



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPR MNR MNSD MNDC FF DRI CNR MNDC OLC

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlords requested:

- an Order of Possession for non-payment of rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67;
- authorization to retain the tenant’s security deposit in partial satisfaction of the monetary order requested, pursuant to section 38;
- a monetary order for compensation for money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72 .

The tenant requested:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- cancellation of the landlords’ 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- a determination regarding their dispute of an additional rent increase by the landlords pursuant to section 43; and
- an order requiring the landlords to comply with the *Act*, regulation or tenancy agreement pursuant to section 62.

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.

Both parties confirmed receipt of each other’s applications for dispute resolution hearing package (“Applications”) and evidence. In accordance with sections 88 and 89 of the *Act*, I find that both the landlords and tenant were duly served with the Applications and evidence.

The landlords provided undisputed testimony that the tenant was personally served with the 10 Day Notice, with an effective date of June 13, 2017, on June 3, 2017. In accordance with section 88 of the *Act*, I find that the tenant was duly served with the 10 Day Notice on June 3, 2017.

Issue(s) to be Decided

Should the landlords' 10 Day Notice be cancelled? If not are the landlords entitled to an Order of Possession for unpaid rent?

Are the landlords entitled to monetary compensation for unpaid rent?

Are the parties entitled to the monetary orders for which they have applied?

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?

Is the tenant entitled to a determination regarding their dispute of an additional rent increase by the landlords?

Is the tenant entitled to an order requiring the landlords to comply with the *Act*, regulation or tenancy agreement?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This month-to-month tenancy began on August 1, 2013. The landlords collected a security deposit of \$550.00, and still hold that deposit. This tenancy pertains to a two level house, and three tenancy agreements were signed between August 2013 and the present. The tenant still resides in the upstairs portion of the house.

The landlords testified that three tenancy agreements have been signed during this tenancy, all three of which were submitted in the landlords' evidence. The first agreement was for a month-to-month tenancy commencing August 1, 2013, with the upstairs portion of the home rented to the tenant for \$1,100.00 per month, payable on

the first of the month. Utilities were not included, and the cost was shared between all occupants in the entire home. The second tenancy agreement was for a month-to-month tenancy commencing on September 1, 2015, with monthly rent set at \$1,400.00, payable on the first of the month, and allowed the tenant to rent the entire home. The landlords had approached the tenant with the offer to rent the entire home when the downstairs tenant had moved out, with the agreement that the tenant could sublet the house to other tenants in order to subsidize his own rent. In January 2017, the landlords notified the tenant with their intention to move back into the basement portion of the home as their landlord was ending their tenancy. The landlords directed the tenant to give a 2 Month Notice to End Tenancy for Landlord's Own Use to the tenants he had sublet the downstairs portion of the house to, and the landlords would move back in. The tenant gave a 2 Month Notice to his tenants, and they had moved out early at the end of February, 2017. On March 1, 2017 the landlords had the tenant sign a new tenancy agreement for \$900.00 per month, plus the cost of utilities for the entire home. The tenant was asked to move upstairs, and the landlords moved into the bottom portion of the home.

The landlords are seeking an Order of Possession, as well as a Monetary Order for \$650.00 as outlined in the table below and in the landlords' Application:

Item	Amount
Unpaid Rent for May 2017	\$200.00
Unpaid Rent for Jun 2017	900.00
Recovery of Filing Fee	100.00
Less Security Deposit	-550.00
Total Monetary Order Requested	\$650.00

The tenant did not dispute that he withheld \$1,100.00 in rent. The tenant did not dispute that he had signed these three tenancy agreements, but testified that issues had arisen when the landlords had ordered him to give his tenant a 2 Month Notice, and forced him to sign the third agreement in order to continue the tenancy. The tenant testified that he had entered into the second agreement in September of 2015, and had sublet to at least four different tenants, all of whom paid him \$800.00 in monthly rent. The tenant was able to subsidize the \$1,400.00 monthly rent with the money he had made subletting the downstairs portion of the home. When the landlords demanded that he issue his tenant a 2 Month Notice, he lost his tenant a month early, and was responsible for paying the \$1,400.00 in monthly rent despite losing \$800.00 in rental income for the months of January and February 2017. The tenant admitted in the hearing that one of

his tenants did not pay rent on time, and was given a 10 Day Notice by him. The tenant was unclear about the dates and duration of the tenancies as he did not maintain a record of them. The tenant requested monetary compensation of \$1,600.00 for these two months of lost rental income.

The tenant testified that he had entered into the third agreement for March 1, 2017, with monthly rent set at \$900.00, plus the cost of all the utilities for the entire home, despite his opposition to signing a new tenancy agreement with these different terms. The agreement contained an attached addendum prepared by the landlord, dated March 7, 2017, which stated that in addition to covering his own utilities, the tenant was now also to provide the same utilities “at no cost to whoever will live the basement suite”, and in this case he was now covering the landlords’ utilities.

The tenant testified that the landlords moved into the downstairs portion of the home, and he no longer had the ability to sublet that portion in order to subsidize his rent. The tenant considered this a rent increase from the landlords as he was only paying \$600.00 of the \$1,400.00 monthly rent under the previous tenancy agreement, and now he was paying \$300.00 more. The tenant applied for monetary compensation in the amount of \$300.00 each for the months of March and April 2017, and \$200.00 in compensation for the month of May 2017. The tenant is also seeking compensation for the utilities he had paid under this new agreement for the months of March 2017 through to June 2017 in the amount of \$676.95, plus \$200.00 for the television and internet for March 2017 through to June 2017. The tenant included gas and hydro bills in his evidence. The tenant’s monetary claim is set out in the table below:

Item	Amount
Compensation for Lost Rental Income for January and February 2017 (\$800.00*2)	\$1,600.00
Hydro Bill for March-April 2017	125.35
Gas Bill for April-June 2017	551.60
Compensation for overpayment of rent for March and April 2017	600.00
Compensation for overpayment of rent for May 2017	200.00
Cost of tv/internet for March – June 2017	200.00
Total Monetary Order Requested	\$3,276.00

In addition to the monetary compensation requested by the tenant, the tenant applied to cancel the 10 Day Notice as he was forced to enter into the new tenancy agreement against his own wishes.

Analysis

Section 26 of the Act, in part, states as follows:

Rules about payment and non-payment of rent

26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

The tenant did not dispute the fact that he had failed to pay the full rent due on June 8, 2017, within five days of being deemed to have received the 10 Day Notice. The tenant made an application pursuant to section 46(4) of the *Act*, within five days of being deemed to have received the 10 Day Notice, to cancel the 10 Day Notice, stating that the landlord had imposed on him an illegal rent increase, and that he was only responsible for a portion of the rent, specifically \$600.00 as that was the portion that he was paying under the second tenancy agreement after subletting the downstairs suite to tenants.

Both parties signed the latest tenancy agreement on March 21, 2017, with an attached typed addendum dated March 7, 2017. The rent is clearly set at \$900.00 per month with the signed addendum that stated the tenant was to “cover your own electricity, gas, cable, and internet. You will also provide the same utilities/service at no cost to whoever will live at the basement suite”. I find that the tenant had signed all three tenancy agreements. He never filed an application for dispute resolution in regards to these tenancies, nor did he apply for a determination regarding the landlord’s alleged failure to abide by the *Act*. I find that the tenant was bound by all three agreements, with monthly rent set at \$1,100.00, \$1,400.00, and \$900.00 respectively. The \$1,400.00 rent was for the entire home, while the \$1,100.00 and \$900.00 rent were for only the upstairs portion of the home. On this basis, I find that the landlords had reduced the rent, and not increased it, as stated by the tenant. I find that the tenant was responsible for paying \$900.00 in monthly rent as agreed to on the tenancy agreement, and not \$600.00 as testified to by the tenant.

I find that the tenant had failed to pay the outstanding rent as required by the *Act*, and I am dismissing the tenant’s application to cancel the 10 Day Notice. I find that the 10 Day Notice issued by the landlords is valid, and complies with section 52 of the *Act*.

I find that the landlords are entitled to a two (2) day Order of Possession against the tenant, pursuant to section 55 of the *Act*. The landlords will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit within the 2 days required, the landlords may enforce this Order in the Supreme Court of British Columbia.

The tenant did not dispute the fact that he withheld rent in the amount of \$1,100.00. The tenant did not have the right under the *Act*, or an order by an Arbitrator to withhold any portion of the rent. I, therefore, grant the landlords' application for \$1,100.00 in unpaid rent. The landlords made an application for recovery of the filing fee for this application. As the landlord was successful in their application I am allowing the landlords to recover \$100.00 for the cost of this application.

The landlords continue to hold the tenant's security deposit of \$550.00. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlords to retain the tenant's security deposit of \$550.00 in partial satisfaction of the monetary claim.

The tenant applied for monetary compensation for monetary loss as a result of the landlords' actions. The tenant did not submit copies of any 2 Month Notices to end Tenancy for Landlord's Own Use, tenancy agreements between himself and his tenants, or any documents to support any kind of monetary loss. The tenant also admitted that he failed to keep proper records of these tenancies. Based on the testimony of both parties, I find that the tenant had his own landlord and tenant relationship with his own tenants, and that all tenants are bound by section 26 of the *Act* to pay rent as required by the *Act* and the tenancy agreement. The tenant testified that his tenant had left before the tenancy was to end, and I find that in the absence of any applications made by the tenant in regards to that tenancy, I dismiss the tenant's claim against the landlord for monetary loss arising out of the sublet situation.

The tenant filed an application disputing a rent increase, and the utilities that he had paid under the latest tenancy agreement. The tenancy agreement is signed by both parties, and it is clear that rent would be set at \$900.00 per month, with the tenant responsible for all the utilities as well as the cable and internet. The *Residential Tenancy Act* provides by section 5 that:

This Act cannot be avoided

- 5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 6 (3) provides:

- (3) A term of a tenancy agreement is not enforceable if
- (a) the term is inconsistent with this Act or the regulations,
 - (b) the term is unconscionable, or
 - (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Section 3 of the Residential Tenancy Regulation gives the following definition of "unconscionable":

3 For the purposes of section 6 (3) (b) of the Act [*unenforceable term*], a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.

The landlords had required the tenant to enter into three different tenancy agreements since the beginning of the tenancy in August of 2013 if the tenant wished to continue to reside in the rental unit. The last tenancy agreement contained an addendum which required the tenant to pay all the utilities for both himself, and anyone living in the basement suite, including the landlords. This requirement was for the benefit of the landlords; the tenancy agreement provided that the tenant would be liable for all of the utility costs, including hydro, gas, cable, and internet, regardless of whether the tenant had used all, or a portion of the services himself, and regardless of how many occupants were in the home. The addendum to the latest tenancy agreement cost the tenant \$476.03 for the gas bill, \$125.35 for the hydro bill, and \$200.00 for the television and internet bill for the months of March through to June, 2017, for a total of \$801.38. The tenant testified that he had signed the new tenancy agreement even though he was opposed because he was worried that refusing to do so would mean the end of the tenancy. The question is whether the terms listed in the addendum can be considered oppressive or grossly unfair to the tenant.

In *Murray v. Affordable Homes Inc.*, 2007 BCSC 1428, the Honourable Madam Justice Brown set out the necessary elements to prove that a bargain is unconscionable. She said at p. 15:

Unconscionability

[28] An unconscionable bargain is one where a stronger party takes an unfair advantage of a weaker party and enters into a contract that is unfair to the weaker party. In such a situation, the stronger party has used their power over the weaker party in an unconscionable manner. (**Fountain v. Katona**, 2007 BCSC 441, at para. 9). To prove that the bargain was unconscionable, the complaining party must show:

- (a) an inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which leaves that party in the power of the stronger; and
- (b) proof of substantial unfairness of the bargain obtained by the stronger.

Morrison v. Coast Finance Ltd. (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257 (B.C.C.A.).

[29] The first part of the test requires the plaintiff to show that there was inequality in bargaining power. If this inequality exists, the court must determine whether the power of the stronger party was used in an unconscionable manner. The most important factor in answering the second inquiry is whether the bargain reached between the parties was fair (**Warman v. Adams**, 2004 BCSC 1305, [2004] 17 C.C.L.I. (4th) 123 at para. 7).

[30] If both parts of the test are met, a presumption of fraud is created and the onus shifts to the party seeking to uphold the transaction to rebut the presumption by providing evidence that the bargain was fair, just and reasonable. (**Morrison**, at 713).

[31] The court will look to a number of factors in determining whether there was inequality of bargaining power: the relative intelligence and sophistication of the plaintiff; whether the defendant was aggressive in the negotiation; whether the plaintiff sought or was advised to seek legal advice; and whether the plaintiff was in necessitous circumstances which compelled the plaintiff to enter the bargain (**Warman** at para. 8). The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered. The test in **Morrison** has also been stated as a single question: was the transaction as a whole, sufficiently divergent from community standards of commercial morality? (**Harry v. Kreutziger** (1978), 95 D.L.R. (3d) 231 at 241, 9 B.C.L.R. 166.)

I find that the requirement of the tenant to pay the entire utility bill for the entire house, which includes the landlords' use, is unconscionable within the meaning of the Regulation. I find that there is an inequality of bargaining power between the tenant and the landlords in circumstances where the tenant had no alternative but to accept the proffered agreement or find a new home on short notice in difficult circumstances. I find that the tenant had established that the landlords had repeatedly used this advantage in order to influence the tenant to agree to terms that were more beneficial to the landlords than the tenant. In this case the tenant had agreed to cover not only his share of the utilities, but for all occupants in the entire house, including the portion he was not renting, and which was occupied by the landlords. On this basis, I find that the tenant is entitled to a monetary award for half of the utilities paid over the last term of the tenancy in the amount of \$400.66 as the tenant occupied only half of the entire home.

Conclusion

I dismiss the tenant's application to cancel the landlords' 10 Day Notice. I find that the landlords' 1 Month Notice is valid and effective as of June 13, 2017. I, therefore, grant an Order of Possession to the landlords effective two **days after service of this Order** on the tenant. Should the tenant and any occupant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia

The tenant is granted a monetary award in the amount of \$400.66 in compensation for the landlords' unconscionable expectation that the tenant pay all the utility bills for the entire home. The remainder of the tenant's application is dismissed.

I issue a \$249.34 monetary Order in favour of the landlords under the following terms, which takes in consideration the tenant's monetary award above, and allows the landlords to recover unpaid rent, and also allows the landlords to recover the filing fee for this application while retaining the tenant's security deposit in partial satisfaction of their monetary claim.

Item	Amount
Unpaid Rent for May and June 2017	\$1,100.00
Recovery of Filing Fee	100.00
Monetary Award to Tenant for Unconscionable Term on Tenancy Agreement	-400.66
Security Deposit	-550.00
Total Monetary Order	\$249.34

The tenant must be served with this Order as soon as possible. Should the tenant 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: July 10, 2017

Residential Tenancy Branch