



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### Dispute Codes:

OPB, MNR, MNSD, MNDC, FF

### Introduction

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for an Order of Possession, a monetary Order for unpaid rent or utilities, a monetary Order for money owed or compensation for damage or loss, to retain all or part of the security deposit, and to recover the fee for filing this Application for Dispute Resolution. At the hearing the Landlord withdrew the application for an Order of Possession, as the rental unit has been vacated.

The Agent for the Landlord stated that on October 06, 2016 the Application for Dispute Resolution and the Notice of Hearing were sent to the Tenant at the rental unit, via registered mail. The Landlord submitted Canada Post documentation that corroborates this statement. In the absence of evidence to the contrary I find that these documents have been served in accordance with section 89 of the *Residential Tenancy Act (Act)*; however the Tenant did not appear at the hearing.

On November 02, 2016 the Landlord submitted 25 pages of evidence to the Residential Tenancy Branch. The Agent for the Landlord stated that this evidence was mailed to the Tenant on November 02, 2017 and it was posted on her door on the same date. In the absence of evidence to the contrary I find that these documents have been served in accordance with section 89 of the *Act* and they were accepted as evidence for these proceedings.

### Issue(s) to be Decided

Is the Landlord entitled to a monetary Order for unpaid rent or utilities and to keep all or part of the security deposit?

### Background and Evidence

The Agent for the Landlord stated that:

- this tenancy began on October 07, 2014;

- the tenancy agreement was for a fixed term, the fixed term of which ended on September 30, 2016;
- the tenancy agreement required the Tenant to vacate the rental unit on September 30, 2016;
- the Tenant agreed to pay monthly rent of \$3,600.00 by the first day of each month;
- there is a clause in the tenancy agreement that specifies the Tenant must pay double the rent if she does not vacate the unit at the end of the fixed term;
- the Tenant paid a security deposit of \$1,800.00;
- the Tenant paid a pet damage deposit of \$1,800.00;
- the Tenant did not pay any rent for September, October, November, or December of 2016;
- the Landlord did not claim compensation for unpaid rent for September of 2016 because the Landlord applied the Tenant's security deposit and pet damage deposit to rent owing for that month;
- the Tenant did not agree that her security deposit and pet damage deposit could be applied to rent owing for September of 2016;
- the Tenant did not inform the Landlord when she vacated the rental unit;
- he went to the residential property on November 15, 2016 at which time he thought the unit appeared vacant;
- a notice of inspection was posted on the door of the rental unit; and
- on November 20, 2016 he went into the rental unit and concluded that the unit had been vacated.

The Landlord is seeking compensation for unpaid rent for October and November of 2016, in the amount of \$7,200.00. The Agent for the Landlord was advised that I am unable to read the term of the tenancy agreement that relates to overholding and he stated that he will re-submit that page of the tenancy agreement prior to the end of the day.

On November 24, 2016 I received the page of the tenancy agreement that refers to over holding. This term reads:

Should the tenant fail to vacate the premise on the day of termination the tenant will be responsible for all costs incurred by the landlord and/or the incoming tenant including but not limited to moving truck costs, hotels or lodging and a rent to be a minimum of those costs plus the current rent time two prorated to time overheld.

The Landlord has applied for unpaid rent for December of 2016. The Agent for the Landlord stated that the rental unit has been re-rented for December 15, 2016.

The Landlord is seeking water charges of \$500.00. The Agent for the Landlord stated that the Tenant was required to pay the water bill during the tenancy. He stated that the Landlord has not received the most current water bill but it is typically around \$500.00.

### Analysis

On the basis of the testimony of the Agent for the Landlord and the tenancy agreement that was submitted in evidence, I find that the Landlord and the Tenant entered into a fixed term tenancy agreement that required the Tenant to vacate by September 30, 2016, for which the Tenant agreed to pay monthly rent of \$3,600.00 by the first day of each month.

On the basis of the undisputed evidence I find that the Tenant had not vacated the rent by the time rent was due on October 01, 2016 and November 01, 2016. As the Tenant was still occupying the rental unit on those dates I find that she was obligated to pay rent on those dates, in the amount of \$3,600.00 per month.

Section 40 of the *Act* stipulates that a “rent increase” does not include an increase in rent that is for one or more additional occupants and is authorized under the tenancy agreement by a term referred to in section 13 (2) (f) (iv) of the *Act*, which relates to a rent increase for additional occupants. I find that the term in the tenancy agreement that requires a tenant to pay double the rent if the tenant does not vacate the rental unit by the end of the fixed term of the tenancy agreement constitutes a rent increase.

I find that the Landlord does not have the right to increase the rent if the tenant does not vacate the rental unit by the end of the fixed term for a variety of reasons, including:

- the Landlord did not give the tenant notice of the rent increase at least 3 months before the effective date of the increase, on the proper form, as is required by sections 42(2) and 42(3) of the *Act*;
- the rent increase exceeds the annual rent authorized by the Residential Tenancy Regulations; and
- there is no evidence that the rent increase was authorized by the director.

I find that the term in the tenancy agreement that requires the Tenant to pay double the rent if she does not vacate the rental unit by the end of the tenancy does not constitute written consent to increase the rent. Rather I find that it is a penalty clause that is only enforceable if the Tenant does not vacate the rental unit at the end of the fixed term of the tenancy.

Section 6(3) of the *Act* stipulates that a term of a tenancy agreement is not enforceable if the term is inconsistent with this *Act* or the regulations; the term is unconscionable; or the term is not expressed in a manner that clearly communicates the rights and obligations under it. I find that the term requiring the Tenant to pay double the rent if she does not vacate the rental unit at the end of the fixed term is inconsistent with section 42 of the *Act* and it is, therefore, unenforceable.

As the term requiring the Tenant to pay double the rent if she does not vacate the rental unit is unenforceable, I dismiss the Landlord's claim for double the rent for October and November of 2016.

As the evidence shows that the rental unit has been vacated and the Tenant is not obligated to pay rent once the rental unit is vacated after the end of the fixed term of the tenancy, I dismiss the Landlord's application for unpaid rent for December of 2016.

Rule 6.2 of the Residential Tenancy Branch Rules of Procedure stipulates that the hearing is limited to matters claimed on the application unless the arbitrator allows a party to amend the application. I decline to consider an application for lost revenue for December of 2016 as the Landlord has not clearly informed the Tenant that she will be seeking lost revenue for the month of December. Given that the Tenant did not attend the hearing and the Tenant had no prior knowledge that the issue of lost revenue might be considered at the hearing, I do not consider it reasonable to amend the Application to include a claim for lost revenue for December of 2016. The Landlord retains the right to file another Application for Dispute Resolution claiming compensation for lost revenue.

As the Landlord has not informed the Tenant that she will be seeking compensation for unpaid rent for September of 2016, I decline to consider a claim for unpaid rent for that month. Given that the Tenant did not attend the hearing and the Tenant had no prior knowledge that rent for September might be considered at the hearing, I do not consider it reasonable to amend the Application to include a claim for unpaid rent from September of 2016.

Section 38(4) of the *Act* stipulates that a landlord may retain an amount from a security deposit or a pet damage deposit if, at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant or, after the end of the tenancy, the director orders that the landlord may retain the amount. As there is no evidence that the Landlord has written authority from the Tenant or the director to apply the security deposit and pet damage deposit to rent, I find that the Landlord does not have the right to apply these deposits to rent owing for September of 2016. I therefore find it appropriate to apply these deposits to rent owing for October and November of 2016.

On the basis of the undisputed evidence I find that the Tenant is obligated to pay for water charges incurred during the tenancy. I find that the Tenant is not obligated to pay those charges until she is presented with a water bill. As the Landlord has not yet received a water bill, which the Agent for the Landlord estimates will be \$500.00, I dismiss the Landlord's claim for \$500.00. The Landlord retains the right to file another Application for Dispute Resolution seeking compensation for water charges once a bill for those charges is received.

I find that the Landlord's application has merit and that the Landlord is entitled to recover the cost of filing this Application for Dispute Resolution.

Conclusion

The Landlord has established a monetary claim, in the amount of \$7,300.00, which includes \$7,200.00 in rent for October and November of 2016 and \$100.00 for filing this Application. Pursuant to section 72(2) of the *Act*, I authorize the Landlord to keep the Tenant's security deposit of \$1,800.00 and pet damage deposit of \$1,800.00 in partial satisfaction of the monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the balance of \$3,700.000. In the event the Tenant does not comply with this Order it may be served on the Tenant, filed with the Province of British Columbia Small Claims 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: November 25, 2016

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Residential Tenancy Branch