Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNDCT, MNSD, MNETC, FFT

Introduction

The Tenant seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- a monetary order pursuant to s. 67 for compensation or other money owed;
- an order pursuant to s. 38 for the return of the security deposit and/or the pet damage deposit;
- an order pursuant to s. 51(2) for compensation equivalent to 12 times the monthly rent payable under the tenancy agreement; and
- return of the filing fee pursuant to s. 72

C.P. appeared as the Tenant and was joined by J.J., who acted as her advocate. J.C. appeared as the Landlord.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Tenant advises having served the Landlord with the Notice of Dispute Resolution, which the Landlord acknowledges receiving without objection. I find that pursuant to s. 71(2) of the *Act* that the Landlord was sufficiently served with the Notice of Dispute Resolution.

The Landlord advised having posted his response evidence to the Tenant's door on May 5, 2023. The Tenant acknowledges retrieving the evidence from her door on May 6, 2023.

The Tenant raised issue with respect to the timing of service and the advocate raised issue with respect to the method of service. The Tenant says that since it was posted to the door, she would be found to have received the evidence five days later.

Section 89 of the *Act* provides special rules for service, though this is limited to the application for dispute resolution. The methods of service for evidence, which are set out under the general service provisions of s. 88 of the *Act*, permit service by attaching it to a conspicuous place at the address at which the person resides. In other words, posting the Landlord's evidence to the door is acceptable.

With respect to timing of service, Rule 3.15 of the Rules of Procedure requires respondents to serve their evidence at least seven days before the hearing. Firstly, the Tenant refers to the deemed service provisions set out under s. 90 of the *Act*, which under the circumstances would be three days, not five, as per s. 90(c). Second, s. 90 of the *Act* is only applicable under circumstances where service cannot be confirmed or is denied for dubious reasons. It forms a presumption of service. In this instance, the Tenant confirms receiving the evidence on May 6, 2023, such that I need not apply s. 90. She did receive the Landlord's evidence and within the applicable deadline.

I find that the Landlord served his response evidence in accordance with s. 88 of the *Act* and that the Tenant received it on May 6, 2023.

The Tenant advises having served the Landlord with her evidence on May 1, 2023. The Landlord acknowledges receiving it, though raised issue with the level of disorganization in the documents. After the hearing commenced, it became apparent that the Tenant had not provided the evidence she served to the Landlord to the Residential Tenancy Branch, despite being obliged to do so under Rule 3.14 of the Rules of Procedure. The parties advised that the evidence served was approximately 200 pages.

Despite breach of Rule 3.14 of the Rules of Procedure, I permitted the Tenant to upload her evidence to the Residential Tenancy Branch by the end of the day, barring which I would not review or consider it in these reasons. The Tenant failed to upload her evidence to the Residential Tenancy Branch following my direction. Accordingly, I have not reviewed or considered the Tenant's evidence as it was not provided to the Residential Tenancy Branch in breach of the Rules of Procedure and in breach of her second opportunity to do so following my directions at the hearing.

Preliminary Issue – Tenant's Claim under s. 51(2) of the Act

Pursuant to s. 51(2) of the *Act*, a tenant may be entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement when a notice to end tenancy has been issued under s. 49 and the landlord or the purchaser who asked the landlord to issue the notice, as applicable under the circumstances, does not establish:

- that the purpose stated within the notice was accomplished in a reasonable time after the effective date of the notice; and
- has been used for the stated purpose for at least 6 months.

Through the course of the Tenant's submissions, it became apparent that no notice to end tenancy was served on her pursuant to s. 49 of the *Act*. I would further note that none has been provided to me. When I raised this issue with the Tenant's advocate, she acknowledged it was an issue and that she had not been involved in preparing the Tenant's application.

Rule 2.2 of the Rules of Procedure limits claims to what is stated in the application. This rule sets a basic procedural safeguard such that respondents know the claims being made against them. It ensures that the claims are defined and limited such that a respondent party can respond in kind.

In this instance, I accept the Tenant likely misplead her claim since s. 51(2) of the *Act* clearly does not apply since no notice to end tenancy was issued under s. 49 of the *Act*. However, it is not up to me to correct issues in the Tenant's pleadings, nor do I believe it appropriate to do so under the circumstances as this would constitute a breach on the Landlord's right to procedural fairness. It is the Tenant's application and she ought to be responsible for ensuring that it was properly pled.

Given this, I dismiss the Tenant's claim under s. 51(2) of the *Act* without leave to reapply.

Preliminary Issue – Limitation Issue

At the outset of the hearing, the Landlord submitted that the tenancy ended on September 15, 2020 and the application was generated on September 22, 2022 such that the claims are statute barred.

Section 60(1) of the *Act* sets out that a claim must be made within 2 years of the end of the tenancy except where the *Act* sets another time limit.

Rule 2.6 of the Rules of Procedure establishes when an application is considered to have been made, which is when the application is filed, and the filing fee paid. Review of the information on file shows this was done on September 11, 2022.

Accordingly, I find that the Tenant filed her application within two years of September 15, 2020, such that it is not barred by s. 60 of the *Act*.

Issues to be Decided

1) Is the Tenant entitled to monetary compensation?
2) Is the Tenant entitled to the return of security deposit?
3) Is the Tenant entitled to her filing fee?

Evidence and Analysis

The parties were given an opportunity to present evidence and make submissions. I have reviewed all included written and oral evidence provided to me by the parties and I have considered all applicable sections of the *Act*. However, only the evidence and issues relevant to the claims in dispute will be referenced in this decision.

General Background

The parties confirm the following details with respect to the tenancy:

- The Tenant moved into the rental unit on October 1, 2015.
- The Tenant moved out of the rental unit on September 20, 2020.
- Rent of $1,066.00 was due on the first of each month.
- A security deposit of $475.00 was paid by the Tenant.

I am provided with a copy of the tenancy agreement by the Tenant.

Both parties refer me to a decision of the Residential Tenancy Branch made on September 15, 2020 (the “2020 Decision”), the file number for which is noted on the cover page of this decision. Review of that matter indicates it pertained to the Tenant’s application to dispute a One-Month Notice to End Tenancy, which was ultimately unsuccessful and resulted in an order of possession being granted to the Landlord.

Tenant's Monetary Claim

Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

In this instance, the Tenant's advocate submits that the 2020 Decision was obtained by fraud and resulted in the Tenant suffering disruption and incurring expenses due to the order of possession being effective two days after it was received.

By way of further explanation, the Tenant's advocate advises that the Tenant had submitted an application for review considerations of the 2020 Decision by dropping it off at a Service BC office. I am told by the advocate that the Tenant's review application was not forwarded to the Residential Tenancy Branch and was instead mailed back to her. I am also told that a photograph of the return envelope was taken and put into evidence. Again, I have not been provided with a copy of this photograph.

Section 79(1) of the *Act* permits a party to file an application requesting a review of a decision or order made by the Director. Review applications are limited to three grounds set out under s. 79(2) of the *Act*, one of which is that a party has evidence that the decision was obtained by fraud.

Now assuming for the sake of argument that I accept the Tenant did file a review application in September 2020 that was not forwarded by the Service BC office to the Residential Tenancy Branch, there is nothing I can do about it. Strictly speaking, if that were to have occurred, it would likely be a breach of procedural fairness the remedy for which is application for judicial review at the BC Supreme Court, not by filing an application with the Residential Tenancy Branch.

Secondly, the Tenant's advocate makes allegations that the 2020 Decision was obtained by fraud without evidence to support the allegation. Again, for the sake of argument, let's say I accept that that is true. There is nothing I can do about that. The 2020 Decision is final. Technically, the Director is *functus officio* with respect to the 2020 Decision, which is to say that I, as a delegate of the Director, cannot sit in judgment or appeal of the 2020 Decision. Further, this is not a review application and even if it were, it was filed nearly two years after the tenancy ended such that the time limit for filing the review application established by s. 80 of the *Act* has long since passed.

The Tenant's advocate raised issue with the Landlord moving forward with the eviction process after obtaining the order of possession even though he was notified by the Tenant that she had filed her review application. The Landlord tells me that he contacted the Residential Tenancy Branch who told him they had not received a review application and that he could proceed by obtaining a writ of possession. The Landlord's evidence includes a screenshot of an email dated September 18, 2020 from an information officer with the Residential Tenancy Branch to that effect.

The Tenant's whole monetary claim is premised on my finding that the 2020 Decision was improperly obtained, thus constituting a breach of the *Act* and damages would flow from it. However, such a finding would be a clear contravention of a defined process for either seeking review consideration or by applying for judicial review. The Tenant has done neither in this case.

What is clear based on the evidence provided to me is that the 2020 Decision provided the Landlord with an order of possession. The Landlord took steps to enforce that order of possession after ensuring the Tenant had not filed a review application. It is entirely incongruous to me to suggest that the Tenant is entitled to compensation from the Landlord for moving expenses after she was lawfully evicted from the rental unit.

In addition to the above, I have been provided with no receipts or monetary order worksheet explaining how the Tenant calculated her claim. Indeed, when asked by the Tenant of this at the hearing, the Tenant acknowledges that the evidence package she served on the Landlord did not contain any receipts quantifying her claim. In other words, I have no evidence to support a finding the Tenant sustained a loss in any event.

All this is to say that I find that the Tenant has failed to prove her monetary claim. It is dismissed without leave to reapply.

Tenant's Security Deposit Claim

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the Residential Tenancy Branch. However, a tenant's right to the return of the security deposit may be extinguished if they fail to participate in the move-in or move-out condition inspection as per ss. 24(1) and 36(1) of the *Act*.

In this instance, the Tenant says that she provided her forwarding address to the Landlord by posting it to his door, though could not provide a clear idea of when she did so. The Landlord acknowledges receiving the Tenant's forwarding address, though argued that the Tenant did not participate in the move-out inspection despite being given two opportunities to do so. The Tenant acknowledges receiving requests to conduct the move-out inspection from the Landlord, but says that she is a nurse and was dealing with a high workload in the fall of 2020 due to the COVID-19 Pandemic. She says that she received the requests after the date proposed had passed. The Landlord further says that a written move-in inspection was conducted, and a copy of the move-in report was given to the Tenant. I have not been provided with a copy of an inspection report from either party.

The Landlord's evidence includes correspondence between he and the Tenant dated October 5, 2020 and October 6, 2020 in which he outlines the various options and confirms that he would forego claiming against her for damage to the rental unit if she agreed that he retain the deposit. The Tenant replied that "I reiterate that you know you can keep the damage deposit and this be done" and "If you choose to file to get more money out of me then we will continue into January as that is next available dates for trials. Or you carry on in life and we have no further need for Any discussions or interactions." The Tenant says that she did not agree to the Landlord withholding the security deposit and merely acquiesced due to the circumstances.

In this instance, I accept that the Tenant did provide her forwarding address, though when that took place is uncertain to me. Presumably she did so before the email exchange of October 5th and 6th. In any event, I accept that the Landlord offered the Tenant at least two opportunities to conduct the move-out inspection. I further accept that the move-in inspection was conducted in compliance with s. 23 of the *Act* as the Tenant did not contradict the Landlord's submission on this point at the hearing.

The Landlord must only offer at least two different opportunities for the Tenant to participate. I accept that the Tenant was busy with work, which I can imagine was extraordinarily challenging at the time. However, the *Act* does not permit special consideration for a tenant's work requirements. I find that the Tenant failed to participate in the move-out inspection as required by s. 35(1) of the *Act* such that her right to the security deposit is extinguished by application of s. 36(1).

Accordingly, her claim for her security deposit is also dismissed without leave to reapply.

Conclusion

I dismiss the Tenant's monetary claim under s. 67 of the *Act* without leave to reapply.

I dismiss the Tenant's claim for her security deposit under s. 38 of the *Act* without leave to reapply.

I find the Tenant was unsuccessful and is not entitled to her filing fee. I dismiss her claim under s. 72 of the *Act* for her filing fee 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: May 17, 2023

Residential Tenancy Branch