Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VAN 2315 W 13 PROJECT
CORP and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFT, MNSD, MNDCT

Introduction

This hearing convened as a Tenant's Application for Dispute Resolution, filed on August 17, 2019, in which the Tenant requested monetary compensation from the Landlord, return of double the security deposit paid and to recover the filing fee.

The hearing was conducted by teleconference at 1:30 p.m. on December 17, 2019. Both parties had agents call in on their behalf and through their agents were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The parties confirmed their email addresses during the hearing as well as their understanding that this Decision would be emailed to them.

Issues to be Decided

1. Is the Tenant entitled to monetary compensation from the Landlord?

2. Is the Tenant entitled to return of double the security deposit paid?

3. Should the Tenant recover the filing fee?

Background and Evidence

The Tenant's Agent testified that this fixed term tenancy began June 30, 2019. Monthly rent was payable in the amount of $650.00. The Tenant paid a $325.00 security deposit.

The Tenant's Agent confirmed that the Tenant gave notice to end her tenancy on July 15, 2019 effective July 31, 2019.

The Tenant alleges that she ended the tenancy for a breach of a material term as she claimed the Landlord did not protect her right to quiet enjoyment. She claimed that the downstairs renter was playing music on an amplifier until 4:00 a.m. and disturbing her to such an extent that she could not sleep. The Tenant's Agent confirmed that he was also present at the rental unit and heard the noise and was woken up as well.

The Agent confirmed that on July 4, 2019 the Tenant gave notice to the Landlord that the Tenant was being disturbed. The Agent stated that there was a phone call between the Tenant's Agent and the Landlord's Agent wherein the Tenant's Agent told the Landlord's Agent that they believed the Tenant's right to quiet enjoyment was being breached.

The Tenant's Agent confirmed that the first written notice to the Landlord of an alleged breach of a material term was on July 13, 2019. The Tenant's Agent confirmed that the Tenant moved out two days later on July 15, 2019 because she could not sleep.

The Tenant's Agent stated that the Tenant gave the Landlord her forwarding address on July 23, 2019. A copy of the letter as well as the tracking number for the registered mail package was provided in evidence before me.

The Tenant's Agent confirmed that the Tenant did not give the Landlord permission to retain her deposit. The Agent further confirmed that the Landlord did not return the deposit, nor did they make an application for dispute resolution.

In response to the Tenant's claims the Landlord's Agent testified as follows. She stated that she was first made aware that the Tenant had issues with the downstairs neighbour a few days after she moved in. The Landlord's Agent stated that she spoke with the downstairs neighbour and his social worker and tried to solve the problem before she served an eviction notice. She stated that on August 1, 2019 she served a 1 Month Notice to End Tenancy for Cause on the downstairs tenant. She confirmed that the downstairs renter moved out the end of August 2019.

The Landlord's Agent testified that she received the Tenant's forwarding address right after she moved out.

The Landlord's Agent also confirmed that she did not make an application to retain the Tenant's security deposit. The Agent stated that she did not have the Tenant's permission to retain the security deposit but she felt they could retain the funds because they suffered two months rental loss.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, and the *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at**:**

www.gov.bc.ca/landlordtenant.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Tenant has the burden of proof to prove their claim.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;

- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;

- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and

- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

The Tenant claims the Landlord breached a material term of the tenancy such that she was permitted to end her tenancy early pursuant to section 45(3) of the *Act;* for clarity I reproduce that section as follows:

> **Tenant's notice**
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> **45** …(3)If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Further guidance can be found in *Residential Tenancy Policy Guideline 8—Unconscionable and Material Terms* which provides in part as follows:

> **Material Terms**
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> A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.
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> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
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> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the

> Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.
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> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
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> - that there is a problem;
> - that they believe the problem is a breach of a material term of the tenancy agreement;
> - that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
> - that if the problem is not fixed by the deadline, the party will end the tenancy.
>
> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

While a tenant's right to quiet enjoyment is protected by section 28, I find the Tenant has failed to submit sufficient evidence to support her claim that she should be permitted to end her tenancy pursuant to section 45(3).

The evidence confirms that shortly after moving into the rental unit the Tenant informed the Landlord she was concerned with the noise from the downstairs unit. The Tenant provided the Landlord written notice on July 13, 2019 that she believed her right to quiet enjoyment was being breached and that this was a material term of her tenancy. Two days later the Tenant gave notice to end her tenancy and moved from the rental unit. In doing so I find the Tenant failed to give the Landlord a reasonable opportunity to correct the situation.

A tenancy may only end a tenancy in accordance with the *Act.* In this case the Landlord was required to follow the *Act* in terms of dealing with the downstairs tenant and also had to give that tenant sufficient warning that their tenancy was in jeopardy. The timeline imposed by the Tenant in the case before me was insufficient for the Landlord to address her concerns in accordance with the *Act.*

I therefore dismiss the Tenant's claim for return of one half of the rent paid for July 2019.

The Tenant also applies for return of their security deposit pursuant to section 38 of the *Residential Tenancy Act* which reads as follows:

Return of security deposit and pet damage deposit

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

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
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> (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

The evidence confirms that the Tenant did not agree to the Landlord retaining any portion of their security deposit.

I accept the Tenant's evidence that she sent her forwarding address to the Landlord on July 23, 2019. Pursuant to section 90 of the *Act,* documents served by registered mail are deemed served five days later; as such I find that the Landlord received the Tenant's forwarding address in writing on July 28, 2019.

The Landlord failed to return the deposit or apply for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenant, as required under section 38(1) of the *Act*. As such the Tenant is entitled to return of double the deposit pursuant to section 38(6) of the *Act.*

As the Tenant has been partially successful in their application, I also award them recovery of the filing fee.

Having made the above findings, I must Order, pursuant to sections 38 and 67 of the *Act*, that the Landlord pay the Tenant the sum of **$750.00**, comprised of double the security deposit (2 x $325.00) and the $100.00 fee for filing this Application.

Conclusion

The Tenant's Application for return of half a month's rent is dismissed.

The Tenant's Application for return of double their security deposit and recovery of the filing fee is granted.

The Tenant is given a formal Monetary Order in the amount of **$750.00.** The Tenant must serve a copy of the Order on the Landlord as soon as possible, and should the Landlord fail to comply with this Order, the Order may be filed in the B.C. Provincial Court (Small Claims Division) and enforced as an Order of that Court.

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 20, 2019

Residential Tenancy Branch