



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNDL-S, MNRL-S, MNDCL-S, FFL, DRI, CNR

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent, for damage to the rental unit, 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 their filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- a determination regarding what the tenant contended was an illegal additional rent increase by the landlord pursuant to section 43.

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.

Since the tenant confirmed that the landlord handed him the 10 Day Notice on November 10, I find that the tenant was duly served with this Notice in accordance with section 88 of the *Act*.

The tenant confirmed that the landlord handed him a copy of the landlord's dispute resolution hearing package and written evidence package on November 17, 2017. I find that the tenant was duly served with these packages in accordance with sections 88 and 89 of the *Act*.

The landlord confirmed that the tenant handed them a copy of the tenant's dispute resolution hearing package on November 24, 2017. I find that the landlord was duly served with this package in accordance with section 89 of the *Act*. The tenant did not submit any written evidence for this hearing, relying almost entirely on the landlord's written evidence in the form of text mail messages to and from the landlord and the landlord's spouse.

During the hearing, the landlord amended their application by removing requests for loss of rent for January 2018. This reduced the landlord's request for a monetary award from \$4,183.58 to \$3,233.30.

Although the tenant had not applied for a monetary award, he contended that he was entitled to a monetary award of double the \$475.00 amount he had overpaid for his initial security deposit for this tenancy. After reviewing the wording of the relevant portion of sections 19 and 20 of the *Act* with the tenant, he understood that any overpayment made, in this case, \$475.00, could be deducted from his unpaid rent.

Issues(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to a monetary award for damage 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? What is the correct charge to be applied for the late payment of rent during this tenancy? 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, including photographs, estimates, miscellaneous text messages and e-mails, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claims and my findings around each are set out below.

On August 31, 2017, the parties signed a one year fixed term Residential Tenancy Agreement (the Agreement) for a tenancy commencing on September 1, 2017. This Agreement contained an Addendum, which the parties also signed, prepared by the landlord. This Addendum contained a clause whereby the parties agreed that the tenant was to pay three per cent per day for each day when the monthly rent had not

been paid in full. Monthly rent is set at \$950.00, payable in advance on the first of each month. The landlord continues to hold a \$950.00 security deposit paid August 31, 2017.

As was noted at the hearing, section 19(1) of the *Act* limits the amount a landlord can charge for a security deposit to one-half of the monthly rent. Pursuant to section 19(2) of the *Act*, I find that the tenant is allowed to recover this \$475.00 by applying this overpayment to the tenant's rent.

The landlord's 10 Day Notice identified \$950.00, as owing as of November 1, 2017. While the landlord's overcharging of the security deposit would reduce the correct amount owing at that time to \$475.00, it is important to note that this amount was payable in advance on November 1, 2017.

The text message written evidence reveals that the tenant was involved in a motor vehicle accident outside the province and advised the landlord on November 2, that he had just been released from the hospital that day and would have to do some banking to look after his monthly rent payment the following day when he returned home. The landlord's spouse responded that the simplest way to arrange for the payment of the outstanding rent would be for the tenant to do by way of an e-transfer of these funds.

On November 5, the landlord's spouse again asked that the tenant make arrangements to pay the outstanding rent. The tenant responded on November 6, advising that he would be unable to pay the required outstanding rent until November 15, as his cheque would not clear until then. The landlord's spouse responded to advise that the late penalty of three per cent per day would result in an overall charge of \$950.00 plus \$427.50, if he paid what the landlord considered owing on November 15.

On November 10, the landlord issued the 10 Day Notice. By November 14, the landlord's spouse was again requesting details as to when and how the tenant would pay the outstanding rent and late charge. The tenant responded that he could not pay the full amount of the \$1,300.00 requested but would have to spread out the payments over time. The landlord's spouse replied on November 14, that they would not allow the tenant to postpone the payments further and needed the payments the following day. The tenant replied as follows that afternoon:

I was also wonder if I could just pay you for the rest of my lease agree to the year in post dated checj's

(as in original)

The landlord's spouse responded a few minutes later in her text message as follows:

No, I don't accept your cheque especially you already have had cheque not clear states. If you can pay the next rental and late fee tomorrow, we can go with you to the bank to help you open the etransfer function and teach you how to use etransfer.

(as in original)

The tenant replied in his text a few minutes later as follows:

I am awareness of the etransfer and I will let you know tomorrow what I'm doing thank you

(as in original)

On November 15, the tenant sent the following text message to the landlord's spouse:

Hi this message is to inform u that my check has still not cleared and I am unable to pay such. An outrageous late fee so I filled a dispute resolution yesterday seeing as u guys served me with a 10day notice and yesterday was five days have a good day

(as in original)

At the hearing, the tenant confirmed that he had not paid any portion of the amount identified as owing in the landlord's 10 Day Notice. He also confirmed that he had not paid anything towards his December 2017 rent, as he believed that his launching of his application for dispute resolution prevented him from having contact with the landlord. The tenant maintained that he had tried to pay for his rent by way of post dated cheques even before November 1. He claimed that the above history of text messages confirmed his assertion that the landlord (and his spouse) had repeatedly refused to accept post dated cheques from him to look after his rent payments throughout the remaining term of his tenancy. He also maintained that the amount requested in the text messages from the landlord's spouse, especially for the late charges, were exorbitant and far in excess of the amount identified as owing in the 10 Day Notice. He said that had he known that only \$475.00 was owing for the remainder of November

2017, he might have been able to pay this outstanding amount when requested by the landlord.

Analysis – Tenant's Application to Dispute a Rent Increase

The tenant has applied to dispute the three per cent per day late fee charge the landlord imposed when he was late in paying his rent for November 2017. The tenant considered this to be a "rent increase" that is not allowed under the residential tenancy legislation. He maintained that this was an unconscionable term of the Addendum to the Agreement the landlord created and required him to sign in order to secure this tenancy. Rather than the \$25.00 maximum fee allowed under the legislation, this resulted in the landlord's attempt to charge the tenant \$427.50 in late fees for the period from November 1 to November 14, 2017.

As outlined at this hearing and in addition to being an unconscionable provision to attach to the Addendum to an Agreement, I find that the landlord's attempted late charge contravenes section 7(1)(d) of the *Residential Tenancy Regulation*, which establishes that a landlord can charge a maximum of \$25.00 to a tenant for the late payment of rent. Therefore, the landlord's charge for the tenant's late payment of rent requested in his application for dispute resolution is hereby reduced from \$427.50 for November 2017 to \$25.00 for November 2017. The landlord is entitled to the same \$25.00 late charge for December 2017.

Analysis – Notice to End Tenancy

Section 26(1) of the *Act* establishes that "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."

In this case, the tenant was correct in believing that the amount identified as owing in the text message from the landlord's spouse was incorrect. Rather than a charge of \$427.50 for the tenant's late payment of rent, the landlord could only charge a maximum of \$25.00 for November 2017. The tenant was also correct in that he was only responsible for paying towards the \$950.00 established as the monthly rent and identified as owing in the 10 Day Notice, and not toward the amount identified in the text messages of the landlord's spouse. I find that the amount identified as owing in the 10 Day Notice as of November 1, 2017 was not \$950.00 as shown on that Notice, but \$427.50, due to the landlord's overcharging for the tenant's security deposit. Despite these deficiencies in the landlord's interaction with the tenant and in managing this

tenancy, I find that \$427.50 was owed by the tenant as of November 1, as monthly rent payments are required in advance. There is no dispute that the tenant had not paid any portion of this \$427.50 by November 10, 2017, when the landlord issued the 10 Day Notice.

Although I have given the tenant's testimony regarding the text message exchanges outlined above careful consideration, I do not find that his explanations vary the fact that the landlord's 10 Day Notice issued on November 10 gave him five days to pay any rent that was legally owing at that time or face eviction for non-payment of rent. His text message on November 14 in which he enquired about whether he could pay the remainder of his rent for the duration of his one year fixed term by way of post-dated cheques remains silent as to the arrangements he was undertaking to pay the amount legally owing at that time to the landlord to comply with the landlord's 10 Day Notice. Whether or not the landlord or his spouse was willing to accept post-dated cheques for the remainder of the tenancy mattered little to the more pressing issue of whether or not the tenant had the funds to pay at least \$427.50, the correct amount owing at that time to the landlord. Had the tenant made a payment of at least \$427.50 on November 15, his application to cancel the 10 Day Notice would likely have been successful. He made no such payment by that date, noting instead in his November 15 text message to the landlord that his cheque still had not cleared, that the late fee was outrageous and that he had filed for dispute resolution the previous day.

Under these circumstances, I find that the tenant has not paid that portion of the amount identified as owing in the landlord's 10 Day Notice that was legally due (i.e., \$427.50) at the time of the landlord's issuance of that Notice. The tenant's failure to pay that amount contravened section 26(1) of the *Act*. While it is of no relevance to this determination, the tenant has also failed to pay anything towards the rent that became owing as of December 1, 2017.

For these reasons, I dismiss the tenant's application to cancel the 10 Day Notice and find that the landlord is entitled to a 2 day Order of Possession. The landlord 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 landlord may enforce this Order in the Supreme Court of British Columbia.

Analysis – Landlord's Application for a Monetary Award

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove

the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities his entitlement to the monetary claim requested.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

There is undisputed evidence that the tenant has failed to pay any rent for November and December 2017. As was noted earlier in this decision, I allow one-half of the tenant's \$950.00 security deposit to be applied towards unpaid rent otherwise owing for November 2017. This results in a monetary award in the landlord's favour in the amount of \$427.50 for November 2017 and \$950.00 for December 2017. I also allow the landlord a monetary award of two late payment fees of \$25.00 for November and December 2017.

As noted at the hearing, the landlord's application for a monetary award for damage arising out of this tenancy is premature at this stage. The landlord has not secured vacant possession of the rental unit, assessed the true state of any damage that may have occurred during the course of this tenancy, and incurred expenses to repair any damage that may have happened. I dismiss this portion of the landlord's claim with leave to reapply.

I allow the landlord to retain the tenant's security deposit in partial satisfaction of the monetary award issued in this decision. Since the landlord has been successful in a number of areas of his application, I allow the landlord to recover his filing fee from the tenant.

Conclusion

I dismiss the tenant's application to cancel the 10 Day Notice without leave to reapply. I allow the landlord's application to end this tenancy on the basis of the 10 Day Notice. I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I find that the correct monthly rent for this tenancy is \$950.00. I find that the late fee charged by the landlord is limited to the \$25.00 per occurrence established pursuant to section 19 (1) of the Act. The landlord's application for a monetary award of \$427.50 for late fees for November 2017 is reduced to \$25.00 for that month, and \$25.00 for the following month.

I issue a monetary Order in the landlord's favour under the following terms, which allows the landlord to recover unpaid rent and the filing fee and to retain that portion of the tenant's security deposit, which the landlord was legally able to charge for this tenancy.

Item	Amount
Unpaid Rent for November 2017 (\$950.00 - \$475.00 for Overcharging of Tenant's Security Deposit = \$475.00)	\$475.00
Late Fee November 2017	25.00
Unpaid December 2017 Rent	950.00
Late Fee December 2017	25.00
Less Legal Amount of Security Deposit	-475.00
Recovery of Filing Fee for Landlord's Application	100.00
Total Monetary Order	\$1,100.00

The landlord is provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

The landlord's application for a monetary award for damage arising out of this tenancy is dismissed with leave to reapply.

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: December 22, 2017

Residential Tenancy Branch