Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNSD, FF

Introduction

This hearing was convened in response to an Application for Dispute Resolution, in which the Tenant applied for the return of the security deposit and to recover the fee for filing this Application.

The male Tenant stated that on October 09, 2014 the Application for Dispute Resolution, the Notice of Hearing, and documents the Tenant wishes to rely upon as evidence were sent to the Landlord, via registered mail. The Landlord acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

The male Tenant stated that on May 08, 2015 the Application for Dispute Resolution was amended to include a claim for the return of double the security deposit. He stated that the amended Application for Dispute Resolution was sent to the Landlord, via express post, on May 08, 2015. The Landlord stated that she received this document. As I would have considered returning double the security even if the Tenant had not amended the Application for Dispute Resolution, I find that service of the amended Application for Dispute Resolution is largely irrelevant.

On May 07, 2015 the Landlord submitted five pages of evidence to the Residential Tenancy Branch, which the Landlord wishes to rely upon as evidence. She stated that these documents were sent to the Tenant, via registered mail, on May 08, 2015. The male Tenant stated that these documents have not yet been received.

The Landlord stated that her evidence was not served to the Tenant earlier because she was exhausted when she was first served with the dispute resolution hearing package; that she placed the documents in a drawer; and that she did not think about serving evidence until recently.

Rule 3.25 of the Residential Tenancy Branch Rules of Procedure stipulates that a respondent's evidence must be served on the applicant and submitted to the Residential Tenancy Branch as soon as possible and, in any event, that it must be received by the applicant not less than seven days before the hearing. In these circumstances the Tenant contends the Landlord's evidence has not yet been received.

As the evidence was not even mailed until six days prior to the hearing, I find that the evidence was not served in accordance with the timelines established by rule 3.25.

Rule 3.14 of the Residential Tenancy Branch Rules of Procedure stipulates that I may refuse to consider evidence if there has been an unreasonable delay in serving the evidence. As the evidence submitted by the Landlord could have been served to the Tenant in October of 2014, given that it was or could have been available at that time, I find there was an unreasonable delay in serving the evidence. I therefore refuse to accept the evidence submitted to the Residential Tenancy Branch by the Landlord on May 08, 2015.

In determining that the evidence should not be accepted, I find that the Landlord has failed to establish that there were exceptional circumstances that prevented her from serving and filing the evidence in a timelier manner. Although I accept she may have been exhausted when she was served with notice of these proceedings, I find that, in fairness to the Tenant, she should have found time to submit the few documents she intended to rely upon.

In determining that the evidence should not be accepted, I was influenced, to some degree, by the fact the Tenant was in attendance at the hearing and was prepared to proceed with the matter. I find that adjourning the matter to provide the Tenant with time to collect and review the Landlord's evidence would be unfair to the Tenant, as the Tenant has already waited several months for the security deposit to be refunded.

In determining that the evidence should not be accepted, I was influenced, to some degree by the fact that one page of the evidence is simply a summary of events that the Landlord can introduce through oral testimony.

In determining that the evidence should not be accepted, I was also influenced by the fact that three pages of the evidence was a tenancy agreement signed on July 17, 2014. This tenancy agreement has been submitted in evidence by the Tenant and both parties will have the opportunity to testify regarding amendments that were made to that tenancy agreement after the agreement was signed.

Both parties were represented at the hearing. They were provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. I specifically note that the Landlord had the opportunity to discuss her evidence at the proceedings.

Issue(s) to be Decided

Is the Tenant entitled to the return of security deposit?

Background and Evidence

The Landlord and the Tenant agree that on July 06, 2014 they signed a fixed term tenancy agreement for a tenancy that was to begin on July 15, 2014. A copy of this tenancy agreement was submitted in evidence by the Tenant.

The Landlord and the Tenant agree that they mutually agreed to abandon the aforementioned tenancy agreement and replace it with a tenancy agreement they signed on July 17, 2014. A copy of this tenancy agreement was submitted in evidence by the Tenant, although both parties agree that the Tenant made several changes to the agreement after it was signed.

The Landlord and the Tenant agree that when the tenancy agreement was signed on July 17, 2015, it declared that the tenancy will begin on July 14, 2014; that it will end on August 31, 2014; that the first rent payment of $1,500.00 will be paid, in cash, on July 16, 2015; that the Tenant will pay monthly rent of $1,500.00 by the 15th day of every month; and that a $1,000.00 damage deposit will be paid, in cash, on July 16, 2014.

The Landlord and the Tenant agree that the Tenant made several changes to the tenancy agreement after it was signed on July 17, 2014. They agree that he amended the agreement to show that a security deposit of $750.00 was due on July 19, 2014 and he created a place for the Landlord to sign the agreement to acknowledge receipt of a $2,250.00 payment on July 19, 2014.

The male Tenant stated that he changed the tenancy agreement because he understood that the Landlord was only entitled to collect a security deposit that is a maximum of 50% of the monthly rent, which in these circumstances was $750.00. He stated that the Landlord refused to reduce the amount of the security deposit so he paid $2,500.00, in cash, to the Landlord on July 19, 2014, $1,000.00 of which was for a security deposit.

The Landlord started that she did agree to reduce the security deposit to $750.00 and that the Tenant paid $2,250.00, in cash, to the Landlord on July 19, 2014. She stated that she did not sign the agreement to acknowledge receipt of the $2,250.00 because she did not agree with some of the other changes the Tenant had made to the agreement. She stated that she subsequently noted that $2,250.00 was paid on July 19, 2014 on her copy of this tenancy agreement.

The Tenant argued that the Landlord would have willingly signed the area on the tenancy agreement that acknowledged receipt of $2,250.00 if she had actually received $2,250.00.

The Landlord stated that she did not provide the Tenant with a receipt for the $2,250.00 she contends was paid on July 19, 2014 because she did not have a receipt book with her and because it was a “poor business practice”.

The Tenant submitted copies of emails exchanged between the Landlord and the Tenant between September 07, 2014 and September 17, 2014. In an email, dated

September 16, 2014, the Tenant asked the Landlord when the security deposit will be returned. The Landlord sent an email response on September 16, 2014, in which she declared the Tenant had not paid a security deposit and that the Tenant had paid cash for “7 weeks rental”.

The Landlord stated that when she wrote the aforementioned email she mistakenly believed that all of the $2,250.00 paid on July 19, 2014 has been paid for rent.

The male Tenant stated that the rental unit was vacated on September 14, 2014. The Landlord stated that the Tenant informed her that they would be vacating on September 15, 2014 and that the rental unit was vacant when she went to the unit on that date.

The Landlord and the Tenant agree that the tenant provided a forwarding address, via email, on September 14, 2014; that the Tenant did not authorize the Landlord to retain any portion of the security deposit; that the Landlord did not have authority from the Residential Tenancy Branch to keep any portion of the security deposit; that the Landlord did not return any portion of the security deposit; and that the Landlord did not file an Application for Dispute Resolution claiming against the security deposit.

Analysis

I find, on the balance of probabilities, that on July 19, 2015 the Tenant paid $2,500.00 to the Landlord, $1,500.00 of which was for rent and $1,000.00 of which was for a security deposit.

In determining that a $1,000.00 deposit had been paid I was guided by *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, where the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

In the circumstances before me, I find the version of events provided by the Tenant to be more probable than the version of events given by the Landlord.

In determining the version of events given by the Tenant are more probable I was influenced, in part, by the fact that the Landlord refused to sign the area on the tenancy agreement that served to acknowledged receipt of $2,250.00. I agree with the Tenant’s submission that the Landlord would have willingly signed this area of the agreement if she had actually received $2,250.00.

I find the Landlord's submission that she did not sign to acknowledge receipt of $2,250.00 because she did not agree with other changes the Tenant had made to the agreement lacks credibility. The format of this acknowledgement clearly refers to the receipt of money and a signature does not infer that the Landlord has agreed to other changes made to the agreement.

I find it far more likely that the Landlord she did not sign to acknowledge receipt of $2,250.00 because she did not agree to reduce the amount due from $2,500.00 to $2,250.00.

In determining the version of events given by the Tenant are more probable I was influenced, in part, by the fact that the legislation does not permit a landlord to collect a security deposit of more than 50% of the rent. This lends credibility to the Tenant's submission that the Tenant objected to paying a security deposit of $1,000.00, as rent was only $1,500.00.

Section 26(2) of the *Residential Tenancy Act (Act)* stipulates that a landlord must provide a receipt when rent is paid by cash. I find that the Landlord breached this section of the *Act* when she neglected to provide the Tenant with a receipt for the rent/security deposit payment made on July 19, 2014. While I accept the Landlord's submission that this was a "poor business practice", I find her statement that she did not provide a receipt because she did not have a receipt book with her to be illogical. The Landlord had the option of signing the area on the tenancy agreement the Tenant had created to acknowledge receipt or she could have created a receipt on a piece of blank paper. I find that the Landlord's failure to provide a receipt for the cash payment made on July 19, 2014 makes it difficult, if not impossible, for either party to establish how much of a security deposit was paid on that date.

In determining the amount of the security deposit that was paid I was influenced, to some degree, by the email sent by the Landlord in September of 2014, in which she declared a security deposit had not been paid and by the Landlord's testimony that when she wrote that email she mistakenly believed a security deposit had not been paid. Given that approximately two months after receiving the security deposit the Landlord did not recall that a security deposit had been paid, I find that her memory of this exchange is impaired and I am hesitant to rely on her recollection of events.

On the basis of the testimony of both parties, I find that the rental unit was vacant on September 15, 2014 and that the Landlord took possession of the rental unit on that date. I therefore find it reasonable to conclude that the tenancy had ended by September 15, 2014. In these circumstances, the exact end date of the tenancy is not relevant.

On the basis of the undisputed evidence, I find that the Landlord received a forwarding address for the Tenant, via email, on September 14, 2014.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in

writing, the landlord must either repay the security deposit and/or pet damage deposit or make an application for dispute resolution claiming against the deposits. I find that the Landlord failed to comply with section 38(1) of the *Act*, as the Landlord has not repaid the security deposit or filed an Application for Dispute Resolution, and more than 15 days has passed since the tenancy ended and the forwarding address was received.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord did not comply with section 38(1) of the *Act,* I find that the Landlord must pay the Tenant double the security deposit.

I find that the Tenant's Application for Dispute Resolution has merit and the Tenant is entitled to recover the fee paid to file this Application.

Conclusion

The Tenant has established a monetary claim of $2,050.00, which is comprised of double the security deposit and $50.00 as compensation for the cost of filing this Application for Dispute Resolution, and I am issuing a monetary Order in that amount. In the event that the Landlord does not voluntarily comply with this Order, it may be filed with the Province of British Columbia Small Claims Court 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: May 15, 2015

Residential Tenancy Branch