



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, FFL

Introduction

In this dispute, the landlord sought compensation for unpaid rent, various fees, and unpaid utilities under section 67 of the *Residential Tenancy Act* ("Act"). They also sought recovery of the filing fee under section of the Act.

The landlord applied for dispute resolution on August 27, 2019 and a dispute resolution hearing was held on January 6, 2020. The landlord's agent and one of the tenants attended the hearing and they were given full opportunity to speak, to present testimony, to make submissions, and call witnesses. No issues of service were raised.

I have reviewed evidence submitted that met the *Rules of Procedure* and to which I was referred but have only considered evidence relevant to the issues of this application.

Issues

1. Is the landlord entitled to compensation for the various amounts claimed?
2. Is the landlord entitled to recover the filing fee?

Background and Evidence

The landlord's agent (hereafter the "landlord" for brevity) testified that the fixed-term tenancy began December 16, 2018 and was supposed to end on December 31, 2019. However, the tenant gave a one month notice on July 1, 2019 to end the tenancy on August 1, 2019. Monthly rent was \$3,500.00 and the tenants paid a security deposit of \$1,750.00, which the landlord currently holds in trust. A copy of the written tenancy agreement was submitted into evidence, along with a copy of the tenants' notice to end the tenancy.

In this dispute, the landlord seeks unpaid rent for the month of August 2019 in the amount of \$3,500.00 and partial unpaid rent for the month of July 2019 in the amount of \$1,400.00. They also seek \$300.00 for the three months (June, July and August 2019) for which the tenants were late paying the rent. The landlord seeks \$160.68 for a municipal utilities bill for April to June 2019 and \$108.34 for a bill for July 2019. In addition, the landlord seeks a "break lease charge" in the amount of \$3,500.00. They also seek the \$100.00 application fee. All of the above-noted amounts were itemized on a monetary order worksheet which was submitted into evidence.

I note that, and the landlord testified that, the written tenancy agreement includes a one-page addendum, which was submitted into evidence. The addendum states, under term 4, that any cheque returned for any reason by the bank will incur a \$50.00 NSF charge as well as a \$50.00 late payment fee. Term 11 of the addendum states that rent does not cover water, among other items. Finally, term 5 of the addendum states that

A \$3,500.00 break-lease charge will be applied to the tenant if the tenancy lasts less than 12 months; not as a penalty, but to reflect the cost of re-rental, latent damage, and advertising.

The landlord testified that new tenants were quickly found, and they moved in August 1, 2019. While he was unable to answer my question as to how much it cost the landlord to find new tenants, the landlord's agent did say that it took effort and time.

The tenant testified that she had to give notice because she simply did not have sufficient funds to pay for the rent. At first, the landlord said, "no problem," but then decided to pursue her anyway for the money. She commented that, despite the time and effort it presumably took the landlord to find new tenants, the landlord placed a free advertisement on the internet. The new tenants apparently moved in before August 1.

The tenant testified that the landlord did not get around to depositing the rent cheques for July and August until August 1, 2019. She also submitted that the utility bill which the landlord wants to collect on is for a period long after the tenancy ended. Finally, she testified as to various issues with the rental unit, such as problems with the bathroom, the bedroom, and the kitchen.

In final submissions, the landlord stated that the evidence is clear, and the tenant stated the landlord is "all about the money."

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Further, section 67 of the Act states that if damage or loss results from a party not complying with the Act, the regulations or a tenancy agreement, an arbitrator may determine the amount of, and order that party to pay, compensation to the other party.

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria to be awarded compensation:

1. has the respondent party to a tenancy agreement failed to comply with the Act, regulations, or the tenancy agreement?
2. if yes, did the loss or damage result from the non-compliance?
3. has the applicant proven the amount or value of their damage or loss?
4. has the applicant done whatever is reasonable to minimize the damage or loss?

In this case, on the question of minimization, the landlord filed for dispute resolution relatively soon after the tenancy ended, and the amounts were due. As such, for the purposes of my analysis I will find that the applicant did whatever was reasonable to minimize the damage or loss, where applicable.

Unpaid Rent, NSF, and Late Charges

The landlord claims that the tenant owes rent for June, July and August 2019. Regarding the partial claim of \$1,400.00 for a “rent check returned,” the bank statement submitted into evidence does not correlate to the amount claimed. The bank statement shows an amount of \$3,500 being deposited (as a cheque) and then returned a few days later. There is no copy of the cheque in question for June 2019. As the onus is on the landlord to prove his case, and as there is no evidence – such as a copy of a cheque that correlates to amounts reflected in a bank statement – to support the claim for \$1,400.00, I dismiss from consideration this amount sought.

Regarding the two late rent cheques for July and August 2019, both cheques were deposited into the landlord's bank account on August 7, 2019. The tenant testified that the landlord deposited both cheques on August 7, 2019, which suggests that the cheques were provided to the landlord before they were due. In any event, the landlord did not counter the tenant's submissions in this regard and there is no conclusive evidence that the landlord actually received the rent cheques late.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has not met the onus of proving their claim for the \$300.00 in NSF and late rent fees. Those claimed amounts are dismissed.

However, the tenant did not dispute that she owed rent for July and August 2019. On that basis, I find that the landlord is entitled to unpaid rent for July 2019. However, the tenant ended the tenancy effective August 1, 2019, and the landlord had new tenants on or before August 1, 2019. As such, the tenant was and is only liable for rent until the end of the tenancy unless the landlord had suffered additional loss of rent. She had not.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has met the onus of proving their claim for unpaid rent for the month of July 2019 in the amount of \$3,500.00.

Utility Charges

The landlord seeks compensation for two municipal utility bills (water and sewer are combined). The first utility bill indicates that there was an amount of \$160.68 for the billing period April 1 to June 30, 2019. The second utility bill indicates that there was an amount of \$325.01 (if paid after the due date) for the billing period of July 1, 2019 to September 30, 2019; the landlord seeks to recover a third of this amount for the month of July 2019 that the tenants were still in the rental unit. The tenant took issue with the billing period of the submitted utility bills, but they are, I conclude, rather straightforward.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has met the onus of proving their claim for the first amount owed of \$160.68.

However, regarding the second utility bill, while the tenants likely owe a portion of the claimed amount, there is no explanation for why they are liable for one-third of the amount. The first bill divided by three (three months in the billing cycle) works out to \$53.56 per month, whereas the second bill divided by three is \$108.34. This represents an increase of approximately 100%, even without considering the various discounts applied to each bill. Either the new tenants are avid shower and bath takers, or the old tenants ran an inexplicable amount of water before they moved out. Regardless, I am without a fulsome explanation from the landlord as to why the tenants are liable for a third of the amount billed. Simply residing in the rental unit for third of billing period is insufficient for me to find them liable for a third of the billed amount.

While the landlord has proven on a balance of probabilities that the tenants owed an amount under the tenancy agreement, they have not established the actual cost. As such, I shall award nominal damages of \$1.00 for the tenants' failure to pay the utility bill. Nominal damages are awarded to a claimant where a breach of the Act or the tenancy agreement is found but where the claimant is unable to establish the amount.

In summary, the landlord is entitled to claim a total of \$161.68 in unpaid utilities.

“Break Lease Charge”

The tenancy agreement contained a provision whereby if the tenant terminated the fixed-term lease before its natural expiry date that the tenant would owe the landlord a charge. This is not an uncommon charge in tenancy agreements and is known in law as a liquidated damages clause.

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. Further, if the clause is a

penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

If a liquidated damages clause is struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

In this case, I cannot find that the amount of the clause, \$3,500.00, is a genuine pre-estimate of the loss should a tenant breach the tenancy agreement. Given that the monthly rent is \$3,500.00, the amount sought under the breach clause is tantamount to a penalty clause. It matters little that the tenancy agreement states that this is to be considered “not as a penalty, but to reflect the cost of re-rental, latent damage, and advertising.”

Indeed, while the landlord’s agent submitted that it took time and effort to rent the rental unit out after the tenants ended the tenancy, there is little evidence (if any) to establish that it cost the landlord anywhere near \$3,500.00 to do so. The tenant’s evidence regarding a free advertisement would support this.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has not met the onus of proving their claim for liquidated damages as claimed. As such, this aspect of their application is dismissed without leave to reapply.

Filing Fee

Section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee.

As the applicant was successful in their claim for unpaid rent and utilities, I grant their claim for reimbursement of the filing fee in the amount of \$100.00.

Summary of Award and Monetary Order

A total monetary award of \$3,761.68, and a monetary order of \$2,011.68, for the landlord is calculated as follows:

CLAIM	AMOUNT
Unpaid rent	\$3,500.00
Unpaid utilities	161.68
Filing fee	\$100.00
<i>LESS</i> security deposit	(\$1,750.00)
Total:	\$2,011.68

The landlord is entitled to retain the tenants' security deposit in partial satisfaction of the award.

Conclusion

I grant the landlord a monetary order in the amount of \$2,011.68, which must be served on the tenants. The order may be filed in, and enforced as an order of, the Provincial Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: January 6, 2020

Residential Tenancy Branch