



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNSD; MNDC; FF

Introduction

This is the Tenants' application for return of the security deposit; compensation for damage or loss under the Act, regulation or tenancy agreement; and to recover the cost of the filing fee from the Landlords.

The Tenant gave affirmed testimony at the Hearing.

The Tenant testified that two copies of the Notice of Hearing documents were hand delivered to the Landlord RM on August 20, 2012. She stated that she also mailed copies of the Tenants' documentary evidence to the landlords on September 12, 2012, by regular mail.

Based on the affirmed testimony of the Tenant, I am satisfied that the Landlord RM was personally served with the Notice of Hearing documents and that the Landlord SM was served by leaving a copy with his agent, pursuant to the provisions of Section 89 of the Act. I am also satisfied that the Landlords were served with the Tenants' documentary evidence.

Rule 10.1 of the Residential Tenancy Branch Rules of Procedure provides as follows:

Commencement of Hearing The hearing must commence at the scheduled time unless otherwise decided by the arbitrator. The arbitrator may conduct the hearing in the absence of a party and may make a decision or dismiss the application, with or without leave to re-apply.

The Hearing remained open for 30 minutes. Despite being served with the Notice of Hearing documents, the Landlords did not sign into the teleconference and the Hearing was conducted in their absence.

Preliminary Matter

In the "Nature of Dispute" section of the Tenants' Application for Dispute Resolution, the Tenants ticked off the boxes for return of the security deposit and recovery of the filing fee. In the "Details of Dispute" section, the Tenants indicated that they were also

seeking compensation for overpayment of rent and utilities. The Tenant explained that it was an oversight that the “Nature of Dispute” section did not include an application for compensation for damage or loss. It is clear from the “Details of Dispute” section, the monetary amount claimed, and the Tenants’ documentary evidence that the Tenants are seeking compensation for overpayment of rent and utilities. Therefore, I amended the Tenants’ Application to include this request.

Issues to be Decided

- Are the Tenants entitled to return of the security deposit?
- Did the Tenants overpay rent for the month of July, 2012?
- Should the Tenants be awarded compensation for overpayment of their share of utilities?

Background and Evidence

The Tenant gave the following testimony:

This tenancy began in December, 2011. Monthly rent was \$1,350.00, due on the last day of each month. The Tenants paid rent in cash. On December 10, 2011, the Tenants gave the Landlords a security deposit in the amount of \$680.00.

The rental unit is the upper suite of a house. There is another suite on the lower floor however the tenancy agreement required the Tenants to pay for the utilities for the whole house. The parties agreed that when the basement suite was tenanted, the Landlords would credit the Tenants \$100.00 per month for the cost of utilities from November to March and \$50.00 from April to October. If the basement suite was not rented, then it was agreed that the Tenants would pay the full amount of the utilities. The Tenant stated that the Landlords advised her that the gas fireplace in the basement suite was not connected, so the credit was for hydro and water consumption only.

In January, the Tenant noticed that her gas bill was getting very high so she spoke to the downstairs occupant, who advised her that the gas fireplace was hooked up in his suite. He also advised her that his hot water tank was powered by natural gas. The Tenant submitted that their agreement with the Landlords was based on the fact that the downstairs Tenant was not consuming any natural gas, and that it was not fair that the Tenants should have had to pay for utilities that the other occupant had used. The Tenant stated that there was one occupant downstairs and there are two Tenants, so she seeks compensation in the amount of 1/3 of the cost of the gas bill from February 1 to June 22, 2012. The Tenant calculates that amount to be \$286.41. The Tenants provided a copy of the gas bill in evidence.

The Tenant testified that she questioned the amount that the Tenants were paying for City utilities because they seemed very high, but that the Landlords refused to give her a copy of the bill. She stated that she went to the City to get a copy of the bill and that through her discussions with the City official, the City found out that there was an illegal suite in the rental property. As a result, the City inspected the basement suite and the occupant had to leave. She stated that the Landlords were very upset because of this.

On July 13, 2012, the parties attended a hearing on the Landlords' application for early termination of the tenancy and an Order of Possession. At that hearing, the parties reached a settlement agreement, the terms of which were:

1. The tenancy will end July 20, 2012 and the landlord will have an order of possession for one o'clock in the afternoon on that date.
2. Should the tenants comply with the order and return full and vacant possession to the landlord prior to one o'clock in the afternoon on July 20, 2012, the July rent will be adjusted to \$871.00 to reflect the 20 days of tenant occupancy during July.
3. The parties agree the tenants presently owe the landlord \$8.59 for water use up to and including the date of this hearing.

The July 13, 2012, Decision also states, "There appears to be a dispute about whether or not the tenants have paid the July rent. Either side is free to apply to have that question determined."

The Tenant testified that the Landlords had agreed that they would provide new appliances for the rental unit if the Tenants paid \$1,200.00 for the fridge. The agreement was that the Tenants could deduct \$100.00 a month from rent until the \$1,200.00 was repaid. She stated that after she gave the Landlord RM the money in cash, he demanded that the Tenants bear the cost of installation of the fridge and insisted that any damages, including normal wear and tear, would be the Tenants' responsibility. The Tenant stated that she told the Landlord RM that the Tenants would not agree and that the \$1,200.00 was to go towards rent. She stated that the Landlord issued a Notice to End Tenancy for Cause three days later. The Tenants provided a copy of a bank receipt showing a withdrawal of \$1,200.00 on June 20, 2012, along with copies of e-mail correspondence between the parties.

The Tenant stated that she paid the balance of the rent in the amount of \$150.00 on June 29, 2012, but that on July 1, 2012, the Landlords issued a Notice to End Tenancy for Unpaid Rent and Utilities.

The Tenant testified that the Tenants moved out of the rental unit on July 18, 2012. She stated that she returned the keys to the Landlord RM and provided a forwarding address in writing on July 18, 2012. The Tenant stated that she asked the Landlord RM if he would like to do a condition inspection, but that he declined saying that he didn't think it was appropriate for him to be alone in the rental unit with her. Therefore, a condition inspection was not performed.

The Tenant stated that she did not agree that the Landlords could retain any of the security deposit and that the Landlords have not returned any of it. The Tenant also seeks a monetary award for \$479.00 representing the pro-rated rent from July 20 – July 31, as agreed in the former hearing.

Analysis

- Are the Tenants entitled to return of the security deposit?

A security deposit is held in a form of trust by the Landlords for the Tenants, to be applied in accordance with the provisions of the Act.

Section 38(1) of the Act provides that (unless a landlord has the tenant's written consent to retain a portion of the security deposit) at the end of the tenancy and after receipt of a tenant's forwarding address in writing, a landlord has 15 days to either:

1. repay the security deposit in full, together with any accrued interest; or
2. make an application for dispute resolution claiming against the security deposit.

I accept the Tenant's undisputed affirmed testimony that she provided the Landlord RM her forwarding address in writing on July 18, 2012. The Landlords did not return the security deposit within 15 days of receipt of the Tenants' forwarding address, nor did the Landlords file for dispute resolution against the security deposit.

Section 38(6) of the Act provides that if a landlord does not comply with Section 38(1) of the Act, the landlord **must** pay the tenant double the amount of the security deposit. Therefore, I find that the Tenants are entitled to a monetary order for double the amount of the security deposit, in the amount of **\$1,360.00**.

- Did the Tenants overpay rent for the month of July, 2012?

I accept the Tenant's undisputed affirmed testimony and documentary evidence that rent was paid in full for the month of July, 2012. Further to the terms of the settlement agreement of July 13, 2012, I award the Tenants the amount of **\$479.00** for this portion of their application.

- Should the Tenants be awarded compensation for overpayment of their share of utilities?

Section 6(3)(b) of the Act provides that a term of a tenancy agreement is not enforceable if the term is unconscionable. Residential Tenancy Branch Policy Guideline 8 states, in part, as follows:

Unconscionable Terms

Under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.

Terms that are unconscionable are not enforceable. Whether a term is unconscionable depends upon a variety of factors.

A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.

In this case, I accept the Tenant's undisputed affirmed testimony that the Landlords mislead her to believe that the downstairs occupant was not using any gas. The Tenant paid for all of the gas used in the rental property. I find that the Tenant is entitled to compensation for the cost of paying for the downstairs Tenant's gas and I further find that the Tenants' submission that the cost should be apportioned at 1/3rd of the gas bill is reasonable.

Therefore, I allow this portion of the Tenants' claim in the amount of **\$286.41**.

The Tenants have been successful in their application and I find that they are entitled to recover the cost of the **\$50.00** filing fee from the Landlords.

The Tenants have established a monetary award, calculated as follows:

Double the amount of the security deposit	\$1,360.00
Rent rebate from July 20 – 31 pursuant to the terms of the settlement agreement dated July 13, 2012	\$479.00
Compensation for 1/3 rd of the gas bill	\$286.41
Recovery of filing fee	<u>\$50.00</u>
Total monetary award	\$2,175.41

Conclusion

I hereby provide the Tenants a Monetary Order in the amount of **\$2,175.41** for service upon the Landlords. This Order may be filed in the Provincial Court of British Columbia (Small Claims) 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: November 19, 2012.

Residential Tenancy Branch