Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding INSIGHT HOLDINGS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing was scheduled to deal with a tenant's application for return of double the security deposit and pet damage deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

At the start of the hearing the tenant stated he had a witness present. The tenant stated that the witness was expected to provide testimony with respect to what transpired at the move-out inspection; other issues during the tenancy; and, confirming the tenant had mowed the lawn. I asked the tenant to exclude his witness until such time he was called to testify. The tenant confirmed that the witness was excluded. The witness was not called to testify during the remainder of the hearing.

I proceeded to explore service of hearing documents and evidence upon each other and the Residential Tenancy Branch. The tenant testified that he sent his Application for Dispute Resolution to the landlord via registered mail on September 22, 2017. The landlord confirmed receipt of the tenant's hearing package.

The landlord served the tenant with a written response and rebuttal evidence by way of registered mail sent on November 7, 2017. The tenant confirmed receipt of this package.

The tenant sent an Amendment to an Application for Dispute Resolution and evidence, including evidence in response to the landlord's evidence, to the landlord via registered mail on March 22, 2018. The landlord confirmed receipt of this package.

The landlord sent a response to the Amendment and the tenant's additional evidence to the tenant via registered mail, and by posting on his door, on March 29, 2018. The landlord pointed out that she provided what she could in the limited amount of time she had after receiving the Amendment. The landlord pointed out that the tenant waited until the very last minute to file the Amendment and the landlord would have liked more time to reply to the amended claim.

I noted that the tenant sought to increase his monetary claim by $15,080.00 by way of his Amendment. The tenant's increased monetary claim pertains to alleged loss of use of the property over several months. The tenant explained that he filed the Amendment very close to the filing deadline because it was put on "backburner" when he was busy at work and he wanted to meet with an attorney first.

Below, I have referenced relevant sections of the Rules of Procedure that were in effect when the tenant filed his original Application for Dispute Resolution, with my emphasis underlined.

> **2.3 Related issues**
> Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.
>
> **4.1 Amending an Application for Dispute Resolution**
> An applicant may amend a claim by:
> • completing an Amendment to an Application for Dispute Resolution form; and
> • filing the completed Amendment to an Application for Dispute Resolution form and supporting evidence with the Residential Tenancy Branch directly or through a Service BC office.
>
> An amendment may add to, alter or remove claims made in the original application.
>
> As stated in Rule 2.3 [*Related issues*], unrelated claims contained in an application may be dismissed with or without leave to reapply.
>
> See also Rule 3 [*Serving the application and submitting and exchanging evidence*].

4.6 Serving an Amendment to an Application for Dispute Resolution
As soon as possible, copies of the Amendment to an Application for Dispute Resolution and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by section 89 of the *Residential Tenancy Act* or section 82 of the *Manufactured Home Park Tenancy Act* and these Rules of Procedure.

The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the Act and these Rules of Procedure.

In any event, a copy of the amended application and supporting evidence should be served on the respondents as soon as possible and must be received by the respondent(s) not less than 14 days before the hearing.

See also Rule 3 [*Serving the application and submitting and exchanging evidence*].

4.7 Objecting to a proposed amendment
A respondent may raise an objection at the hearing to an Amendment to an Application for Dispute Resolution on the ground that the respondent has not had sufficient time to respond to the amended application or to submit evidence in reply.

The arbitrator will consider such objections and determine if the amendment would prejudice the other party or result in a breach of the principles of natural justice. The arbitrator may hear the application as amended, dismiss the application with or without leave to reapply, or adjourn the hearing to allow the respondent an opportunity to respond.

I was of the view that the tenant's request to amend the original Application for Dispute Resolution to include a monetary claim for loss of use is largely unrelated to the tenant's request for return of double the security deposit and pet damage deposit. The landlord has had ample time to prepare to respond to the request for double the deposits having received the original Application for Dispute Resolution in September 2017; however, the landlord indicated that more time was needed to fully prepare to respond to the tenant's claims for loss of use. I find the landlord's position reasonable considering she

had less than six days from the time she received the Amendment to provide a written response and gather evidence for the amended claims.

Rules 2.3 and 4.1 provide me the discretion to dismiss, with or without leave, claims that not sufficiently related and Rule 4.7 provides me the authority to dismiss a request for Amendment considering the respondent's objection. During the hearing, I informed the tenant that I was prepared to severe the tenant's request for compensation for loss of use from his original claim for return of the security deposit and pet damage deposit and the tenant did not object. Accordingly, I exercise my discretion under Rules 2.3, 4.1 and 4.7 and I dismiss, with leave, the tenant's request for compensation for loss of use. The tenant is at liberty to file another Application for Dispute Resolution to make such a claim within two years of the date the tenancy ended.

Issue(s) to be Decided

Has the tenant established an entitlement to return of double the security deposit and pet damage deposit?

Background and Evidence

The tenancy started on May 1, 2014 and the tenant paid a security deposit of $650.00 and a pet damage deposit of $650.00. The tenant was required to pay rent of $1,300.00 on the first day of every month. The tenancy ended pursuant to a tenant's notice to end tenancy. The tenant's notice had a stated effective date of "August 30, 2017"; however, the tenant remained in possession of the rental unit until August 31, 2017 and the parties met at the property on August 31, 2017 for property for purposes of inspecting the property.

After the landlord's agent attended the property on August 31, 2017 to do the inspection, the key to the rental unit remained with the tenant as he was to perform some additional tasks at the property. A new tenant was set to move into the rental unit on September 1, 2017. On the evening of August 31, 2017 the parties exchanged some text messages with respect to retrieving or returning the key. In the text messages exchanged on August 31, 2017 the tenant provided the street number and the street name of his "new address" and his work address as possible places the landlord may retrieve the key. Ultimately, the tenant ended up dropping the key off with the receptionist at the landlord's office in the morning of September 1, 2017.

On September 11, 2017 the tenant signed the move-out inspection report to authorize the landlord to deduct $57.57 from the security deposit/pet damage deposit. On September 18, 2017 the landlord issued a cheque to the tenant for the balance of his deposits in the amount of $1,242.43. The cheque was mailed to the tenant. The tenant stated that he received it in the mail on September 22, 2017 and the landlord stated that the cheque was cashed on September 22, 2017.

The parties were in dispute as to when and if the tenant provided his forwarding address to the landlord in writing. Below, I have summarized their respective positions.

The tenant submitted that he provided his forwarding address by way of text messages sent and received by the landlord on August 31, 2017. The tenant testified that he also wrote his address on a piece of paper and gave it to the receptionist at the landlord's office when he delivered the key on September 1, 2017. The tenant acknowledged that he did keep a copy of the document he left with the receptionist or otherwise have any corroborating evidence to show that he delivered his written forwarding address to the landlord's office on September 1, 2017. The tenant pointed out that the landlord had the tenant's forwarding address because the refund cheque has his forwarding address on it, albeit with an error in the street name, and it was mailed to him at his forwarding address.

The landlord acknowledged the tenant provided two incomplete addresses in text messages he sent to her on August 31, 2017 but she took the purpose of receiving those addresses as being for retrieving the key. The landlord stated that during a phone conversation with the tenant on September 8, 2017 she asked the tenant to confirm the address she was to use to send the refund cheque, which he did orally during the telephone call. The landlord testified that the key was delivered to her office on September 1, 2017 but there was no forwarding address provided with the key. The landlord pointed out that the forwarding address was not written on the move-out inspection report either.

The tenant denied that there was a conversation about his forwarding address during a telephone call on September 8, 2017.

The parties were also of differing positions as to whether the tenant agreed with the landlord that the refund cheque would be issued on September 18, 2017 or whether he "just went along with it". I informed the parties, that parties are not permitted to contract outside of the Act and that an agreement to violates the Act will not be enforced.

The parties provided opposing positions with respect to the date the tenancy ended. The possible dates put forth to me were: August 30, 2017 which is the date indicated on the tenant's notice to end tenancy; August 31, 2017 which is the last day in the rental month; September 1, 2017 which is the date the tenant returned the key to the landlord; or a subsequent date when the tenant returned to the property to finish performing certain tasks in the yard of the property.

The parties provided arguments as to whether a landlord has 15 calendar days to return a deposit and whether the deadline is extended to the next business day since the landlord is a business and the business office is closed on the weekend. The landlord pointed to the "glossary of terms" on the Residential Tenancy Branch website which references the *Interpretation Act*. The parties also provided different arguments as to the when the 15 day calculation should commence.

Analysis

As provided in section 38(1) 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 and/or pet damage deposit to the tenant, reach written agreement with the tenant to keep some or all of the deposit(s), or make an Application for Dispute Resolution claiming against the deposit(s). If the landlord does not return or file for dispute resolution to retain the deposit(s) within fifteen days, and does not have the tenant's written agreement to keep the deposit, the landlord must pay the tenant double the amount of the deposit pursuant to section 38(6) of the Act.

In this case, the tenant provided written authorization for the landlord to deduct $57.57 from the deposit(s), leaving the tenant entitled to a refund of $1,242.43. The tenant did receive a refund of $1,242.43 by way of a cheque issued on September 18, 2017 and mailed to him shortly after its issuance since the tenant received it no later than September 22, 2017. The issue for me to determine is whether the landlord met its obligation to pay the refund to the tenant within the required time limit.

As stated earlier, a landlord's obligation to pay the deposit back to the tenant, less authorized deductions, is "within 15 days" of the later of two dates: the date the tenancy ended or the date the landlord receives the tenant's forwarding address in writing.

Undeniably the tenancy has ended and I find the date it ended is August 31, 2017. I make this finding since an incorrect effect date on a notice to end tenancy automatically changes to comply with the Act, as provided in section 53 of the Act. The tenant gave a

written notice in July 2017 to end the tenancy effective “August 30, 2017”. The date of August 30, 2017 does not comply with section 45 of the Act. Section 45 of the Act requires that the effective date “is the day before the day in the month…that rent is payable under the tenancy agreement”. This provision means that if the rent is paid on the first day of the month under the tenancy agreement, a notice to end tenancy is effective the day before the first. In this case, the tenant was required to pay rent on the first day of the month and August 31, 2017 is the day before the rent would have been due. Accordingly, the tenant’s notice to end tenancy automatically changed to read August 31, 2017.

A tenancy may be found to have ended earlier had the tenant vacated and returned possession of the rental unit before August 31, 2017; but that was not the case in this case. The tenant was in possession of the rental unit on August 31, 2017.

As to the landlord’s position that the tenant had possession and returned the key after August 31, 2017 I am of the position that did not extend the end of tenancy date. Where a tenant remains in possession of a rental unit after the end of the tenancy, the tenant is considered an “over-holding tenant” as defined in section 57 of the Act; however, that does not in itself change the end date of the tenancy. Also of consideration is that the landlord acknowledged that the new tenant took possession of the unit on September 1, 2017. Accordingly, I remain of the view that the tenancy ended effective August 31, 2017 even if the tenant had the key for the rental unit until the morning of September 1, 2017.

The other date that must be determined is the date the tenant provided the landlord with a forwarding address in writing. The party that gives something to another party generally has the burden to prove when and/or how it was given. Since it is the tenant that must give the landlord a written forwarding address to trigger an entitlement to return of the security deposit and/or pet damage deposit it is the tenant that bears the burden to prove when and how it was given. Since the forwarding address must be given in writing, I expect that this is accomplished by way of a document. This is in keeping with section 88 of the Act which provides for ways a landlord or tenant must give a document to the other party. Section 88 does not recognize text messages as a way of giving a document. Accordingly, I do not consider the text messages the tenant sent to the landlord on August 31, 2017 to meet his obligation to give a forwarding address to the landlord in writing.

The tenant testified that he also provided a document containing his forwarding address to the landlord when he delivered the key to the landlord’s office receptionist on

September 1, 2017. The landlord acknowledged receipt of the key but denied that a document containing the tenant's forwarding address accompanied the key. I could not determine whether one party was more credible than the other, and I found the disputed verbal testimony insufficient for me to make a determination. I turned to the text messages that were provided to me as evidence in an effort to determine whether there is any indication of a written forwarding address being provided with the key. When I look at the text messages exchanged between the parties on August 31, 2017, September 1, 2017 and later dates, I see reference to the tenant delivering the key to the landlord's office but I do not see any reference by the tenant that he delivered a piece of paper with his forwarding address. Nor, is there indication the landlord received such a document. I note that in a September 11, 2017 text message the landlord refers to the tenant's "new address" but there is no mention as to how she received it. The landlord may have determined the tenant's "new address" from the August 31, 2017 text messages or the telephone conversation she said took place on September 8, 2017; or, a document given on September 1, 2017 as alleged by the tenant but the evidence is not sufficiently conclusive. Also of consideration is that the tenant did not produce a copy of the document he allegedly delivered to the landlord's office on September 1, 2017 and I am unable to verify that it contained a forwarding address, if it even exists.

It is clear that the tenant did send his forwarding address to the landlord, in writing, by way of the Application for Dispute Resolution he sent to the landlord on September 22, 2017. Accordingly, I find the best evidence as to the date the landlord received the tenant's forwarding address in writing is the date the landlord received the tenant's Application for Dispute Resolution. However, the landlord had already refunded the security deposit to the tenant by the time the Application for Dispute Resolution was received by the landlord.

In light of the above, I find the tenant did not meet his burden to prove he provided the landlord with a forwarding address in writing more than 15 days before the landlord sent the refund cheque to him. Accordingly, I find there is insufficient evidence that the landlord violated section 38(1) of the Act and I dismiss the tenant's request for return of double the security deposit and pet damage deposit.

It is important to note that I dismissed the tenant's application because the tenant did not provide sufficient evidence to demonstrate he delivered a forwarding address in writing to the landlord on September 1, 2017 as he alleged. Accordingly, it was unnecessary for me to make a determination as to whether the landlord had 15 calendar days to refund the deposits to the tenant or whether the deadline for refunding

the deposit was extended to the next business day. I strongly suggest the landlord seek its own legal advice on that point going forward.

Conclusion

The tenant's request for return of double the security deposit and pet damage deposit is dismissed without leave.

The tenant's request to amend the original Application for Dispute Resolution to increase the monetary claim for loss of use of the property is dismissed with leave to reapply.

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 13, 2018

Residential Tenancy Branch