



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 0899462 BC Ltd Lanai Apartments
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNDCT

Introduction

Pursuant to section 58 of the *Residential Tenancy Act* (the *Act*), I was designated to hear an application regarding the above-noted tenancy. The tenants applied for:

- an order for the landlord to return the security deposit pursuant to section 38; and
- a monetary order for compensation for damage or loss under the Act, Residential Tenancy Regulation (“Regulation”) or tenancy agreement pursuant to section 67 of the Act.

Both parties attended the hearing. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with sections 88 and 89 of the *Act*.

Issues to be Decided

Are the tenants entitled to:

1. an order for the landlord to return the security deposit?
2. a monetary order for compensation for loss?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenants’ claims and my findings are set out below. I explained

rule 7.4 to the attending parties; it is their obligation to present the evidence to substantiate the application.

Both parties agreed the tenancy started on November 01, 2018 and the tenants have not been living in the rental unit since March 06, 2020. Monthly rent was \$950.00 due on the first day of the month. At the outset of the tenancy a security deposit of \$475.00 was collected and the landlord still holds this amount in trust. The tenancy agreement was submitted into evidence.

Both parties also agreed rent due on March 01, 2020 was paid on time, a fire happened in the tenants' rental unit on March 06, the unit has been uninhabitable since that date, and the tenants' forwarding address was only provided to the landlord when the materials of this application were received on May 01, 2020.

The landlord stated the tenants breached the tenancy agreement by not having tenant's insurance. The tenancy agreement states:

03. The tenant is required to carry adequate insurance coverage for fire, smoke, water, damage and theft on his/her own possessions, and will be held liable for accidental injury, accidental damage, or accidental breakage arising from the Tenant's abusive, willful or negligent act or omission, or that of his/her guest or agent in his/her use of the landlord's services and property, whether or not such injury, damage or breakage was foreseeable.

The tenants admitted they did not have tenant's insurance.

The tenants applied to receive the amount of \$766.16 from the landlord, as this is the *pro rata* rent for the days in March 2020 that the rental unit was uninhabitable due to the accidental fire and rent was paid.

The tenants submitted into evidence a hotel invoice indicating they stayed in a hotel room from March 09, 2020 to April 01, 2020 at a rate of "\$42.14+6.74 tax per night".

The tenants affirmed the cause of the fire can not be determined and they are not responsible for it. The fire department document dated July 16, 2020 states:

To clarify the results of the fire investigation for your rental needs. The fire is considered accidental with no way of determining exact cause due to the contamination of the scene by the restoration company.

The landlord testified the fire was caused because the tenants smoked in the rental unit. The email dated March 13, 2020, sent by the fire investigator hired by the landlord's insurance company, states:

The fire patterns observed during my examination of [anonymized] were consistent with fire originating in the southwest corner of the living room area where a glad bong and butane torch were reported by the tenant to be stored. These objects were located by [anonymized] on March 9, 2020 along with several cigarette butts. The origin of the cigarette butts could not be confirmed to be the living room due to actions of restoration contractors (shoveling debris including smoking materials from the exterior balcony area to the interior of the unit).

[...]

No physical evidence has been retained from the fire scene. The physical evidence observed is consistent with the possibility that the fire may have been caused by recent smoking activities within the southwest corner of the unit [anonymized] living room which caused the ignition of surrounding combustible materials including an upholstered sofa and carpet flooring. The tenant reported information is inconsistent with this hypothesis; however, no evidence of a failure of the building electrical wiring, partially melted extension cord wiring or any of the connected electric powered devices or their power cords was observed.

The tenants said they only smoked in the rental unit's balcony, both of them left the rental unit around 10:00 A.M. on the day the fire happened and the fire only started at 1:05 P.M.

The tenants also stated there were several complaints to the landlord about the rental unit's fuse box, an electrician informed the landlord the fuse box needed to be replaced and all the electrical cords in the rental unit were brand new.

The tenants argued that on January 21, 2020 the building manager asked them to remove the smoke detector, as it was going off constantly. The tenants were told a new smoke detector would be installed, but this did not happen.

Analysis

Sections 7 and 67 of the Act state:

Liability for not complying with this Act or a tenancy agreement

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.

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.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

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.

Monetary order for compensation for loss

Based on the testimony of both parties, I find the rental unit was uninhabitable since March 06, 2020, due to an accidental fire.

Section 28 of the Act states:

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];

Section 32 of the Act states:

- (1) A landlord must provide and maintain residential property in a state of decoration and repair that
- (a) complies with the health, safety and housing standards required by law, and
 - (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Based on the fire department document dated July 16, 2020 and the tenants detailed and coherent testimony, I find the fire was not caused by the tenants, the landlord breached sections 28 and 32 of the Act and the tenants suffered a financial loss.

Residential Tenancy Branch Policy Guideline 05 explains the duty of the party claiming compensation to mitigate their loss:

B. REASONABLE EFFORTS TO MINIMIZE LOSSES

A person who suffers damage or loss because their landlord or tenant did not comply with the Act, regulations or tenancy agreement must make reasonable efforts to minimize the damage or loss. Usually this duty starts when the person knows that damage or loss is occurring. **The purpose is to ensure the wrongdoer is not held liable for damage or loss that could have reasonably been avoided.**

In general, a reasonable effort to minimize loss means taking practical and common-sense steps to prevent or minimize avoidable damage or loss. For example, if a tenant discovers their possessions are being damaged due to a leaking roof, some reasonable steps may be to:

- remove and dry the possessions as soon as possible;
- promptly report the damage and leak to the landlord and request repairs to avoid further damage;
- file an application for dispute resolution if the landlord fails to carry out the repairs and further damage or loss occurs or is likely to occur.

Compensation will not be awarded for damage or loss that could have been reasonably avoided.

Partial mitigation

Partial mitigation may occur when a person takes some, but not all reasonable steps to minimize the damage or loss. If in the above example the tenant reported the leak, the landlord failed to make the repairs and the tenant did not apply for dispute resolution soon after and more damage occurred, this could constitute partial mitigation. **In such a case, an arbitrator may award a claim for some, but not all damage or loss that occurred.**

I find the tenants, by staying in a reasonably priced hotel after the fire, took actions to mitigate the losses related to the rental unit being uninhabitable. However, the tenants did not fully mitigate the damages because they did not not have tenant's insurance.

In accordance with sections 28, 32 and 67 of the Act and Residential Tenancy Branch Policy Guideline 05, as the tenants did not properly mitigate their loss, I find the tenants are not entitled for the compensation claimed.

Residential Tenancy Branch Policy Guideline 16 states:

An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:

"Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

As the landlord breached sections 28 and 32 of the Act, I award the tenants nominal damages in the amount of \$350.00.

Security deposit

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing:

- (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.

Based on the undisputed testimony, I find the landlord did not receive the tenants' forwarding address in writing before the materials for this application were received by the landlord on May 01, 2020.

Therefore, the landlord's obligation under the Act to either return the deposit or file an application has not started. I find that this application is premature.

Section 71(2)(b) of the Act states the director may order that:

(2) In addition to the authority under subsection (1), the director may make any of the following orders:

(a) that a document must be served in a manner the director considers necessary, despite sections 88 [how to give or serve documents generally] and 89 [special rules for certain documents];

(b) that a document has been sufficiently served for the purposes of this Act on a date the director specifies;

Thus, I order that the landlord is sufficiently served the tenants' forwarding address on the date of this decision. The landlord is cautioned to comply with section 38 of the Act.

Conclusion

I grant the tenants a monetary order pursuant to section 67 of the Act, in the amount of \$350.00.

The tenants' application for an order for the landlord to return double the security deposit 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: August 17, 2020

Residential Tenancy Branch