



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HOLLYBURN ESTATES LTD.
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 its filing fee for this application from the tenants pursuant to section 72.

The tenant HP attended the hearing. The landlord's agent attended the hearing. The landlord's agent confirmed that she had full authority to act on behalf of the landlord. Both parties were given a full opportunity to be heard, to present their sworn testimony, and to make submissions.

The agent testified that the landlord served the tenants with the dispute resolution package on 21 April 2015 by registered mail. The agent testified that this package included all evidence before me. The agent provided me with a Canada Post tracking number for the mailing sent to the tenant EP. The tenant HP appeared and did not contest service. On the basis of this evidence, I am satisfied that the tenants were deemed served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

Issue(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 and losses 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

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

This tenancy began 1 March 2006. The parties entered into a tenancy agreement dated 28 February 2006. Currently monthly rent is \$1,245.00 and is due on the first. The agent testified that the landlord continues to hold the tenants' security deposit in the amount of \$520.00, which was collected on 20 January 2006.

The tenancy agreement provides for monthly parking charges in the amount of \$30.00. The tenancy agreement also provides for a late fee charge at clause 3.03:

A late fee of \$15.00 shall be added to any payment of rent made after the 3^d day of the month and \$30.00 shall be added to any payment of rent made after the 5th day of the month in which the rent is due. In addition, a Deficient Cheque Fee of \$20.00 shall be charged for each returned cheque.

On 7 April 2015, the landlord served the tenants with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice). The landlord served this notice by posting it to the tenants' door. The 10 Day Notice set out an effective date of 17 April 2015. The 10 Day Notice was given for outstanding rent in the amount of \$1,245.00, which was due 1 April 2015.

The landlord provided me with a copy of the tenants' ledger, which was current to 20 April 2015. The ledger dates from August 2014. On this ledger late fees in the amount of \$25.00 were issued eight times.

The agent testified to the following payments received from the tenants after 20 April 2015:

- 28 April 2015 \$1,000.00
- 1 May 2015 \$300.00
- 12 May 2015 \$300.00
- 22 May 2015 \$500.00
- 29 May 2015 \$500.00

The agent testified that receipts were issued to the tenants for these payments that indicated that the payments were received on the basis of the tenants' "use and occupancy only".

The agent testified that the current ledger balance is \$1,325.00.

At the hearing I asked the tenant HP how many late fees the tenants were charged over the course of their tenancy. The tenant HP could not recall. The agent did not offer the information.

The tenant testified that the tenants are behind on rent and that it is because of circumstances beyond the tenants' control. The tenant HP testified that she hopes that the tenancy will be permitted to continue. The tenant HP testified of the tenants' intent to make two payments in June that would eliminate their rent arrears.

Analysis

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

The landlord issued a 10 Day Notice pursuant to section 46 with a corrected effective date of 20 April 2015.

The tenants failed to pay the outstanding rent within five days of receiving the 10 Day Notice. The tenants have not made application pursuant to subsection 46(4) of the Act within five days of receiving the 10 Day Notice. In accordance with subsection 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 effective date of the notice. In this case, this required the tenants to vacate the premises by 20 April 2015. As that has not occurred, I find that the landlord is entitled to a two-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 two days required, the landlord may enforce this order in the Supreme Court of British Columbia.

The landlord has applied for a monetary order in the amount of \$1,300.00. The ledger and testimony provided to me indicates that the arrears amount is composed of rent, parking fees, and late charges.

Subsection 7(1) of the *Residential Tenancy Regulations* (the “Regulations”) provides that a landlord may charge an administration fee of \$25.00 for late payment of rent. Pursuant to subsection 7(2) a late fee charge may only be applied if the tenancy agreement provides for that fee.

Section 5 of the Act prohibits landlords and tenants from contracting out of the Act or Regulations: terms which purport to do this are of no effect.

The tenancy agreement sets out the following with respect to late payments:

A late fee of \$15.00 shall be added to any payment of rent made after the 3rd day of the month and \$30.00 shall be added to any payment of rent made after the 5th day of the month in which the rent is due. In addition, a Deficient Cheque Fee of \$20.00 shall be charged for each returned cheque.

This provision provides for two types of late fees: (1) a \$15.00 late fee for payments received after the third and (2) a \$30.00 late fee for payments received after the fifth. A late fee in the amount of \$25.00 is not provided for anywhere in the tenancy agreement. The late fee provision that purports to charge \$30.00 for a late fee is in violation of the Regulations and is of no force and effect. This amount cannot be corrected to \$25.00 (the greatest amount permitted by regulation). The late fee provision that purports to charge \$15.00 for a late fee is compliant with the Act and Regulations and, as such, is an enforceable term of the agreement.

The landlord has applied late fees in the amount of \$25.00 at least eight times on the information available to me. As determined, this amount is not permitted. Neither the tenant nor the agent provided me with the total number of unlawful late fees charged over the course of the tenancy. Without this information, I am unable to determine what rent amount is outstanding. As such, I dismiss the landlord’s application for a monetary order for unpaid rent and losses, with leave to reapply. Leave to reapply is not an extension of any applicable time limit.

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$50.00 filing fee paid for this application.

The agent testified that the landlord continued to hold the tenants' \$520.00 security deposit, plus interest, paid on 20 January 2006. Over that period \$18.26 in interest is payable. Using the offsetting provisions of section 72 of the Act, I allow the landlord to retain \$50.00 from the security deposit in satisfaction of the monetary award.

Conclusion

The landlord's application for a monetary order for unpaid rent and losses is dismissed with leave to reapply.

The landlord is provided with a formal copy of an order of possession. 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 order the landlord to recover the \$50.00 filing fee from the tenant by allowing the landlord to retain \$50.00 from the security deposit for this tenancy. I order that the value of the security deposit for this tenancy is reduced from \$538.26 to \$513.26.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: June 04, 2015

Residential Tenancy Branch

