



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT, MNDCT

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution, filed on November 18, 2019, in which the Tenant sought monetary compensation from the Landlord for overpayment of utilities and recovery of the filing fee.

The hearing of the Tenant's Application was scheduled for teleconference at 1:30 p.m. on April 16, 2020. The Tenant called into the hearing as did, B.P., an agent for the Landlord. Both were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Tenant entitled to monetary compensation from the Landlord?
2. Should the Tenant recover the filing fee?

Background and Evidence

The Tenant testified that the tenancy began April 1, 2017. She rented the upper unit in a home which also had a basement suite. At the time the tenancy began there were four people living upstairs and two people living in the suite.

The tenancy ended on January 11, 2019.

The Tenant testified that as a term of the tenancy agreement she was required to put the utilities in her name. The Tenant was also responsible for 75% of these utility charges. The Tenant testified that at the time the agreement was negotiated the Landlord informed her that her 75% was based on the fact she had four people living upstairs and there were only two students living in the suite.

The Tenant testified that in July of 2018 a third person moved into the basement suite such that the total utility consumption increased. Despite this, the Tenant continued to be responsible for 75% of the total utilities. In her claim the Tenant sought the sum of \$600.63 representing the amounts she claimed she paid over and above

The Tenant provided copies of the utility invoices as well as a breakdown of charges comparing the usage when two people lived in the basement and when the third person moved in. This breakdown provided by the Tenant supported her claim that the utility usage increased during this time period and that as a consequence, she overpaid by \$600.63.

In response to the Tenant's claim the Agent testified as follows. He confirmed he was not present when the parties negotiated the tenancy agreement. He further confirmed it was the Landlord's position that the tenancy required the Tenant to pay 75% of the utilities irrespective of the number of occupants in the downstairs unit.

The Landlord did not dispute the \$600.63 figure proposed by the Tenant.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, and the *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at:

www.gov.bc.ca/landlordtenant.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Tenant has the burden of proof to prove their claim.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;
- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the *Act* or agreement;
- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- proof that the applicant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

The Tenant sought compensation for an alleged overpayment of the utility bills rendered in her name. She argued that although she agreed to pay for 75% of the utility charges at the beginning of her tenancy, this proportionate share was based on the fact her rental unit had four people living in it and the basement unit had two. She submitted that it was unconscionable that the Landlord require her to put the utility bills in her name when the downstairs renters were also using the utilities. She also argued that she should be compensated for the amounts she overpaid when a third person moved into the basement and she continued to pay 75% of the overall utility charges.

Section 5 of the Act provides that the Act cannot be avoided and reads as follows:

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 of the Act provides that unconscionable terms are not enforceable and reads as follows:

Enforcing rights and obligations of landlords and tenants

- 6 (1) The rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant under a tenancy agreement.
- (2) A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58
- (1) *[determining disputes]*.
- (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.

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.

I find that there was an inequality of bargaining power between the parties such that the Landlord was the stronger party. I also find that the Landlord, as the stronger party in this transaction, took unfair advantage of the Tenant and attempted to contract out of the Act contrary to section 5. It is the Landlord's responsibility to ensure that the tenancy agreement complied with the Act and that any provisions with respect to the payment of utilities were conscionable. The onus was on the Landlord to make a fair arrangement in this regard. I find the requirement that the Tenant have the utilities in her name unconscionable.

At the time the parties entered into the agreement, the Tenant agreed to pay 75% of the utilities. I accept the Tenant's evidence that this was based on the fact that she resided in the upper unit with three others and there were only two people in the basement suite.

I also accept the Tenant's evidence that her 75% share was based on the fact she had twice as many people living upstairs as the downstairs renters. The Landlord did not attend the hearing to dispute this, and his agent was not present when the tenancy agreement was negotiated. I find that when more people moved into the basement suite, her proportionate share became inequitable.

I also accept the Tenant's evidence that the amount of her overpayment equals \$600.63. This amount was supported by the documentary evidence she provided with her claim. Notably, this figure was not disputed by the Landlord. I therefore find the Tenant is entitled to recover this sum from the Landlord.

As the Tenant has been successful in her application, she is also entitled to recover the \$100.00 filing fee for a total award of \$700.63.

Conclusion

The Tenants request for monetary compensation from the Landlord for overpayment of utilities and recovery of the filing fee is granted.

The Tenant is granted a Monetary Order in the amount of **\$700.63**. This Order must be served on the Landlord and may be filed and enforced in the B.C. Provincial Court (Small Claims Division) 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: April 22, 2020

Residential Tenancy Branch