

Decision

Dispute Codes: OPC, MNR, MNDC, MNSD, FF

Introduction

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act* for orders as follows:

1. An Order of Possession pursuant to section 55.
2. A monetary order for rental arrears and money owed for the rental premises pursuant to section 67.
3. An Order to be allowed to keep all or part of the security deposit pursuant to section 38.
4. To recover the filing fee from the landlord for the cost of this application pursuant to section 72.

The landlord and tenant were given full opportunity to be heard, to present evidence and to make submissions. As English is not the tenant's first language, he obtained assistance with his evidence from a person who speaks his language.

The landlord provided evidence that he sent the tenant a One Month Notice to End Tenancy for Cause (the notice) by registered mail on March 25, 2010. The landlord gave sworn testimony that he sent the tenant the Application for Dispute Resolution hearing package (the hearing package) by registered mail on May 14, 2010. The landlord provided Canada Post tracking numbers to confirm the service of the notice and the hearing package to the tenant by registered mail. The tenant confirmed that service was provided for both the notice and the hearing package as described by the landlord. I accept that the tenant was duly served with the notice and the hearing package.

The tenant testified that he vacated the rental premises on April 30, 2010, the date specified in the notice. As such, the tenant questioned why the landlord included a request for an Order of Possession in the landlord's May 14, 2010 application for

dispute resolution. As the tenant has vacated the premises, I dismiss the landlord's application for an Order of Possession.

Although the parties had witnesses available, during the hearing it became apparent that the issues that the witnesses planned to address were related to the Order of Possession and not the monetary order that remained at issue. As such, these witnesses were not called by the parties.

On the basis of the solemnly sworn evidence presented at the hearing a decision has been reached.

Issue(s) to be Decided

Whether the landlord is entitled to a monetary order for unpaid rent, a damage fee and recovery of the filing fee for this application. Whether the landlord is entitled to retain all or a portion of the security deposit.

Background and Evidence

The landlord gave evidence that this fixed term tenancy commenced on December 1, 2009 for a one-year period to end on November 30, 2010. He submitted into evidence a copy of the written tenancy agreement, as well as a signed copy of a November 23, 2009 Rental Agreement Addendum (the addendum). Rent was established at \$1,450.00 per month, payable on the first of each month. The landlord said that he continued to hold the \$725.00 security deposit paid by the tenant on November 23, 2009.

On May 14, 2010, the landlord applied for a monetary order of \$2,865.00. This application included the following three items:

- \$690.00 in payments withheld by the tenant in April 2010 as a result of his understanding of the provisions of the tenancy agreement;
- \$1,450.00 in rental loss for May 2010; and
- \$725.00 in damage fees.

The landlord testified that the rental premises were in good condition when the landlord and tenant conducted the move-out condition inspection. The landlord has made no claim for damages resulting from the tenant's failure to maintain the rental premises.

Summary of Evidence - Utilities

The landlord testified that from December 2009 until April 2010 the tenant paid \$1,450.00 in rent plus \$138.00 per month in utilities. The landlord maintained that this additional payment for utilities was required as per the following provisions of Section 3 of the tenancy agreement:

3. Rent

a) Payment of Rent:

The tenant will pay the rent of \$1450 each...month to the landlord on the first day of the rental period which falls on the ...1st day of each...month...

b) What is included in the rent: *(Check only those that are included and provide additional information, if needed.)...*

Additional Information: \$138/month utilities – to be adjusted if bill to owner changes by 10% or more...

The landlord said that the tenant did not reduce his rental payment by the amount of the utility payments (i.e., 5 months at \$138.00 per month) until after the landlord issued him the one month notice to vacate the premises.

The tenant gave sworn evidence that he withheld \$552.00 in rent in April 2010 because he believed that the landlord had been improperly charging him for utilities since the commencement of the tenancy agreement in December 2009. The tenant noted the wording of the tenancy agreement stated that \$138.00 in utilities were to be included in the \$1,450.00 rent. The tenant maintained that section 3(b) of the tenancy agreement only requires an additional payment for utilities if the utilities bill changed by 10% or more. The tenant provided undisputed testimony that the landlord did not make any assertion that the utility costs had changed by 10% or more. The tenant also entered into evidence a March 9, 2010 payment receipt issued by the landlord. This receipt provided a breakdown of the tenant's March payment of \$1,450.00 into separate payments of \$1,312.00 for "March Rent/Lease Income" and \$138.00 for "March Additional rent (utilities)." The tenant stated that he had not asked for a receipt from the landlord until that time, and testified that this was the only receipt that he had received for his payments.

The landlord said that the March receipt was a computer-generated error and that he had spoken with the tenant about this error when the tenant asked him about this. He also explained that this partially resulted from an N.S.F cheque submitted by the tenant.

Summary of Evidence – Rental Loss May 2010

The landlord applied for \$1,450.00 in lost rental income for the month of May 2010, following the tenant's departure from the rental premises.

The tenant testified that he left the rental premises on April 30, 2010, the date set out in the landlord's notice. The tenant noted that the premises were left in good condition, a fact that was undisputed by the landlord. The tenant questioned the extent to which the landlord attempted to mitigate his losses by advertising the premises for rental. The tenant noted that the application for dispute resolution, including the landlord's request for an Order of Possession, was not submitted until May 14, 2010. The tenant submitted undisputed evidence that the landlord did not commence advertising the premises for rent until May 17, 2010.

The landlord testified that he had a potential tenant who had made a verbal agreement to rent these premises in May 2010. However, the landlord said that this prospective tenant decided not to rent these premises at the last minute, primarily because there were concerns about accessing the rental premises. The landlord testified that he did not submit a request to the tenant to allow access to the premises so that any prospective tenants could view the premises.

Summary of Evidence – Damage Fee as set out in Addendum

The landlord applied for a monetary order of \$725.00 in damage fees, asserting that this fee was in accordance with item 3 of the addendum, which reads in part as follows.

DAMAGE FEE(S): *If the tenant ends the fixed term tenancy before the end of the original term as set out in (2) page 2 of 6 of the RTA, the landlord may, at the landlord's option, treat this Agreement as being at an end. In such event, the sum of \$725 will be paid by the tenant to the landlord as damages, and not as a penalty, to cover the administration costs of re-renting the rental unit...*

The tenant testified that it was the landlord who initiated the eviction process and caused the tenancy to be discontinued before the end of this fixed term tenancy. The tenant did not believe that the tenant ended the fixed term tenancy, and, as such, the landlord should be responsible for the costs incurred in re-renting the rental unit.

Analysis and Findings

Monetary Order- Utilities

In reviewing this matter, I note that the tenant did not apply for dispute resolution under the *Act* when he realized that the landlord was charging him for items that he believed were included in his rent. This was the legal remedy available to the tenant if he believed that the landlord was charging him for items beyond the terms of the tenancy agreement. Although the legal process for recovering these payments was unfamiliar to

the tenant, this does not allow him to arbitrarily reduce his April rent payment by the amount that he believed his landlord had overcharged him.

I find that the landlord has failed to demonstrate that the terms of the tenancy agreement called for an additional payment of \$138.00 for April 2010. In coming to this conclusion, I rely on the plain wording of Section 3(b) of the tenancy agreement and the confirmation that utilities were included in the tenant's rent by way of the only payment receipt provided to the tenant in March 2010. The burden of proof in applications for monetary orders rests with the applicant, and the landlord has not met that burden with respect to his claim for \$138.00 in utilities owing for the April 2010 rent. I accept that the tenant acted in accordance with the *Act* when he did not pay the landlord \$138.00 for utilities for April 2010.

However, the tenant reduced his April rent payment by a further \$552.00 to reflect the amount that he believed he had overpaid during the course of his lease. I accept the landlord's assertion that the process followed by the tenant to recover utility payments already made for the months of December 2009 through March 2010 was not in accordance with the *Act*. For that reason, I find that the tenant's arbitrary decision to withhold \$552.00 from his April 2010 rent for the four months from December 2009 until March 2010 was contrary to the *Act*. As such, I issue the landlord a monetary order of \$552.00 for non-payment of this portion of the tenant's April 2010 rent.

Monetary Order- Rental Loss May 2010

I am not satisfied that the landlord has taken adequate steps to mitigate his loss of rent for May 2010. The landlord sent a One Month Notice to Vacate to the tenant on March 25, 2010. The tenants moved on April 30, 2010, as required in the landlord's notice. The landlord did not attempt to show the rental premises to prospective tenants during the remainder of March or during April. The landlord provided no evidence to contradict the tenant's testimony that the landlord did not commence advertising the premises for rent until May 17, 2010. Under these circumstances, I dismiss the landlord's application for a monetary order for loss of rent during May 2010.

Monetary Order- Damage Fee

Section 3 of the addendum states that the Damage Fee of \$725.00 can be claimed by the tenant if the tenant ends the fixed term tenancy before the end of the original term. In this case, the landlord ended the fixed term tenancy agreement. The landlord did not produce evidence to support his assertion that this provision of the addendum applied under these circumstances. Consequently, I dismiss the landlord's application for a monetary order for a damage fee.

Filing Fee

As the landlord was partially successful in this application, I find that the landlord is entitled to recover the \$50.00 filing fee paid for this application.

Security Deposit

The landlord testified that he continues to hold a security deposit of \$725.00 plus interest for this tenancy from November 23, 2009 to the date of this decision. No interest is payable over this period.

Conclusion

I order the landlord to reduce the amount of the security deposit to be returned to the tenant by \$602.00. This order is based on the following breakdown of my findings.

Item	Amount Owing
Monetary Order for Rental Arrears	\$552.00
Recovery of Filing Fee for this application	50.00
Security Deposit	-725.00
Total Monetary Award	(\$123.00)

To implement my findings on the landlord's application, I order the landlord to return to the tenant \$123.00 of the tenant's security deposit. This reflects the difference between the monetary order issued and the security deposit retained.

Should the landlord fail to comply with this Order, this Order may be filed and enforced as an Order of the Provincial Court of British Columbia.

This decision 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*.