



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNR, MND, MNDC, FF

Introduction

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act* for orders as follows:

1. A monetary order pursuant to Section 67; and
2. An Order to recover the filing fee pursuant to Section 72.

I accept that undisputed evidence of the landlord that the tenant was served with the Application for Dispute Resolution hearing package by way of registered mail followed by personal service on the tenant of an amended claim and evidence package on June 22, 2011.

The tenant did not appear. The landlord was given full opportunity to be heard, to present evidence and to make submissions.

On the basis of the solemnly sworn evidence presented at the hearing a decision has been reached.

Issue(s) to be Decided

Whether the landlord is entitled to monetary orders claimed as well as recovery the filing fee paid for this application.

Background and Findings

The landlord claims the following sums:

January 2011 rent	\$1,175.00
Utilities	472.52
Breaking Lease	1,410.00
Bailiff & Supreme Court Fees	1,844.00
Advertising Fees	103.62
Late Payment Fee	25.00
Show Suite Fee	150.00
Mr. Hand-I-man services (repairs)	2,007.01
K&S Cleaning and Painting	1,195.00
Residential Tenancy Branch Filing Fees	100.00
Total	\$8,482.15

The landlord submits that this tenancy began on or about October 1, 2010 and ended on December 16, 2010 although the tenancy was to have been for a fixed term ending in September 2011.

The landlord submits that the tenant never paid rent. The landlord therefore made application for and received an Order of Possession on December 6, 2010. The landlord testified that despite the issuance and service of that Order the tenant did not vacate the premises. The landlord therefore enforced the Order and engaged the services of the bailiff to complete the eviction which occurred on December 16, 2010. The landlord has submitted receipts for the bailiff and Supreme Court fees totalling \$1,844.00.

With respect to damages and cleaning the landlord says he offered the tenant three options to complete a move-out inspection but she did not attend. The landlord submits the Condition Inspection Reports he prepared at move-in and move-out. At move-out the report lists instances of damage and lack of cleaning. The landlord testified that he discovered that the tenant had left a pan on the stove and nearly "burnt the rental unit down" but did not advise him of this. The landlord testified that after the tenant was removed from the rental unit he discovered that the bathroom door was off its hinges, the furnace had been set at 88 degrees, the smoke detector was hanging by its wires and that the tenant had had repairs attempted on the furnace and various mechanisms on the furnace had been taped up. The landlord testified that in addition to these repairs it was necessary to replace the bathroom sink, smoke alarm, bedroom blinds, a fridge shelf and to repair the furnace and replace the stove from the fire. The landlord submits an invoice from his own company, Mr. Hand-I-Man, dated January 3, 2011 for

“parts and gas” of \$965.01 and “Labour including time shopping and delivering” charges of \$1,045.00 for a total of \$2,007.01.

The landlord also submits an invoice from K&S Painting in the sum of \$1,195.00 for “...cleaning, fixing, garbage removal, washed all floors, tile wood, washed dryer, washer, fridge, dish washer, cleaned kitchen, bathroom, laundry room, filled all holes, sanded primed painted, scrubbed pen off outside fridge, took forever to remove from fridge, tile floor entrance was very dirty, removed all garbage to dump”.

The landlord submitted photographs which he says depicts the poor condition of the rental unit at move-out. However as the photograph were not originals and were faxed copies, the photographs are of poor quality and contain no useful information.

The landlord submits an invoice from Terasen Gas due December 28, 2010 in the sum of \$189.98; an invoice from BC Hydro for the period November 5 to 30, 2010 in the sum of \$329.58; a further invoice from Terasen Gas due January 27, 2011 in the sum of \$225.45 and a further invoice from Terasen Gas due February 22, 2011 in the sum of \$46.17. The landlord seeks \$472.52 as the tenant’s share of these invoices stating that the tenancy agreement sets out that the tenant was responsible to pay her share of the utilities.

With respect to his attempts to re-rent the premises the landlord submits advertising invoices for advertisements placed in various newspapers on January 17, 2011 and January 24, 2011 totalling \$103.62. The landlord testified that he had three parties come to look at the rental unit but he was unable to re-rent the premises until February 1, 2011. The landlord submits that he has been a landlord for many years and it is not possible to secure tenants in the month of January.

With respect to the amount of the rent the landlord submitted that the agreement did contain a provision for a \$200.00 rental reduction if all the terms of the agreement, including paying rent on time, were met by the tenant. However, because the tenant did not meet her obligations the rent remained at \$1,175.00 and this was confirmed in a finding of a Dispute Resolution Officer in her Decision rendered December 6, 2010. In addition to the \$1,175.00 loss of revenue for January the landlord claims a \$25.00 late fee.

The landlord also claims the advertisement fees of \$103.62, a “show suite” fee of \$150.00 and a “lease breaking fee” of \$1,410.00 which he says is 10% of the total lease value and is in accordance with clause 39 of the Tenancy Agreement.

With respect to the “lease breaking fee”, the advertising costs and the “show suite” fee the landlord refers to paragraph 39 of the Tenancy Agreement which states:

If the Tenant wishes to leave the premises early and break this lease agreement, they agree to pay any costs incurred in renting the suite e.g. the advertising bills, loss of rent, lawn cutting, the landlord is entitled to compensation of 10% of the total value of the lease. It is agreed that the Landlord’s time is valuable and therefore the Tenant agrees to pay \$50.00 to the Landlord each time the landlord shows the suite until it is rented. The Landlord has the right of refusal. All compensation will be considered as additional rent.

The landlord argued that this clause entitles him to all of the sums claimed with respect to the costs involved in the rental loss, finding a new tenant and the lease breaking fee. The landlord argued that the 10% lease breaking fee of \$1,410.00 is a charge similar to that which a bank would charge as a penalty for paying out a mortgage before the end of its term he argued that in this case, the tenant ended a fixed term tenancy prior to the end of its term.

The landlord added that because all of these fees have been defined in the Agreement as “rent” and the *Residential Tenancy Act* allows landlords to collect rent, these fees are valid and must be awarded to him.

Findings

January 2011 rental loss: \$1,175.00 and late payment fee of \$25.00

The tenant was evicted from the rental unit by the Bailiffs on December 16, 2010. However, while the cleaning and painting invoice is dated December 30, 2010 and it is reasonable and probable to assume that these jobs were complete by that date, the landlord did not place the first advertisements attempting to secure a new tenant until January 17, 2011. While the landlord claims it is not possible to secure new tenants in January, he has supplied little evidence, except his own testimony, to support that claim. Based on the landlord’s evidence, I find that the landlord has failed to supply sufficient evidence to demonstrate that he took steps to mitigate his damages by trying to secure a tenant sooner than later.

As I have not allowed for the January rental loss I will also not allow for the late payment fee.

This claim for January rental loss and the late payment fees are therefore dismissed.

Utilities \$472.52

The landlord made a previous claim in which he sought and was awarded utilities. The landlord seeks recovery of utility costs once again. With respect to the charges for utilities for November and December I find that the principle of *res judicata* applies. That is that a judgment in a prior suit between the same parties is final not only as to all matters that were in fact offered and received to sustain or defeat the claim but also as to all matters that might have been offered for that purpose.

Further, with respect to the claim for utility charges due in January and February as I have found that the tenant is not responsible for loss of rental income for January it is reasonable too then that she is not responsible for utility costs for that same period or any period thereafter.

The claim for utilities in the sum of \$472.52 is therefore dismissed.

Bailiff & Supreme Court Fees \$1,844.00

I am satisfied that the landlord was forced to pay these sums due to the tenant's failure to vacate the premises in accordance with the Order of Possession.

The claim for the Bailiff and Supreme Court Fees in the sum of \$1,844.00 is therefore allowed.

Breaking Lease Fee \$1,410.00 and Show Suite Fee \$150.00

The landlord refers to paragraph 39 of the tenancy agreement which says:

If the Tenant wishes to leave the premises early and break this lease agreement, they agree to pay any costs incurred in renting the suite e.g. the advertising bills, loss of rent, lawn cutting, the landlord is entitled to compensation of 10% of the total value of the lease. It is agreed that the Landlord's time is valuable and therefore the Tenant agrees to pay \$50.00 to the Landlord each time the landlord shows the suite until it is rented. The Landlord has the right of refusal. All compensation will be considered as additional rent.

This type of paragraph is usually referred to as a "liquidated damages clause". A liquidated damages clause is a clause to which the parties agree in advance the damages to be payable in the event of a breach of the tenancy agreement. The testified that the "lease breaking fee" similar to a penalty which would be charged by a bank when a mortgage is paid out prior to the end of its term. However, Residential Tenancy Act policy states that liquidated damage fees 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. I find that there is insufficient evidence to show how this pre-estimated was calculated but more importantly, based on the landlord's own testimony that the liquidated damages clause is akin to a penalty charged by a bank then I find that the clause is indeed a penalty and it is therefore unenforceable.

With respect to the "show suite fee" once again I find that this fee is unconscionable. The costs of showing a suite and other "leg work" performed to re-rent the premises are the landlord's costs of running his business and should be incorporated into and recovered via the rent received.

The landlord's secondary argument with respect to these fees is that since the fees have been characterized in the tenancy agreement as "rent" and because a landlord has a right to collect rent, that he is entitled to the fees as a form of rent. However, the Residential Tenancy Act defines "rent" as:

"rent" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities...

I find that the "Breaking Lease Fee" and the "Show Suite Fee" that the landlord has claimed are in fact a penalty and a fee respectively and not monies paid in return for the right to possess a rental unit or use the common areas or for services or facilities and they are therefore not "rent".

Further, with respect to this clause, and indeed other clauses contained in the tenancy agreement submitted by the landlord I direct the landlord's attention to the following provisions of the *Residential Tenancy Act*:

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.

and

6 (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.

For the reasons set out above, the claim for the "lease breaking fee" of \$1,410.00 is dismissed as is the claim for the "show suite fee" of \$150.00.

Advertising costs \$103.52

Even though I have found that the landlord did not mitigate his damages sufficiently to be awarded loss of rental income for January 2011, I do find that were it not for the tenant not meeting her obligations under the tenancy agreement the tenancy ended 3 months into a 1 year fixed term and the landlord would not have expected to have to advertise the rental unit so soon after the commencement of this tenancy.

The claim for advertising costs of \$103.52 is allowed.

Mr. Hand-I-man services (repairs)

Although the landlord has provided a "Hand-I-Man" invoice for supplies purchases and labour performed he admits that he is the proprietor of Hand-I-Man services, and while this alone is not a difficulty, the difficulty for I find in granting his claim with respect to the items he says he purchased, he has not submitted receipts for those purchases which total \$965.01. Nor has he supplied an accounting of the charge of \$1,045.00 for labour which time included time spent "shopping" and "delivering". I am therefore not satisfied that the landlord has met his burden of proving this claim.

The Hand-I-Man Services claim in the sum of \$2,007.01 is therefore dismissed.

K&S Cleaning and Painting \$1,195.00

With respect to this claim, once again there is no detailed accounting of the hours spent or the rates charged for the jobs performed. I do note that paragraph 38 of the tenancy agreement states:

"When the Tenant moves out, IF the suite is not cleaned to the standards as when moved in, the Tenant agrees to pay Landlord \$100.00 per hour for clean up and any maintenance"

However, I find this term to be unenforceable and unconscionable.

A tenant is required to maintain "reasonable health, cleanliness and sanitary standards" throughout the rental unit and property. The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for

repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or a guest.

Further, Residential Tenancy Agreements must not include terms that contradict the Legislation. For example, the tenant cannot be required as a condition of tenancy to paint the premises or to maintain and repair appliances provided by the landlord. Such a term of the tenancy agreement would not be enforceable and I find that a term in which the tenant agrees in advance to pay the landlord for “clean up and any maintenance” if the suite is not cleaned to a standard set by the landlord, to be unenforceable.

Finally, I find that the \$100.00 per hour requested is grossly unfair hourly rate for cleaning and maintenance tasks and for this reason, it is unconscionable.

I will accept, however, based on the move-out inspection report that cleaning and repair work was required. I find that cleaning and painting costs of \$25.00 per hour to be reasonable and I will allow for 13 hours for cleaning and maintenance tasks at that rate for a total of \$325.00.

Filing Fees

As the landlord has had some success in this application I find that he is entitled to recover the filing fees paid for this application.

Calculation Summary of Award Monetary Award

January 2011 rent	0.00
Utilities	0.00
Breaking Lease	0.00
Bailiff & Supreme Court Fees	1,844.00
Advertising Fees	103.62
Late Payment Fee	0.00
Show Suite Fee	0.00
Mr. Hand-I-man services (repairs)	0.00
K&S Cleaning and Painting	325.00
Residential Tenancy Branch Filing Fees	100.00
Total	2,372.62

Conclusion

The landlord is provided with a formal copy of an order for the total monetary award as set out above. Should the tenant(s) fail to comply with this Order, this Order may be filed 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 *Residential Tenancy Act*.
