Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution, filed on August 10, 2020, wherein the Tenant sought monetary compensation from the Landlord in the amount of $8,734.00.

The hearing of the Tenant's Application was scheduled for teleconference at 1:30 p.m. on November 30, 2020. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me. The Tenant called in on her own behalf and was assisted by her spouse, J.G. The Landlord's spouse, B.C. called in on his behalf as did the Landlord's Agent, D.M.

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. Is the Tenant entitled to return of double the security deposit paid?

3. Should the Tenant recover the filing fee?

Background and Evidence

In support of her claim the Tenant testified as follows. She stated that this tenancy began August 1, 2015 and ended August 28, 2018. Monthly rent was $2,380.00 and the Tenant paid a $1,150.00 security deposit.

The Tenant testified that she received an email titled “Notice to Vacate” on August 24, 2018 wherein the Landlord informed the Tenant that they needed to move due to extensive water damage at the rental unit. A copy of this email was provided in evidence before me. The Tenant confirmed that the building in which the rental unit was located suffered water damage due to a fire in the neighbouring building.

The Tenant confirmed that she moved from the rental unit on August 28, 2020. The Tenant alleged that she felt pressured by the Landlord to sign a Mutual Agreement to End Tenancy, and argued that the Landlord did not end the tenancy in good faith. She confirmed that she received a Mutual Agreement to End Tenancy from the Landlord on August 28, 2020 as the Landlord gave the document to the Tenant’s then boyfriend (now husband) J.G. but she did not sign this document. The Tenant confirmed that she did not receive a formal 2 month Notice to end Tenancy. She stated that she was informed the property was uninhabitable and confirmed she did not see a formal order from the City that the property had to be vacated.

The Tenant claimed that she tried to talk to the Landlord about moving back in after the repairs were done and believed that she could move back in.

The Tenant further testified that she initially left the rental unit as the fire department told all the tenants to leave for the evening due to the smoke. The next day she received the email from the Landlord informing her that she needed to move out. She confirmed that she did not call the Residential Tenancy Branch to see what her options were, she simply moved out as requested.

The Tenant testified that she provided the Landlord with her forwarding address by text message sent on September 6, 2018 to the Building Manager. When asked if she ever provided this request in the form of a letter, the Tenant initially testified that she did not provided the Landlord with a letter asking for return of her security deposit. The Tenant then testified that she provided the Landlord with her forwarding address in September of 2019. When I informed her that this was beyond the one year required by section 39

of the *Act,* she then stated that she provided the letter in August 2019. That letter was not provided in the evidence before me.

The Tenant confirmed that on October 21, 2018 the Landlord sent her $595.00 by way of an e-transfer; she stated that she did not accept these funds.

The Tenant then testified that she did not ask the Landlord for her security deposit again until she filed for dispute resolution on August 10, 2020.

The Tenant filed a Monetary Orders Worksheet in which she claimed the following:

Legal consultation	$448.00
Storage fees	$430.95
Moving truck	$86.70
Moving truck	$51.54
Increased rent for one year	$1,296.00
Unused portion of rent for August 2018	$264.00
Double the security deposit	$1,056.00
Exemplary damages pursuant to section 87.3-4 of the *Act*	$5,000.00
Total claimed	**$8,634.00**

In terms of the "unused portion of rent", the Tenant confirmed she moved from the property as of August 24, 2020 and as such she sought compensation for 1/3 of the rent paid for the days she was not in occupation.

In terms of "Exemplary damages" the Tenant stated that she sought an administrative penalty pursuant to section 87 as she alleged the Landlord did not act in good faith.

The Tenant's husband, J.G. also testified. J.G. stated that he helped the Tenant draft a registered letter requesting return of the security deposit. He testified that this occurred on August 21, 2019. He stated that they did not provide this letter in evidence because they were informed not to include any evidence which was marked "Without Prejudice".

J.G. also testified that the fire occurred on August 24, 2018. He further stated that the Tenant had plans to go away that weekend and as such he dealt with moving her from the rental unit. He claimed that it was only supposed to be a "temporary moveout". J.G. stated that when he moved the Tenant's items out of the on August 28, 2018, they understood they would be moving back in. He testified that they then received the

Mutual Agreement and the Landlord boarded up the rental building denying anyone access.

J.G. also confirmed the Landlord sent $595.00 to the Tenant on October 21, 2018. The Tenant did not accept these funds as they were instructed by their lawyer not to deposit the funds.

In response to the Tenant's claim, the Landlord's spouse, B.C., testified as follows. She confirmed that the Landlord did not issue a 2 Month Notice to End Tenancy. She stated that there was a fire at the neighbouring rental property on August 23, 2018 which rendered the rental unit uninhabitable. She testified that they did not initially know the scope of the damage but noted that the neighbouring building burned down to ash. She also testified that as a result of the use of fire hoses, the subject rental unit was deemed uninhabitable on the same day due to water damage, smoke and electrical hazard.

B.C. stated that the fire department boarded up the building. B.C. stated that the building is still vacant and there are no tenants. B.C. confirmed that they still own the building.

B.C. testified that they returned $1,785.00 to the Tenant and her two roommates, which included return of the full damage deposit, plus interest, and return of 8 days rent. She stated she tried to send the Tenant's portion of $595.00 to the Tenant on October 21, 2018 but she refused the funds. B.C. testified that the other two Tenants received and accepted their $595.00.

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.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

The Tenant seeks monetary compensation for the cost of her legal consultation. Such administrative costs are not recoverable under the *Act,* as such I dismiss her claim for $448.00.

The Tenant also seeks monetary compensation for her storage fees, moving truck expenses and increased rent for one year. As noted above, to receive compensation the Tenant must prove the Landlord breached the *Act.* In this case, I accept the Landlord's evidence that the rental unit was rendered uninhabitable due to a fire in the neighbouring building. This was not a result of the Landlord's actions or negligence in violation of the *Act.* This was an unfortunate incident which amounted to *frustration* of the tenancy agreement.

Guidance can be found in *Residential Tenancy Branch Policy Guideline 34—Frustration* which provides in part as follows:

> A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.
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> The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

I find that the tenancy agreement (the contract) was frustrated when, without the fault of either party, the contract became incapable of being performed because of the fire in the neighbouring building. I accept the Landlord's evidence and testimony that this fire rendered the rental unit uninhabitable. I further accept her testimony that it was the fire department who boarded up the building. Occupation of the rental unit is a fundamental term of a tenancy agreement; when the Tenant could no longer occupy the unit the tenancy agreement was frustrated and each party was relieved of their obligations pursuant to the contract.

I therefore dismiss the Tenant's claim for storage fees, moving truck expenses and increased rent for a year as I find these expenses were not caused through any fault or negligence of the Landlord in violation of the *Act*. I further note that a tenancy does not guarantee perpetual occupation and as such moving expenses, storage fees and variations in rent are inevitable factors in tenancies.

The evidence confirms that on October 21, 2018, the Landlord returned the Tenant's security deposit, plus interest (even thought interest was not payable) as well as 8 days of rent for the days the rental unit was uninhabitable. I accept the Landlord's testimony that the other tenants accepted these funds. This Tenant refused payment, apparently on the advice of legal counsel.

I find the Tenant is entitled to return of the rent paid for August 24 through August 31. As rent was payable in the amount of $2,380.00, the daily rate is $76.77. As the Landlord has already reimbursed the other two tenants, the Tenant is entitled to 1/3 of

the amount paid for a total of $25.60 per day, or **$204.73.** I award the Tenant compensation in this amount.

The Tenant seeks return of double her security deposit. She testified that she sent her forwarding address by text message to the resident property manager. As discussed during the hearing, text message is not an appropriate form of service under the *Act.*

In any event, I find the Landlord returned the Tenant's security deposit on October 21, 2018. This was well before the Landlord received the Tenant's written request for return of the deposit. In doing so, I find the Landlord complied with section 38 of the *Act.* As such, the Tenant is not entitled to double her deposit pursuant to section 38(6).

After I informed the Tenant that text messaging was insufficient, the Tenant then testified that she sent a letter to Landlord in September of 2019. That letter was not provided in evidence before me. Following this, the Tenant changed her testimony to state she sent the letter in August of 2019. I find it likely the Tenant changed her testimony after I informed her of the one year deadline imposed by section 39 of the *Act*. For clarity, I reproduce that section as follows:

> **Landlord may retain deposits if forwarding address not provided**
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> **39** Despite any other provision of this Act, if a tenant does not give a landlord a forwarding address in writing within one year after the end of the tenancy,
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> (a)the landlord may keep the security deposit or the pet damage deposit, or both, and
>
> (b)the right of the tenant to the return of the security deposit or pet damage deposit is extinguished.

The Tenant's witness, who was her boyfriend at the time the tenancy ended, testified on the Tenant's behalf. While I asked him to remain outside of the room while the Tenant gave testimony, I heard the Tenant and her witness speaking immediately before he was affirmed. He then testified that they sent a letter on August 21, 2018. I give little weight to this testimony as I find it likely it was influenced by the discussion between the Tenant and her witness after she had informed me the letter was sent in September.

The Tenant's witness stated that they did not include the letter as it was marked "Without Prejudice". While the settlement proposals contained in such communication are inadmissible, the Tenant could have introduced the letter for the sole purpose of showing the date it was sent and the Tenant's request for return of her deposit. As the

letter was not provided in evidence before me, I make no finding as to the contents of the letter.

I find the Tenant has submitted insufficient evidence to support a finding that she provided the Landlord with her forwarding address in writing within one year of the end of the tenancy as required by sections 38 and 39, as such, and pursuant to section 39, I find the Landlord is entitled to retain the Tenant's portion of the security deposit.

The Tenant was inconsistent in terms of the reasons for her request for $5,000.00. On her application and during her testimony she alleged the Landlord did not end the tenancy in "good faith". Considerations of good faith are specific to sections 49 and 51 of the *Act* as a tenant may be entitled to compensation if the landlord does not end a tenancy in good faith. Compensation pursuant to section 51(2) is only available to tenants who receive notice pursuant to section 49. The parties agreed that the Tenant did not receive a 2 Month Notice to End Tenancy pursuant to section 49; as such the Tenant is not entitled to compensation pursuant to section 51(2) of the *Act.*

The Monetary Orders Worksheet filed in evidence before me indicated the Tenant sought $5,000.00 pursuant to section 87 of the *Act*. Section 87 deals with "administrative penalties" which are levied by the Director and are payable to the government; they are not payable to parties to a dispute.

For these reasons I dismiss the Tenant's request for $5,000.00 in compensation from the Landlord.

Having been largely unsuccessful in her application, and refusing to accept the reimbursement of rent in October of 2018, I find the Tenant is not entitled to recover the filing fee.

Conclusion

The Tenant's request for monetary compensation is granted in part. The Tenant is entitled to the sum of **$204.73** representing reimbursement of 1/3 of the rent paid for 8 days in August 2018 when the rental unit was rendered uninhabitable due to a fire in the neighbouring rental building.

The balance of the Tenant's claim is dismissed without 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 9, 2020

Residential Tenancy Branch