



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, CNR, OPB, OPC, OPR, MND, MNDC, MNR, MNSD

Introduction

This hearing was scheduled to deal with applications by both the tenant and the landlord. The tenant applied to cancel a notice to end tenancy for cause, and to cancel a notice to end tenancy for unpaid rent. The landlord applied:

- for an order of possession because the tenant has breached an agreement with the landlord
- for an order of possession based on cause
- for an order of possession based on unpaid rent
- for a monetary order for unpaid rent
- for a monetary order for damage to the unit, site, or property
- for a monetary order for money owed or compensation for damage or loss under the Act, Regulation, or tenancy agreement
- for an order allowing the landlord to keep all or part of the security deposit

Both the landlord and tenant attended the teleconference hearing and gave affirmed evidence.

The tenant advised that she moved out of the rental unit effective August 31, 2014 and therefore withdraws her application to cancel the notices. The landlord gave evidence that he did not know for sure whether the tenant had moved out, and so he requests an order of possession.

Issue(s) to be Decided

Is the landlord entitled to an order of possession?

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to a monetary order for damage to the unit, site, or property?

Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the Act, Regulation, or tenancy agreement?

Background and Evidence

The tenancy agreement signed by the parties on August 10, 2013 indicates the tenancy started October 1, 2013 and was for a fixed term ending September 30, 2014. The tenant was obligated to pay rent of \$3,500.00 monthly in advance on the first day of the month. She also paid a security deposit of \$1,750.00.

The tenant gave evidence that she gave notice that she would be moving out effective August 31, 2014 by sending the notice by registered mail on July 10, 2014. The tenant gave evidence that she did move out prior to the end of August. She says she did a walk-through of the rental unit with the property manager on August 31, 2014.

Unpaid Rent

The landlord gave evidence that he did not receive rent of \$3,500.00 for each of the months of June, July, and August 2014, totalling \$10,500.00.

His evidence is that the tenant provided him with 11 post-dated cheques which he left with his bank for automatic deposit. He says the June, July, and August cheques were returned by the tenant's bank.

The tenant gave evidence that, after the landlord served her with two notices to end tenancy in late June 2014, she sought advice from the RTB. She says the RTB recommended she pay her rent directly to the landlord by bank draft. She provided a copy of a bank draft dated June 9, 2014 payable to the landlord for \$3,525.00 to cover June rent and a \$25.00 bank charge. She says she took the bank draft to the landlord's bank on June 9, 2014 and left it in an envelope for bank employee KM. She gave evidence that she had dealt with this same bank employee in the past when she needed to replace rent cheques.

The landlord gave evidence that it does not appear the bank draft was deposited to his account. During the hearing, he checked online and was unable to find a deposit for that amount. He said it was possible the amount was deposited to his account with one or more other items and he would investigate further.

The tenant gave evidence that she sent a bank draft for \$7,000.00 to cover July and August rent to the landlord's home in Oregon on August 28, 2014. She provided a photocopy of a bank draft for \$7,000.00 payable to the landlord and dated August 26, 2014. She also provided a Canada Post tracking number; an online search of the tracking number indicates the package was delivered to a location at the landlord's zip

code on September 2, 2014. The tenant says the package also contained her evidence for this hearing.

The landlord agrees he received a package at his Oregon home containing the tenant's evidence for this hearing, however he did not find a bank draft in the package. He advised he would check the envelope again.

The tenant gave evidence that the bank draft was paper clipped to the front of the first page of her evidence, and says there would have been no reason for her to retain the bank draft payable to the landlord.

Liquidated Damages

The landlord claims liquidated damages of \$3,500.00 based on paragraph 5 of the tenancy agreement, which reads:

“LIQUIDATED DAMAGES. If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the landlord to end the tenancy before the end of the term as set out in B above, or any subsequent fixed term, the tenant will pay to the landlord the sum of \$3500.00 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property.”

The landlord gave evidence that he has always used an agent to rent out the property, although he has a different one now than he did when the tenancy started. However, he says the fee structure is fairly standard. Agents generally charge about half a month's rent to find new tenants, as well as a sign-up fee of about \$225.00 when the agents are first engaged. In addition, his costs of re-renting include advertising costs of \$250.00 to \$300.00 and cleaning costs of about \$250.00.

The tenant gave evidence that she is not clear what the term “liquidated damages” means. However, she says she left the house in very good order and she has a Condition Inspection Report signed by the property manager at move-out.

Unpaid Utilities

The landlord claimed an amount of unpaid utilities from the District of West Vancouver. During the hearing, the landlord advised he was satisfied these amounts have now been paid, and he withdraws this claim.

Glass window repair

The landlord claims the cost of repairing a plate glass window. He provided a quote of \$2,140.19 in support of the claim.

The landlord does not know exactly how the window was damaged. He says the tenant was away at the time. Asked why he claimed the amount against the tenant, the landlord said because he had had to pay for repair of the window.

The tenant says that when she and her family returned home from March break, there was a crack in the middle of a picture window. She says the handyman told her it could have resulted from a stone thrown by the lawnmower or from a bird flying into the window. She reported the crack to the landlord, and thinks he reported it to his insurance company.

Replacement lock

The landlord claims \$179.00 for the cost of an electronic lock with a keypad. He says that he left all booklets and manuals for the house in a drawer and advised the tenant where they were at the beginning of the tenancy. The tenant then contacted him on August 5, 2014 to tell him that she did not have a manual to reset the electronic lock and so the landlord would have to buy another. The landlord gave evidence that he could put in a service call to the manufacturer but the service cost would be greater than the cost of replacing the lock. He claims the cost of replacement, on the basis that the tenant must have lost the manual.

The tenant says she took the entire contents of the drawer and placed them in a plastic bag in a closet for the duration of the tenancy. She only looked for the manual toward the end of tenancy when she discovered that the lock code had been given out to various people and not changed at the start of her tenancy. At that point, there was only a manual for the other electronic lock and not this one.

The landlord says the tenant could have advised him sooner if the manual was not present.

Analysis

I accept the tenant's evidence that she moved out of the rental unit effective August 31, 2014 and that she attended a move-out inspection with the property manager on August 31, 2014. I suspect the landlord's statement that he did not know whether the tenant had moved out was disingenuous. I find the landlord did regain possession of the rental unit after the tenant moved out, and I do not need to consider his application for an order of possession.

Unpaid Rent

I accept the tenant's evidence that she delivered a bank draft for June 2014 rent to the landlord's bank on June 9, 2014. Since she had used this method to pay rent previously, and since there is no evidence that the landlord ever told her to not use this method, I find it was an acceptable method of paying rent. I find the tenant paid rent in full for June 2014.

I accept the tenant's evidence that she mailed a bank draft for July and August 2014 rent to the landlord along with her evidence for the hearing. The landlord agrees he received the package. I had no concerns with the tenant's credibility as a witness and she was certain of her evidence. I found the landlord less certain of his evidence and sometimes unclear about the standard of evidence necessary to support his claim. For those reasons, I believe the tenant's statement that she enclosed the bank draft in the package the landlord received. I therefore find the tenant paid rent in full for July and August 2014.

Liquidated Damages

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 this case, the landlord has indicated that his normal costs of re-renting are one half month's rent (\$1,750.00) as well as advertising costs of \$250.00 to \$300.00 and cleaning costs of \$250.00. I do not include the agent "sign-up fee" as that would only be incurred when a new agent is first employed and so is not a normal cost of re-renting. On the landlord's evidence, his expected costs of re-renting are about \$2,300.00. For that reason, I find the amount specified in the liquidated damages clause (\$3,500.00) is not a genuine pre-estimate of the landlord's costs of re-renting. I find that the liquidated damages amount is a penalty

rather than a genuine pre-estimate of loss and for that reason I find the clause to be unenforceable. I dismiss the claim for liquidated damages.

Glass Repair

On the landlord's own evidence, there is no indication that the tenant was responsible for the damage to the glass window. A tenant is only obligated to repair damage that is caused by the actions or neglect of the tenant. For that reason, the claim for compensation for the cost of glass repair is dismissed.

Lock Replacement

The landlord did not provide evidence that establishes, with certainty, that the electronic lock manual was present at the beginning of the tenancy. For that reason, the tenant cannot be held responsible for losing it. The claim for compensation for lock replacement is therefore dismissed.

In summary, I have found that the tenant does not owe the landlord any money. The landlord is therefore ordered to return the tenant's security deposit to her in full. I grant the tenant a monetary order for that amount, which is \$1,750.00. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

I grant the tenant a monetary order of \$1,750.00.

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: September 22, 2014

Residential Tenancy Branch

