Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL (Landlord)
MNETC, MNSD, FFT (Tenants)

Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties (the "Applications").

The Landlord filed their application October 15, 2021 (the "Landlord's Application"). The Landlord applied as follows:

- For compensation for monetary loss or other money owed
- To keep the security deposit
- For reimbursement for the filing fee

The Tenants filed their application January 27, 2022 (the "Tenants' Application"). The Tenants applied as follows:

- For compensation because the Landlord ended the tenancy and has not complied with the Act or used the rental unit/site for the stated purpose
- For return of double the security deposit
- For reimbursement for the filing fee

The Landlord appeared at the hearing with R.Z. and J.W. (the "Landlords"). The Tenants appeared at the hearing with Legal Counsel. I explained the hearing process to the parties. I told the parties they are not allowed to record the hearing pursuant to the Rules of Procedure (the "Rules"). The parties, other than Legal Counsel, provided affirmed testimony.

Pursuant to rule 2.3 of the Rules, I told the Tenants at the outset of the hearing that I will consider the requests for return of double the security deposit and reimbursement for the filing fee but dismiss the request for compensation because it is not sufficiently related to the main issues raised in the Applications. The request for compensation is dismissed with leave to re-apply. This decision does not extend any time limits set out in the *Residential Tenancy Act* (the "*Act*").

Both parties submitted evidence prior to the hearing. I confirmed service of the hearing packages and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the relevant evidence provided. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Is the Landlord entitled to compensation for monetary loss or other money owed?

2. Is the Landlord entitled to keep the security deposit?

3. Is the Landlord entitled to reimbursement for the filing fee?

4. Are the Tenants entitled to return of double the security deposit?

5. Are the Tenants entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted, and the parties agreed it is accurate. The agreement names the landlord as the company J.W. works for; however, the parties agreed the Landlord owns the rental unit. The tenancy started November 01, 2019, and was for a fixed term ending October 31, 2021. Rent was $4,100.00 per month due on the first day of each month. The Tenants paid a $2,050.00 security deposit. The agreement has a one-page addendum.

Tenants' Application

The parties agreed the tenancy ended September 30, 2021.

The Tenants testified that they provided their forwarding address to the Landlord by email October 15, 2021. The Landlords did not know when the Landlord received the forwarding address.

The parties agreed the Landlord did not have an outstanding Monetary Order against the Tenants at the end of the tenancy and the Tenants did not agree to the Landlord keeping the security deposit.

The Landlords testified that the parties did a move-in inspection. The Tenants testified that no move-in inspection was done, and they were not offered two opportunities to do a move-in inspection.

The parties agreed they did a move-out inspection.

Landlord's Application

The Landlord sought the following compensation:

Item	Description	Amount
1	Gas, Electricity, Water	$7,247.00
2	Filing fee	$100.00
	TOTAL	**$7,347.00**

The Landlord seeks compensation for utility bills not paid during the tenancy. The Landlords relied on term 10 in the tenancy agreement addendum which states:

> 10. The rent does not cover Gas, Electricity, water, sewer, gas, Internet and cable. The tenants will open their own Gas & Electricity account on or before possession date and pay 70% of whole expense for the city Richmond utility bill, gas & electricity.

The Landlords said the utility bills were provided to the Tenants each month; however, the Tenants did not pay all of the bills. The Landlords said the Tenants sometimes paid $200.00 per month towards utilities.

The Tenants took the position that they paid $200.00 to $300.00 every month for utilities. The Tenants said they never received utility bills from the Landlord. Legal Counsel argued that it was implied that the $200.00 to $300.00 paid each month was fine with the Landlord.

In reply, it was clear that the Landlord thought J.W. sent the Tenants utility bills each month and J.W. thought the Landlord sent the Tenants utility bills each month. The Landlords could not point to further evidence to show utility bills were sent to the Tenants during the tenancy. J.W. testified that they discussed utilities with the Tenants a couple of times and the Tenants said they did not agree with the percentage they had to pay because the Landlord's parents were on the property more than they thought they would be. J.W. said the Tenants had wanted to pay less for utilities.

In reply, the Tenants testified that they did ask to lower the percentage of utilities they were responsible for, and this was agreed to by J.W. Legal Counsel submitted that it was implied that the $300.00 paid for utilities was the cost owing because the Tenants never received utility bills. Legal Counsel submitted that the Landlord should have raised an issue with the $300.00 the Tenants were paying earlier if this was an issue. The Tenants took the position that they had a verbal agreement with J.W. that utilities would be $300.00 per month and relied on a May 05, 2020 email in evidence.

In reply, J.W. denied that there was a verbal agreement between the parties that the Tenants could pay $300.00 per month for utilities.

Analysis

Pursuant to rule 6.6 of the Rules, it is the applicant who has the onus to prove their claim. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts are as claimed.

Tenants' Application

Security deposit

Pursuant to sections 24 and 36 of the *Act*, landlords and tenants can extinguish their rights in relation to the security deposit if they do not comply with the *Act* and *Residential Tenancy Regulation* (the "*Regulations*"). Further, section 38 of the *Act* sets out specific requirements for dealing with a security deposit at the end of a tenancy.

Regardless of which party is correct about a move-in inspection being done, I find the testimony of the parties does not support that the Tenants extinguished their rights in relation to the security deposit pursuant to section 24 of the *Act*. Based on the testimony of both parties in relation to a move-out inspection, I find the Tenants did not extinguish their rights in relation to the security deposit pursuant to section 36 of the *Act*.

It is not necessary to determine whether the Landlord extinguished their rights in relation to the security deposit pursuant to sections 24 or 36 of the *Act* because extinguishment only relates to claims that are solely for damage to the rental unit and the Landlord has claimed for utilities, not damage.

Based on the testimony of both parties, I accept that the tenancy ended September 30, 2021.

I accept that the Tenants provided their forwarding address to the Landlord by email October 15, 2021, because the Landlord did not dispute this, the Landlord simply did not know when they received the forwarding address.

Pursuant to section 38(1) of the *Act*, the Landlord had 15 days from the later of the end of the tenancy or the date the Landlord received the Tenants' forwarding address in writing to repay the security deposit or file a claim against it. Here, the Landlord had 15 days from October 15, 2021. The Landlord's Application was filed October 15, 2021, within time. I find the Landlord complied with section 38(1) of the *Act* and was entitled to claim against the security deposit when the Landlord's Application was filed. Given this, the Tenants are not entitled to return of double the security deposit pursuant to section 38(6) of the *Act*.

Given the Tenants have not been successful in the Tenants' Application, they are not entitled to reimbursement for the filing fee.

The Tenants' Application is dismissed without leave to re-apply.

Landlord's Application

Compensation

Section 7 of the *Act* states:

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

RTB Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

> 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:
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> - 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.
>
> These criteria may be applied when there is no statutory remedy (such as the requirement under section 38 of the Residential Tenancy Act for a landlord to pay double the amount of a deposit if they fail to comply with the Act's provisions for returning a security deposit or pet deposit).

In *Guevara v. Louie*, 2020 BCSC 380, the Justice addresses the legal principle of estoppel and states at paragraphs 62 to 67:

[62] …the real issue before him was whether Ms Louie was estopped from enforcing a provision of the tenancy agreement by her past conduct. That issue required a determination of whether Ms. Louie's conduct led Ms. Guevara to conclude that e-transferring the rent within a day or two after the first of the month was acceptable to her. Therefore, the proper question was whether Ms. Louie could rely on past instances of rent not being paid on the first of the month to terminate the tenancy agreement when for years she had acquiesced in the manner that rent was paid. Specifically, had Ms. Louie represented through her conduct and communications that she did not require strict compliance with the term of the tenancy agreement stating that rent must be paid on the first day of the month.

[63] While the legal test of waiver requires a "clear intention" to "forgo" the exercise of a contractual right, the equitable principle of estoppel applies where a person with a formal right "represents that those rights will be compromised or varied:" Tymchuk v. D.L.B. Properties, 2000 SKQB 155 at paras. 11-17. Unlike waiver, the principle of estoppel does not require a reliance on unequivocal conduct, but rather "whether the conduct, when viewed through the eyes of the party raising the doctrine, was such as would reasonably lead that person to rely upon it:" Bowen v. O'Brien Financial Corp., 1991 CanLII 826 (BC CA), [1991] B.C.J. No. 3690 (C.A.). Thus, the relevant legal concept before the Arbitrator was not waiver of a contractual right, but rather whether Ms. Louie's prior conduct estopped her from relying on past rental payments made a day or two after the first of each month to evict Ms. Guevara on the grounds of "repeatedly late" payment under s. 47(1)(b) of the RTA…

[65] The following broad concept of estoppel, as described by Lord Denning in Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd. (1981), [1982] Q.B. 84 (Eng. C.A.), at p. 122, was adopted by the Supreme Court of Canada in Ryan v. Moore, 2005 SCC 38 at para. 51:

> …When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[66] The concept of estoppel was also described by the British Columbia Court of Appeal in Litwin Construction (1973) Ltd. v. Pan 1988 CanLII 174 (BC CA), [1998] 29 B.C.L.R. (2d) 88 (C.A.), 52 D.L.R. (4th) 459, more recently cited with approval in Desbiens v. Smith, 2010 BCCA 394:

> …it would be unreasonable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment ..." [emphasis added]. That statement was affirmed by the English Court of Appeal in Habib Bank and, as we read the decision, accepted by that Court in Peyman v. Lanjani, [1984], 3 All E.R. 703 at pp. 721 and 725 (Stephenson L.J.), p. 731 (May L.J.) and p. 735 (Slade L.J.).

[67] The distinction between waiver and estoppel is vital in this case because Ms. Louie relies on alleged defaults that occurred before she gave any indication that she required strict compliance with the requirement to pay rent on the first of the month. It is not until email reminders dated May 2 and June 3, 2019, that Ms. Louie states that she would require “all future payments” to be made on the 1st of the month. Such a notice would have had to be clear. As reviewed, previous correspondence regarding rental payments made after the 1st of the month involved language to the effect of ‘please transfer rent at your earliest convenience’ and ‘do you know when I can get the rent?’ (December 2018 correspondence). In light of Ms. Louie’s history of acquiescence, I find that Ms. Louie could not rely on instances where Ms. Guevara paid rent after the 1st of the month, where these payments occurred prior to Ms. Louie’s notice that she would require Ms. Guevara’s strict compliance with the tenancy agreement’s rental payment due date. I find Ms. Louie was required to give Ms. Guevara reasonable notice that strict compliance would be enforced, before taking steps to terminate the residency for late payment. Such notice was not provided.

The Landlord seeks $7,247.00 in utility charges. The Landlord submitted a spreadsheet showing how they calculated the amount sought. The spreadsheet shows the Landlord is seeking payment for utility charges dating back to 2019. The spreadsheet also sets out payments received from the Tenants showing they paid between $200.00 and $300.00 every month, other than for three of the months, between January of 2020 and September of 2021 for utilities.

I am not satisfied the Landlord is entitled to collect $7,247.00 in utility charges dating back to 2019. I find the Landlord did not provide the Tenants with utility bills throughout the tenancy because the Landlord said they thought J.W. was providing them and J.W. said they thought the Landlord was providing them. Further, the Landlord could not point to documentary evidence showing the utility bills were sent to the Tenants. As well, the Tenants testified that they did not receive utility bills.

I do not accept that there was a verbal agreement between the Tenants and J.W. that the Tenants could pay $300.00 per month for utilities because the parties gave conflicting testimony about this, and the Tenants were not able to point to documentary evidence to support their position. The Tenants did point to a May 05, 2020; however, this email does not show there was the alleged verbal agreement between the parties.

However, I find there are two issues that preclude the Landlord from collecting the $7,247.00 sought.

First, I find the legal principle of estoppel applies. I find the Landlord is estopped from enforcing term 10 in the tenancy agreement addendum because of the Landlord's conduct throughout the tenancy. I find the Landlord did not provide the Tenants with utility bills throughout the tenancy, the Landlord accepted payments of $200.00 to $300.00 from the Tenants for utilities and the Landlord did not seek further payments for utilities until the end of the tenancy. I accept that the Landlord's conduct reasonably led the Tenants to conclude that paying $200.00 to $300.00 per month for utilities was acceptable to the Landlord. I note that the Tenants could not have known that $200.00 to $300.00 did not cover their portion of the utilities throughout the tenancy because they did not receive the utility bills from the Landlord. I find the Landlord acquiesced in the Tenants paying $200.00 to $300.00 each month for utilities and cannot now seek to collect monies owing since 2019. I acknowledge that the Landlord had a right to collect 70% of the utility bills pursuant to term 10 in the tenancy agreement addendum; however, I find the Landlord, through their conduct, represented to the Tenants that this right would be varied. I find it would be unfair and unjust to now allow the Landlord to collect $7,247.00, a large sum of money, from the Tenants despite the Landlord taking no reasonable steps to enforce their right to collect 70% of the utility bills until the end of the tenancy.

Second, I find the four-part test outlined in RTB Policy Guideline 16 does apply here because there is no set amount in the tenancy agreement for utility payments and there is no set statutory remedy for the Landlord's claim. I accept that the Tenants failed to

comply with term 10 of the tenancy agreement addendum because I did not understand the Tenants to dispute that they did not pay 70% of the utility bills throughout the tenancy. I find the Landlord suffered loss due to the breach because the Landlord received substantially less in utility payments than they were originally entitled to pursuant to the tenancy agreement addendum. I am satisfied the Landlord has proven the amount of loss through the spreadsheet outlining the utility bill amounts and amounts paid by the Tenants. However, I find the Landlord failed to act reasonably to minimize their loss. By not providing the utility bills to the Tenants and not taking steps to enforce term 10 of the tenancy agreement addendum until the end of the tenancy, the Landlord did not take the most obvious and minimal steps to minimize their loss. Instead, the Landlord allowed the monies owing to accrue to $7,247.00, a large sum of money, before seeking these monies from the Tenants at the end of the tenancy. I find it completely unreasonable for the Landlord to allow years to go by, and the amount of monies owing to reach more than $7,000.00, before taking steps to enforce term 10 of the tenancy agreement addendum.

Given the above, I decline to award the Landlord the amount sought.

Given the Landlord has not been successful in the Landlord's Application, the Landlord is not entitled to reimbursement for the filing fee.

The Landlord's Application is dismissed without leave to re-apply.

Summary

Given the Landlord has failed to show a basis to keep the security deposit, the Landlord must now return the security deposit to the Tenants and the Tenants are issued a Monetary Order for $2,050.00 pursuant to section 67 of the *Act*. I note that the Tenants are not entitled to interest on the security deposit because interest owed has been 0% since 2009. I also note that although the security deposit is being returned, the Tenants have still not been successful in the Tenants' Application for return of double the security deposit and are not entitled to reimbursement for the filing fee because the outcome here was determined on the Landlord's Application and there was no need for the Tenants to file the Tenants' Application to have the security deposit returned.

Conclusion

The Applications are dismissed without leave to re-apply.

The Landlord must return the security deposit to the Tenants and the Tenants are issued a Monetary Order for $2,050.00. This Order must be served on the Landlord. If the Landlord fails to comply with this Order, it may be filed in the Small Claims division of the Provincial Court 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 *Act*.

Dated: June 29, 2022

Residential Tenancy Branch