



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD and MNDC

Introduction

This application was brought by the tenant seeking a Monetary Order for return of her security deposit and six months' rent paid in advance of the tenancy on grounds, among others, that the tenancy did not begin due material breaches by the landlord.

As a preliminary matter, I noted a number of variations in the spelling of the named Agent. However, there are two versions printed on cheques issued by her and I take the version used twice as the primary one, and the other as "also known as."

In addition, the tenant's advocate from the UBC Law Students' Legal Advice Program gave evidence that a title search on the rental property revealed the two other named parties as owners of the rental property. They were, therefore, joined as respondents, though only the first named respondent, the "agent," conducted business with the tenant.

Despite having been served with the Notice of Hearing sent by registered mail to each of the three respondents sent on August 27, 2012, none of them called in to the number provided to enable their participation in the telephone conference call hearing. The tenant's advocate gave evidence that the rental unit was the only address available to the tenants and noted that the Canada Post tracking information indicated service had been refused.

Therefore, as authorized by section 71(2)(c) of the Act, I found notice had been sufficiently served for purposes of the Act and the hearing proceeded in the absence of the respondents.

In addition, in an Affidavit sworn on November 7, 2012, the advocate gave evidence that he had attempted personal service on the agent and landlords of evidence four times between November 5, 2012 and November 7, 2012, twice during business hours and twice after hours.

The Affidavit refers to statements by the applicant tenant of the agent routinely refusing to answer her door or receive service, and on the last call the server reluctantly left the material in the mail slot. He stated that a harsh telephone call to the tenant in common who had conducted most of the correspondence on the following day indicated that the agent had received the evidence.

Issue(s) to be Decided

This matter requires a decision on whether the rental agreement is unconscionable and whether the tenant is entitled to return of the six months' rent paid in advance and the security deposit.

Background and Evidence

This matter is somewhat complicated by the fact that the issues in dispute relate to two tenants acting in concert. However, in the absence of a written rental agreement and given that the tenancies were to start at different times and the tenants made separate payments, they were identified as "tenants in common" with separate verbal agreements rather than co-tenants who could dispute collectively.

In the present matter, the applicant tenant seeks return of \$5,600 of which \$1,400 is double the security deposit and \$4,200 is six months' rent demanded by the agent before the tenancy began.

During the hearing, the tenant gave evidence that she while there was no written rental agreement, she had paid the money to the agent and agreed to the tenancy on April 17, 2012.

According to the tenant, the agent had rushed the viewing of the rental unit and in subsequent communications had been condescending and dismissive, referring to the tenants as babies when they balked at the rent and security deposits, and stating that the amounts were insignificant.

She stated that her tenancy was to begin on May 1, 2012, but the agent would not provide a key until May 3, 2012.

After having her move put off until May 3, 2012, she found the agent would not provide the agreed to room, the bathroom was to be shared rather than exclusive as promised,

and the landlord had changed her mind about permitting the tenant to bring her own furnishings. The landlord then pressed the tenant to take a larger room at another address at a higher rate of rent.

At the landlord's refusal to abide by their agreement, the tenant repudiated it.

Both tenants provided the landlord with their forwarding address by letter sent on May 8, 2012 requesting return of the rent and deposits.

After breaking three or four appointments, the agent acquiesced to the wishes of both tenants and issued a cheque for \$10,850 on May 9, 2012 to return the rent paid in advance and the security deposits.

However, the cheque was post dated to June 15, 2012. According to the tenant, the agent had variously told the tenants that they were lucky to be getting anything back, that she had used their money to purchase another property, and that they could be assured the cheque would not bounce.

On June 14, 2012, the agent left a message stating that the check would not clear due to insufficient funds and told the tenants to wait until July 1, 2012 to deposit it, warning the tenants that if they sued they would only get half of what was owed.

She called again on June 29, 201 and asked the tenants to hold the cheque until July 15, 2012 as she was having cash flow problems.

The tenants were alarmed and deposited the cheque on July 3, 2012 which led to a call from the agent describing the difficult position in which the NSF cheque had placed her but inviting contact so she could replace it.

On July 9, 2012, the agent called again and this time advised the tenants that she had now decided to withhold one month's rent and half of the security deposit and donate the withheld amount to charity.

The parties met on July 13, 2012 at which time the landlord offered a cheque for \$7,750 for both and the tenant signed a receipt for the payment. However, the landlord took

the cheque and receipt back when the tenants declined to sign a waiver forfeiting their right to sue for the balance.

Analysis

Residential Tenancy Policy Guideline 8 states that:

“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.”

The burden of proving a term is unconscionable is upon the party alleging unconscionability.”

I find that the landlord, an older and more sophisticated person, clearly set out to exploit the younger tenants by demanding twice the security deposit permitted by law and by manipulating students with derisive comments to pay six months' rent in advance. I find that the landlord further acted unconscionably in failing to have the tenant's room ready for the start of tenancy date, then by refusing to honour her agreement with respect to furnishings, and provision of a private bath. The misrepresentation was compounded by the landlord's attempts to have the tenant take another rental unit.

I find that the subject tenancy was founded on misrepresentation to the tenant and that the agreement is enforceable.

I further find that the cheque issued by the agent on May 9, 2012 for the full amount paid by both tenants constitutes conclusive acknowledgement of the indebtedness by the agent.

Therefore, I find that the applicant tenant is entitled to return of all of her prepaid rent and her security deposit.

As to the portion of the payment that represents the security deposit, section 19(1) of the Act provides that, "A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement."

A security deposit is a payment that is held in trust and is not the property of the landlord.

Section 38(1) of the Act requires that a landlord who does not have the tenant's consent, must within 15 days of the latter of the end of the tenancy or receipt of the tenant's forwarding address either return the security deposit or make application for dispute resolution to claim against it.

Section 38(6) of the Act states that a landlord who does not comply with the 15-day requirement, must pay the tenant double the amount.

In the present matter, I find that the landlord did not return the deposit as required and must return it in double.

Thus, I find that the agent and/or landlords owe to the tenant an amount calculated as follows:

Six month rent paid in advance at \$700	\$4,200.00
To double security deposit under s.38(6)	<u>700.00</u>
TOTAL	\$5,600.00

Conclusion

The tenant's copy of this Decision is accompanied by Monetary Order, enforceable through the Provincial Court of British Columbia, in the amount of \$5,600 for service on the landlords and their agent.

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 13, 2012.

Residential Tenancy Branch