



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This matter dealt with an application by the Tenant to recover a security deposit or alternatively an overpayment of rent, for compensation for damage or loss under the Act or tenancy agreement and to recover the filing fee for this proceeding.

Issue(s) to be Decided

1. Is the Tenant entitled to the return of a security deposit?
2. Is the Tenant entitled to recover an overpayment of rent?
3. Is the Tenant entitled to compensation and if so, how much?

Background and Evidence

This tenancy started on August 1, 2009 as a one year fixed term tenancy that continued on its expiry on a month-to-month basis. The Tenant and his family vacated on or about January 19, 2012 however the tenancy did not end until the end of that month. Rent was \$1,743.50 per month plus \$50.00 for parking which was payable in advance on the 1st day of each month. The Tenant paid a security deposit of \$840.00 at the beginning of the tenancy.

The Tenant said that when he and his family returned from a two week vacation on January 1, 2012, they could smell a strong odour of what they believed was cigarette smoke in the rental unit. The Tenant said the Landlord does not permit smoking inside the rental units. The Tenant said he ventilated the rental unit for approximately 8 days by leaving open windows and doors. On January 9, 2012, the Tenant mentioned the smell of the smoke to a building manager who then spoke to the downstairs tenant and gave them a verbal warning.

The Tenant said he also spoke with the downstairs tenants the following day to discuss the matter and discovered that they were smoking "shisha" from a water pipe. The Tenant said despite the warning to the downstairs tenants, they continued to smoke inside and he and his family could still smell the smoke especially at night which kept them awake. The Tenant said both his spouse and his son suffer from asthma which is often triggered by smoke. The Tenant said on January 11, 2012 his son was suffering

from an asthma attack and had to stay home from school. Consequently, the Tenant said he made a second verbal complaint to the building manager about the downstairs tenants smoking and she again gave them a verbal warning.

The Tenant said he and his family continued to smell smoke so he made a written complaint to the building manager on January 13, 2012. The Tenant said the smoke was giving himself and his family headaches and making them feel dizzy so they continually had to ventilate their rental unit by leaving the windows open even though it was very cold outside. The Tenant said on January 15, 2012, the building manager approached his spouse when she saw that she was crying and was advised by his spouse that she was distressed by the constant smell of smoke which was making her feel ill and depriving her of sleep. As a result, the Tenant's spouse asked if they could move to another suite. The resident manager advised the Tenant that he and his family could use a vacant suite temporarily to sleep in. The Tenant said he and his family used the vacant suite to sleep in for 4 days but during the day hours they could not tolerate the constant smell of smoke so they avoided being in the rental unit.

The Tenant said on January 15, 2012, he made a second written complaint to the building manager but the smell of the smoke persisted. Consequently, the Tenant said he did not believe the Landlord was taking his complaints seriously or that the problem was not going to be dealt with so on January 19, 2012 he rented other premises nearby and moved in there. The Parties agree that on January 23, 2012, the Tenant gave the Landlords his written notice ending the tenancy. The Parties conducted a move out inspection on January 31, 2012 and the Tenant provided his forwarding address in writing at that time.

The Tenant said approximately two weeks later, he received a Move Out Statement from the Landlord. The Tenant said the Landlord had put through a pre-authorized payment for February 2012 rent in the amount of \$1,793.00 but returned only \$871.50 of that amount. The Landlord's agent confirmed that the Landlord deducted from the Tenant's February pre-authorized payment \$50.00 for parking and 14 days of pro-rated rent. The Landlord also returned the Tenant's security deposit. The Landlord's agent admitted that the Tenant did not give him authorization to deduct these amounts but claimed that the payment was put through because the Tenant did not give adequate notice. The Landlord's agent said the rental unit was re-rented as of February 13, 2012.

As a result of these events, the Tenant sought compensation for his and his family's loss of use and enjoyment of the rental unit for the month of January 2012, their moving expenses, fees associated with transferring a security system, the increased portion of his rent payment for the month of February 2012 and to recover the balance of the rent and parking payment retained by the Landlord.

The Landlord's agent argued that the Landlord's building manager was not aware of the smoke issue until January 9, 2012 and therefore could not be responsible for dealing with an issue of which she was unaware. The Landlord's agent said as soon as the issue was brought to the building manager's attention on January 9, 2012, she

immediately gave the downstairs tenant a warning. The Landlord's agent admitted that the building manager received written complaints from the Tenant on January 13 and 15, 2012. The Landlord's agent said the Tenant and his family were given permission to use a vacant suite on the 15th and a breach letter was served on the downstairs tenant on January 16, 2012. The Landlord's agent claimed that the downstairs tenant surrendered the water pipe to the building manager shortly thereafter. The Landlord's agent said the building manager inspected the downstairs suite sometime later and could not detect a smell of smoke only a strong smell of Pinesol cleaner. Consequently the Landlord's agent argued that there was no further smoking as of January 16, 2012 (which the Tenant denied).

As a result, the Landlord's agent argued that the Landlord did everything in its power to resolve the issue and did so within a reasonable time and that the "temporary discomfort" of the Tenant and his family did not entitle him to compensation or to end the tenancy early.

Analysis

Section 28 of the Act says that a tenant is entitled to quiet enjoyment of the rental unit which includes the right to exclusive possession and freedom from unreasonable disturbance.

I find that the Tenant did not tell the Landlord about the smoking until January 9, 2012. Consequently, the Landlord cannot be held liable for failing to take remedial steps during that time when it did not know about the problem. I also find that the building manager gave the downstairs tenant a verbal warning on January 9, 2012 not to smoke but that the tenant ignored that warning and continued to do so. I find that the Tenant made a second verbal complaint on January 11, 2012 which he followed up with written complaints on January 13 and 15, 2012. The Landlord claims that the downstairs tenant was served with a breach letter on January 16, 2012 and that the smoking stopped as of that date. The Tenant claims the smoking did not stop as of that date and that although the downstairs tenant delivered a water pipe to the building manager, he believes the tenants had another water pipe because he could still smell smoke up until the date he vacated.

I find that the Landlord acted reasonably in giving the downstairs tenant a verbal warning on January 9, 2012. I also find that the Landlord acted reasonably in delivering the downstairs tenants a breach letter on January 16, 2012 when it was apparent that they had ignored the previous verbal warnings. Although the Tenant argued that the downstairs tenants continued to smoke after January 16, 2012, this was denied by the Landlords and the Tenant provided no corroborating evidence to resolve this contradiction. Although I too have reservations that the downstairs tenants owned only one water pipe, I find that there is insufficient evidence to conclude that they continued to smoke after January 16, 2012.

A Tenant may be entitled to compensation if the Landlord has breached a duty under the Act or tenancy agreement. In this case, I find that the Tenant and his family likely were significantly disturbed by the downstairs tenant's smoking from January 1 – 16, 2012 and in particular suffered from headaches, dizziness and in the case of his wife and son, breathing problems associated with asthma (which I would not characterize as "temporary discomfort.") However, for the reasons set out above, I cannot conclude that the Landlord's agents failed to take adequate steps to resolve this problem. Consequently, I find that the Tenant has not established a monetary claim for loss of use of the rental unit, for moving expenses, security system transfer fees and increased rent and those parts of his claim are dismissed without leave to reapply.

Although the Tenant moved out on or about January 19, 2012, rent was paid for the full month of January 2012. I find that although the Landlord had notice the Tenant was vacating as of January 23, 2012, the Landlord retained the Tenant's rent payment for February 2012 without his authorization and without an order for the Residential Tenancy Branch. Consequently, I find that the Tenant is entitled to recover an overpayment of rent (and parking fees) in the amount of \$953.00 as well as the \$50.00 filing fee for this proceeding.

The Landlord argued that the Tenant was not entitled to end the tenancy early however, as there was no claim for a loss of rental income from the Landlord before me, I make no findings on that issue. As the Tenant's security deposit was returned that part of the Tenant's claim is also dismissed without leave to reapply.

Conclusion

A Monetary Order in the amount of **\$1,003.00** has been issued to the Tenant 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: April 26, 2012.

Residential Tenancy Branch