Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF, O

Introduction

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

- 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;
- authorization to recover their filing fee for this application from the tenant pursuant to section 72; and
- an "other" remedy.

The landlords did not set out any specific "other" remedy that they sought.

All named 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.

On 14 July 2015, the landlords served the tenant with the dispute resolution package in person.

The landlords claim for $2,330.00:

Item	Amount
Revocation of Subsection 51(1) Compensation	$500.00
July Rent	500.00
Application Fee BCSC	80.00
Bailiff	1,000.00
Cleaning	100.00
Change the Locks	100.00
Filing Fee	50.00
Total Monetary Order Sought	**$2,330.00**

Request to Join Matters and Consider Evidence

At the hearing, the tenant asked that her matter set to be heard 15 June 2016 be joined with this application. The tenant filed her application 25 November 2015.

The tenant submits that these matters should be heard together as they are in respect of similar subject matter. The tenant submits that she was unable to file earlier as she had to move, difficulties communicating with her assistance worker, and health issues (including brain injury).

Submitted with the tenant's application were some eighty pages of additional material. These pages included some material that was submitted on time in response to the landlord's application. The tenant asked that I consider this evidence in my determination of this matter.

I informed the parties at the hearing that I would not be joining the matters or considering the evidence. These are the reasons why I refused the tenant's application to join her application or admit her late evidence.

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. Rule 3.15 of the Rules sets out that a respondent must receive evidence from the applicant not less than 7 days before the hearing. The definition section of the Rules contains the following definition:

> In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, qualified by the words “not less than”, the last day for the tenant to file and serve evidence in support of her application was 16 November 2015. In accordance with rule 3.15 and the definition of days, the last day for the tenant to file and serve additional evidence in reply to the landlords’ application was 23 November 2015. The tenant did not provide the package until 25 November 2015.

It follows that the application must be filed and served prior to the hearing so that the evidence requirements in rules 3.14 and 3.15 can be met.

This evidence was not served within the timelines prescribed by rule 3.14 or rule 3.15 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

I examined the proposed evidence to determine the possible prejudice to the tenant in not considering the evidence. The tenant was permitted to make submissions at this hearing, so there is no prejudice to the tenant in excluding her written statements as she was capable of presenting the same orally at the hearing. The vast majority of the documentary evidence contained in the tenant’s package related to her application. As such, she is not prejudiced by this exclusion as the evidence would not be helpful to me in the determination of the landlord’s claim on its merits.

In this case, the tenant’s application raises multiple new issues to which the landlords were entitled to respond. The tenant had nearly six months to comply with the timeline for filing. While I am sympathetic to the tenant’s complicated personal circumstances, I find that it would unduly prejudice the landlords to admit any of this evidence or join the applications.

Amendment

The landlords filed an amended monetary order worksheet on 27 November 2015 for a hearing 1 December 2015. The tenant was not served with the amendment. The amendment sought the following monetary amount:

Item	**Amount**
Revocation of Subsection 51(1) Compensation	$500.00
July Rent	500.00
Application Fee BCSC	120.00
Broken Window	464.18
Loss of Use of Suite	1,000.00
Electronic Equipment	150.00
Filing Fee	50.00
Total Monetary Order Sought	**$2,784.18**

Paragraph 64(3)(c) allows me to amend an application for dispute resolution. In determining whether or not to allow an amendment, I must consider the possible prejudice to the parties. Further, a party is entitled to have notice of the case it must meet.

On the basis that there is no prejudice to the tenant in allowing the landlords to amend their application to remove the claim for bailiff services, cleaning, and changing the locks, those amendments are permitted. On the basis that the remaining amendments would prejudice the tenant, I have not permitted the remaining amendments.

The landlords were given the option of adjourning the hearing to be heard at the same time as the tenant's application so that the amendment could be dealt with properly. The landlords elected to proceed on the basis of the following monetary claim:

Item	**Amount**
Revocation of Subsection 51(1) Compensation	$500.00
July Rent	500.00
Application Fee BCSC	80.00
Filing Fee	50.00
Total Monetary Order Sought	**$1,130.00**

The decision to reject the amendment does not mean that the landlords cannot attempt reapply for the remaining portions; however, the landlords are cautioned that their claim may be procedurally barred by cause of action estoppel.

Submissions Received after Hearing

The tenant submitted a one page letter to me after the hearing. It is not appropriate to attempt to communicate with me after the hearing. I have not considered her submissions.

Prior Matter

On 3 June 2015, the landlord YC and the tenant attended the tenant's application. That application, among others, was to cancel three notices: a one-month notice, a two-month notice, and a ten-day notice. The landlord requested an order of possession. On 3 June 2015, the landlord was granted an order of possession on the basis of the two month notice for landlord's use. The order was effective 1 July 2015.

Some of the landlords' submissions attempted to reargue this prior decision. I cannot disturb the findings or order of the prior arbitrator. Subject to specific rights of review, the prior arbitrator's decision is final and binding on the parties.

Issue(s) to be Decided

Are the landlords entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Are the landlords entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Are the landlords 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 landlords' claim and my findings around it are set out below.

This tenancy began 15 April 2011. Monthly rent was $500.00. The tenant provided a handwritten receipt setting out that she provided $250.00 to the landlords as a security deposit. The landlords continue to hold the tenant's security deposit in the amount of $250.00, which was collected at the beginning of the tenancy. The tenancy ended 1 July 2015 pursuant to an order of possession issued by this Branch.

The landlords served the order of possession on the tenant 11 June 2015 by posting that notice to the tenant's door. The tenant admitted receipt of the order.

The tenant provided a transcript of her response to the posted order:

> *Thank you for service of your copy of the Arbitrator's Order of Possession. The Arbitrator's decision is not the final step in this process as you may have or will discover. An Order of Possession must be filed by you in a court of law in order to be enforceable. Ask the RTB. After July 1st (since you do not have possession of the property until then and only then if you file it with the courts, I await service of a Court Order as I understand it. Thanks for service, though.*

On 3 July 2015, the landlords wrote to the tenant demanding vacant possession of the rental unit.

On 14 July 2015, the landlords were granted a writ of possession in the Supreme Court of British Columbia. The landlords testified that this filing cost $120.00. I was provided with a receipt that sets out the same.

The landlords testified that the tenant vacated the rental unit on or about 20 July 2015. The tenant testified that she vacated the rental unit 19 July 2015. The tenant testified that she advised the landlords prior to 1 July 2015 that she would be unable to move.

The landlord ZL testified that the tenant did not pay rent for June or any amount for her use and occupation of the rental unit in July. The tenant agrees that she did not pay rent for June and did not pay any amount for July.

The tenant disputes the landlords' entitlement to the monetary order sought. The tenant submits that she should not have to pay the landlords because of her financial circumstances. The tenant asked me to impose administrative penalties.

Analysis

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. Pursuant to subsection 57(3) a landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit.

I find that the tenant willfully failed to comply with an order of possession in the landlord's favour issued by this Branch. The tenant's complex personal circumstances cannot relieve her from her obligation to comply with that valid order. The tenant seemed to conflate the landlords' inability to take possession with her right to keep possession of the rental unit. The tenant refused to comply with this Branch's order until the landlords obtained a writ of possession. By failing to comply with a validly issued order of this Branch, the tenant caused the landlords to incur costs associated with obtaining possession of the rental unit.

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, 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 landlords provided evidence that in order to obtain its rightful possession of the rental unit as ordered by this Branch, the landlords incurred costs totalling $120.00. The landlords attempted to mitigate this cost by asking the tenant to leave voluntarily. Pursuant to subsection 57(2) and section 67 of the Act, I find that the landlords have proven their entitlement to full amount of their claim for the cost of enforcing the order in the amount of $80.00.

The tenant testified that she vacated the rental unit on 19 July 2015. The landlords testified that the tenant vacated the rental unit on 20 July 2015. On balance, I prefer the evidence of the landlords as I found them to be more credible than the tenant. The tenant admits that she did not pay any amount for her use and occupation in July. On the basis of subsection 57(3) of the Act, I find that the landlords have proven their entitlement to compensation for the tenant's use and occupation of the rental unit for the period 2 to 20 July 2015. The landlords are not entitled to compensation for the period 21 to 31 July 2015 as possession of the rental unit had returned to them for their personal use pursuant to the 2 Month Notice. The landlords are entitled to $306.46 (19 days / 31 days * $500.00) for the tenant's overholding use and occupancy of the rental unit.

Pursuant to subsection 51 a tenant is entitled to receive the equivalent of one month's rent in compensation:

> A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

There is no provision for revoking this compensation under the Act for the tenant's failure to comply. As such, there is no statutory basis for me to order the repayment of this amount.

The tenant's request to waive enforcement against her on the basis of her impecuniosity amounts to a request for equitable relief. This Branch, as a statutory body, is not constituted with jurisdiction to apply the laws of equity. I cannot grant the tenant this relief.

Pursuant to paragraphs 38(1)(d) and 38(4)(b) a landlord may apply to keep amounts from the tenants security deposit at the end of the tenancy. Where the amounts claimed do not relate to damage to the rental unit, the rules in sections 24 and 36 do not apply to extinguish the landlord's right to claim against the deposit amount. On this basis, the landlords are entitled to retain the tenant's security deposit in partial satisfaction of their monetary award.

As the landlords were successful in this application, I find that the landlords are entitled to recover the $50.00 filing fee paid for this application.

I am not a delegate of the Director of the Residential Tenancy Branch for the purposes of imposing administrative penalties.

Conclusion

I issue a monetary order in the landlords' favour in the amount of $186.46 under the following terms:

Item	Amount
July Compensation	$306.46
Application Fee BCSC	80.00
Filing Fee	50.00
Less Security Deposit Retained	-250.00
Total Monetary Order	**$186.46**

The landlords are 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: December 31, 2015

Residential Tenancy Branch