the tenant's absence.

I have amended the landlord's application to also include the request to retain the tenant's security deposit plus interest in partial satisfaction of any monetary claim established.

Issues to be Determined

Has the landlord established a monetary claim due to non-payment of rent by the tenant? Is **Schedule A: Addendum to the Tenancy Agreement** enforceable term? Is the landlord entitled to retain the tenant's security deposit plus interest in partial satisfaction of this claim?

Background and Evidence

The parties entered into a tenancy agreement on February 7, 2009 to rent a unit beginning March 1, 2009 for the monthly rent of \$875.00 plus \$40.00 for storage for a total of \$915.00 per month. The tenant paid a security deposit of \$437.50 on February 7, 2009. In addition to the tenancy agreement the parties signed an addendum which provided for a rent reduction of \$100.00 per month if certain terms and conditions were met. I have decided to reproduce the terms and conditions of the addendum in full below:

Provided the Tenant is not in default and has not breached the terms and conditions of the Agreement, and provided further that all of the following terms and conditions are met, the Landlord hereby offers the Tenant a rental discount of \$815.00 ("the discounted Rent")

Terms and Conditions to Discounted Rent:

- A. *Rent must be received by the Landlord on or before the first day of the month. "Cash Rents" will be accepted up to 1:00 p.m. on banking days only, therefore if you choose to pay in this method your rent must be into the office no later than 1:00 p.m. on the last open banking day of each month. Any Rents received after the first day of the month will not be eligible for this discount and the amount due will be the Basic Rent for that month, plus the late surcharge as per your lease agreement;*
- B. *If at any time during the term of this agreement, rent is received late two (2) times the Rental Discount shall be null and void and Basic rent will be due for the rent of the duration of the term;*
- C. *All payments of Rent by cheque or otherwise must be honoured – any cheque not honoured or otherwise returned NSF will be deemed a late payment and the Tenant shall be obligated to pay the Basic Rent for that month unless the Tenant has breached the agreement as stated above in section B;*
- D. *If at any time during the Term of this Agreement the Tenant vacates or abandons the Premises, the Rental Discount shall be null and void and all such discounted rent granted to the Tenant up to that time, in the aggregate, shall become due and owing and shall be refunded in full by the Tenant to the Landlord. All such amounts shall be deemed to be rent in arrears.*

I note that there is an error in the addendum where the identified rental discount is identified as \$815.00 instead of \$100.00. I also note that the tenancy agreement is unclear as to whether it is a month to month tenancy or a periodic tenancy. This confusion is because a fixed term rental period is provided under the heading of a periodic tenancy which is month to month. This is very misleading and unclear.

On April 3, 2009 the landlord served the tenant with a 10 day Notice to End Tenancy due to non-payment of rent. The amount of rent owed, as indicated on the notice was \$815.00. The tenant did not pay the outstanding rent and abandoned the rental unit on approximately May 15th, 2009.

The landlord requested a monetary claim for the sum of \$1,880.00 comprised of two months lost rent in the sum of \$915.00 plus the recovery of the \$50.00 filling fee paid for this application. The landlord also seeks to retain the tenant's security deposit plus interest in partial satisfaction of this claim.

Analysis and Findings

I accept that the tenant failed to pay the rent owed for April 2009 and was served in person with a 10 day Notice to End Tenancy. I also accept that the tenant did not pay the outstanding rent or file an application to dispute the notice within five (5) days of receiving the notice. Pursuant to section 46(5) of the *Act* the tenant is conclusively presumed to have accepted the end of the tenancy.

I find that the tenant was required to vacate the rental unit as of April 12, 2009 which was the effective date of the 10 day Notice to End Tenancy. I accept the landlord's evidence that the tenant remained in the rental unit until approximately May 15, 2009 and as a result the landlord has lost a further month's revenue due to the tenant's failure to comply with the tenancy agreement and *Act*.

However, I do not accept the landlord's claim for damages in the sum of \$1,880.00. This sum is based on the monthly rent of \$915.00 which the landlord did not charge the tenant. The tenant was charged a monthly rent of \$815.00.

Although the landlord has characterized this clause as an incentive, the structure of its terms is in fact more akin to a penalty. I specifically find that clause D of the **Schedule A: Addendum to Residential Tenancy Agreement** to be grossly unfair to the tenant. It reads as follows:

D. If at any time during the Term of this Agreement the Tenant vacates or abandons the Premises, the Rental Discount shall be null void and all such discounted rent granted to the tenant up to that time, in the aggregate, shall become due and owing and shall be refunded in full by the Tenant to the Landlord. All such amounts shall be deemed to be rent in arrears.

I understand this clause to mean that any former months where a tenant had received a "rent discount" would become owed resulting in potentially hundreds or thousands of dollars.

The landlord relies on the addendum in calculating the sum they alleged is owed to them by the tenant. I find that this term in the tenancy agreement is unenforceable and unconscionable as it is grossly unfair and attempts to contract outside of the *Act*. A tenancy agreement must not include terms that contradict the legislation and that any terms which contradict the legislation will not be enforceable. Section 5 of the *Act* also states that landlords and tenants may not avoid or contract outside of this *Act* or regulations.

The landlord has also structured this addendum to unfairly benefit the landlord if the conditions are not met by the tenant. There is no obligation or requirements for the landlord to meet or any reciprocal penalties owed to the tenant if the landlord breaches the contract. For example, even though a tenant may have a reduced rent for many months, if the rent is paid late on one occasion the landlord has structured this agreement so the tenant must pay a substantial rent increase for that month, in addition to the allowable late payment fees allowed by the regulations. The *Act* specifically prohibits rent increases outside of the prescribed sum and requires the landlord to provide the tenant three months notice for any increases. This addendum attempts to circumvent the *Act* and regulations. The *Act* also specifically prohibits the landlord from charging any fees outside of those allowed in the regulations.

This addendum also attempts to circumvent the *Act* and regulations by demanding payment of rent by 1:00 p.m., if in cash, and on certain days only, contrary to the *Act*. Payment of rent, pursuant to the *Act*, allows for payment of rent on a specified day and the payment can be made anytime on that day.

I reject this addendum to the tenancy agreement and find it is not enforceable as it is an attempt to contract outside of the *Act* and is grossly unfair to the tenant. I find that the monthly rent for this rental unit was \$815.00 per month. I accept that the tenant failed to pay this sum for April 2009 and also caused the landlord a loss of revenue for \$815.00

for May 2009. I also accept that the landlord is entitled to one late payment of rent fee for the sum of \$25.00 for April 2009 and to recover the \$50.00 filling fee paid for this application by the landlord.

I find that the landlord has established a total monetary claim for the sum of \$1,705.00. From this sum, I Order pursuant to section 72 of the *Act* that the landlord may retain the tenant's security deposit plus interest of \$437.50 in partial satisfaction of this claim. I grant the landlord a monetary Order for the remaining balance owed of **\$1,267.50**. This Order may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

Conclusion

The landlord's application is granted in part. I have determined that the addendum to the tenancy agreement respecting the rate of the monthly rent is not enforceable and have determined that the landlord's monetary claim be adjusted to reflect the actual rent paid by the tenant.

Dated May 29, 2009.

Dispute Resolution Officer