Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW HEARING DECISION

Dispute Codes MNSD FF

Introduction

On March 18, 2016 the Tenants filed an application for Dispute Resolution seeking a $3,100.00 Monetary Order for the return of double their $1,000.00 security deposit; double their $500.00 pet deposit; plus recovery of their $100.00 filing fee. The Tenant's application was scheduled to be heard via teleconference on July 27, 2016.

On July 27, 2016 the hearing commenced in the presence of the male Tenant. No one was in attendance on behalf of the Landlords. The Landlords were deemed to have been served notice of the hearing and the hearing continued in absence of the Landlords. On July 29, 2016 I issued my Decision granting the Tenants' application in the amount of $1,600.00.

On September 7, 2016 the Landlords filed an Application for Review Consideration in response to the July 29, 2016 Decision and Order. On September 19, 2016 an Arbitrator granted the Landlords a Review Hearing ordering the following:

> ***Notices of hearing are included with this review consideration decision for the LANDLORD to serve to EACH TENANT within 3 days of receipt of this decision.***
>
> *The **landlord must** serve each tenant a copy of this review consideration decision and the evidence supplied for the review consideration decision.*
>
> [Reproduced as written p 3 para 5 & 6]

That Arbitrator further ordered, in part:

> *…the decision and order issued on July 29, 2016 are suspended until a review hearing is held with the original arbitrator. The original arbitrator will consider evidence related to receipt of the forwarding address by the landlord and any other matters the arbitrator finds relevant to the return of the deposits.*
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> [Reproduced as written p 3 para 4]

This Review Decision must be read in conjunction with my original July 29, 2016 Decision and the September 19, 2016 Review Consideration Decision.

The Review Hearing was scheduled to be heard on November 16, 2016 at 9:00 a.m. via teleconference. The male Tenant appeared at the Review Hearing at the scheduled time. The male Landlord signed into the proceeding 4 minutes late. The Tenant affirmed he was representing both Tenants and the Landlord affirmed he was representing both Landlords in this matter. Therefore, for the remainder of this decision, terms or references to the Tenants or the

Landlords importing the singular shall include the plural and vice versa, except where the context indicates otherwise.

I explained how the Review Hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

The Tenant testified he received copies of the Review Consideration Decision and Notice of Review Hearing documents from the Landlord. He stated he did not receive copies of any documentary evidence from the Landlord.

The Landlord testified he served the Tenant in person with all of his documents and evidence. The Landlord was not able to provide evidence as to the date he served his documents.

The Tenant argued he was not personally served with the aforementioned documents. Rather, the Landlord placed the documents through his mail slot. Upon further clarification the Tenant stated he received 4 pages of the Review Consideration Decision and a one page Notice of Review Hearing document that were placed in a standard letter envelope. He noted he had received two copies, one in the mail from the Residential Tenancy Branch (RTB) and the other through his mail slot from the Landlord. He reiterated that he did not receive any other documents or evidence from the Landlord.

The Landlord confirmed he placed the envelope through the mail slot. He asserted he had knocked on the door first and when the Tenant opened the door and saw the Landlord he closed the door right away. The Landlord stated he had papers to serve him and then placed them through the mail slot.

RTB Rule of Procedure 3.14 stipulates that documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the RTB not less than 14 days before the hearing.

RTB Rule of Procedure 3.17 provides that the Arbitrator has the discretion to determine whether to accept documentary evidence that does not meet the requirements set out in the Rules of Procedure.

After careful consideration of the foregoing, and in consideration of the volume of papers submitted by the Landlord with his Application for Review Consideration, I favored the Tenant's submissions that he was not served with copies of the Landlords' evidence that had previously been submitted to the RTB with the Landlords' Application for Review Consideration. I favored the Tenant's submission in part as it would be difficult to fold and fit that amount of paperwork (evidence, Review Consideration Decision, and Notice of Review Hearing) into a standard letter envelope. Accordingly, I find the Landlords' documentary evidence had not been served upon the Tenants in accordance with the Rules of Procedure.

To consider evidence that was not served upon the other party would be a breach of administrative fairness. As such, I declined to consider the documentary evidence submitted with the Landlords' Application for Review Consideration. I did however consider the oral submissions from both parties and the evidence that had been submitted with the Tenant's

March 18, 2016 application for Dispute Resolution. It should be noted that no documentary evidence had been received on file from the Landlords prior to initial July 27, 2016 hearing.

Both parties were provided with the opportunity to present relevant oral evidence, to ask and to make relevant submissions. Following is a summary of those submissions and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1) Should the original July 29, 2016 Decision and Order(s) be confirmed, varied, or set aside?

Background and Evidence

The Landlord testified that the Tenants failed to provide him with their forwarding address in writing in accordance with Policy Guideline 17(b)(10). He asserted he did not receive notice of the Tenants' address by email, written, or otherwise until he received a copy of the Tenants' application for Dispute Resolution.

The Landlord argued that the fact that he did not serve a demand for payment of the $338.76 unpaid utilities to the Tenants, until they personally served him with their application for Dispute Resolution, is proof that he did not receive the Tenants' forwarding address by email.

The Landlord submitted that to be "equitable", arbitrator's decisions should rule in accordance with published policy. He asserted the RTB website stipulated tenants are required to provide landlords with "explicit notice" of their forwarding address. He stated he submitted evidence printed from the RTB website which stated "email or text message was not an approved method" to provide a landlord with a tenant's forwarding address; therefore, an email does not qualify.

The Landlord asserted that "irregardless" of what the Tenants submitted a reasonable person or landlord would expect a ruling in their favor in accordance with policy. The Landlord then pointed to Policy Guideline 12 which provides policy regarding service methods. He asserted that policy supported his argument that email was not considered served. He argued that in order to be "equitable" he should be able to rely on that policy.

The Landlord testified that he did not receive an email with the Tenant's forwarding address and argued there was no way to prove he received the email dated February 2, 2016.

I asked the Landlord if he had copies of the Tenants' documentary evidence in front of him. He responded "yes". I asked the Landlord how many pages of emails were included in that evidence and the Landlord began shuffling numerous papers around and was not able to provide an answer. After a few more moments of shuffling paper, I asked again if the Landlord had the evidence in front of him and the Landlord responded stating that he had the February 2, 2016 email in front of him and that he wished to speak only to that email.

After further clarification, I determined the Landlord had not gathered all of his documents or the Tenants' original evidence in preparation prior to the start of this Review Hearing. The Landlord had confirmed he had received the Tenants' evidence and application for Dispute Resolution. In addition, I determined the Landlord did not have the Tenants' evidence before him when he had

answered yes to my previous two questions and directed the Landlord to move forward with his oral submissions. The Landlord continued by repeating his previous submissions.

The Tenant submitted that it was evident the Landlord was not prepared for this Review Hearing. The Tenant pointed to his documentary evidence and argued the string of emails was proof the Landlord was sent their forwarding address on February 2, 2016. He noted that they gave the Landlords some time to respond and then on March 4, 2016 they continued the email string informing the Landlord they had not received the deposit. The Landlord responded by email March 5, 2016 and said "Yes, I have a check for you. I will put it in the mail today. My apologies for the delay."

The Tenant asserted that the Landlord would not have said the cheque was in the mail if he did not have their address. The Tenant submitted there were additional email strings which were not submitted into evidence which proved the Landlord was simply making excuses to delay the return of their deposits. The Tenant noted that on March 21, 2016 he received an email from the Landlord stating that the Landlord had been dealing with personal issues and there was a delay in their accounting regarding the utilities.

The Tenant read an email into evidence which he testified was sent to him from the Landlord on March 26, 2016, shortly after he served the Landlord with copies of their application for Dispute Resolution. I requested the Tenant read sections of that email into evidence four times to ensure I had noted the content correctly. The following is a transcription of that email, in part:

> *I haven't looked at it yet. I received what appears to be your dispute notice. I am going to refund your deposit in full on Wednesday March 30, 2016. I apologize for the delay. Please accept it wasn't pettiness, just circumstance. I thought I had 30 days and I was waiting for the final utility statement from the city of [city name]. I would also like to offer you the $50.00 filing fee you paid to file your dispute, in an effort to avoid arbitration. I know I'm in the wrong here and would prefer to get it out of the way. I hope you are of the same mind. Irregardless of any response I will send an email transfer to you on Wednesday for the $1,500.00 and any interest I'm responsible for.*
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> [Reproduced as per the Tenant's oral submission excluding the city name]

In response to the Tenant's oral submissions, the Landlord stated he did not "recollect sending that email." Upon further clarification the Landlord responded he did not "recollect specifically sending that email".

The Landlord then argued the Tenant's oral submission was not evidence and "irregardless" of that email he said he had already received the Tenants' application for Dispute Resolution by that point. The Landlord then repeated his previous submissions stating he did not receive the February 2, 2016 email and he never told the Tenants a cheque was in the mail.

I provided the Landlord another opportunity to gather the Tenants' evidence submissions and in order to speak directly to that evidence. I asked the Landlord if that evidence was near him so he could gather it quickly. As the Landlord continued to shuffle papers around he stated he had that evidence in front of him now and he wanted to speak about the February 2, 2016 email.

In attempts to confirm the Landlord was looking at the same documents as I was I asked if he had the 3 pages of emails in front of him and he answered "yes". I then asked the Landlord to tell me what the first words were on the top of anyone of those pages. The Landlord replied that

he was looking at the February 2, 2016 email. I asked the Landlord a second time to tell me the first words on the top of any of the pages, at which point he confirmed he did not have the evidence in front of him.

The Landlord was given the opportunity to provide his final submissions and the opportunity to present any new evidence which he had not already orally submitted. He replied that he should not be held to email communication as he does not conduct his business that way. He asserted he manages his landlord business when he has papers in front of him and it was not "equitable" to expect that he would work with emails as they cannot be relied upon and are not approved in tenancy policy.

The Landlord argued that responding to emails; paying attention to what was received; or recalling responses, would be his "last concern". He stated he simply replies to emails quickly with little attention to them afterwards. He said that "irregardless" of having emails there was nothing to prove he received the February 2, 2016 email.

I then concluded the hearing and questioned how each party wished to receive copies of my Decision. When I began to explain the process after they received my Review Decision the Landlord interrupted and stated he wanted to present further evidence regarding the Tenants' email evidence. Despite the hearing being concluded, I afforded the Landlord some leniency and granted him additional time to submit testimony regarding the Tenants' email evidence. I then asked if the Landlord if he had found the three pages of emails and had them in front of him to which he answered "yes".

I then attempted to clarify again if he had the same documents in front of him that were submitted to the RTB and asked again what the words were on the top of the pages. The Landlord became upset stating that he would only provide testimony relating to the February 2, 2016 email and would not speak to the other emails. As that testimony had already been submitted by the Landlord, I ended the hearing.

The Tenants' three pages of email evidence included an email string between the male Landlord and the female Tenant between February 2, 2016 and March 3, 2016. Those emails began with the Landlord's February 2, 2016 email sent to the Tenants at 10:11 a.m. where the Landlord wrote, in part, as follows:

> *I did a walk through the unit last night and did not see anything that would cause me to make any claim against your damage deposit, and therefore I will refund it in full.*
> *I do require a forwarding address, though, so once I receive that I will mail the check.*
> [Reproduced as written]

The above email was the start of a string of emails which were responses and "forwarded" messages submitted into evidence. The March 5, 2016 email was sent by the Landlord and states as follows:

> *Yes, I have a check for you. I will put it in the mail today. My apologies for the delay.*
> [Reproduced as written]

Analysis

After careful consideration of the foregoing; documentary evidence; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

My original Decision of July 29, 2016 was issued in accordance with the *Residential Tenancy Act* (the *Act*) after consideration of the Tenants' undisputed documentary email evidence and oral submissions.

In regards to the Landlord's arguments that it was not was equitable for me to accept an email as service of the Tenants' forwarding address, the *Act* does not provide an arbitrator the authority to determine disputes under the law of equity.

I favored the evidence of the Tenants documentary evidence which clearly displayed the Landlord's email response that he would put a check in the mail. I favored the Tenant's evidence over the oral evidence of the Landlord as the Landlord provided contradictory submissions. I favored the evidence of the Tenants over the Landlord, in part, because the Tenant's evidence was forthright, consistent, and credible.

> In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, 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:
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> > *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 is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

Throughout the Review Hearing the Landlord continued to testify he had the Tenants' evidence in front of him and each time I asked to clarify the content of that evidence he was not able to do so. Furthermore, the Landlord's insistence and refusal to speak to any other emails, other than the February 2, 2016 email, led me to believe the Landlord did not have the Tenants' evidence in front of him or was not willing to acknowledge the content of those emails. In addition, despite the Landlord's interruption after the hearing had concluded he was not able to prove, or willing to prove, he had that evidence in front of him. As such, I find that the Landlord's explanation that he simply did not receive the Tenants' forward address by email to be improbable, given the documentary evidence before me. In addition, the Landlord's use of "irregardless" throughout his testimony was consistent with the email read consistently four times into evidence by the Tenant. I find the Tenant's documentary evidence and his oral submissions of the content of the Landlord's March 26, 2016 email to be plausible given the circumstances presented to me during the hearing.

When determining disputes regarding receipt of a tenant's forwarding address and the disbursement of a security and/or pet deposit, I must consider the form in which the forwarding address was provided and the method upon which it is served.

Notwithstanding the Landlord's argument that he considered versions of policy and publications posted on the RTB website, I did not consider policy or publications listed on the RTB website

when I determined that the Landlord had received the Tenant's forwarding address via email in my July 29, 2016 Decision. I did not consider those publications or policy as the Tenants' submissions were undisputed during the July 27, 2016 hearing.

After consideration of the Landlord's oral submissions in the Review Hearing, I have determined that I will not be considering the policy or publications referred to during the Review Hearing. I am not considering those submissions as there have been several versions of Policy and publications published by the RTB regarding service by email and text messaging. The newer versions contradict previous versions.

For example, the previous version which the Landlord relied upon did state using email or text messaging was not considered served as it was an unacceptable method. Another version of the publication and flow chart provided that service was preferably on paper and an arbitrator may or may not consider an email or text as received. There is also an additional version that said service preferably on paper and an arbitrator may or may not consider an email or text as served. In such cases of contradictory publications, or evidence that would dispute policy, section 62 of the *Act* prevails, giving an arbitrator the authority to make findings relevant to each individual matter.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding **address in writing,** the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit.

[My emphasis added with bold text].

In determining if the forwarding address was provided in the proper format, I am now guided, in part, by the definition provided by the Black's Law Dictionary Sixth Edition, which defines "writing" as "handwriting, typewriting, printing, photostating, and every other means of recording any tangible thing in any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof". I find that an email message meets the definition of written as defined by Black's Law Dictionary.

Furthermore, Section 6 of the *Electronics Transactions Act* stipulates that a requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides the information or record in electronic form and the information or record is accessible by the other person in a manner usable for subsequent reference, and capable of being retained by the other person in a manner usable for subsequent reference.

Section 62 (2) of the *Residential Tenancy Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*.

As email messages are capable of being retained and used for further reference, I find that an email message can be used by a tenant to provide a landlord with a forwarding address pursuant to section 6 of the *Electronics Transactions Act,* and pursuant to section 62 of the *Residential Tenancy Act.*

Section 88 of the *Residential Tenancy Act* specifies a variety of ways that documents, other than documents referred to in section 89 of the *Act,* must be served. Service by text message or email is not one of methods of serving documents included in section 88 of the *Act*.

Section 71(2)(c) of the *Residential Tenancy Act* authorizes me to conclude that a document not given or served in accordance with section 88 or 89 of the *Act* is sufficiently given or served for purposes of this *Act*.

Notwithstanding the Landlord's assertion that he only conducted his business via paper, as listed above, the email string submitted into evidence began with the Landlord's email advising the Tenants he had not found anything wrong with the inspection; he would be refunding their full deposit; and he requested their forwarding address. It should also be noted that email makes no reference to unpaid utilities. That evidence satisfied me that the Landlord was not averse to communicating with the Tenant by email.

Section 82(3) of the *Act* stipulates that upon review of the director's decision and/or order, following the Review Hearing, the director may confirm, vary or set aside the original decision or order.

As noted above, I favored the Tenant's submissions. I now confirm my previous finding that there was sufficient evidence to prove the Landlord was sufficiently served with the Tenants' forwarding address by email, either on February 2, 2016 or as forwarded on March 4, 2016, pursuant to sections 62, 71 and 82 of the *Act.* There was further evidence that the Landlord did not return the Tenants' deposits within 15 days of either date, in breach of Section 38 of the *Act.* Accordingly, the July 29, 2016 Decision and Monetary Order are confirmed and are in full force and effect.

Section 79 (7) of the Act stipulates that a party to a dispute resolution proceeding may make an application under this section (*application for review of director's decision or order)* only once in respect to the proceedings.

As per the foregoing, the current proceedings were granted upon review from the Landlords' application for Review Consideration. Accordingly, I find the Landlords have exhausted their right for review as it pertains to the Tenants' application, and no further applications for Review Consideration will be considered from the Landlords regarding the July 29, 2016 Decision, pursuant to Section 79(7) of the Act.

Conclusion

The July 29, 2016 Decision and Monetary Order were confirmed and are in full force and effect.

This decision is final, legally binding, and 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: November 18, 2016

Residential Tenancy Branch