



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding FIRSTSERVICE RESIDENTIAL BC 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;
- authorization to recover its filing fee for this application from the tenants pursuant to section 72.

The tenants did not attend this hearing, although I waited until 1113 in order to enable the tenants to connect with this teleconference hearing scheduled for 1100. The landlord's agent attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The agent testified that the landlord served the tenants with the dispute resolution package on 2 July 2015 by registered mail. The agent provided me with a Canada Post tracking numbers that showed the same. The agent testified that the packages were returned to sender as the tenants failed to retrieve the mailings. The agent testified that, to the best of her knowledge, the tenants were occupying the rental unit when the mailing was sent. On the basis of this evidence, I am satisfied that the tenants were deemed served with the dispute resolution package pursuant to paragraph 89(1)(c) and section 90 of the Act.

Preliminary Issue – Landlord’s Amendment

At the hearing the agent informed me that, at some point prior to 5 August 2015, the tenants vacated the rental unit. The agent had attempted to contact the tenants to secure payment of rent, but the agent believed that the tenants were avoiding her calls. As possession of the rental unit had returned to the landlord, the agent asked to amend the claim to withdraw the request for an order of possession as the issue was moot. As there is no prejudice to the tenants in allowing this amendment, it was granted.

Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) establishes that evidence from the applicant must be received by the respondent not less than 14 days before the hearing.

The landlord provided evidence in support of an amendment. The agent testified that the amended evidence was not provided to the tenants. As the landlord has not served the tenant with the proposed amendment or attached evidence, I am exercising my discretion to refuse the amendment as the amendment unduly prejudices the tenants. The tenants are entitled to be provided with the documents to determine whether or not they wish to speak to the various allegations against them.

Issue(s) to be Decided

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 tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the agent, 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 November 2014. The parties entered into a written tenancy agreement dated 29 October 2014. The tenancy agreement was for an initial fixed-term of one year. Monthly rent of \$825.00 was due on the first. The landlord continues to hold the tenants’ security deposit in the amount of \$412.50, which was collected at the beginning of the tenancy.

On 10 June 2015, the landlord served the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (10 Day Notice) to the tenants by posting that notice to the tenants’

door. The 10 Day Notice set out an effective date of 23 June 2015. The notice set out that it was given as the tenants had failed to pay rent in the amount of \$2,475.00 that was due 1 June 2015. This amount included rent arrears for April, May and June.

The tenants did not apply to dispute the 10 Day Notice.

The agent testified that the landlord has not received any amount towards the rent arrears from the tenants.

The landlord claims for \$3,300.00:

Item	Amount
Unpaid April Rent	\$825.00
Unpaid May Rent	825.00
Unpaid June Rent	825.00
July Rental Loss	825.00
Total Monetary Order Sought	\$3,300.00

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.

The landlord was entitled to rent due 1 April 2015, 1 May 2015, and 1 June 2015 under the tenancy agreement. The agent provided sworn and uncontested testimony that the tenants failed to pay rent for April, May and June. On the basis of this evidence, I find that the landlord had proven its entitlement to these rent arrears.

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 tenant to vacate the premises by 23 June 2015.

The landlord claims a rental loss for July. *Residential Tenancy Policy Guideline*, "3. Claims for Rent and Damages for Loss of Rent" provides guidance in determining damages in an application such as the landlord's:

These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant

of the Act or tenancy agreement. ...[A]s a general rule non-payment of rent is considered to be a fundamental breach.

If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice. ...

On the evidence before me, I find that the tenants fundamentally breached the tenancy agreement by failing to pay rent due 1 June 2015. I find that the landlord's application dated 29 June 2015 provides the tenants with sufficient notice that the landlord has claimed for this loss.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, regulations or a tenancy agreement, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

The agent has testified that the tenants avoided the agent. The agent testified that she did not know whether or not the tenants had vacated the rental unit. Pursuant to subsection 57(2) of the Act a landlord must not take actual possession of a rental unit that is occupied by an overholding tenant unless the landlord has a writ of possession issued under the Supreme Court Civil Rules. An overholding tenant is a tenant who continues to occupy a rental unit after the tenant's tenancy is ended. The landlord acted prudently by not attempting to take possession of the rental unit before finding out the tenants had vacated. I find that the landlord has established a rental loss for July. This loss was the result of the tenants breaching their fixed-term tenancy agreement. On the basis of the agent's sworn and uncontested testimony, I find that the landlord was unable to further mitigate its loss as the tenants did not communicate when they vacated the rental unit. As such, the landlord is entitled to the full amount of its proven loss: \$825.00.

The landlord applied to keep the tenants' security deposit. I allow the landlord to retain the security deposit in partial satisfaction of the monetary award. No interest is payable over this period.

As the landlord has been successful in this application, it is entitled to recover the \$50.00 filing fee from the tenants.

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$2,937.50 under the following terms:

Item	Amount
Unpaid April Rent	\$825.00
Unpaid May Rent	825.00
Unpaid June Rent	825.00
July Rental Loss	825.00
Offset Security Deposit Amount	-412.50
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	\$2,937.50

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.

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: August 28, 2015

Residential Tenancy Branch