



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Boardwalk General Partnership
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The tenants did not attend this hearing, although I waited until 9:42 a.m. in order to enable them to connect with this teleconference hearing scheduled for 9:30 a.m. The landlord attended the hearing and was given a full opportunity to be heard, to present evidence and to make submissions. The landlord entered into written evidence a witnessed Proof of Service document attesting to the landlord's posting of a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) on the tenants' door on September 3, 2013 at 2:42 p.m. The landlord testified that copies of the landlords' dispute resolution hearing package were sent to both tenants by registered mail on September 18, 2013. The landlord entered into written evidence copies of the Canada Post Tracking Number and a document from the Canada Post Online Tracking System confirming that both hearing packages were successfully delivered on September 19, 2013. I am satisfied that the landlord served the above packages to the tenants in accordance with the *Act*.

Issues(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent? Is the landlord entitled to a monetary award for unpaid rent, losses and damages arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenants' security deposit

in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

This one-year fixed term tenancy commenced on November 1, 2012. According to the signed Residential Tenancy Agreement (the Agreement) entered into written evidence by the landlord, the tenancy was to continue at the expiration of the Agreement as a periodic tenancy. Monthly rent is set at \$899.00, payable in advance on the first of each month, plus \$10.00 in monthly parking. The landlord continues to hold the tenants' \$299.00 security deposit paid on November 1, 2012.

The landlord's application for a monetary award of \$3,401.00 included the following items:

Item	Amount
Unpaid September 2013 Rent, Parking and Late Payment Fee (\$898.00 + \$10.00 + \$25.00 = \$934.00)	\$933.00
Unpaid October 2013 Rent, Parking and Late Payment Fee (\$899.00 + \$10.00 + \$25.00 = \$934.00)	934.00
Anticipated Loss of Rent for November 2013, Parking and Late Payment Fee (\$899.00 + \$10.00 + \$25.00 = \$934.00)	934.00
Forfeited Rental Incentive	600.00
Total Monetary Order	\$3,401.00

The landlord testified that although the November 2013 rent is not yet due, he anticipates that it will be unlikely that the rental unit can be rented for all of that month, as the tenants have yet to yield vacant possession of the rental unit to the landlord. The landlord's application for \$600.00 in rental incentive was a \$600.00 rental incentive reduction in rent granted to the tenants during the first month of their tenancy on the condition that they abided by the terms of their Agreement, paid their rent on time and avoided having two rent payments returned to the landlord for insufficient funds in their account. This provision was set out in section 9 of the Agreement. A further \$899.00 incentive would have been given on October 1, 2013 had the tenants been able to avoid contravening any of the provisions outlined in section 9 of the Agreement.

Analysis

The tenants failed to pay the rent identified as owing in the 10 Day Notice in full within five days of being deemed to have received the 10 Day Notice on September 6, 2013. The tenants have not made application pursuant to section 46(4) of the *Act* within five days of September 5, 2013. In accordance with section 46(5) of the *Act*, the tenants' failure to take either of these actions within five days led to the end of their tenancy on the corrected effective date of the notice. In this case, this required the tenants to vacate the premises by September 16, 2013. As that has not occurred, I find that the landlord is entitled to a 2 day Order of Possession. The landlord will be given a formal Order of Possession which must be served on the tenant(s). If the tenants do not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

Based on the landlord's undisputed testimony that the tenants have not made any payments to the landlord since the landlord issued the 10 Day Notice, I find that the landlord is entitled to a monetary award of \$933.00 for September 2013 and \$934.00 for October 2013, the amounts claimed by the landlords for these months.

Given the date of this hearing and the tenants' failure to have yielded vacant possession of the rental unit in accordance with the 10 Day Notice, I find that the landlord is entitled to a monetary award of one-half month's rent for November 2013. This results in a monetary award of \$449.50 ($\$899.00 \times 50\% = \449.50) for anticipated loss of rent for the month of November 2013.

I have also considered the landlord's application to recover the rental incentive provided to the tenant during the first month of this tenancy. I find that the rental incentive forfeiture requested by the landlord and as set out in the Agreement is actually a liquidated damage clause inserted for the benefit of the landlord. Residential Tenancy Branch (RTB) Policy Guideline #4 with respect to Liquidated Damages includes the following guidance with respect to the interpretation of such clauses:

A liquidated damages clause is 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 will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- *A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.*
- *If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- *If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum...

I deny the landlord's claim for recovery of the rental incentives of \$600.00 because I find that the landlord's requested rent concession constitutes a penalty. In reaching this conclusion, I note that section 9 of the Agreement enables the landlord to recover the rental incentive in the event that the tenants were responsible for a serious breach of the Agreement. While this would definitely qualify as a serious occurrence as outlined in Policy Guideline 4, I question whether the other provisions included in section 9 of the Agreement enabling a full forfeiture of the rental incentive would be appropriate if the tenant were one day late in paying their rent on any occasion or if insufficient funds were in their account on two occasions. I also note that the effect of the landlord's successful application for a monetary award for unpaid rent for September and October 2013 provides the landlord with rent from the tenants for all 12 months of this initial fixed term tenancy. As noted above, the Agreement allows the tenancy to continue as a periodic tenancy after the end of the fixed term on October 31, 2013. However, there is no provision in section 9 of the Agreement to set aside the provisions of the rental incentive in the event that the tenancy were to continue. Thus, I find that this provision remains in place and could be invoked clearly as a penalty to require the tenants to pay their rent on time and to issue negotiable cheques throughout the entire course of their tenancy, even had they remained in the rental unit for many years. I find that this type of provision acts as an ongoing and permanent penalty that the landlord could invoke at any time during this tenancy to recover the rental incentive provided in November 2012 and again in October 2013. For these reasons, I consider the provision for the recovery of the rental credit fee constitutes a penalty, a penalty that was to continue even after the initial fixed term of the tenancy ends. I dismiss the landlord's application for recovery of the rental incentive provided to the tenants at the beginning of this tenancy without leave to reapply.

As the landlord has been partially successful in this application, I allow the landlord to recover the \$50.00 filing fee from the tenants.

I allow the landlord to retain the tenants' security deposit plus applicable interest in partial satisfaction of the monetary award issued in this decision. No interest is payable over this period.

Conclusion

I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant(s). Should the tenant(s) fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a monetary Order in the landlord's favour under the following terms, which allows the landlord to recover unpaid rent and losses arising out of this tenancy and the filing fee and to retain the tenants' security deposit:

Item	Amount
Unpaid September 2013 Rent, Parking and Late Payment Fee (\$898.00 + \$10.00 + \$25.00 = \$933.00)	\$933.00
Unpaid October 2013 Rent, Parking and Late Payment Fee (\$899.00 + \$10.00 + \$25.00 = \$934.00)	934.00
Loss of Income November 2013	449.50
Less Security Deposit	-299.00
Filing Fee	50.00
Total Monetary Order	\$2,067.50

The landlord is provided with these Orders in the above terms and the tenant(s) must be served with this Order as soon as possible. Should the tenant(s) fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: October 30, 2013

Residential Tenancy Branch

