Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Prang Holdings Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: MNDCT, FFT

Introduction

In this dispute, the tenant seeks compensation against the landlord under section 67 of the *Residential Tenancy Act* (the "Act") for a breach of section 28 ("quiet enjoyment") of the Act. They also seek recovery of the filing fee pursuant to section 72 of the Act.

The tenant applied for dispute resolution on February 15, 2020 and a dispute resolution hearing was held on April 17, 2020. The tenant, her advocate (a law student), the advocate's supervising counsel, the landlord's agent, and a witness for the landlord, attended the hearing. The parties were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses. Finally, the parties acknowledged and confirmed that they had exchanged evidence and submissions, and no issues with respect to service of evidence were raised.

I have only considered evidence submitted in compliance with the *Rules of Procedure,* to which I was referred, and which is relevant to the issues of this application. As such, not all of the parties' testimony may necessarily reproduced below.

Finally, I note that while the tenant's application initially included a claim to dispute a 10 Day Notice to End Tenancy for Unpaid Rent, that claim was amended and removed by the tenant before the hearing. The issuing of that notice, however, is significant within the narrative of this dispute and forms part of the basis on which the tenant seeks compensation.

Issues

1. Is the tenant entitled to compensation under section 67 of the Act?
2. Is the tenant entitled to recovery of the filing fee under section 72 of the Act?

Background and Evidence

The tenancy began on August 15, 2015, and the rental unit is one of 111 rental units in a group of apartment buildings that were built in the 1960s or 1970s. Monthly rent is $1,096.00, which is due on the first of the month; a security deposit of $500.00 was paid by the tenant. Submitted into evidence was a copy of the written tenancy agreement.

What gave rise to this action were two events: the landlord's issuing of a notice in August 2019 that rent had not been paid, and the landlord's issuing of a 10 Day Notice to End Tenancy for Unpaid Rent in February 2020. Both notices were issued in error. I note that the overall facts of this dispute are not in dispute (with the exception of a few matters that shall be addressed below), and the landlord did not dispute that the notices had been incorrectly issued as a result of an accounting error.

Tenant's Testimony and Evidence

The tenant testified that, on August 1, 2019, she received a general notice (addressed to all tenants) about the new landlord and the expected methods for paying the rent. Previously, the tenant had paid rent by way of Interac e-transfer; the new landlord no longer accepted rent by e-transfer, and instead explained that rent would only be accepted by cash, cheque, or through a PAD agreement. The tenant paid the rent by cheque and sent it to the landlord's address. A copy of a receipt for August's rent, paid on July 29, 2019, was submitted into evidence.

Three weeks later, on August 13, 2019, the tenant received a notice from the landlord indicating that rent had not been paid and copy of which was posted to their door. Receiving this notice "got me really scared," she testified. A copy of the notice was submitted into evidence; the notice (which was not a 10 Day Notice to End Tenancy for Unpaid Rent) states that

> Our records indicate that your August rent
> has not yet been paid.
>
> Please arrange to have your payment
> delivered to our office within three (3)
> business days to avoid further action.

The tenant checked her bank account and confirmed that the cheque had, in fact, been cashed. The tenant emailed the landlord but received no immediate response.

In the meantime, the tenant became increasingly distracted at work and was unable to focus. She spoke to her boss, who was empathetic and understanding with the tenant's situation; her boss recommended that the tenant make an appointment with her doctor. The tenant visited her doctor, who recommended that the tenant reduce her hours at work in order to manage her stress.

The tenant sent another e-mail to the landlord regarding the rent issue, and the landlord responded to that email admitting that they had made a mistake, and that the tenant could disregard the notice. A copy of the email from the tenant to the landlord, and the landlord's response, was submitted into evidence. The email of August 13, 2019, from the tenant to the landlord reads as follows (reproduced as written):

> Hi Mr. [name redacted]
> I received the attached notice on my door today.
> I paid my august rent by personal hand delivered cheque to the west 75th ave office on July 29-the same day I met with [name redacted].
> Any particular reason I didn't receive an email or phone call if there were problems with it? I am often out of town for periods of time and it makes me wonder what would have happened if I wasn't at home at this particular day.....
> Not to mention its quite embarrassing to have this note on my door as I have not ever been late with rent.... in my life.....
> Worried
> [tenant's first name]

The next morning, the landlord's Junior Property Accountant responded as follows:

> Good Morning [tenant],
> Apologies for the delay but yes I have processed your check already so you can disregard this notice. For future reference, when you send cheques to remit payments, kindly indicate your unit number and address somewhere on the cheque in order to ensure your payments are applied to your account properly.
> Thank you!
> Kind regards,

Submitted into evidence by the landlord was a copy of the tenant's cheque, on which there is no indication of the unit number and address. The landlord added an evidentiary note to this evidence, which reads "Attached is a copy of tenant's cheque for her August rent, with no mention of unit number and address. The accountant, per email to [tenant] dated Aug 15, 2019, had no way of processing this cheque."

Several months went by without further incident. In late January 2020, the tenant hand-delivered a rent cheque (for February's rent) to the landlord's office. The office staff made a photocopy of the cheque and date stamped the photocopy, for the tenant's records. This photocopy was the receipt for the rent; a copy of the receipt was tendered into evidence. The tenant left the office and carried on with life, "going about my business." She even checked her bank account shortly after, confirming that the cheque had been processed on or about February 5.

On February 14, 2020, the tenant received a 10 Day Notice to End Tenancy for Unpaid Rent. Testifying that "I thought it was extreme," the tenant filed an application for dispute resolution the next day, on February 15. The tenant reiterated that she felt "this was pretty extreme," considering that in the almost-five years she has lived in the rental unit she had received "no complaints" and have not once paid the rent late. Acknowledging that, while "clerical errors happen, somebody shouldn't lose their home because of a clerical error," the tenant submitted.

It was not until March 4, 2020, that the landlord (after having received the Notice of Dispute Resolution Proceeding) admitted making a mistake, and that the tenant could disregard the notice. A copy of the email from the landlord's property manager (the agent who attended the hearing on behalf of the landlord) reads as follows:

> Hi [tenant],
>
> We have received your notice of dispute resolution proceeding with regards the 10 Day Eviction that you have received.
>
> I wanted to let you know that the eviction was served by mistake as our accounting had made an error and deposited your cheque in unit [redacted]'s account, it should have been deposited in your account in unit [redacted], as you can see in the ledger attached. This error has now been corrected and you have no outstanding balance owing.
>
> Our sincerest apologies for the error caused and believe this to be the first eviction that we had mistakenly served against you.
>
> Due to our accounting error, your rent for February is deemed paid on-time, in which case the 10-Day Notice that was served to you, no long has an effect. Therefore, I would now like to ask if you could consider withdrawing this dispute resolution.

> I look forward to your response and apologies once again for our oversight on this matter.

Under direct examination, the tenant's advocate asked the tenant about the letter from the tenant's employer. In response, the tenant testified that the letter describes the tenant's performance at work, and that it was "highly unusual" for the tenant to be so distracted and unfocussed." She went on, testifying that she had to reduce her hours and she stopped driving, being unable to focus while driving.

The letter, a copy of which was submitted into evidence, is dated March 26, 2020, provide a rather glowing reference, and it was drafted by the tenant's supervisor. The content of the letter largely mirrored and was consisted with the tenant's testimony. In the letter, the supervisor describes the tenant as one who

> [. . .] displays infinite patience and ethic of positive regard despite regular incidence of verbal and physical violence towards staff and witnessing suffering on a daily basis. She is well-liked by her co-workers and trusted by the women we serve, she has regularly stepped up to be my "right-hand" whenever she was needed. She is someone I would consider to be of sturdy and unshakable nature.

The tenant works in various capacities at a transitional housing program for women with complex mental health, addictions and trauma histories. The letter goes on to state that

> It is deeply concerning to witness the affect of the stress and pressure being put on her by her housing situation, she has been distracted and is visibly stressed. She has spoken openly about feeling harassed and bullied and the physical and psychological impacts of that – lost sleep, muscle tension, headaches, stomach upset, anxiety. I have encouraged her to seek medical supports, but under the current Covid-19 pandemic, that has been complicated; if not, impossible.

More recently, the tenant testified that she is "coping better with [the] stress," but that there is "stress with losing [one's] home."

In respect of the tenant's visit to her doctor, the doctor recommended a decrease in hours after the initial incident in August 2019. A copy of the doctor's note, dated August 13, 2019, was submitted into evidence, and it states, in part, that the tenant "has shown good response to the decreased work hours to working one less day each week. This note is to request that this medical accommodation be extended till Nov 4, 2019, in the best interest of her health." The tenant's employer was "on board" with this extended

accommodation, and the decreased hours plan continued from mid-August 2019 for a period of three months.

Written submissions were provided by the tenant's legal advocate outlined that the remedy sought was compensation under section 7 of the Act for (1) loss of quiet enjoyment and (2) mental damage, in the amount of (A) $2,140 for the August 2019 incident (equal to two months' rent at that time) and (B) $2,192 for the February 2020 incident (equal to two months' rent).

I will reproduce the following excerpt from the tenant's advocate's written submission, as it outlines the position of the tenant in respect of her claim for damages (I have reformatted for clarity):

> 25. Under section 28 of the Residential Tenancy Act (RTA) a tenant is entitled to quiet enjoyment, including, but not limited to, *inter alia,* the right to freedom from unreasonable disturbance.
>
> 26. A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises.
>
> 27. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.
>
> 28. A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA.
>
> 29. The facts set out above establish an unreasonable disturbance by the Landlord on two occasions amounting to a breach of the Tenant's entitlement to quiet enjoyment.
>
> <u>Compensation for Damage or Loss (see RTB Policy Guideline 16 at Exhibit C attached hereto)</u>
>
> 30. Under section 7 of the RTA a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

31. Damage or loss is not limited to physical property only, but also includes less tangible impacts such as, *inter alia,* damage to a person, including both physical and mental.

32. The facts set out above show the Landlord has failed to comply with the RTA and/or regulations and/or the tenancy agreement.

33. The Tenant took reasonable steps minimize the damage or loss by seeking medical attention and modifying her work week on medical advice.

34. The acts of the Landlord in serving the Notice of Late Rent and 10 Day Notice were either deliberate in order to pressure the Tenant to vacate, or negligent.

35. In the event they were not deliberate the Landlord was negligent not in making accounting errors but in the actions taken on foot of those accounting errors without taking steps to confirm non-payment either internally or with the Tenant.

36. PQ staff had actual knowledge that the Tenant's rent was paid in both incidents. If the facts do not support actual knowledge, PQ had constructive knowledge that the rent was paid as simple enquiries would have led to actual knowledge.

Test for Aggravated Damages

37. Aggravated damages may be awarded in situations where the wronged party cannot be fully compensated by an award for damage or loss with respect to property, money or services. Aggravated damages may be awarded in situations where significant damage or loss has been caused either deliberately or through negligence (see RTB Policy Guideline 6 at Exhibit C attached hereto).

38. The test for aggravated damages has been set out in past RTB decisions and requires the RTB establish the following (see example at page 6 of RTB Decision dated 18 February 2015 at Exhibit D attached hereto):

a. The damage must be caused by the deliberate or negligent act or omission of the wrongdoer;

b. The damage must also be the type the that the wrongdoer should reasonably have foreseen in tort cases, or in contract cases, that the parties had in contemplation at the time they entered into the contract that the beach complained of would cause the distress claimed;

c. They must also be sufficiently significant in depth, or duration, or both, that they represent a significant influence on the wronged person' life. They are awarded where the wronged person cannot be fully compensated by an award for pecuniary losses. Aggravated damages are rarely awarded and must be specifically sought.

39. The facts above establish deliberate or negligent acts or omissions by the Landlord, which directly caused mental damages to the Tenant.

40. It was reasonably foreseeable that service of documents a person that threaten the security of their home, whether valid or not, could cause significant mental distress to that person.

41. The mental damages to the Tenant were significant enough that she sought medical attention and took a reduced work week. The damage continued for several months from August to November 2019, if not longer, and recurred in February 2020.

Landlord's Testimony and Evidence

In his testimony, the landlord's property manager (hereafter "landlord" for brevity) explained that his property management company took over management of the property on July 9, 2019. The building was "neglected by the former company" and there were "lots of files missing, tenancy agreements [missing]," and the new property management company had the unenviable job of having to puts things back in order. One of the steps taken was to revise how rent could be paid by the tenants, and which included no longer accepting rent by e-transfer. He testified about the general notice referred to earlier in the tenant's testimony, and which notice indicated rent could only be paid by cheque, cash, or by PAD. The notice was posted by a caretaker, B.

On February 2, 2020, the landlord filed and served the 10 Day Notice, after reviewing the landlord's arrears reports. These reports, copies of which were submitted into evidence by the landlord, show the payments made on each tenant's account. Where rent is not paid, the non-payment shows up, and it is on this basis that the landlord would decide

whether to issue a notice to end tenancy. In reviewing the tenant's report, the landlord's accounting staff believed that rent had not been paid, because no payment had been posted to the report, and "at the time we didn't know there was an error." What had happened, the landlord explained, was that "the tenant's cheque was wrongly deposited into another tenant's account." And, that the landlord "didn't know there was a problem until we saw the RTB application," he remarked. After receiving the tenant's Notice of Dispute Resolution Proceeding, the landlord emailed the tenant "right away" regarding the error. (This email is cited above.)

The landlord explained that, after receiving the Notice of Dispute Resolution Proceeding, the accountant went through all tenants' accounts and discovered that the cheque from the tenant was inadvertently posted to another account. The tenant's three-digit address ends in a "B" and the other tenant, who has the same three-digit number, ends in a "C." The landlord's accounting employee then "reversed the cheque in [###]C and credited [###]B . . . we corrected it right away."

The landlord further testified that the tenant had previously complained about the landlord's inflexibility with payment methods, but that the landlord said they were sorry but "we can't accept e-transfers," adding, "we're just not set up" for that method.

The landlord's witness, the company's director of finance and the individual responsible for accounting operations, testified that "our banks don't accept e-transfer due to security reasons." He further explained the problem with Interac e-transfers is that they can be intercepted and redirected into any bank account, including that of someone other than the intended recipient.

In cross examination, the tenant's advocate asked the landlord, "Is there any process other than an arrears report before a 10 Day Notice is issued?" The landlord responded that there is not, and that they "use arrears reports as the tool to determine" whether a 10 Day Notice will be issued. He added that, while "it's unfortunate we have to use these arrears reports to use a tool to decide when to give out" the notices, there is nothing else in place at the moment. The landlord's witnesses added that this was simply a case of a posting error, and that with 111 rental units, errors might happen.

The tenant's advocate then asked the landlord, "In this process, at not stage do they [the landlord] contact a tenant [when the arrears report shows rent owing]?" The landlord answered, "Yes." In closing submissions, the landlord testified that "It's unfortunate. I admit that I make mistakes. I do my best." And he expressed regret at the error having been committed.

Both parties also testified to some degree about whether the rental unit's rent was below, or at market rent. However, as this side-issue was not particularly relevant to the central issue of this dispute, I will not address it further.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. Thus, the onus in this case is on the tenant to prove that she is entitled to compensation under the Act.

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria before compensation may be awarded:

1. has the respondent party to a tenancy agreement failed to comply with the Act, regulations, or the tenancy agreement?
2. if yes, did the loss or damage result from the non-compliance?
3. has the applicant proven the amount or value of their damage or loss?
4. has the applicant done whatever is reasonable to minimize the damage or loss?

The above-noted criteria are based on sections 7 and 67 of the Act, which state:

> 7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
>
> (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the 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.

Question 1: Did the landlord breach section 28 of the Act?

In this case, the tenant claims that the landlord failed to comply with section 28 of the Act, specifically, with the tenant's right to freedom from unreasonable disturbance. Section 28, which is titled "Protection of tenant's right to quiet enjoyment," states that

> A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
>
> (a) reasonable privacy;
> (b) freedom from unreasonable disturbance;
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

It is important first to examine what is meant by "freedom from unreasonable disturbance." Tenant's advocate submitted that the "facts set out [...] establish an unreasonable disturbance by the Landlord on two occasions amounting to a breach of the Tenant's entitlement to quiet enjoyment." Is it a disturbance to be given a notice in error? I find that it is. Is it an unreasonable disturbance? I find that, given the landlord had within its means to verify that rent was paid, it is.

Residential Tenancy Policy Guideline 6 Entitlement to Quiet Enjoyment outlines the subject of quiet enjoyment (generally) in a cursory manner, stating that

> A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.
>
> Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In my mind, ordinary and lawful enjoyment of one's premises includes the freedom to come and go without the looming threat of eviction. By issuing a notice that rent was not paid in August 2019, and then issuing another notice (this time by way of a 10 Day Notice to End Tenancy for Unpaid Rent) in February 2020, the landlord negligently breached the tenant's right to quiet enjoyment by interfering with her lawful enjoyment of the premises.

While I do not find that the landlord's actions were in any way deliberate, vindictive, or driven by an intent to maliciously drive the tenant out – the evidence does not, I find, support any such an argument (and, indeed, the landlord was quite apologetic about the two instances) – the landlord's actions were, however, negligent.

Based on the testimony of the tenant, the argument of the tenant's legal advocate, and documentary evidence (primarily the e-mail and two notices), I find that the landlord breached section 28 of the Act.

Question 2: Did the tenant suffer a loss from the breach?

A substantial factor in determining liability in negligence is the "but for" test, which is subsumed within section 67 of the Act. The test basically asks, "but for the existence of X, would Y have occurred?" In this case, it is critical to ask, but for the landlord's issuing of the notice in August 2019 and the 10 Day Notice in February 2020, would the tenant have suffered the losses claimed?

I find, based on the evidence, that the answer is in the negative. In other words, there is no evidence of any peripheral or unrelated event in the tenant's life between the period of August to February that lead to her performance issues at work, stress, lack of focus (including an inability to drive), and overall decline in her quality of life.

Question 3: Has the tenant proven the amount or value of the damage or loss?

The tenant seeks non-pecuniary damages for, as variously submitted by counsel, "mental damages" and "significant mental distress" (page 3 of written submissions) in the amount of $4,332.00. I note that aggravated damages are also sought.

Determining such losses is an excruciatingly difficult exercise. As explained in *The Law of Torts,* "Non-pecuniary losses include pain, suffering, permanent impairment of physical or mental capacity, and loss of expectation of life. It is a difficult task to determine an

appropriate quantum of compensation for these losses."[1] That said, *Residential Tenancy Policy Guideline 6* provides the following guidance about assessing the amount

> In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

That having been said, I cannot emphasize enough that *the onus is on the applicant to establish* how the amount of $4,332.00 was arrived at. There is no explanation or evidence to support how this amount was determined; the simple multiplication of rent is insufficient to arrive at what is a large monetary amount. Nor has tenant's counsel submitted any case law or Residential Tenancy Branch decisions to support an argument that $4,332.00 is reasonable, or within an acceptable quantum for such a breach.

Regarding the doctor's note, while there is a reference to a recommended reduction in hours, there is no medical evidence that unambiguously links the entirety of the tenant's "mental damages" and "significant mental distress" to the notices being issued. The doctor's note is dated from August 2019, shortly after the first notice, but there is no medical evidence of anything after that. There is, likewise, no mental or psychiatric assessment in evidence proving that the tenant actually suffered losses or injury that might give rise to justifying the amount claimed.

Finally, the letter from the tenant's employer dated March 26, 2020, while a strongly supportive letter which references the tenant's being affected by her housing situation, does not provide sufficient evidence linking the landlord's errors in issuing the two notices to the tenant's mental situation. Moreover, the letter erroneously refers to the tenant's "feeling harassed and bullied" by the landlord. Overall, I place little evidentiary weight on this letter, because (1) there is no evidence that the landlord engaged in harassment or bullying – issuing two notices in error was negligence, but such negligence does not rise to the level of harassment or bullying, and in making this erroneous claim I question the entirety of the letter, (2) the letter was drafted mere weeks before the hearing, whereas documentary evidence created contemporaneously to the events in question would have provided a more accurate, and perhaps less biased, description of the events, and (3) the letter's author did not testify as to the contents of the letter.

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[1] Osborne, P.H., *The Law of Torts* (Toronto: Irwin Law, 2011) at 126.

Taking into consideration all the oral testimony and documentary evidence presented before me, I find that the tenant has not met the onus of establishing or proving the damages sought. Regarding the claim for aggravated damages, which “may be awarded in situations where significant damage or loss has been caused either deliberately or through negligence,” the tenant has failed to prove significant damage or loss.

In this case, because the landlord breached section 28 of the Act, I award the tenant nominal damages of $1.00. Nominal damages are a small monetary remedy recognizing that, though the applicant suffered no harm, a breach of the Act occurred and that her rights were infringed. Having awarded the tenant nominal damages, I need not turn to whether the tenant did what was reasonable to minimize her alleged damages or loss.

Claim for Recovery of the Filing Fee Pursuant to Section 72 of the Act

As the tenant was successful in proving a breach of the Act, but unsuccessful in proving a loss or damage, I grant a reduced recovery of the filing fee in the amount of $50.00.

Conclusion

I grant the tenant a monetary order in the amount of $51.00, which must be served on the landlord. The order may be filed in, and enforced as an order of, the Provincial Court of British Columbia.

Alternatively, pursuant to section 72(2)(a) of the Act, the tenant may withhold $51.00 of the rent for May or June 2020. If this latter option is chosen, the tenant must advise the landlord, in writing, that she will be withholding this amount from the rent.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: April 22, 2020

Residential Tenancy Branch