



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Pemberton Holmes
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MNDC, FF

Introduction

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has requested compensation for damage or loss under the Act and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

The agent for the landlord provided affirmed testimony that on January 29, 2013 copies of the Application for Dispute Resolution and Notice of Hearing were sent to the tenant by registered mail. A Canada Post tracking number was provided as evidence of service to the forwarding address given by the tenant when the tenancy ended on July 31, 2012.

The mail was returned to the landlord, marked by Canada Post as unclaimed.

Service may not be avoided by a refusal to claim registered mail. Therefore, I find that these documents are deemed to have been served in accordance with section 89 of the Act; however the tenant did not appear at the hearing.

Issue(s) to be Decided

Is the landlord entitled to compensation for a rent repayment to the tenant that was not required and liquidated damages?

Is the landlord entitled to the filing fee cost?

Background and Evidence

The tenancy commenced on March 1, 2012 and was a fixed-term which was amended to end February 28, 2013. A copy of the signed tenancy agreement supplied as evidence indicated that the tenant was required to pay \$500.00 liquidated damages should he end the fixed term tenancy. On March 8, 2012 the tenant signed a

documents setting out the consequences for breaking the lease, including liquidated damages in the sum of \$500.00. A copy of this document was supplied as evidence.

Rent was \$900.00 per month, due on the 1st day of each month.

The tenant gave notice to end the fixed term prior to the end of the term; July 31, 2013. The deposit, less an amount agreed to by the tenant, was returned. A copy of the detailed refund record kept by the landlord was supplied as evidence of repayment made.

The unit was rented effective August 1, 2012; a copy of that tenancy agreement was supplied as evidence.

The landlord said that the tenant's rent for August was mistakenly withdrawn from the tenant's account. The landlord immediately returned August rent to the tenant, in the sum of \$900.00.

After returning the August rent to the tenant the landlord then discovered that the withdrawal they had made for August rent had in fact not processed. The tenant then agreed to repay the landlord the \$900.00 that had been mistakenly returned to him. Since that time the tenant has repaid \$450.00 of the \$900.00.

The landlord supplied a copy of a ledger showing payment made to the tenant on August 2, 2012, in the sum of \$900.00. A copy of the tenant ledger supplied as evidence showed that effective August 8, 2012 the withdrawal of August rent was returned as NSF. The landlord had already issued the tenant a cheque returning the August 2012 rent. The landlord submitted a CIBC electronic funds transfer record which showed that the rent payment for August 2012 was NSF.

Copies of emails sent between the landlord and tenant were supplied as evidence. On August 22, 2012 the tenant wrote, agreeing to a repayment plan, of 3 payments, totaling \$900.00 by September 21, 2012. The tenant has repaid \$450.00.

The landlord has claimed \$500.00 for liquidated damages, as set out in clause 5 of the tenancy agreement signed by the tenant.

Analysis

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

I find, from the evidence before me, that this tenancy ended effective July 31, 2012 when the tenant vacated the rental unit. Once the tenancy had ended the landlord inadvertently made a \$900.00 August rent deduction from the tenant's account, returned that sum to the tenant, only to discover that the tenant's account had not been debited in that sum. The result of this error provided the tenant with a \$900.00 refund to which he was not entitled.

I have considered sections 62(3) and 67 of the Act, in relation to the claim for payment given to the tenant that he was not entitled to receive. The sections provide:

Director's authority respecting dispute resolution proceedings

62 (1) *The director has authority to determine*

(a) disputes in relation to which the director has accepted an application for dispute resolution, and

(b) any matters related to that dispute that arise under this Act or a tenancy agreement.

(2) The director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act.

(3) The director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.

67 *Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.*

(Emphasis added)

After considering section 62(3) I find that the matter of rent payment and loss that occurred after the end of the tenancy relates to the tenancy agreement and the Act. If a tenancy had not been in place the inadvertent rent payment would not have been attempted and the landlord would not have returned funds to the tenant.

In this case I find that it was the landlord who failed to comply with the Act, by attempting to obtain payment after the time the tenancy had effectively ended; however they did immediately rectify the situation, in good faith, by returning what they believed was owed to the tenant. The tenant accepted the \$900.00 compensation at a point where I find it was reasonable he knew that his August 2012 rent payment would not in fact process. Therefore, I find, pursuant to section 62(3) of the Act, that the landlord is entitled to compensation in the sum of \$450.00 for the balance of August 2012 rent that

was given to the tenant when the tenant was not entitled to that refund. I find that the landlord has a right to rent when it is owed and a right to return of funds that have been overpaid to a tenant.

I have considered Residential Tenancy Branch policy which defines a liquidated damages clause as a clause in a tenancy agreement where the parties agree in advance the damages 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 as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator considers the circumstances at the time the contract was entered into.

The tenant signed the tenancy agreement which included the liquidated damages clause; he also signed a separate document which further indicated that he could be responsible for the liquidated damages if he ended the tenancy before the end of the fixed term. While I find that the amount of \$500.00 is on the high end of the range, I do accept that it is a reasonable pre-estimate of costs that the landlord could incur and that, as the tenant ended the tenancy in breach of section 45 of the Act, the landlord is entitled to compensation for liquidated damages in the sum of \$500.00.

I find that the landlord's application has merit and that the landlord is entitled to recover the \$50.00 filing fee from the tenant for the cost of this Application for Dispute Resolution.

Based on these determinations I grant the landlord a monetary Order in the sum of \$1,000.00. 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.

Conclusion

The landlord is entitled to a monetary Order in the sum claimed.

The landlord is entitled to filing fee costs.

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: April 17, 2013