Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: CNC

Introduction

On September 29, 2011 Dispute Resolution Officer (DRO) provided a decision on the tenant's Application for Dispute Resolution seeking a monetary order for return of double the amount of the security deposit.

That decision granted the tenants a monetary award as a result, at least in part, of the landlords' absence and therefore undisputed testimony provided by the landlord.

Division 2, Section 79(2) under the *Residential Tenancy Act (Act)* says a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

1. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
2. A party has new and relevant evidence that was not available at the time of the original hearing.
3. A party has evidence that the director's decision or order was obtained by fraud.

The landlords submit in their Application for Review that that they were unavailable at the time due to circumstances beyond their control; that they have new and relevant evidence that was not available at the time of the hearing; and that the tenants obtained the decision and order by fraud.

Issues

The issues to be decided are whether the landlords are entitled to have the decision of September 29, 2011 set aside and a new hearing granted because they have provided sufficient evidence that they were unable to attend the hearing due to circumstances beyond their control; that they have new and relevant evidence that did not exist at the time of the hearing; or the original decision was obtained by fraud.

Facts and Analysis

In their Application for Review, the landlords in response to the question "What happened that was beyond your control or that could not have been anticipated that

prevented you from attending the original hearing state: "Why didn't tenant contact us?" Why were we not informed of a hearing?"

In the decision provided DRO XXXX she states the respondent (landlord) was served with notice of hearing documents via registered mail. In support of this claim the tenants had provided into evidence print outs from Canada Post tracking the registered mail sent to the landlord showing that the landlord refused to accept the registered mail.

Refusal of the registered mail resulted in the landlord not being aware of the hearing and the dispute, however, I find the refusal to accept registered mail was a conscious effort on the part of the landlords and was well within their control. I also find that had the landlords accepted the registered mail they would have been informed of the hearing and been able to attend.

In response to the request to list each item of new and relevant evidence and state why it was not available at the time of the hearing and how it is relevant the landlords submit: "Please see Residential Tenancy Act paragraph 11.3 (copy attached). The landlords have attached pages from A Guide for Landlords and Tenants in British Columbia and have highlighted section 11.3 regarding when a fixed term tenancy ends.

Residential Tenancy Policy Guideline 24 defines evidence as any oral statement, document or thing that is introduced to prove or disprove a fact in a dispute hearing. I find the submission of a copy of a Residential Tenancy publication does not provide any proof regarding any particular facts in this case and cannot, therefore be considered new or relevant evidence, in this matter.

In regard to the landlord's assertion the tenants obtained the decision and order based on fraud the landlords state several times that they were not aware of what evidence was relied upon in the decision so they are unable to answer the specific questions on the Application for Review.

In addition the landlords submit that the tenants breached a fixed term tenancy agreement and that they sent letters to the tenants regarding the security deposit since they (the tenants) never fulfilled their lease obligations. Specifically the tenants wanted to move out early and the landlords did not agree to the early end of the tenancy.

As the Application for Dispute Resolution adjudicated by DRO XXXX was the tenants' Application for return of the security deposit and **not** the landlord's Application to retain the security deposit for any liabilities incurred as a result of the tenancy, the fact that the tenants may have breached the tenancy agreement would have no impact on this decision.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit less any mutually agreed upon (in writing) deductions or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the

landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

Section 44 of the *Act* stipulates that, among other things, a tenancy ends when the tenant vacates or abandons the rental unit. In such cases, where a landlord asserts that the tenants have breached a fixed term tenancy agreement by ending the tenancy outside of that fixed term and if wishing to be compensated for that breach, the landlord must apply for dispute resolution to claim for damage or losses.

In that process the landlord may request to retain the security deposit in partial satisfaction of that loss. Section 38 does not allow the landlord to unilaterally retain the any portion of the security deposit for such claims. A consequence of failing to return the deposit or file an Application to claim against the security deposit by a landlord will result, as in this case, in the tenant being granted double the security deposit regardless of any liability owed to the landlord.

As such, I find the landlords have failed to provide any evidence to establish the tenants obtained the decision and/or order by fraud.

Decision

For the reasons noted above, I dismiss the landlords' Application for Review in its entirety. The decision made on September 29, 2011 stands.

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: October 07, 2011.

Residential Tenancy Branch