



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, MNR, MNSD, FF

### Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent and utilities, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts.

The Landlord's application named two parties as Tenants, namely, S.F. and B.D. At the beginning of the hearing, the Tenant, S.F., claimed that B.D. should not have been named a party to these proceedings because she was not a party to the tenancy agreement. The Parties agree that B.D. was a party to a previous fixed term tenancy agreement but that she vacated the rental unit and another person, D.C., moved in. At that time the Landlord entered into a new fixed term tenancy agreement with S.F. and D.C. The Tenant, D.C., subsequently moved out and B.D. moved back in however the Landlord did not enter into a new tenancy agreement. RTB Policy Guideline #13 states at p. 1 as follows:

"Where co-tenants have entered into a fixed term lease agreement, and one tenant moves out before the end of the term, that tenant remains responsible for the lease until the end of the term. If the landlord and tenant sign a written agreement to end the lease agreement, or if a new tenant moves in and a new tenancy agreement is signed, the first lease agreement is no longer in effect."

Given that the Landlord did not sign an agreement with S.F. and D.C. to end the current fixed term tenancy agreement and given that the Landlord did not enter into a new tenancy agreement with S.F. and B.D., I find that B.D. is not a party to the tenancy agreement and is therefore not properly named as a party to these proceedings. Consequently, the style of cause is amended by removing B.D. as a party to these proceedings.

### Issue(s) to be Decided

1. Does the Landlord have grounds to end the tenancy?
2. Are there rent and/or utility arrears and if so, how much?
3. Is the Landlord entitled to keep the Tenant's security deposit?

### Background and Evidence

This tenancy started on November 15, 2009. The Parties entered into a fixed term tenancy agreement on August 15, 2011 which started September 1, 2011 and expires on August 31, 2012. Rent is \$1,950.00 per month payable on the 1<sup>st</sup> day of each month plus 65% of the utilities (gas, electricity and water) for the rental property unless the lower suite becomes vacant and then the Tenant is responsible for 100% of the utilities. The Parties' tenancy agreement also contains a term that requires the Tenant to pre-pay \$200.00 each month for utilities and the Landlord to provide the Tenant with a statement of account every four months for the actual cost of the utilities.

The Parties' tenancy agreement contains a further term that provides that the Tenant will receive a rent reduction of \$100.00 per month for so long as she makes rent and utility pre-payments on time. If rent and utilities are not fully paid on the 1<sup>st</sup> day of each month or the tenancy is terminated before the end of the fixed term, the tenancy agreement says that the rent reduction will be discontinued and the Tenant must pay back to the Landlord any rent discounts she has received.

The Landlord said on May 3, 2012, he served the Tenant's father in person with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated May 2, 2012. The Tenant admitted that her father was residing with her at the time and that she received the Notice. The 10 Day Notice alleges that as of May 1, 2012, the Tenant had rent arrears of \$900.00 and utility arrears of \$667.38. The Parties agree that the Tenant's cheque in pre-payment of October 2011 utilities and her rent cheque for December 2011 were returned for non-sufficient funds. Consequently, the Landlord said he served the Tenant with a 10 Day Notice dated December 12, 2011 and a letter advising the Tenant that she was no longer entitled to a rent reduction and was required to pay back rent discounts for the previous three months.

The Landlord said the Tenant ignored this letter and continued to pay \$1,850.00 each month. The Landlord said the Tenant was also getting further behind in paying utilities and as a result, he gave her the 10 Day Notice dated May 2, 2012, the rent portion of which represents the \$100.00 rent discount the Tenant received for 9 months and must repay under the terms of the tenancy agreement. The Landlord also claimed that on April 1, 2012, he gave the Tenant a demand letter to pay utilities for the previous four month period of \$1,387.38 but she paid only \$400.00 of that amount. Consequently, on May 3, 2012, the Landlord said he gave the Tenant another demand letter setting out an accounting of what was owed for utilities as of that date or \$667.38. The Landlord admitted that this amount included NSF charges of \$80.00 and utility pre-payment charges for March and April 2012 of \$400.00. The Landlord said he has received additional utility invoices (which he provided to the Tenant in his evidence package) for hydro and gas to May 2, 2012 and for water to March 30, 2012. As a result, the Landlord said the Tenant now owes \$643.32 for utilities.

The Tenant did not dispute the accuracy of the Landlord's utility calculations but claimed that she did not believe the term of the tenancy agreement requiring her to pay back rent of \$100.00 per month was legal. The Tenant also argued that she should be entitled to a reduction of rent and/or utilities because the Landlord failed to make repairs which resulted in excessive heating bills.

### Analysis

I find that the term of the Parties' tenancy agreement that requires the Tenant to pay back a rental discount if she failed to pay rent when it was due is an enforceable term and as a result, I find that the Tenant has rent arrears of \$1,000.00 which represents \$100.00 per month for the period, September 1, 2011 to June 30, 2012.

I find that the term of the Parties' tenancy agreement that requires the Tenant to pre-pay utilities is contrary to the Act. A Tenant is not required to pay utilities until such time as a Landlord makes a written demand for payment of the actual amount of the utilities with a copy of the utility invoices attached. As a result, section 46(6) of the Act says that a Landlord cannot serve a Tenant with a 10 Day Notice to End Tenancy for unpaid utilities until such time as the Landlord gives a written demand to the Tenant for payment of them and they still remain unpaid after 30 days. Consequently, I find pursuant to s. 5 of the Act that the term of the tenancy agreement requiring the Tenant to pre-pay utilities is unenforceable.

I find however that there are utility arrears of \$643.32 as follows:

Balance owing as of April 1, 2012:	\$987.38
Less Payment April 26, 2012:	(\$350.00)
Less Payment May 11, 2012:	<u>(\$450.00)</u>
Subtotal:	\$187.38

#### New Charges:

Hydro for Mar. 6 – May 2, 2012:	\$209.04
Gas for Mar. 6 – May 2, 2012:	\$182.73
Water for Feb. 4 – Mar. 30, 2012:	<u>\$64.17</u>
Total:	\$643.32

Consequently, I find that the Landlord is entitled to recover unpaid rent of \$900.00 and unpaid utilities of \$643.32. The Landlord also sought to recover late payment fees for two late payments. Section 7 of the Regulations to the Act says that a Landlord may charge a maximum of \$25.00 as a late fee provided that the tenancy agreement contains **that term** as well as his actual bank charges for a returned cheque. I find that the Parties' tenancy agreement contains a term authorizing the Landlord to collect a late fee of \$40.00 and as a result, I find that the Landlord has not complied with s. 7 of the

Regulations to the Act and is not entitled to recover a late fee. However, I find that the Landlord has provided evidence that he was charged NSF fees from his financial institution of \$12.00 and therefore he is entitled to recover that amount.

Section 46(4) of the Act states that within 5 days of receiving a Notice to End Tenancy for Unpaid Rent or Utilities, a Tenant must either pay the overdue rent or utilities or (if she believes the amount is not owed) apply for dispute resolution. If a Tenant fails to do either of these things, then under section 46(5) of the Act, she is conclusively presumed to have accepted that the tenancy will end on the effective date of the Notice and must vacate the rental unit at that time.

However, it is a principle of common law that if a Landlord accepts a payment of rent or overdue utilities from a Tenant after the 5 days granted on the 10 Day Notice and does not make it clear to the Tenant that the tenancy will still end, then the Landlord is deemed to have reinstated the tenancy (*see also RTB Fact Sheet #124*). The Landlord's demand letter dated May 3, 2012 shows that the Landlord acknowledged a payment of \$450.00 for utilities made by the Tenant (which was post-dated for May 18, 2012). There is no evidence that the Landlord gave the Tenant a receipt for this payment stating that it was accepted for use and occupancy only and would not reinstate the tenancy. The Tenant claimed that the Landlord also cashed her cheque of \$1,850.00 for June 2012 rent and did not provide her with a receipt for use and occupancy for that payment. The Landlord claimed that he sent the Tenant a receipt for use and occupancy for the payment made June 1, 2012 by regular mail on Saturday, June 2, 2012. The Landlord did not provide a copy of this receipt as evidence at the hearing.

The Landlord has the burden of proof on this matter and therefore must show on a balance of probabilities that after serving the Tenant with a 10 Day Notice on May 3, 2012, that he did not reinstate the tenancy by accepting a utility and rent payment after the 5 days granted on the Notice. However, I find that there is no evidence that the Landlord gave the Tenant a receipt for use and occupancy for her utility payment made May 18, 2012. I also find that there is no corroborating or reliable evidence that the Landlord gave the Tenant a receipt for use and occupancy for her rent payment made June 1, 2012. Furthermore, section 90(a) of the Act says that a document delivered by mail is deemed to be received by the recipient 5 days later. Consequently, even if the Landlord sent the receipt in the mail as he claimed, I find that the Tenant had not received it as of the date of the hearing and she is not deemed to have received it for 3 days following the hearing or until June 7, 2012.

The Landlord also argued that he could not issue a receipt until he was sure the Tenant's cheque had cleared however the Landlord admitted this occurred on June 1, 2012 when he presented it for payment. Given that the hearing was on June 4, 2012, I find that it would have been prudent for the Landlord to serve the Tenant with his receipt ***in person*** (as he had done on many other occasions) but instead allegedly chose to deliver it by regular mail. Furthermore, I find that the Landlord could have submitted a

copy of the alleged receipt to the Residential Tenancy Branch on June 1, 2012 but did not do so.

In summary, I find that the Landlord has provided insufficient evidence to conclude that he did not reinstate the tenancy by accepting a payment for overdue utilities and rent after the 5 days granted on the Notice. Consequently, the Landlord's application for an Order of Possession is dismissed with leave to reapply if the above-noted rent and utility arrears remain unpaid, however the Landlord will have to serve the Tenant with a new 10 Day Notice to End Tenancy. I find that the Landlord is entitled pursuant to s. 72 of the Act to recover from the Tenant the \$50.00 filing fee for this proceeding. However, given the tenancy will not be ending, I find that the Landlord's application to keep the Tenant's security deposit in payment of the rent and utility arrears is premature and it is dismissed with leave to reapply.

As the Tenant did not file an application for dispute resolution (or counterclaim) to make a claim for compensation, those matters could not be dealt with during the hearing however she is still at liberty to file an application.

On a final note, I find that the term of the tenancy agreement that requires the Tenant to pay for 100% of the utilities for the rental property when the lower suite is unoccupied may also not be an enforceable term. In particular, this term may be found to be unconscionable because it makes the Tenant responsible for paying a portion of the expenses (eg. for heat and electricity) for part of the rental property she does not occupy. However, given that this particular matter was not in issue at the hearing, I make no findings as to whether this term is enforceable or not.

### Conclusion

The Landlord's application for an Order of Possession is dismissed with leave to reapply. The Landlord's application to keep the Tenant's security deposit is dismissed with leave to reapply. The Landlord's application for a Monetary Order is granted in part. A Monetary Order in the amount of **\$1,705.32** has been issued to the Landlord and a copy of it must be served on the Tenant. If the amount is not paid by the Tenant, the Order may be filed in the Provincial (Small Claims) Court of British Columbia 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: June 05, 2012.

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Residential Tenancy Branch