Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

The tenant applies to recover a security deposit, doubled pursuant to s. 38 of the *Residential Tenancy Act* (the "*Act*"). That section provides that once a tenancy has ended and once the tenant has provided the landlord with a forwarding address in writing, the landlord must either repay the deposit money or make an application to keep all or a part of it within fifteen days. A landlord who fails to do either of those things within the fifteen day period will incur the penalty of having to account to the tenant for double the amount of the deposit.

The hearing of this matter started on May 12. However, the landlord's representative, Mr. T.K. indicated that the landlord had not received the tenant's application. This was strongly denied by the landlord's counsel. Additionally, Mr. T.K. had expected that a cross claim by the landlord (related file #1, shown on cover page of this decision) would be heard at the same time as this application. However, that file, an application by Mr. T.K. personally against this tenant and against a Mr. D.R. for damages and loss related to a claim of damage due to smoking in the rental unit, had been cancelled by Mr. T.K. on May 9.

Mr. T.K. indicated that it had been cancelled in error by the Residential Tenancy Branch and that the file he had wished to cancel was actually related file #2, which Residential Tenancy Branch records show to be an application by this landlord against another company as tenant for damage to furniture in this same rental unit and for damages and loss resulting from smoking in the rental unit.

Ms. L.W., counsel for the tenant, stated the tenant had not received the Notice of Dispute Resolution Proceeding or any evidence in support of the related file #1 application. Mr. T.K. disagreed, indicating that service had been made by registered mail.

This matter was adjourned to May 16. The tenant was permitted until May 14 to upload and provide the tenant with its materials. The landlord was permitted until May 15 to file and trade its evidence. It was determined at the May 12 hearing that the landlord's claim for damage and loss was a claim unrelated to the claim at issue here, the return of a deposit long after the end of the tenancy. Mr. T.K. was counselled to make another application, which he did (related file #3), in his own name as landlord.

The hearing continued on May 16 and the tenant presented evidence in support of its claim. In response Mr. T.K. testified. Available time ran out and the matter was set over to June 12 for Mr. T.K. to continue to present the landlord's defense.

The evidentiary portion of the hearing was completed on June 12 and the parties were offered an opportunity to make submissions on how the evidence and the law should be properly perceived. Unfortunately, Mr. T.K. left the hearing at that point. The matter was adjourned to June 19 for submissions.

The hearing continued on June 19. Mr. T.K. strongly advanced the proposition that this matter should be heard with his now renewed application (related file #3) but, again, it was the view of this arbitrator that the issues in this matter were discreet and separate. This tenancy ended long ago. The landlord did not possess either an arbitrator's order or the tenant's written authorization to keep the deposit money. The tenant is entitled to recover its deposit and if the landlord later pursues and succeeds on its application the deposit award will be offset. The central question of whether or not the tenant is entitled to a doubling of its deposit is a question unrelated to whether or not the tenant or its permitted occupants damaged the rental unit.

At the June 19 hearing Mr. T.K. indicated that he could not prepare properly in the time allowed since the last hearing. Mr. T.K. indicated that he wished the landlord's lawyer, who was said to be familiar with the matter, an opportunity to attend. The hearing was adjourned for twenty minutes for the lawyer to be contacted. Unfortunately, the lawyer was not available. The matter was adjourned to June 29 to permit counsel for the landlord to attend and make submissions.

On June 29, for reasons unrelated to either party, the hearing of submissions was not held. The matter was adjourned to August 3 and a new Notice of that hearing was sent to the parties by email attachment to the addresses they had provided earlier.

On August 3, Ms. L.W. for the tenant attended and made submissions. Neither Mr. T.K. nor the landlord's lawyer attended.

Both parties' representatives, Ms. L.W. and Mr. T.K., attended all evidentiary portions of the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Is the landlord in non-compliance with s. 38 of the *Act*, entitling the tenant to recover double the amount of the deposit?

Background and Evidence

The rental unit is a four bedroom, condominium apartment. There is a written tenancy agreement between the parties showing that the tenancy started on July 7, 2017 for a fixed term to August 6, 2017 and that the tenant was obliged to vacate the premises at the end of that fixed term. The rent was $34,000.00 for the one month fixed term. The tenancy agreement calls for a $17,000.00 security deposit to be paid on the date of signing. There is no dispute that the deposit was paid.

The tenant is in the business of movie productions. The rental unit was intended for the use of two actors during filming in the area.

Mr. T.K. signed the tenancy agreement on page 5 of 6 as "landlord's agent." On page 6, the *Strata Property Act* "Form K"., the tenants are listed as two individuals, not the tenant company. Mr. T.K. signed the document on page 6, above the line indicating "signature of landlord or landlord's agent." Below that line the document indicates "landlord's agent's name - CBP Realty" (*full name redacted for privacy reasons*).

In the right hand corner of the same page the agreement reads "The address to which any notices to the registered owner of the strata lot shall be delivered is …" followed by the name CBP Realty and giving address of the company and the email address of Ms. L.C.

Ms. L.C. of CBP Realty was the person who originally introduced the tenant to the property through the tenant's representative Ms. P.Y.

On July 4 Ms. L.C. emailed Ms. P.Y. reporting that the existing tenant would vacate a few days early to accommodate the tenant's requirements. Her email stated: At the current rate the landlord has agreed to your lease" and "if this is acceptable I will forward you the lease."

On July 6, Ms. L.C. sent the tenancy agreement to Ms. P.Y. for the tenant to sign.

Also on July 6 Ms. L.C. emailed Ms. P.Y. referring her to the security deposit return rules (or a part of them, excluding reference to the doubling penalty) contained in s. 38 of the *Act*.

On July 7, 2017 the tenancy agreement signed on behalf of the tenant was returned to Ms. L.C.

The tenant's internal business record requisitioning a cheque to pay the security deposit for this tenancy shows Ms. L.C. as the "contact."

On July 7 Ms. L.C. emailed Ms. P.Y. attaching the fully signed tenancy agreement and noting that if the tenant wanted a pet "we will have to approve" the breed and size.

Also on July 7, the tenant paid the security deposit and received a receipt signed by a Mr. P.D, "on behalf of" Ms. L.C.

Ms. P.Y. for the tenant testified that Ms. L.C. told her that "my associate Paul" would be "handling" the move-in inspection on July 7.

On August 2 Ms. L.C. emailed Ms. P.Y. stating that she had been informed that the occupants of the rental unit "are in breach of our contract" and have been actively smoking in the unit. The next day Ms. P.Y. replied that they could discuss any issues further at the "checkout."

Ms. L.C. attended and conducted the move-out inspection with Ms. P.Y. on August 6.

At some time between August 6 and August 14 (the date is not shown on the text) Ms. P.Y. texted Ms. L.C., enquiring about the deposit and giving a forwarding address. Ms. L.C. replied, "the landlord will be holding the deposit."

On August 21 Ms. P.Y. texted Ms. L.C. saying "today is past 15 days after check out and we have yet to receive any news." Ms. L.C. replied "I have just spoken to them – they will call."

On August 31 Mr. D.R., the tenant's production accountant, sent a registered letter to CBP Realty, referencing the address of the rental unit, demanding return of the deposit within fifteen days and providing the name of the desired payee and the forwarding address.

After that the tenant's lawyers became directly involved. This application was made on September 29, 2017. There appears to have been further correspondence with Ms. L.C., who, on October 19 emailed the tenant's lawyer stating:

> While I am disappointed that this matter has not been resolved to date, neither me nor my brokerage are in possession of the security deposit relating to the lease. I have responded to [*Mr. D.R.*] several times and have informed him of this. I have also encouraged him to contact the landlord directly, as the return of the deposit is directly between the tenant and them. I would appreciate it if you would refrain from including me on any communication regarding this dispute. If you have any questions with respect to the tenancy I may be reached
> at [*redacted*]..
> It may also be helpful to note that the address for the landlord provided in your attachment on page 1 is incorrect. The correct address as specified on the lease is [*redacted*] not [redacted]. The contact information I have for [*Mr. T.K.*] is [*redacted*] and his mobile number is [*redacted*].
> I hope you are able to resolve this dispute amicably.

The tenant took further steps to provide the landlord with its forwarding address in writing, however the landlord, or rather, Mr. T.K., made an application for dispute resolution (related file #1) on October 21, 2018 naming this tenant and Mr. D.R. as his tenants.

Mr. T.K. testifies that the landlord company is his personal company. He says that he had a long term tenancy agreement with the actual, offshore, owners of the condominium and that the tenancy agreement is, in fact, a sub-lease.

He says that Ms. L.C. was the owners' agent at all times, not his agent or the agent of his company, and that the tenant knew it. All her actions in regard to the tenancy in question were to protect the interest of the owner, the head landlord. He never hired her or paid her.

He says that page six of the tenancy agreement, the *Strata Property Act*, Form K, which lists CBP Realty as agent of the landlord and gives the address for delivery of all notices, is not part of the tenancy agreement; that the owner and Ms. L.C. needed to "submit it", not him.

He says that Ms. L.C. said many times she was not the landlord's agent and in fact she was more the tenant's agent as she was showing them places available to rent.

He testifies that he received the rent and the security deposit in full. He says that the Mr. P.D. who signed the deposit receipt is an employee of his company. He doesn't know why Mr. P.D. wrote "on behalf of Ms. L.C." on the receipt.

He says he received the tenant's forwarding address in writing from Mr. D.R. only four days before he made his own application.

In regard to receipt of the tenant's evidence package Mr. T.K. states on cross examination that he does not dispute that Mr. D.W. may have corresponded with the tenant's lawyers on behalf of the landlord and may have received the tenant's application by registered mail sent by the tenant's lawyers to the landlord's address in the tenancy agreement. But, he says, Mr. D.W. who was helping while Mr. T.K. was away, should not have been representing him. He was not an employee of the company.

Mr. T.K. appears to deny that Ms. L.C. sent the tenancy agreement to the tenant. He believes that a temporary employee in his office sent the tenancy agreement.

He says that his tenancy with the owners ended at about the same time as this tenancy and that he carried out a move out inspection with Ms. L.C. and signed a report. He says he attended the move out inspection for this tenancy but was late.

Ms. L.C. testified. She says the registered owner of the property is a woman who lives in China. She is the agent of that owner for this property and others that the woman owns. She says she is not the agent of this landlord and has not received any payment from it.

She denies receiving any deposit money nor did she sign the lease.

When the tenant's people contacted her about the deposit money after the tenancy ended, she directed them to this landlord and to Mr. T.K.

Under questioning Ms. L.C. agrees she arranged this tenancy. The tenant's representatives, perhaps Ms. P.Y. had contacted her about another property and she ended up showing them this one. She acknowledges conducting the move out inspection but says it was as the owner's representative. She did not sign the move out report. Neither party submitted a copy of any inspection report.

Analysis

Generally

As indicated earlier, at this point in the relationship between the parties, the tenant is entitled to return of its security deposit. The landlord does not have a lawful reason to withhold it. As of the date this matter first came on for hearing, the landlord had neither an arbitrator's order or the tenant's written authorization to withhold any of the deposit money. Mr. T.K.'s application made in October 2017, even had it been made within the fifteen day period in s. 38 of the *Act*, had been cancelled.. In any event that application was not made by the landlord indicated on this tenancy agreement.

The *Residential Tenancy Act*, is considered to be "consumer protection" legislation and as a result, in the event of ambiguity in its wording the benefit of the doubt should be given to the tenant. However, in my view the doubling provision in s.38 is a significant penalty and therefore any alleged violation of it should be clearly established by the evidence.

Section 38 provides:

> **Return of security deposit and pet damage deposit**
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> **38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a) the date the tenancy ends, and
> (b) the date the landlord receives the tenant's forwarding address in writing,
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> the landlord must do one of the following:
>
> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and
(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or
(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and
(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

(7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.

(8) For the purposes of subsection (1) (c), the landlord must repay a deposit

(a) in the same way as a document may be served under section 88 (c), (d) or (f) *[service of documents]*,

(b) by giving the deposit personally to the tenant, or
(c) by using any form of electronic
    (i) payment to the tenant, or
    (ii) transfer of funds to the tenant.

CBP Realty As Agent of Landlord

Page six of the tenancy agreement, the Form K, is, I find, virtually determinative of this question. It is part of the tenancy agreement. It is a page numbered in sequence with the remainder of the tenancy agreement. It is dated the day of signing of the agreement and is signed by Mr. T.K. on behalf of the landlord and by the tenant's representative. Even if it might be considered an "addendum" to the agreement, it is a clear indication that the landlord has designated CBP Realty as the agent of the landlord.

The parol evidence rule would prevent the landlord from presenting evidence (other than evidence of the surrounding circumstances at the time the agreement was made) to contradict the written agreement; to show that CBP Realty was not the landlord's agent. However, that rule of evidence does not apply to this proceeding (s. 75 of the *Act*).

In my view, for the landlord to show that the designation of CBP Realty as its agent was somehow wrong or incorrect would require clear and convincing evidence. The evidence produced at this hearing is to the contrary. Ms. L.C.'s actions and correspondence confirm that she was acting as the agent of the landlord by: showing the premises, negotiating an early termination for the previous tenants' tenancy, negotiating the rent, providing the tenancy agreement and arranging for its signing, discussing with the tenant the possibility for a pet in the rental unit, referring the tenant to security deposit rules, referring to the tenancy agreement as "our contract," conducting the move out inspection, informing the tenant that the landlord would be holding the deposit and purporting to contact the landlord about return of the deposit on August 21.

In her submissions, Ms. L.W., counsel for the tenant, indicates that there was no communication between the tenant and Mr. T.K. either before or during the tenancy and none of the evidence produced at hearing would indicate otherwise. Ms. P.Y. confirmed that virtually all her dealings regarding the tenancy before and during its term were with Ms. L.C.

I find that CBP Realty was the agent of the landlord.

Delivery of Forwarding Address to Landlord or its Agent

By its registered letter dated August 31, 2017 the tenant provided a forwarding address to CBP Realty.

Section 88 of the *Act* specifies methods by which documents must be given. It states:

> **88** All documents, other than those referred to in section 89 *[special rules for certain documents]*, that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:
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> (a) by leaving a copy with the person;
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> (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
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> (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
>
> (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
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> (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
>
> (f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
>
> (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
>
> (h) by transmitting a copy to a fax number provided as an address for service by the person to be served;
>
> (i) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;
>
> (j) by any other means of service prescribed in the regulations.

Subsection 88(c) authorizes a document such as a forwarding address in writing to be given to a landlord by regular mail or registered mail. If delivery is to be made on an agent of the landlord then ss. (b) requires that the document be left with the agent. That was not done in this case.

I find that the tenant's letter of August 31 to the landlord's agent giving a forwarding address was not delivered on the landlord in accordance with s. 88(b).

The tenant also provided a forwarding address to the landlord in Ms. P.Y's text to the Ms. L.C., sent between August 6 and August 14, 2017. Such electronic communication is not contemplated in s. 88, above. However, it is a method of communication permitted by the *Electronic Transactions Act*, SBC 2001, c. 10 (the "*ETA*").

Section 6 of that statute provides:

> **6**. 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
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> (a) accessible by the other person in a manner usable for subsequent reference, and
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> (b) capable of being retained by the other person in a manner usable for subsequent reference.

A text message satisfies both of those requirements.

The operation of s. 6 is not compulsory or mandatory. Section 4 of the *ETA* provides that it does not require a person to provide, receive or retain electronic information without that person's consent and that consent by a person may be inferred from the person's conduct. In this case Ms. Y.P. and Ms. L.C. were in email and text communication a number of times and were, I infer, agreeably exchanging information in that fashion on behalf of the parties.

Section 2(1) of the *ETA* states:

> **2** (1) This Act does not limit the operation of a law that
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> (a) expressly authorizes, prohibits or regulates the use of information or records in electronic form, or
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> (b) requires information or a record to be posted, displayed or delivered in a specific manner.

Section 88 of the *Residential Tenancy Act*, above, clearly requires information or a record to be delivered in a specific manner. The provisions of the *ETA*, cited above do not limit the delivery provisions in the *Residential Tenancy Act*, rather, as clearly intended, they supplement those provisions to account for the modern communications landscape.

I find that the tenant provided the landlord with a forwarding address in writing by text transmission from Ms. P.Y. for the tenant to Ms. L.C. for the landlord between the dates of August 6 and August 14, 2017.

Conclusion

The landlord has failed to comply with s. 38 of the *Act* by either repaying the deposit money or making application to keep it within fifteen days after the end of the tenancy and receipt of the tenant's forwarding address in writing.

The tenant is entitled to a doubling of the $17,000.00 security deposit to the amount of $34,000.00.

The tenant will have a monetary award of $34,000.00 plus recovery of the $100.00 filing fee. There will be a monetary order against the landlord in the amount of $34,100.00.

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: August 12, 2018

Residential Tenancy Branch