Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with a tenant's application, as amended, for a Monetary Order for doubling of the security deposit and pet damage deposit; and, compensation for damages or loss under the Act, regulations or tenancy agreement. The landlord did not appear at the hearing. One of the co-tenants appeared and confirmed that he was representing all three co-tenants.

I heard that tenants' original application and evidence was sent to the landlord via registered mail on August 11, 2016 and successfully delivered on August 22, 2016. The tenant provided a registered mail tracking number as proof of service.

The tenants filed an Amendment to decrease the claim in recognition that the landlord had returned the security deposit and pet damage deposit after ordered to do so by way of previous dispute resolution proceeding (file number referenced on cover page of this decision). I heard that the tenant sent the Amendment to the landlord via registered mail on December 3, 2016 and it was successfully delivered on December 6, 2016. The tenant provided a registered mail tracking number as proof of service.

The tenant's evidence included a Compact Disk but it was not accompanied by a Digital Evidence Details worksheet or other form of printed description. I enquired as to whether the tenant had confirmed with the landlord that she was able to see or hear the content of the disk. The tenant stated that he had enquired with the landlord via email and her response was that she only had an IPhone.

Rule 3.10 of the Rules of Procedure provides for submissions of digital evidence. Rule 3.10 provides as follows, with my emphasis underlined:

3.10 Digital evidence

Digital evidence includes only photographs, audio recordings, and video recordings. Photographs of printable documents, such as e-mails or text messages, are not acceptable as digital evidence.

Digital evidence must be accompanied by a printed description, including:

- a table of contents;
- identification of photographs, such as a logical number system;
- a statement for each digital file describing its contents;
- a time code for the key point in each audio or video recording; and
- a statement as to the significance of each digital file.

To ensure a fair, efficient and effective process, identical digital evidence and the accompanying printed description must be served on each respondent and submitted to the Residential Tenancy Branch directly or through a Service BC office.

The format of digital evidence must be accessible to all parties. Before the hearing, the party submitting the digital evidence must determine that the other party and the Residential Tenancy Branch have playback equipment or are otherwise able to gain access to the evidence.

If a party is unable to access the digital evidence, the arbitrator may determine that the digital evidence will not be considered.

If a party asks another party about their ability to gain access to a particular format, device or platform, the other party must reply as soon as possible, and in any event so that all parties have 7 days with full access to the evidence and the party submitting and serving digital evidence can meet the requirements for filing and service established in Rules 3.1, 3.2, 3.14 and 3.15.

Regardless of how evidence is accessed during a hearing, the party providing digital evidence must provide the Residential Tenancy Branch and each respondent with a copy of the evidence on a memory stick, compact disk or DVD for its permanent files.

In the absence of a printed description of the content of the Compact Disk and the landlord's communication to the tenant that she was able to access the content, I found the digital evidence inadmissible and I have not viewed the content. However, I did

permit the tenant to describe its content to me during his testimony, which I have considered.

Issue(s) to be Decided

1. Are the tenants entitled to doubling of the security deposit and pet damage deposit?
2. Have the tenants established an entitlement to compensation from the landlord for damages or loss under the Act, regulations or tenancy agreement?

Background and Evidence

The tenancy started in July 2012 and the tenants paid a security deposit of $800.00 and a pet damage deposit of $800.00. The tenants were required to pay rent of $1,600.00 on the first day of every month. The tenancy ended and the parties participated in a move-out inspection together on March 24, 2016.

The tenant submitted that landlord prepared a move-in and move-out condition inspection report. The tenant provided the forwarding address in writing on the move-out inspection report.

The landlord filed an Application for Dispute Resolution seeking compensation form the tenants and authorization to retain the deposits on April 7, 2016. I heard that application on August 24, 2016 and issued a written decision on September 23, 2016. In short, the landlord had failed to serve evidence and an Amendment in accordance with the Rules of Procedure and her claims were dismissed with leave. The deposits were ordered to be returned to the tenants. The landlord returned the deposits to the tenants as ordered but did not file another Application for Dispute Resolution.

Below, I have summarized the tenant's claims against the landlord.

1. Doubling of security deposit and pet damage deposit

The tenant is of the position that the security deposit and pet damage deposit should be doubled because the landlord acted in bad faith during the move-out inspection. The tenant submitted that during the move-out inspection the landlord indicated to the tenants that there were no issues with the condition of the rental unit and she would be returning the deposits to the tenants but then landlord filed a claim against the deposits. The tenant submitted that the landlord's statements were captured in an audio recording that is on the Compact Disk.

The tenant also pointed out that the landlord did not sign the move-out inspection report. The tenant is of the position the landlord did this intentionally based upon evidence the landlord served the tenants for the previous proceeding.

Further, the tenant pointed out that landlord did not serve her Application for Dispute Resolution upon the third co-tenant.

Finally, the tenant stated that he believed that the served a copy of the move-out inspection report with her evidence in August 2016. I noted that the tenants did not make this argument on their Application for Dispute Resolution.

2. Repairs not made

The tenant submitted that there was a broken window in the master bedroom and missing spindles in the bannisters since the start of the tenancy. The tenant submitted that these issues were raised at the start of the tenancy and periodically thereafter. The move-in inspection report indicates that there were repairs to be made at the start of the tenancy and the tenants provided copies of some emails sent to the landlord where repair issues were raised. The tenant stated that upon raising these issues to the landlord's attention she would indicate she was see to the repair but then nothing more was done.

The tenant submitted that the broken window resulted in a cold bedroom and higher heating costs and the missing spindles were a safety hazard. The tenants seek compensation for the 45 months of their tenancy for these repair issues in the amounts of $10.00 per month for the broken window and $10.00 per month for the missing spindles, or $900.00.

3. Loss of enjoyment due to smoke smell

The tenant submitted that the tenants noticed the smell of smoke in the rental unit on the first day of their tenancy. During the tenancy, the tenants determined that the downstairs tenant was a heavy smoker and that he was likely smoking inside his suite. The tenant stated that the issue was brought to the landlord's attention and in response the landlord claimed to have spoken with the downstairs tenant and that he denied smoking inside his unit. The tenants provided written statements of their guests. The guests all describe the smell of smoke in the rental unit during the entire time the tenants occupied the rental unit. One of the witnesses suspected that the smoke smell was from the downstairs tenant or imbedded in the house.

The tenant submitted that the smell of smoke diminished the tenants' enjoyment of their rental unit and caused the tenants to do more laundry. The tenants seek compensation of $50.00 per month for the 45 months of their tenancy, or $2,250.00.

I noted that the tenancy was nearly four years in duration and the tenants had not filed an Application for Dispute Resolution seeking repair orders or orders for compliance. Nor, did the tenants end the tenancy for these reasons. The tenant explained that they continued their tenancy for so long as the location of the rental unit was very convenient to their work places and because the landlord permitted the tenants to have a dog in the rental unit so they were willing to overlook some issues.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

Doubling of the security deposit and pet damage deposit

The tenants raised a number of matters with respect to seeking doubling of the deposits, which I have analyzed below.

As for serving only two of the three co-tenants with the Landlord's Application for Dispute Resolution, I find that argument is no basis for doubling of the deposits. Where there is a co-tenancy, all co-tenants are jointly and severally responsible and entitled under the Act, regulations and tenancy agreement. Accordingly, it is sufficient for a landlord to pursue one or all co-tenants in filing an Application for Dispute Resolution. The landlord had pursued two of the co-tenants with respect to her claims against them of their deposits and not pursuing the third co-tenant is not a basis for doubling the deposit. Accordingly, I do not consider this argument further.

I found the tenant's submission that the move-out inspection report may have been served upon the tenants after the time limit for doing so, I did not consider this submission further given the tenant's lack of certainty and the fact it was not raised in the tenants' submissions made at the time of filing their Application for Dispute Resolution.

As for the tenant's argument that the landlord acted in bad faith during the move-out inspection and indicated to the tenants that she would be returning the deposits to them, I find that argument does not form a basis for doubling the security deposit and pet damage deposit. As seen in section 21 of the Residential Tenancy Regulations, the Act

contemplates that there may be circumstances where damage or a condition becomes apparent after a condition inspection is performed and the inspection report completed. The landlord's Application for Dispute Resolution appears to allege that pet urine, or the smell of it, became apparent after the tenancy ended. Where that is the case or not, is not before me, but the landlord did not lose the right to make a claim for damage, other losses, and a claim against the deposits. In order to award the tenants doubling of the deposits, I must determine that the landlord failed to meet her obligations with respect to handling of the deposits. Section 38 of the Act specifically provides for the landlord's obligations with respect to handling of the deposits and the consequences for not doing so (doubling of the deposit) and I turn to section 38 to determine the tenant's entitlement to doubling of the deposits.

Under section 38 of the Act, a landlord has 15 days, from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to return the security deposit plus interest to the tenant, reach written agreement with the tenant to keep some or all of the security deposit, or make an application for dispute resolution claiming against the deposit. If the landlord does not have the tenant's consent to retain the deposit and does not return the deposit or file for dispute resolution to retain the deposit within fifteen days the landlord must pay the tenant double the amount of the deposit.

In this case, the landlord did not have the tenant's written authorization to make deductions from the deposits, the landlord did not refund the deposits within 15 days of the tenancy sending or receiving the forwarding address, but the landlord did file an Application for Dispute Resolution seeking an Arbitrator's authorization to retain the deposits within 15 days. While the landlord may not have been successful in pursuing her claim because she failed to follow the Rules of Procedure, I find the landlord met her obligation to take action with respect to the deposits within the time limit for doing so. Therefore, I dismiss the tenants' request for the deposits to be doubled.

Claim for compensation for repairs not made and smoke smell

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;

3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

As described above, it is not enough to prove the other party breached the Act, regulations or tenancy agreement in order to receive compensation. Rather, the other tests for compensation must also be proven. I accept the unopposed evidence before me that there were outstanding repair issues for a long period of time and the tenants experienced a distasteful smell of smoke during their tenancy. I also accept that these issues likely resulted in some loss or devaluation in their tenancy; however, where a party seeks compensation for an issue that has been outstanding for a very long time, such as in this case, mitigation must be considered.

Despite the tenant's assertion that the landlord did not take sufficient action to rectify the issues the tenants did not file an Application for Dispute Resolution seeking remedy during the tenancy. Nor, did the tenants end the tenancy for these issues. Rather, the tenant acknowledged that the tenants were willing to overlook some issues in recognition of the landlord's willingness to permit them to have a pet. Their decision to tolerate some issues and not escalate enforcement action was their decision but in making such a decision I find they are not entitled to seek compensation after-the-fact for several years of tolerance or acceptance on their part. Therefore, I dismiss the tenant's request for compensation for outstanding repairs and smoke smell.

Having dismissed all of the tenants' claims against the landlord, I make no award for recover of the filing fee.

In light of all of the above, I dismiss the tenant's application in its entirety.

Conclusion

The tenants' application has been dismissed in its entirety.

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: February 10, 2017

Residential Tenancy Branch