



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes:

OPR, CNR, CNC, MNR, MNSD, MNDC, RP, LRE, RR, FF

Introduction

This hearing was scheduled in response to cross applications.

The Landlord filed an Application for Dispute Resolution, in which the Landlord has made application for an Order of Possession for Unpaid Rent; a monetary Order for unpaid rent; a monetary Order for money owed or compensation for damage or loss; to retain all or part of the security deposit; and to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution.

The Landlord stated that copies of the Application for Dispute Resolution and Notice of Hearing were sent to the Tenant via registered mail at the service address noted on the Application, on December 09, 2010. Canada Post documentation was submitted to corroborate this statement. In the absence of evidence to the contrary, I find that these documents were served in accordance with section 89 of the *Residential Tenancy Act* (Act), however the Tenant did not appear at the hearing.

The Tenant filed an Application for Dispute Resolution, in which the Tenant has made application to set aside a Notice to End Tenancy for Unpaid Rent; to set aside a Notice to End Tenancy for Cause; for an Order requiring the Landlord to make repairs; for an Order suspending or setting conditions on the Landlord's right to enter the rental unit; for a rent reduction; and to recover the filing fee from the Landlord for the cost of this Application for Dispute Resolution.

The hearing was scheduled for 10:30 a.m. on this date and by 10:51 a.m. the Tenant had not appeared. I find that the Tenant failed to diligently pursue her Application for Dispute Resolution and I therefore dismiss her application without leave to reapply.

Issue(s) to be Decided

The issues to be decided in relation to the Landlord's Application for Dispute Resolution, are whether the Landlord is entitled to an Order of Possession for unpaid rent; to a monetary Order for unpaid rent, loss of revenue, late fees, liquidated damages, and damages to the rental unit; to keep all or part of the security deposit; and to recover the filing fee from the Tenant for the cost of the Application for Dispute Resolution, pursuant to sections 38, 55, 67, and 72 of the Act.

Background and Evidence

The Landlord submitted a written tenancy agreement that shows this tenancy began on June 01, 2008; that it was for a fixed term that ended on June 01, 2009; that the tenancy continued on a month to month basis after June 01, 2009; that the tenancy agreement required the Tenant to pay monthly rent of \$1,100.00 on the first day of each month; and that the Tenant paid a security deposit of \$550.00. The Landlord stated that the security deposit was paid on May 09, 2008.

The Landlord stated that the Tenant was served with a Notice of Rent Increase that increased the rent to \$1,135.00, effective January 01, 2011.

The Landlord stated that the Tenant did not pay any rent for December of 2010.

The Landlord stated that he personally served the Tenant with a Ten Day Notice to End Tenancy for Unpaid Rent, which had an effective date of December 12, 2010, on December 02, 2010. The Notice declared that the Tenant owed \$1,100.00 in rent that was due on December 01, 2010.

The Landlord stated that he believes the Tenant is still occupying the rental unit. He stated that he did not advertise the rental unit for rent for January 01, 2010 as he did not know whether the Tenant would be vacating the rental unit by January 01, 2010, due to the fact she did not vacate the rental unit on December 12, 2010, as required by the Notice to End Tenancy, and she had filed an Application for Dispute Resolution disputing the Notice to End Tenancy that was served to her.

The Landlord is claiming compensation, in the amount of \$250.00, for liquidated damages. Item 8 of the tenancy agreement stipulates, in part, that "If the Tenant does not give proper notice or breaks the Lease term, and the Landlord is able to re-rent the Premises a two hundred and fifty dollar (\$250.00) re-rental fee shall be deducted from the deposit for administrative and marketing costs.

The Landlord is claiming compensation for late fees, in the amount of \$450.00. The Landlord stated that the Tenant has been late paying rent of nine occasions in 2010. Item 3 of the tenancy agreement stipulates, in part, that if the Tenant fails to pay rent when rent is due and the Landlord subsequently elects to accept rental payments, the Tenant "shall pay additional rental of fifty dollars (\$50.00) per day for every day rent is late".

The Landlord had claimed compensation, in the amount of \$200.00, for damage to the rental unit. He stated that he did not clearly inform the Tenant that the \$200.00 claim for damage to the rental unit related to a flood that occurred in August of 2010, because he did not expect this claim for damages to be considered at this hearing.

Analysis

Based on the evidence provided by the Landlord and in the absence of evidence to the contrary, I find that the Tenant entered into a tenancy agreement with the Landlord that currently requires the Tenant to pay monthly rent of \$1,100.00 on the first day of each month. Section 26(1) of the *Act* requires tenants to pay rent to their landlord.

Based on the evidence provided by the Landlord and in the absence of evidence to the contrary, I find that the Tenant did not pay rent when it was due on December 01, 2010. As she is required to pay rent pursuant to section 26(1) of the *Act*, I find that the Tenant must pay \$1,100.00 in outstanding rent to the Landlord.

If rent is not paid when it is due, section 46(1) of the *Act* entitles landlords to end the tenancy within 10 days if appropriate notice is given to the tenant. In the absence of evidence to the contrary, I find that the Tenant was properly served with a Notice to End Tenancy that required the Tenant to vacate the rental unit on December 12, 2010, pursuant to section 46 of the *Act*. As the Tenant has not paid rent that was due and has been properly served with notice pursuant to section 46(1) of the *Act*, I find that the Landlord has grounds to end this tenancy pursuant to section 46 of the *Act*. On this basis I find that the Landlord is entitled to an Order of Possession.

I find that the Tenant must pay rent for the period between January 01, 2011 and January 15, 2011, pursuant to section 67 of the *Act*, as her failure to vacate the rental unit by the declared effective date of the Ten Day Notice to End Tenancy, made it difficult, if not impossible, for the Landlord to find new tenants for January 01, 2011. Given that the Tenant disputed the Ten Day Notice to End Tenancy and that a hearing into that matter had been scheduled for December 30, 2010, I find that the Landlord acted reasonably when he did not attempt to locate a new tenant for January 01, 2011. I therefore find that the Tenant must pay the Landlord \$567.50, which is one half of the monthly rent due for January of 2011. I find that the Tenant must pay this amount to the Landlord regardless of whether or not she occupies the rental unit between January 01, 2011 and January 15, 2011, in compensation for the loss of revenue that the Landlord is likely to experience during that period.

I dismiss the Landlord's application for compensation for loss of revenue between January 16, 2011 and January 31, 2011, with leave to reapply on this specific issue. I find that I am unable to determine, with any degree of certainty, that the Landlord will not be able to enter into a new tenancy that starts on January 16, 2011. The Landlord

retains the right to file another Application for Dispute Resolution claiming further compensation if he experiences a loss of revenue after January 16, 2011.

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages that will be 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 will be unenforceable. There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause, including whether the sum payable is extravagant in comparison to the greatest loss that could follow a breach.

I find that the clause in the tenancy agreement that requires the Tenant to pay \$250.00 if the Tenant does not give proper notice of her intent to end the tenancy constitutes a penalty, as it is not a genuine pre-estimate of a potential loss. In my view, a landlord will incur the same marketing and advertising costs at the end of a month-to-month tenancy when the tenancy ends in accordance with the *Act* as would be incurred if the tenancy was not ended in accordance to the *Act*. On this basis, I dismiss the Landlord's claim for liquidated damages, as the administrative costs of re-renting the rental unit are not directly related to a breach of the *Act*. In reaching this conclusion, I note that the Landlord has been compensated for the loss of revenue arising from the Tenant's breach of the *Act*.

Section 7(1)(d) of the *Residential Tenancy Regulation* stipulates that a landlord can charge a fee of not more than \$25.00 for a late rent payment. Section 7(2) of the *Regulation* stipulates that a landlord can only charge this fee if the tenancy agreement provides for this fee.

The tenancy agreement provides for a \$50.00 daily late fee, which is not authorized by the *Regulation*. I find that condition of the tenancy agreement regarding late fees does not comply with the legislation, and therefore I dismiss the Landlord's application for a monetary Order for late payment of rent. To be enforceable, the tenancy agreement must stipulate that the Tenant agrees to a late payment fee of \$25.00 or less. The clause requiring the Tenant to pay a daily late fee of \$50.00 is not in proportion to the costs the Landlord would incur as a result of the late payment and must, therefore, be considered to be a penalty.

I decline to consider the Landlord's application for compensation of \$200.00 for damages to the rental unit, pursuant to section 59(5)(a) of the *Act*, because his Application for Dispute Resolution did not provide sufficient particulars of his claim for compensation, as is required by section 59(2)(b) of the *Act*. In reaching this conclusion, I was strongly influenced by the fact that the Landlord did not clearly inform the Tenant that the \$200.00 claim related to a flood that occurred in August of 2010. I

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find that proceeding with the Landlord's claim for damages at this hearing would be prejudicial to the Tenant, as the absence of particulars makes it difficult, if not impossible, for the Tenant to adequately prepare a response to the claims. The Landlord retains the right to file another Application for Dispute Resolution in which he claims compensation for damages to the rental unit.

I find that the Landlord's application has merit and that the Landlord is entitled to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution.

Conclusion

I grant the Landlord an Order of Possession that is effective two days after it is served upon the Tenant. This Order may be served on the Tenant, filed with the Supreme Court of British Columbia, and enforced as an Order of that Court.

I find that the Landlord has established a monetary claim, in the amount of \$1,717.50, which is comprised of \$1,100.00 in unpaid rent, \$567.50 for loss of revenue, and \$50.00 in compensation for the filing fee paid by the Landlord for this Application for Dispute Resolution.

I hereby authorize the Landlord will be retaining the Tenant's security deposit, in the amount of \$550.00, plus interest of \$5.34, in partial satisfaction of the monetary claim, pursuant to section 72(2) of the *Act*.

Based on these determinations I grant the Landlord a monetary Order for the balance of \$1,162.16. In the event that the Tenant does not comply with this Order, it may be served on the Tenant, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

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*.

Dated: December 30, 2010.

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