

## **DECISION**

**Dispute Codes**      MNDC, MNSD, FF

### **Introduction**

This matter dealt with an application by the Tenants for the return of a security deposit and pet damage deposit plus compensation equivalent to the amount of the security deposit and pet damage deposit due to the Landlord's failure to return them within the time limits required by the Act and to recover the filing fee for this proceeding. The Landlord applied for compensation for damage or loss under the Act or tenancy agreement, to recover the filing fee for this proceeding and to keep the Tenants' security deposit and pet damage deposit in payment of those amounts.

The Landlord's agent said she served the Tenants with her hearing package by registered mail on March 16, 2010 which the Tenants received on March 22, 2010 (2 days prior to the hearing of this matter). The Tenants were given an opportunity to adjourn the hearing if they needed an opportunity to respond to the Landlord's evidence, however, they stated that they did not require an adjournment and were prepared to respond to the Landlord's application and evidence in support of it.

### **Issues(s) to be Decided**

1. Are the Tenants entitled to the return of their damage deposit and pet deposit and if so, how much?
2. Is the Landlord entitled to compensation for damages and if so, how much?

### **Background and Evidence**

This month to month tenancy started on May 1, 2009 and ended on October 27, 2009 when the rental property was substantially destroyed by a fire. Rent was \$650.00 per month plus 40% of the utilities for the rental property. The Tenants paid a security deposit of \$325.00 and a pet damage deposit of \$325.00 on April 22, 2009.

#### **The Landlord's Claim:**

The Landlord claims that the Tenants were responsible for the fire and resulting damages to the rental property and as a result, she seeks to recover the \$1,000.00 insurance deductible paid by the owners of the rental property. In support of her position, the Landlord provided a copy of a fire investigation report that concluded that the fire originated in a carport/garage and that "smoking materials were suspected to be the cause of the fire." The Landlord claimed that the Tenants had exclusive use of the garage/carport and that under the terms of the tenancy agreement smoking was not permitted in the "premises." The Landlord argued that this meant smoking was not permitted inside any building on the rental property.

The Landlord also provided a witness statement from another occupant of the rental property who claimed that in the early morning hours of October 27, 2009 after he discovered the fire, one of the Tenants (G.D.F.) admitted to him that he and a friend had been smoking in the garage the previous evening and he had left candles burning. The Landlord also called a witness, C.T., who is an employee of the Landlord, and who stated that she had a telephone conversation with one of the Tenants (G.D.F.) later in the morning on October 27, 2009 and that he apologized for the fire, claimed it was an accident and said that he may not have put out a cigarette properly.

One of the Tenants (G.D.F.) denied that he had a telephone conversation with the Landlord's witness on the morning of October 27, 2009. This Tenant also denied having a conversation with the other occupant of the rental property earlier that day. Instead the Tenant claimed that the other occupant contacted him after the fire, demanded compensation and threatened that if the Tenant did not pay he would make the Tenants' lives miserable.

The Tenants argued that the fire investigation report provided by the Landlord was unreliable because it could have been prepared by anyone and that portions of it (such as the residential address) had been blacked out for privacy reasons. The Tenants admitted, however, that the report contained contact information and that they could have investigated the authenticity of the report but did not do so. The Tenants also admitted that many of the particulars of the report corresponded with the description of the property and the date and time of the fire. In particular, the Tenants admitted that the rental property was a 2 storey building located in Mission, B.C., that the fire originated in a garage located at the south end of the property, and that the fire occurred at approximately 4:00 a.m. on the morning of October 27, 2009.

The Tenants also argued that fire was caused by the Landlord's failure to comply with health, safety and housing standards. In particular, the Tenants claimed that the attached carport/garage was built by a previous tenant without a permit or inspection and that the interior was constructed only of wood panelling. The Tenants argued that the B.C. Building Code requires an addition to a structure to have a fire separation of 5/8" drywall with insulation and caulking. The Tenants noted that the fire investigation report also stated that "a significant fuel load of household items combined with combustible wall paneling inside the garage contributed to the fire load." The Tenants further argued that the garage did not have a smoke alarm or a fire extinguisher.

The Tenants denied that they were responsible for the fire. The Tenants admitted that one of them smoked but denied that they ever smoked in the garage. The Tenants also denied that they had any other form of open flame in the garage. In essence, the Tenants claimed that they had no idea how the fire started and claimed that the building was not locked so that anyone could have gained access.

#### The Tenants' Claim:

The Tenants said they gave their forwarding address in writing to the Landlord on October 29, 2009 but admitted that while it did state the rental unit address, it did not include their names. The Tenants said they did not authorize the Landlord to keep the security deposit or pet damage deposit and that they have not been returned.

The Landlord's agent admitted that she received the Tenants' forwarding address and that even though it was missing the Tenants' names, she knew it was theirs. The Landlord's agent claimed that she could not return the Tenants' deposits within 15 days of the end of the tenancy because there were a number of things that had to be dealt with such as ensuring the Tenants' belongings were removed. The Landlord's agent admitted that everything had been dealt with by November 16, 2009 and the Tenants' deposits still were not returned.

## **Analysis**

### **The Landlord's Claim:**

Although the Tenants argued that the fire investigation report could have been a forgery, I find that there is no evidence to support that argument. In particular, I find that the Tenants had the opportunity to investigate its authenticity but chose not to do so. Consequently, I find that the fire investigation report is an authorized report.

I also do not accept the Tenants' argument that because the address was blacked on the report that it probably did not apply to the rental property. I find that there is sufficient detail in that report to conclude that it was the report of the investigation that was conducted following the fire at the rental unit. Furthermore, I note that the Tenants themselves relied on certain findings in that report to support their position that the Landlord had breach its duty under the Act. Consequently, I find that the fire investigation report submitted as evidence by the Landlord is for the rental property.

The fire investigation report found that the likely cause of the fire was "suspected to be" smoking materials. One of the Tenants denied that he or his spouse or any of their guests smoked in the garage and denied knowing how the fire could have started. The Landlord claimed that this Tenant admitted to 2 different people at the time of the fire or shortly thereafter that he was responsible for the fire. Where the evidence of the Tenants and Landlord differ on this point, I prefer the evidence of the Landlord as I did not find the evidence of the Tenant, G.D.F., on this point to be reliable.

The Tenant denied talking to the Landlord's witness the morning of October 27, 2009 and stated instead that he only left a message that day and much later spoke to the Landlord's agent when she returned his call. The Landlord's agent denied this and said she was not in the office that day and that her telephone records (which were not submitted as evidence) would show that her witness returned the Tenant's call that morning. Furthermore, I note that the Tenants' own timeline evidence states that on October 27, 2009 they "informed (the Landlord) of the fire." Consequently, I find on a

balance of probabilities that one of the Tenants did have a telephone conversation with the Landlord's witness.

The Tenant also denied talking to another occupant of the rental property on the morning of the fire and confessing his role in the fire. The Tenant claimed that only the first paragraph of that statement was true and that the rest of it was untrue. The Tenant also claimed that this person's statement was unreliable because he had threatened to cause problems for the Tenants if they did not pay him some money. However, the part of the witness statement the Tenant claimed was untrue does state that the other occupant asked the Tenants to pay for his insurance deductible as they alleged. Furthermore, I find that the only plausible reason for the other occupant to ask the Tenants to pay for his insurance deductible would be if he had reason to believe that the Tenants were responsible for the fire. Consequently, even if the deponent was seeking money from the Tenants, I do not find that that alone would invalidate his written statement.

I also note that in his initial evidence, the Tenant, G.D.F., claimed that while his spouse smoked, he did not. When asked if he smoked at the time of the fire, the Tenant paused and reluctantly stated that he did. However, later in his evidence, the Tenant denied that he smoked at the time of the fire and claimed that he never smoked. However, having regard to the conclusions contained in the fire inspection report and the evidence of the Landlord's witnesses, I find on a balance of probabilities that one of the Tenants failed to put out a cigarette which started the fire in the garage.

The Tenants also argued that the Landlord was responsible for the damage caused by the fire because the garage was not built to Code. They further argued that had the garage contained a smoke alarm and fire extinguisher, they would have been alerted to the fire and been able to put it out before it caused extensive damage. While this is a possibility, I find that it is speculative and fails to address the fact that the fire would not have occurred in the first place if the Tenants had not left a cigarette smouldering. I also find that this argument fails to address the further finding in the fire inspection report that it was not only the wood panelling but also "a significant fuel load of household items" belonging to the Tenants that contributed to the "fire load." Consequently, even if the Tenants could have put out the fire earlier as they suggested, it is speculative at best to suggest that there would have been no damage or that the damage would have been less than the Landlord's \$1,000.00 insurance deductible.

For all of the above reasons, I find that the Tenants were responsible for accidentally starting a fire in the rental property and under s. 32(3) of the Act, I find that they are liable for reimbursing the Landlord its \$1,000.00 insurance deductible.

#### The Tenant's Claim:

Section 38(1) of the Act says that a Landlord has 15 days from either the end of the tenancy or the date she receives the Tenant's forwarding address in writing (whichever

is later) to either return the Tenant's security deposit and pet damage deposit or to make an application for dispute resolution to make a claim against them. If the Landlord does not do either one of these things and does not have the Tenant's written authorization to keep the security deposit or pet damage deposit then pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit and pet damage deposit.

I find that the tenancy ended on October 27, 2009 and that Landlord received the Tenants' forwarding address in writing on October 29, 2009. I also find that the Landlord did not return the security deposit or pet damage deposit and did not make an application for dispute resolution to make a claim against those deposits until March 12, 2010. I further find that the Landlord did not have the Tenants' written authorization to keep the security deposit and pet damage deposit. As a result, I find that pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit (\$650.00) and double the amount of the pet damage deposit (\$650.00) to the Tenants.

The Tenants also sought to recover rent and utilities they paid for the period October 27 – 31, 2009 in the amount of \$23.81 per day or a total of \$95.22. RTB Policy Guideline #34 (Frustration) states 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 not possible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.....***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.***” (emphasis added)

As I have found that the Tenants were responsible for the fire, I find that they cannot rely on the doctrine of frustration to recover rent for the balance of October 2009 and that part of their claim is dismissed.

As the parties have both made a claim to recover their filing fee for their respective applications, I find that they would be offsetting and therefore make no award of the filing fee. I order pursuant to s. 72 of the Act that the Parties' respective monetary awards be set off and that the Tenants will receive a monetary order for the balance owing of \$300.00.

## **Conclusion**

A monetary order in the amount of **\$300.00** has been issued to the Tenants and a copy of it must be served on the Landlord. If the amount is not paid by the Landlord, the Order may be filed in the Provincial (Small Claims) Court of British Columbia and enforced 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: March 25, 2010.

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Dispute Resolution Officer