

## **DECISION**

**Dispute Codes:** MNR, MNDC, FF

### **Introduction**

This application was brought by landlord seeking a Monetary Order for unpaid rent and liquidated damages, and recovery of the filing fee for this proceeding.

At the commencement of the hearing, counsel for the landlord advised that she had received an email from the tenant on December 7, 2009 requesting an adjournment and expressed her objections to the granting of it.

The landlord first made this application on July 9, 2009 and amended it on July 17, 2009. The matter was originally set for hearing on October 28, 2009 and was adjourned at the request of the tenant's legal counsel with consent of the landlord on the grounds that the tenants were in South Africa and counsel had not had an opportunity to examine the landlord's evidence.

The present request for adjournment was received December 7, 2009, one business short of the three day requirement and the tenant was not represented by an agent to make the request as required under item 6.2 of the Rules of Procedure to qualify for adjournment.

In addition, I have considered the request for adjournment vis a vis the criteria set out at item 6.4 of the Rules of Procedure and I find no compelling reason for granting

adjournment including: contribution to resolution of the dispute, provision of a fair opportunity to be heard, degree to which the negligence of the party seeking adjournment contributed to the need for it, and possible prejudice to either party.

Therefore, even if the request for adjournment had been made on time or by an attending agent, I would have denied the request. The hearing proceeded in the absence of the respondent tenants

### **Issue(s) to be Decided**

This application requires a decision on whether the landlord is entitled to a Monetary Order for the unpaid rent, liquidated damages as per the rental agreement and recovery of the filing fee for this proceeding.

### **Background and Evidence**

This tenancy began on August 16, 2007 under a two-year fixed term rental agreement to August 31, 2009. Under the agreement, rent was \$4,350 in the first year, escalating to \$4,850 in the second year. The landlord holds a security deposit of \$2,175 paid on or about August 16, 2007. The landlord gave evidence that the tenant had reached an agreement with the previous property manager to surrender the deposit against damage to the rental unit.

The tenant did not give written notice to end the tenancy, but advised the property manager verbally three weeks before departing at the end of May 2009.

Clause 5 of the rental agreement contains a provision that, if the tenants were to leave the tenancy early, the tenants would pay \$8,700 in liquidated damages. That clause also states that the tenants would also be liable for loss of rent to the end of the fixed term agreement on August 31, 2009.

The liability for loss of rent is repeated and initialed by the tenants on item 5 on an addendum to the rental agreement.

In his application and conformed at the hearing, the landlord makes no claim for loss of rent beyond that for the month of May 2009 during which the tenants occupied the rental unit without having paid rent. The tenants had also defaulted on the April rent, but subsequently paid in response to a demand letter from the landlord.

The landlord gave evidence of early and sustained advertising of the rental units in multiple mediums in an effort to minimize his losses as required under section 7 of the *Act* but was not able to find a new tenant before the expiry of the fixed term agreement.

## **Analysis**

Section 45(2) of the *Act* provides that a tenant in a fixed term rental agreement may give notice to end the tenancy on a date that is not before the termination date set by the rental agreement.

In this instance, the landlord would have been in a position to make application for the unpaid rent for May, and the loss of rent for June, July and August. However, the landlord seeks only the unpaid rent for May and the liquidated damages agreed to by the tenants.

Residential Policy Guideline 4 provides guidance on determining whether the amount stated in a liquidated damages clause constitutes a genuine pre-estimate of the loss a landlord will incur if the tenant leaves the agreement early, or whether the amount constitutes a penalty.

In this instance, in order to give the tenant the fairest possible consideration, I must be mindful that the landlord expressed his willingness to waive his right to the full loss of rent ( $\$4,850 \times 4 = \$19,400$ ) if granted the agreed to amount of the liquidated damages plus the unpaid rent for May ( $\$8,700$  plus  $\$4,850 = \$13,550$ ).

Therefore, I do not find it necessary or in the interest of the tenant to take measure of the liquidated damages clause to ascertain if there is an element of penalty in the amount.

In consideration of the landlord's promise that this monetary award constitutes full and final settlement of his claims against the tenants' breach of the rental agreement in leaving the tenancy early, I find that the landlord is entitled to a Monetary Order for all claims as made as follows:

Unpaid rent for May 2009	\$4,850.00
Liquidated damages	8,700.00
Filing fee	<u>100.00</u>
<b>TOTAL</b>	<b>\$13,650.00</b>

## **Conclusion**

Thus, the landlord's copy of this decision is accompanied by a Monetary Order, enforceable through the Provincial Court of British Columbia, for \$13,650 for service on the tenants.