



Dispute Resolution Services

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 tenant's 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 tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord was represented by its agents: DD and ET

The agent DD testified that the landlord served the tenant with the dispute resolution package (including all evidence before me) on 25 May 2015 by registered mail. The landlord provided me with a Canada Post customer receipt that showed the same. The tenant confirmed receipt of the dispute resolution package. On the basis of this evidence, I am satisfied that the tenant was served with the dispute resolution package pursuant to section 89 of the Act.

The agent DD testified that the landlord served the tenant with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) on 7 May 2015 by posting that notice to the tenant's door. The tenant confirmed receipt of the 10 Day Notice. On the

basis of this evidence, I am satisfied that the tenant was served with the 10 Day Notice pursuant to section 88 of the Act.

Preliminary Issue – Tenant's Request to Adjourn

At the commencement of the hearing the tenant informed me that she had a doctor's appointment at 1130. The tenant asked if the hearing could be rescheduled. I informed the tenant that I believed we could finish the hearing in that time. The tenant was able to attend the hearing for its entirety. It was not necessary to adjourn the hearing.

Preliminary Issue – Amendment to Landlord's Application

Paragraph 64(3)(c) of the Act allows me to amend an application for dispute resolution.

At the hearing, the landlord asked to amend this application to include unpaid rent for June and July and late fees. The landlord asked to amend its total monetary order sought to \$4,240.00. This amount includes three months of rent at a rate of \$1,385.00 per month and a \$25.00 late fee for each month. As the tenant reasonably ought to have known that these amounts would accrue if she continued to occupy the rental unit, I have allowed the amendment as there is no undue prejudice to the tenant.

Preliminary Issue – Prior Application

The tenant applied to cancel the 10 Day Notice and for various other remedies. That application was set to be heard 25 June 2015. The landlord made this application and asked that the files be joined. They were not.

The tenant did not attend the hearing. The tenant informed me at this hearing that when she received the Notice of a Dispute Resolution hearing in respect of the landlord's application she believed that the hearing had been rescheduled.

In the tenant's absence, the previous arbitrator reached a decision on the tenant's application. As well, the previous arbitrator considered the landlord's oral request for an order of possession. The previous arbitrator dismissed the tenant's claim without leave to reapply and granted the landlord an order of possession. The previous arbitrator's decision was made 25 June 2015.

The agent DD testified that she received a copy of the prior decision last week. The tenant testified that she has not yet received a copy of the prior decision. The agent DD testified that the landlord has not yet served the tenant with the order of possession.

Res judicata is the legal doctrine preventing, among others, the rehearing of an issue that has been previously settled by a judicial decision. There are three elements to this doctrine:

- an earlier binding decision has been made on the issue,
- a final judgment on the merits has been made, and
- the involvement of the same parties.

Section 79 of the Act grants a party the ability to apply for a review of a decision of this Branch. A decision or an order of the Branch may be reviewed only on one or more of the following grounds:

- (a) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control;
- (b) a party has new and relevant evidence that was not available at the time of the original hearing;
- (c) a party has evidence that the director's decision or order was obtained by fraud.

As the tenant did not appear at the previous hearing, the tenant could apply for a review on that basis. (I am not suggesting that a review would necessarily be granted.) Because of this ability to apply for review, I find that the decision made 25 June 2015 is not yet final. As such, I do not consider myself bound by the findings of the previous arbitrator. However, as will be seen, this is of little effect as I do not disagree with any of the previous arbitrator's findings of fact.

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 tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

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 April 2015. The parties entered into a tenancy agreement dated 26 March 2015. Monthly rent of \$1,385.00 is due on the first. The landlord continues to hold the tenant's security deposit in the amount of \$692.50, which was collected at the beginning of this tenancy.

I was provided with a copy of the written tenancy agreement. Clause 3.03 provides for a late fee of \$25.00 for payment of rent after the fifth day of the month.

On 7 May 2015, the landlord issued the 10 Day Notice to the tenant. The 10 Day Notice was dated 7 May 2015 and set out an effective date of 17 May 2015. The 10 Day Notice set out that the tenant failed to pay \$1,385.00 in rent that was due on 1 May 2015.

The agent DD testified that the tenant has not paid any rent for May, June or July. The agent DD testified that she was not aware of any reason that would allow the tenant to deduct any amount from rent. The tenant admits she did not pay these amounts, but submits that she was entitled to deduct amounts from rent because of her dispute with the landlord.

The landlord seeks a total monetary order in the amount of \$3,587.50:

Item	Amount
Unpaid May Rent	\$1,385.00
Unpaid June Rent	1,385.00
Unpaid July Rent	1,385.00
Late Fees (x3)	75.00
Retain Security Deposit	-692.50
Recover Filing Fee	50.00
Total Monetary Order Sought	\$3,587.50

Analysis

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

There are various provisions of the Act that permit a tenant to deduct amounts from rent:

- Subsection 19(2) permits a tenant to deduct amounts from rent to recover the excess amounts of a security deposit that did not comply with the Act.

- Subsection 33(7) permits a tenant to deduct amounts from rent for the costs of emergency repairs.
- Subsection 43(5) permits a tenant to deduct the amount of a rent increase which did not comply with the Act from rent.
- Subsection 51(1.1) permits a tenant to deduct one month rent where the landlord has issued a notice to end tenancy pursuant to section 49.
- Subsection 65(1) and subsection 72(2) permit a tenant to deduct rent to recover an amount awarded in an application before this Branch.

There are no other deductions from rent permitted under the Act or regulations. The tenant has not provided me with any evidence that would entitle her to deduct any amount from rent for any of the above-noted reasons. As such, the tenant was responsible for paying her rents due 1 May 2015, 1 June 2015 and 1 July 2015.

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 agent testified that the tenant failed to pay rent for May. The tenant admits that she did not pay May's rent. As the tenant has failed to pay her rent in full when due, I find that the 10 Day Notice issued 7 May 2015 is valid. As the 10 Day Notice is valid, the landlord was entitled to possession of the rental unit on 20 May 2015, the corrected effective date of the 10 Day Notice. As this date has now passed, the landlord is entitled to an order of possession effective two days after it is served upon the tenant(s).

The tenant admits that she has not paid rent for May, June or July. I find that the landlord is entitled to recover these amounts. I issue a monetary order in the landlord's favour in the amount of \$4,155.00, to enable the landlord to recover unpaid rent from the tenant.

The landlord applied to recover three months' of late fees from the tenant. Paragraph 7(1)(d) 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) of the Regulations a late fee charge may only be applied if the tenancy agreement provides for that fee. The tenancy agreement provides for this fee at clause 3.03. I find that the landlord is entitled to charge the fee. I find that the tenant has paid rent late on three occasions. The landlord is entitled to recover \$25.00 per occasion.

The landlord has applied to retain the tenant's security deposit to satisfy the monetary order. Using the offsetting provisions of section 72 of the Act, I the landlord is permitted to retain the security deposit in partial satisfaction of the monetary award.

As the landlord has been successful in its application, I order that it is entitled to recover its filing fee from the tenant.

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$3,587.50 under the following terms:

Item	Amount
Unpaid May Rent	\$1,385.00
Unpaid June Rent	1,385.00
Unpaid July Rent	1,385.00
Late Fees (x3)	75.00
Retain Security Deposit	-692.50
Recover Filing Fee	50.00
Total Monetary Order	\$3,587.50

The landlord is provided with this order 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 this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

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.

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: July 09, 2015

Residential Tenancy Branch