



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ASSOCIA BRITISH COLUMBIA BC
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: MNDC O FF

Introduction:

The tenant/applicant did not attend but had submitted a request for an adjournment. The landlord, counsel and witnesses attended and gave sworn testimony. The landlord confirmed that they received the tenant's Application for Dispute Resolution on July 17, 2017 after repeated request.. I find that the landlord is served with the Application according to section 89 of the Act. The tenant applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) A monetary order pursuant to Sections 7, 32, 33 and 67 for damages suffered due to lack of supervision or negligence of the landlord and for reimbursement for moving expenses, storage, motel rental and suffering, pain and loss,
- b) To obtain a refund of the security deposit; and
- c) An order to recover the filing fee pursuant to Section 72.

Preliminary Issue: Adjournment Request

Rule 6 of the Residential Tenancy Branch Rules of Procedure provide rules on rescheduling and adjournments. Rule 6.1 states the Branch will reschedule if written consent is received from both parties at least 3 days before the scheduled date for the hearing. I find the tenant did not obtain consent from the landlord to reschedule the hearing.

Rule 6.2 states that if a party is unable to get consent and they want to request a rescheduling of the hearing because they will be unable to attend the proceeding due to circumstances beyond his or her control, the dispute resolution proceeding must commence at the scheduled time. The party requesting the adjournment can ask the arbitrator to reschedule the proceeding by submitting the request to the Residential Tenancy Branch at least 3 business days before the proceeding and setting out the circumstances that are beyond the party's control or having an agent represent him or her to make the request to the arbitrator. I find the tenant made the request in writing on December 5, 2017.

Rule 6.4 sets out the criteria to be applied in granting an adjournment without restriction to the arbitrator's authority to consider other factors as follows:

- a) The oral or written submissions of the parties
- b) Whether the adjournment will contribute to the resolution of the matter
- c) Whether the adjournment is required to provide and a fair opportunity for a party to be heard, including whether there was sufficient notice of the dispute proceeding;
- d) The degree to which the need for adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and
- e) The possible prejudice to each party.

In applying the criteria, I find this request for an adjournment arises from the fact that the tenant has chosen to accompany his wife out of the country where she is scheduled to have cosmetic surgery on December 12, 2017. Although the wife's doctor says it is necessary for him to accompany her, I note this hearing was scheduled for December 11, 2017 which is before the surgery date; the hearing date was set on July 4, 2017. As he was flying down to the other country on December 9, 2017, I find he would have had ample time to prepare to call into the conference from his location there. The tenant was also advised by counsel for the respondent landlord and the Residential Tenancy Branch that he had the option of calling in to the conference from the other country or having an agent represent him. Furthermore, I find an adjournment is unlikely to contribute to a resolution of this matter and it would prejudice the landlord who is represented by counsel who has done significant preparation at considerable expense for this hearing. I declined to grant an adjournment and the hearing proceeded.

Issue(s) to be Decided:

Has the tenant proved on a balance of probabilities that they have suffered damage and loss due to act or neglect of the landlord? If so, to how much compensation have then proved entitlement?

Background and Evidence:

The tenant did not attend the hearing although it is his Application/Notice of Hearing which he scheduled with the Residential Tenancy Branch. The landlord attended and was given opportunity to be heard, to present evidence and to make submissions. The landlord stated that the tenancy commenced March 1, 2017 on a fixed term to February 28, 2017, that monthly rent was \$1845 plus \$70 parking and a security deposit of \$922.50 was paid. The landlords said the tenant had some complaints about second hand smoke and a break –in at the building so they agreed he could break the fixed

term lease. A mutual agreement to end tenancy was signed on June 30, 2017 to be effective July 31, 2017.

The tenant claims as follows:

Tolls: \$16

Security Deposit: \$922.50

Storage fee (3 months); \$600

Health, violation of privacy, pain suffering, inappropriate conduct: \$15,000

Moving fees to storage: \$325

No documents were provided to support the above costs, other than the tenancy agreement regarding the security deposit.

The landlord said they understood one of the tenant's issues was alleged suffering from second hand smoke and concerns over a break-in. The landlord provided evidence that this was a no-smoking building, this was clearly in the leases and enforced by the landlord. Smokers were permitted to reside in the building but they had to go across the street or use a laneway or other public property to smoke. They were not permitted to smoke anywhere on the property. The landlord provided evidence of enforcing this rule against 3 different properties. If a tenant or a guest was observed smoking on the property, breach letters were sent to be followed by a Notice to End Tenancy for material breach of the tenancy agreement. They noted the tenant's girlfriend called the Police on one occasion about smoke but it was smoke coming from a fire pit on a neighbour's property. The landlord noted the tenant gave no written or verbal complaints about this problem until June 30, 2017 when he wanted to end his fixed term tenancy early. They signed a Mutual Agreement to End Tenancy on June 30, 2017 with no penalty attached.

Another issue concerned a break-in into the parking garage and two secured areas. 7 tenant files were stolen and also the video feed. The Police were called immediately and 24 hour security was put in place. The tenant complained that all the locks were not rekeyed immediately but the landlord said it was a Friday and the locksmith could not do all this work until the Monday. They note they did everything within a very reasonable time and paid for additional protection in the interim. The landlord further notes the tenant had an alarm system for which no-one else had the codes. This presented difficulty for them in trying to arrange showings to prospective tenants. After the break-in, the landlord provided evidence of a review by OIPC which found all reasonable steps were taken to protect the tenants.

The landlord notes they withheld \$250 from the tenant's security deposit as he had agreed on his lease to have the carpets professionally cleaned at move-out and provided the receipt to the landlord. He did not have the carpets cleaned and he did not consent on the condition inspection report that the landlord could retain any amount from his security deposit. The landlord agreed they may have violated section 38 of the Act in this respect.

The tenant provided a doctor's report stating he was advising the tenant to find another place to live due to the amount of smokers in his building. The doctor notes he treats the tenant for asthma and since living with the increase of smokers, he has had more issues with his breathing. The tenant states he cannot spend time on his deck as there is too much smoke outside of his unit. He notes his rights under the Act of quiet enjoyment of the rental property and freedom from unreasonable disturbance have been breached repeatedly.

He also alleges that the landlord was negligent with his personal information which was left onsite at the property without his knowledge. He states he was very concerned for the safety of his family and himself when keys were not changed immediately. He notes he will open an investigation with the OIPC as there has been an inappropriate disclosure of his personal information. He wants compensation for the emotional and physical trauma he suffered while living in this building. Some photographs of packets of drugs allegedly found by the doors of the building are included in evidence. On the basis of the documentary and solemnly sworn evidence, a decision has been reached.

Analysis

Awards for compensation are provided in sections 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.

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Section 67 of the Act does *not* give the director the authority to order a respondent to pay compensation to the applicant if damage or loss is not the result of the respondent's non-compliance with the Act, the regulations or a tenancy agreement.

The onus is on the tenant as applicant to prove on the balance of probabilities that the landlord, through act or neglect, violated the Act or tenancy agreement and that the violation caused him loss. I find the landlord's evidence credible that they have not violated the Act or tenancy agreement. I find their credibility is well supported by their tenancy agreements which prohibit smoking anywhere on their property and copies of their posted signs reminding tenants. I find they were not negligent in enforcing this term as they provided evidence of breach letters sent to some tenants and the tenants' responses to them. While the doctor said the tenant suffered from smokers in his building, I find, with respect, that the doctor did not know of the landlord's smoking controls in the building and on their entire property. I find the tenant suffered from a pre existing condition of asthma according to the doctor. While some second hand smoke may have drifted from the street or neighbouring properties, I find the landlord had no control over smokers on public property. I find insufficient evidence that the tenant's health issues were caused by actions or neglect of the landlord. I dismiss his claim for compensation.

In respect to the tenant's claim for a breach of his privacy due to a break-in, I find the weight of the evidence is that the landlord immediately addressed the problem by calling the police, hiring extra security and arranging to have locks changed as soon as reasonably possible which was Monday when the locksmith could do it. In support of this, I find the OIPC stated that security measures at the time of the break in appeared reasonable as tenant information was in a filing cabinet inside a locked office, which was inside a larger locked room requiring fob access. They noted the landlord took every reasonable effort to mitigate the harm and appropriate steps to prevent further breaches. I find insufficient evidence that the breach of privacy was due to act or neglect of the landlord. I dismiss the tenant's claim for compensation for breach of privacy.

Regarding the tenant's further allegations of disturbance of his reasonable enjoyment by scheduling viewings of the suite at times unsuitable to him, I note section 29 of the Act limits the rights of the landlord in entering a tenant's suite. I find insufficient evidence that the landlord violated section 29 of the Act. I find the weight of the evidence is that they provided 24 hour notice and tried to arrange a schedule of showings with the tenant. I note the tenant was permitted to break his fixed term lease without penalty and the landlord was attempting to re-rent and avoid further monetary loss. As I find the landlord did not breach the Act, I find insufficient evidence that any disturbance to the

tenant's reasonable enjoyment was caused by an act or neglect of the landlord that violated the Act or the tenancy agreement. I dismiss this portion of his claim for compensation.

In summary, I find insufficient evidence that the tenant's losses exist as he submitted no receipts for costs he allegedly incurred. I find he did not prove on a balance of probabilities that his problems with second hand smoke or any disturbance of his reasonable enjoyment were caused by act or neglect of the landlord in violation of the Act or his tenancy agreement. I find furthermore the landlord made all reasonable efforts to protect his privacy and safety when the break-in occurred.

Regarding the refund of his security deposit, I find the landlord with held \$250 for carpet cleaning without the tenant's consent. I find the landlord returned \$672.50 on or about August 3, 2017. I refer the tenant to section 38 of the Act which provides the landlord must return the tenant's security deposit in full within 15 days of the later of the tenant vacating and providing their forwarding address in writing or file an application to claim against it within the 15 days. If the landlord does not refund it or file an application, the tenant may apply for a refund of double their security deposit. As the tenant did not attend the hearing, I have insufficient evidence of the date he forwarded his address in writing and requested the refund of his security deposit. I dismiss this portion of his claim and give him leave to reapply.

Conclusion:

I dismiss the application of the tenant and find he is not entitled to recover filing fees due to lack of success. I give him leave to reapply for the refund of his security deposit.

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: December 11, 2017

Residential Tenancy Branch