Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 537003

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78, as amended

Between

CENTURY 21 KOOTENAY HOMES INC, Landlord(s),

Applicant(s)

And

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental unit at: s.22 Trail, BC

Date of Hearing: August 23, 2013, by written submission

Date of Decision: August 23, 2013

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR

Introduction

This hearing proceeded by way of Direct Request Proceeding, pursuant to section 55(4) of the Act, and dealt with an Application for Dispute Resolution by the Landlord for an Order of Possession for unpaid rent and a Monetary Order for unpaid rent.

The Landlord submitted a signed Proof of Service of the Notice of Direct Request Proceeding which declares that on August 20, 2013, at 12:15 p.m. the Landlord served each Tenant with the Notice of Direct Request Proceeding by posting them to the Tenants' door. Based on the written submissions of the Landlord, I find that each Tenant is deemed to be served with the Dispute Resolution Direct Request Proceeding documents effective August 23, 2013, three days after they were posted to the door; in accordance with section 90 of the *Residential Tenancy Act*.

Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession and a Monetary Order pursuant to section 55 of the *Residential Tenancy Act*?

Background and Evidence

I have carefully reviewed the following evidentiary material submitted by the Landlord:

- A copy of the Proof of Service of the Notice of Direct Proceeding for each Tenant;
- A copy of a residential tenancy agreement which was signed by the Landlord and Tenant s.22 for a fixed term tenancy agreement that began on December 8, 2012 and is set to end on December 8, 2013, for the monthly rent of $800.00 due in the 1st of each the month; and

- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent which was issued on, August 7, 2013, with an effective vacancy date listed as August 19, 2013, due to $800.00 in unpaid rent that was due on August 1, 2013.

Documentary evidence filed by the Landlord indicates that the Tenants were served the 10 Day Notice to End Tenancy for Unpaid Rent on August 7, 2013, when it was posted to their door, in the presence of a witness.

Analysis

I have reviewed all documentary evidence and note that Tenant s.22 did not sign the tenancy agreement, however Tenant s.22 did. Therefore, as this application has been filed under the Direct Request process I find it can only proceed against Tenant s.22 , who is a signatory to the tenancy agreement. Accordingly, I dismiss the claim against Tenant s.22 without leave to reapply; and I proceeded with the claim against Tenant s.22

Section 89 of the *Residential Tenancy Act* determines the method of service for documents. The Landlord has applied for an order of possession and a monetary Order which requires that the Landlord serve the respondent Tenant with the notice for dispute resolution in accordance with section 89 (1) of the Act [Section 89 of the Act has been pasted at the end of this decision for further reference].

Section 89(2)(c) provides that if the notice of direct request application was posted at the rental unit, service is met only for the request of an Order of Possession. Furthermore, the Proof of Service Document stipulates if service is by posting: *"NOTE: Do not use this method if requesting a monetary order"*

In this case the Landlord provided evidence which indicates the Tenant was the Notice of hearing documents and his application through the Direct Request process by posting them on the rental unit door on August 20, 2013. Therefore, I find that the service requirements for the request for a monetary order have not been met and I hereby dismiss the Landlord's request for a monetary order, with leave to reapply.

Order of Possession - I have reviewed all documentary evidence and accept that the Tenant has been served with notice to end tenancy as declared by the Landlord. The notice is deemed received by the Tenant on August 10, 2013, three days after it was posted to the door, and the effective date of the notice is August 20, 2013, pursuant to section 90 of the *Act*. I accept the evidence before me that the Tenant has failed to pay the rent owed in full within the 5 days granted under section 46 (4) of the *Act*.

Based on the foregoing, I find that the Tenant is conclusively presumed under section 46(5) of the Act to have accepted that the tenancy ended on the effective date of the Notice and I hereby grant the Landlord an Order of Possession.

Any deposits currently held in trust by the Landlord are to be administered in accordance with Section 38 of the *Residential Tenancy Act*.

Conclusion

I HEREBY FIND that the Landlord is entitled to an Order of Possession effective **two days after service on the Tenant**. This Order is legally binding and must be served upon the Tenant.

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 23, 2013

L. Bell, Arbitrator
Residential Tenancy Branch

Section 89 of the *Residential Tenancy Act*

89 (1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

(a) by leaving a copy with the person;

(b) if the person is a landlord, by leaving a copy with an agent of the landlord;

(c) by sending a copy by 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 registered mail to a forwarding address provided by the tenant;

(e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*.

(2) An application by a landlord under section 55 *[order of possession for the landlord]*, 56 *[application for order ending tenancy early]* or 56.1 *[order of possession: tenancy frustrated]* must be given to the tenant in one of the following ways:

(a) by leaving a copy with the tenant;

(b) by sending a copy by registered mail to the address at which the tenant resides;

(c) by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;

(d) by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;

(e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*.

(3) A notice under section 94.21 *[notice of administrative penalty]* must be given in a manner referred to in subsection (1).

Residential Tenancy Branch

RTB-136

Now that you have your decision…

All decisions are binding and both landlord and tenant are required to comply.

The RTB website (www.rto.gov.bc.ca) has information about:

- How and when to enforce an order of possession:
  Fact Sheet RTB-103: *Landlord: Enforcing an Order of Possession*
- How and when to enforce a monetary order:
  Fact Sheet RTB-108: *Enforcing a Monetary Order*
- How and when to have a decision or order corrected:
  Fact Sheet RTB-111: *Correction of a Decision or Order*
- How and when to have a decision or order clarified:
  Fact Sheet RTB-141: *Clarification of a Decision or Order*
- How and when to apply for the review of a decision:
  Fact Sheet RTB-100: *Review Consideration of a Decision or Order* **(Please Note: Legislated deadlines apply)**

To personally speak with Residential Tenancy Branch (RTB) staff or listen to our 24 Hour Recorded Information Line, please call:

- Toll-free: 1-800-665-8779
- Lower Mainland: 604-660-1020
- Victoria: 250-387-1602

Contact any Service BC Centre or visit the RTB office nearest you. For current information on locations and office hours, visit the RTB web site at www.rto.gov.bc.ca

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 741004

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

s.22 **Tenant(s),**

Applicant(s)

And

NORBEX HOLDINGS LTD. , BILL BANKS, STEVE MARSHALL, and MARION MARSHALL, Landlord(s),

Respondent(s)

Regarding a rental unit at: s.22 , Smithers, BC

Date of Hearing: April 16, 2010, by conference call.

Date of Decision: April 16, 2010

Attending:

For the Landlord: Stephen Marshall, Resident Manager
Bruce McKenzie, Legal Counsel

For the Tenant: s.22 Tenant
s.22 Case Manager (Advocate)

DECISION

Dispute Codes O

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant to dispute the Landlord's excessive claim for damages.

Service of the hearing documents, by the Tenant to the Landlord, was done in accordance with section 89 of the *Act*, served personally to the Resident Manager on December 3, 2009.

The Resident Manager and the Tenant appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

Is the Tenant entitled to an Order to prevent the Landlord from seeking damages under section 62 of the *Residential Tenancy Act*?

Preliminary Issues

Landlord's Counsel advised that he had not had an opportunity to prepare for this hearing because he was recently handed this file by his legal partner and he was advised the owner of the property s.22 Counsel requested an adjournment of today's hearing.

After a review of the application and in consideration that the Landlord was represented by Counsel and his Resident Manager who dealt directly with the situation, the

adjournment request was denied and the hearing proceeded on its merits in accordance with the *Residential Tenancy Branch Rules of Procedure 6.4.*

Background and Evidence

The Tenant provided testimony that he moved into the rental unit sometime in March or April 2006 and moved out in July 2009 after receiving an eviction notice from the Landlord. Rent was payable in the amount of approximately $460.00 and the Tenant believes he paid as security deposit of $230.00.

The Tenant testified that he could not recall signing a tenancy agreement or a move-in inspection report.

The Resident Manager (RM) testified that a notice to end tenancy was issued after the Tenant failed to clean up his apartment after the RM had spoken to the Tenant, requesting he clean the rental unit, on three prior occasions. The RM stated that they had a recent infestation of mice and that he traced the infestation to the Tenant's apartment. RM stated that when the Tenant did not respond the RM and his wife sought assistance from the local government agencies and their attempts were unsuccessful.

The RM confirmed that he received notification in the mail on approximately July 5, 2010, that the Tenant had vacated the rental unit. The RM testified the Tenant had left the apartment filled with, among other things: contaminated food and dead mice inside the fridge and on the stove top; refuse filling the entire rental unit; mice feces; urine; human feces; a broken toilet seat; filthy shower unit; and rotten vanity, which took the RM and one other person over 7 ½ hours to clean and remove the refuse that was left behind. RM argued that he took 19 trips to the dump in his Ford Ranger pick- up truck and filled two overhead dumpsters with refuse taken from the Tenant's rental unit.

During the RM's testimony the Tenant's Advocate advised the Tenant left the room upset, and returned approximately three minutes later.

Analysis

The Tenant has filed an application for dispute resolution in response to a written demand issued by the Landlord's Counsel to the Tenant, on November 9, 2009, for damage and loss in the amount of $14,798.54 resulting from the tenancy.

Upon hearing the testimony, I find jurisdiction of this matter to fall within the *Residential Tenancy Act,* and I hereby order the Landlord to comply with the Act, pursuant to section 62(3).

In the absence of an application for dispute resolution filed by the Landlord, it is my finding that at the time that the Tenant applied for dispute resolution, there is no claim against the Tenant for damage or loss, in accordance with the Act, and therefore the Tenant's application is premature. I therefore dismiss this claim with leave to re-apply.

Conclusion

I HEREBY DISMISS the Tenant's application, 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: April 16, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 744311

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

s.22 **Tenant(s),**

Applicant(s)

And

BOB STEWART, Landlord(s),

Respondent(s)

Regarding a rental unit at: s.22 Invermere, BC

Date of Hearing: May 25, 2010, by conference call.

Date of Decision: May 25, 2010

Attending:

For the Landlord: No One

For the Tenant: No One

DECISION

Dispute Codes O

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant for an Order to prevent the new owner from evicting him so they could occupy the rental unit.

No one was in attendance for either the Landlord or the Tenant.

Issue(s) to be Decided

Is the Tenant entitled to an Order under section 49 of the *Residential Tenancy Act*?

Background and Evidence

There was no additional evidence or testimony provided as there was no one in attendance at the scheduled hearing.

Analysis

Section 61 of the *Residential Tenancy Act* states that upon accepting an application for dispute resolution, the director must set the matter down for a hearing and that the Director must determine if the hearing is to be oral or in writing. In this case, the hearing was scheduled for an oral teleconference hearing.

In the absence of the applicant Tenant and respondent Landlord, the telephone line remained open while the phone system was monitored for ten minutes and no one on behalf of the applicant Tenant or respondent Landlord called into the hearing during this time. Based on the aforementioned I find that the Tenant has failed to present the merits of their application and the application is hereby dismissed, with leave to reapply.

Conclusion

I HEREBY DISMISS the Tenant's application, 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: May 25, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 744661
Additional File(s):744423

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

SHEILA MARIE BROWN, Landlord(s),
Applicant(s)/Respondent(s)

And

s.22 **Tenant(s),**
Applicant(s)/Respondent(s)

Regarding a rental unit at: s.22 , North Vancouver, BC

Date of Hearing: August 16, 2010, by conference call.

Date of Decision: August 16, 2010

Attending:

For the Landlord: Sheila Brown

For the Tenant: s.22

DECISION

Dispute Codes MNR MNDC FF
O MNDC LAT FF CNC

Introduction

This hearing was convened after a review was granted of the original hearing held December 8, 2009 and the original decision dated December 21, 2009. The original Monetary Order of $850.00 was suspended until the review hearing is conducted and a decision rendered.

Issues(s) to be Decided

Is the Landlord entitled to a Monetary Order under Section 67 of the *Residential Tenancy Act*?

Is the Tenant entitled to a Monetary Order under Section 67 of the *Residential Tenancy Act*?

Is the Tenant entitled to other Orders under sections 47, and 62 of the *Residential Tenancy Act*?

Background and Evidence

During the course of the reconvened hearing the parties reached an agreement to settle these matters.

Analysis

The parties agreed to settle these matters, on the following conditions:

1. the Tenant withdraws her application in full; and

2. the Landlord withdraws her application in full; and

3. the Monetary Order issued December 21, 2009 in the amount of $850.00 is hereby cancelled and is of no force or effect; and

4. in consideration for this mutual settlement the parties agree that no further claims and no further applications for review will be made by either party whatsoever arising from this tenancy.

Conclusion

The matters were settled therefore I decline to award recovery of the filing fee to either party.

In the presence of the settlement agreement there is no further action required. Therefore, the file is now closed.

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 16, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 747508

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

s.22 **Tenant(s),**

Applicant(s)

And

PETER DELAPLACE, Landlord(s),

Respondent(s)

Regarding a rental unit at: s.22 Powell River, BC

Date of Hearing: July 05, 2010, by conference call.

Date of Decision: July 06, 2010

Attending:

For the Landlord: Peter Delaplace

For the Tenant: s.22 Tenant
Gillian I. Andrew, Legal Advocate
s.22 Agent s.22

DECISION

Dispute Codes O

Preliminary Issues

At the onset of the hearing the Landlord was signed into the hearing and advised that he experience trouble gaining access to the hearing. There was no one in attendance for the Applicant Tenant at the beginning of the hearing so the respondent Landlord was advised that we would have to wait on the line for ten minutes while I monitored the teleconference hearing to see if anyone signed into the hearing for the Applicant Tenant.

After ten minutes I began to explain to the respondent Landlord that I would be dismissing the Tenant's application. Before the respondent Landlord left the hearing the parties appeared on behalf of the applicant Tenant and advised they had trouble gaining access to the hearing.

After hearing the troubles the parties experienced when signing into the hearing I contacted the operator and was able to confirm the difficulties. I then informed the parties that my previous decision to dismiss the application was hereby quashed and we would be proceeding with the hearing as scheduled.

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant for Other reasons to seek Orders to have the Landlord establish terms of the tenancy agreement pertaining to utility costs, in accordance with the Act.

Service of the hearing documents, by the Tenant to the Landlord, was done in accordance with section 89 of the *Act*, sent via registered mail on May 14, 2010. The Landlord confirmed receipt of the hearing package.

The Landlord, the Tenant and the Tenant's Agent appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other. The Tenant and his advocate were accompanied by the Tenant's legal Advocate.

Issues(s) to be Decided

Is the Tenant entitled to Orders under section 62 of the *Residential Tenancy Act*?

Background and Evidence

The Tenant testified and confirmed that he s.22 s.22 lives on his own conducting his own business and banking. He advised that he has lived in this rental unit since June 1, 2009 and that his current monthly rent is $500.00 and is paid directly to the Landlord from his s.22 The Tenant stated that he took over the rental unit from s.22 tenancy agreement and s.22 was with him when he brought the paperwork from the s.22 office to the Landlord to sign for his rent to be paid to the Landlord. The Tenant argued that at that time the Landlord told him that the hydro would be approximately $50.00 and that the Tenant would have to pay the hydro. The Tenant referred to his documentary evidence which included a letter from his legal advocate and copies of the hydro and natural gas bills. The Tenant argued that he could not afford to pay the full hydro and natural gas bills which is comprised of usage from his suite as well as the rental unit in the basement. The Tenant stated that he tries to be responsible to pay his bills and has had to go without food or proper heat to accommodate the high costs of these utilities.

The Landlord testified and stated that the Tenant's rent was $550.00 per month with a $50.00 discount for utilities. The Landlord went on to explain that he reduced the Tenant's rent by $50.00 for the Tenant to pay the hydro bill. When I requested information about the terms of the tenancy agreement he stated that he could not remember and then stated that he found a written tenancy agreement that he had entered into with the previous tenant s.22 The Landlord testified that the previous tenant called him sometime in 2009 to advise that s.22 was taking over the rental unit after which the Landlord completed the intent to rent documents to have a security deposit of $250.00 and the monthly rent of $500.00 paid directly to him. Upon further clarification the Landlord stated that he entered into a verbal tenancy agreement with the Tenant and the Tenant would continue to pay the hydro as s.22 did. The Landlord confirmed that the rental unit is one of three separate units in the house which he purchased approximately six years ago. The Tenant's rental unit is on the main floor of the house and shares a hydro and gas meter with the rental unit located in the basement.

The Agent for the Tenant testified that the hydro and natural gas bills were put in her name in 2008 when s.22 took possession of the rental unit. The Agent contends that the current Tenant was not told that he would be responsible for natural

gas costs in addition to the hydro and he was not initially aware that he would be paying these costs on behalf of other tenants. The Agent stated that she was not present when the Tenant and Landlord entered in this agreement and the Tenant understood that his rent would be paid directly to the Landlord and he would pay approximately $50.00 per month for hydro. The Agent argued that when the cost of the hydro and natural gas began to rise the Tenant did what he could to cover the costs. At times the Tenant would go without food, turn off the heat, or even reside elsewhere until he could afford to pay the bills. The Agent stated that she then approached the Landlord to try and come to an agreement to have the tenant in the lower suite share the costs of the utilities, to have the utility bills put in the Landlord's name, or have separate meters installed but the Landlord refused to come to a resolution. When asked why she did not bring this issue forward prior to May 2010 the Agent stated that she was not sure how to proceed as she wanted to be able to come to an agreement with the Landlord without coming to arbitration but she realized she had to do something to assist s.22 The Agent is also seeking compensation for the utilities which are currently outstanding.

The Landlord confirmed the tenant in the lower unit does not pay for utilities, that these utilities are in s.22 name, and he refuses to have an additional meter installed because he cannot afford to do so. The Landlord argued that the tenant in the lower suite has resided there for three to four years and is hardly there so he feels it would be unfair to have him pay for utilities while the upstairs Tenant is there all the time with guests. The Landlord confirmed the tenant is currently heating the lower suite with a portable electric heater because the upstairs tenant is conserving the natural gas and has the heat turned down. The Landlord argued the Tenant cannot afford to rent this unit and should move out.

Analysis

All of the testimony and documentary evidence was carefully considered.

A "**tenancy agreement**" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit. I find that based on the above definition, oral terms contained in, or form part of, tenancy agreements and may still be recognized and enforced. That being said I find that where verbal terms are clear and both the Landlord and Tenant agree on the interpretation, there is no reason why such terms cannot be enforced. However when the parties disagree with what was agreed-upon, the verbal terms, by their nature, are virtually impossible for a third party to interpret when trying to resolve disputes as they arise.

The evidence supports that the initial terms of the tenancy agreement were the Tenant's rent is payable monthly in the amount of $500.00, as supported by the s.22 payments being sent directly to the Landlord, and that the Tenant would be paying for the cost of hydro at approximately $50.00 per month. In this case the Tenant has been paying for the cost of hydro and natural gas which is consumed by his rental unit and a separate self contained rental unit located in the basement.

Section 6 (3) of the Act provides that a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under the term and / or if the term is unconscionable. In this case I find the verbal terms of the tenancy agreement to be unclear, as explained by the Landlord. I also find the Landlord's expectation that a tenant in a separate self contained suite is to be responsible for the cost of hydro and natural gas consumed in a separate self contained suite to be unconscionable. I do not accept the Landlord's argument that the Tenant cannot afford to rent this unit and should simply move out.

Having found above, that the terms relating to payment of the utilities are unconscionable and unenforceable, I HEREBY ORDER the hydro account and natural gas account to be switched into the Landlord's name **no later than July 9, 2010.** The Tenant's Agent is at liberty to provide a copy of this decision to the hydro and natural gas companies to ensure the utilities are put in the property owners name in accordance with my Orders.

The Landlord is required to issue the Tenant a written request for payment of 50% of the hydro and 50% of the natural gas bills, once they begin to be billed to the Landlord, and the Landlord **must** attach a copy of the actual hydro and natural gas bills to support the amounts the Tenant is required to pay. The Tenant is HEREBY ORDERED to pay 50% of the hydro and natural gas bills within 10 days of receiving the Landlord's written request and copies of the utility bills for the remainder of the tenancy.

I HEREBY ORDER the Landlord to enter into a written tenancy agreement with the Tenant which is in the proper format and contains the standard terms of a tenancy agreement in accordance with section 13 of the Act. The tenancy agreement must indicate: a) rent is payable in the amount of $500.00 per month; b) the Tenant is responsible to pay 50% of the hydro costs and 50% of the natural gas costs; and c) a security deposit of $250.00 was paid on June 1, 2009.

Section 32 of the Act provides that a Landlord must provide and maintain the rental unit in a state of decoration and repair that complies with health, safety and housing standards required by law.

The evidence supports that there is one thermostat to control heat in two separate rental units with the upstairs Tenant having control of the heat in the lower rental unit. I

find that in circumstances where tenants are responsible for paying utilities and one rental unit has control of the thermostat which heats the other rental unit restricts one rental unit from having a properly heated rental unit.

Based on the aforementioned I hereby order the Landlord to have a programmable thermostat installed and programmed with temperatures that are mutually agreed upon, in writing, between the upper Tenant and the lower tenant, after which the thermostat is to be encased in a locked cover to prevent either tenant from accessing the thermostat, no later than July 30, 2010.

The evidence supports that neither the Tenant nor his Agent attempted to have these issues resolved prior to May 2010. Therefore I find the Tenant and his Agent did not mitigate the losses, in accordance with section 7 of the Act, and I hereby dismiss their request for reimbursement or compensation for the current or previous amounts for hydro and natural gas costs. Based on my Orders listed above, the Tenant is responsible for 100% of the costs of hydro and natural gas until July 8, 2010 and from July 9, 2010 onward the Tenant is responsible for 50% of the cost of hydro and natural gas.

Conclusion

I HEREBY ORDER the hydro account and natural gas account to be switched into the Landlord's name **no later than July 9, 2010.**

The Tenant is **HEREBY ORDERED** to pay 50% of the hydro and natural gas bills within **10 days** of receiving the Landlord's written request and copies of the utility bills for the remainder of the tenancy.

I HEREBY ORDER the Landlord to enter into a written tenancy agreement with the Tenant, in accordance with the Act, **no later than July 9, 2010.**

I HEREBY ORDER the Landlord to install a locked, programmable thermostat no later than **July 30, 2010**.

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: July 06, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 748693

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

NICOLE NEWMAN, Landlord(s),

Applicant(s)

And

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental unit at: s.22
WHISTLER, BC

Date of Review: November 08, 2010

REVIEW DECISION

This is an application by the tenant for a review of a decision rendered by L. BELL, Dispute Resolution Officer, on October 5, 2010

Section 79 of the *Residential Tenancy Act* provides that a Dispute Resolution Officer's decision may be reviewed if:

1. A party was unable to attend the original hearing due to circumstances that could not be anticipated and that were beyond his or her control;
2. A party has new and relevant evidence that was not available at the time of the original hearing;
3. A party has evidence that the Dispute Resolution Officer's decision was obtained by fraud.

In this matter, the Applicant applies for review on all of the above grounds.

A Dispute Resolution Officer may dismiss or refuse to consider an application for review for one or more of the following reasons:

- the issues raised can be dealt with under the provisions of the Legislation that allow an Dispute Resolution Officer to correct a typographical, arithmetical or other similar error in the decision or order; clarify the decision, order or reasons, or deal with an obvious error or inadvertent omission in the decision, order or reasons;
- the application does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely;
- the application does not disclose sufficient evidence of a ground for review;
- the application discloses no basis on which, even if the submission in the application were accepted, the decision or order of the Dispute Resolution Officer should be set aside or varied;
- the application is frivolous or an abuse of process;
- The applicant fails to pursue the application diligently or does not follow an order made in the course of the review.

Unable to Attend

In order to meet this test, the application must establish that the circumstances which led to the inability to attend the hearing were both:

- beyond the control of the applicant, and
- could not be anticipated.

A hearing is a formal, legal process and parties should take reasonable steps to ensure that they will be in attendance at the hearing. This ground is not intended to permit a matter to be reopened if a party, through the exercise of reasonable planning, could have attended.

New and Relevant Evidence

Leave may be granted on this basis if the applicant can prove that:

- he or she has evidence that was not available at the time of the original arbitration hearing;
- the evidence is new;
- the evidence is relevant to the matter which is before the Dispute Resolution Officer;
- the evidence is credible; and
- the evidence would have had a material effect on the decision of the Dispute Resolution Officer

Only when the applicant has evidence which meets all five criteria will a review be granted on this ground.

Evidence which was in existence at the time of the original hearing, and which was not presented by the party, will not be accepted on this ground unless the applicant can show that he or she was not aware of the existence of the evidence and could not, through taking reasonable steps, have become aware of the evidence.

“New” evidence is evidence that has come into existence since the hearing. It includes evidence which the applicant could not have discovered with due diligence before the hearing. New evidence does not include evidence that could have been obtained before the hearing took place.

Evidence is “relevant” if it relates to the matter at hand, or tends to prove or disprove an alleged fact.

Evidence that “would have had a material effect upon the decision of the Dispute Resolution Officer” is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

A suspicion of fresh evidence is not sufficient.

Decision Obtained by Fraud

This ground applies where a party has evidence that the Dispute Resolution Officer’s decision was obtained by fraud. Fraud must be intended. A negligent act or omission is not fraudulent.

A party who is applying for review on the basis that the Dispute Resolution Officer’s decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the Dispute Resolution Officer, and that the evidence was a significant factor in the making of the decision. The party alleging fraud must allege and prove new and material facts, or newly discovered and material facts, which were not known to the applicant at the time of the hearing, and which were not before the Dispute Resolution Officer, and from which the Dispute Resolution Officer conducting the review can reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision or order was obtained by fraud. The burden of proving this issue is on the person applying for the review. If the Dispute Resolution Officer finds that the applicant has met this burden, then the review will be granted.

A review hearing will likely not be granted where a Dispute Resolution Officer prefers the evidence of the other side over the evidence of the party applying.

It is not enough to allege that someone giving evidence for the other side made false statements at the hearing, which were met by a counter-statement by the party applying, and the whole evidence adjudicated upon by the Dispute Resolution Officer.

FINDINGS

Unable to Attend Hearing

In her application for review, in response to the question “List the reasons for being unable to attend” the applicant states there was a major family emergency that has required her full attention “...for the past few months up until the present date”. The applicant does not submit any other evidence to support her application and states that it is a “...personal medical crises that I don’t mind disclosing to the RTB, if necessary...” Overall I find that the application for review fails to show that the applicant was unable to attend as result of circumstances that could not be anticipated and were beyond her control.

New and Relevant Evidence

The application for review does not meet the five criteria set out above that would allow me to order a review in this matter based on “new and relevant evidence” specifically the applicant has failed to show how the evidence is new or to show that the evidence was not available at the time of the hearing.

Decision obtained by Fraud

I find that the applicant has not met the burden of proving that she has new and material facts, or newly discovered and material facts, which were not known to her at the time of the hearing, and which were not before the Dispute Resolution Officer, from which I, in the conduct of this review, can reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision or order was obtained by fraud.

In overall conclusion I find that the application does not disclose sufficient evidence of a ground for review.

The original decision is confirmed.

Dated: November 08, 2010.

D. SIMPSON
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 748693

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

NICOLE NEWMAN, Landlord(s),

Applicant(s)

And

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental unit at: s.22 , Whistler, BC

Date of Hearing: October 04, 2010, by conference call.

Date of Decision: October 05, 2010

Attending:

For the Landlord: No One

For the Tenant: s.22

DECISION

Dispute Codes MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order to retain the security and or pet deposit and to recover the cost of the filing fee from the Tenant for this application.

No one was in attendance for the applicant Landlord however the Tenant appeared at the hearing.

Issue(s) to be Decided

Is the Landlord entitled to a Monetary Order under sections 38, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

There was no additional evidence or testimony provided in support of the Landlord's claim as no one attended on behalf of the Landlord.

The respondent Tenant appeared and testified that the rental unit was a two bedroom condo and the Landlord insisted on two separate tenancy agreements, one for each bedroom. There were three occupants to each bedroom (1 bed and 1 set of bunk beds in each room). There were six tenants in total and three were listed on each tenancy agreement. Rent was $2,250.00 per bedroom or per tenancy agreement ($750.00 per person) and was payable on the first of each month. The tenancy agreement was effective on October 1, 2009 and ended April 30, 2010. The Landlord insisted that two separate tenancy agreements be entered into, one that ended March 31, 2010 and a second one for the period of April 1, 2010 to April 30, 2010. The Landlord demanded

rent for the month of April to be paid in advance on October 1, 2009 otherwise the Tenants would not get possession of the unit.

A security deposit was collected for each separate tenancy agreement of $1,125.00 for a total security deposit paid of $2,250.00 for the rental unit. The Landlord has applied to keep the combined total of the two security deposits of $2,250.00 on her application where she only names one of the six Tenants. As noted on the Landlord's application she was in receipt of the forwarding addresses on April 30, 2010.

Analysis

Section 61 of the *Residential Tenancy Act* states that upon accepting an application for dispute resolution, the director must set the matter down for a hearing and that the Director must determine if the hearing is to be oral or in writing. In this case, the hearing was scheduled for an oral teleconference hearing. In the absence of the applicant Landlord, the telephone line remained open while the phone system was monitored for ten minutes and no one on behalf of the applicant Landlord called into the hearing during this time. Based on the aforementioned I find that the Landlord has failed to present the merits of her application and the application was dismissed, without leave to reapply.

The Tenant confirmed the Landlord has not returned the security deposits to any of the six Tenants a total of $2,250.00. The tenancy ended April 30, 2010, the Landlord had the forwarding addresses April 30, 2010, and the Landlord did not file her application until 18 days after the tenancy ended on May 18, 2010.

Having dismissed the Landlord's application the Landlord is not entitled to retain the Tenants' security deposit, or portion thereof. Therefore the Tenants are at liberty to apply for dispute resolution and seek return of double their security deposits.

Conclusion

I HEREBY DISMISS the Landlord's application, without 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: October 05, 2010.

Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 752260

In the matter of the *Manufactured Home Park Tenancy Act,* SBC 2002, c. 77., as amended

Between

s.22 **Applicant(s),**

Applicant(s)

And

s.22 **Respondent(s),**

Respondent(s)

Regarding a rental unit at: s.22 Langley , BC

Date of Hearing: May 13, 2010, by conference call.

Date of Decision: May 17, 2010

Attending:

For the Respondent: No One

For the Applicant: s.22 Occupant

s.22

DECISION

Dispute Codes O

Introduction

This hearing dealt with an Application for Dispute Resolution by the Occupant to obtain an Order under the Manufactured Home Park Tenancy Act to allow him to occupy the site for twelve months after the sale of the property.

Service of the hearing documents, by the Applicant to the Respondent, was done in accordance with section 89 of the *Act*, served personally by the Applicant on March 29, 2010.

Issues(s) to be Decided

Is the Occupant entitled to an Order under the Manufactured Home Park Tenancy Act to allow him to occupy the property for twelve months after the sale of the property?

Background and Evidence

At the onset of the hearing I raised the issue of jurisdiction with the Applicant at which time he provided the following information:

- His manufactured home has been located on the property since 2004 and the property is owned by his s.22
- He was not required to pay a security deposit at the onset of his occupancy;
- His s.22 retain access to and control over the property;
- He pays property taxes annually and the amount is determined by s.22 s.22
- He does not pay a fixed amount for rent;
- The property is owned by s.22 and he was granted occupancy of the property based on his personal relationship and there has never been any business considerations to occupy the property;
- There were previous discussions that the Occupant would inherit the property if s.22 predeceased him;
- The Supreme Court issued an Order dated December 11, 2009 restraining the respondent to this decision from otherwise impeding or interfering with the use or

enjoyment of the Occupant's home until the trial, other disposition, or until further order of the Supreme Court.

Analysis

Upon careful review of the evidence and testimony before me I find the Applicant's entitlement to occupy the land would be considered a license to occupy under the common law and is therefore not governed under the Manufactured Home Park Tenancy Agreement.

I also note that this matter is substantially linked to a matter that is before the Supreme Court.

Based on the aforementioned reasons, I declined to hear this matter for want of jurisdiction.

Conclusion

I HEREBY DISMISS the application, for want of jurisdiction and if the Applicant wishes to pursue this matter they are advised to make application with the appropriate 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 *Manufactured Home Park Tenancy Act.*

Dated: May 17, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 753098

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

LOMBARDY PARK APARTMENTS PARTNERSHIP and WAYN SAWATZKY, Landlord(s),

Applicant(s)

And

s.22

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental unit at: s.22 Kelowna, BC

Date of Hearing: August 23, 2010, by conference call.

Date of Decision: August 24, 2010

Attending:

For the Landlord: Wayne Sawatzky, Landlord
Norman Sawatzky, Owner

For the Tenant: Patricia Lakes, Legal Advocate

s.22 Tenant (1)
Tenant (2)
Tenant (3)
s.22 Tenant (4)

DECISION

Dispute Codes RI

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order to allow an additional rent increase over the legislated amount of 3.2 % for the year 2010.

The Landlord amended their application on June 8, 2010 to include one additional rental unit in their application.

The hearing documents were served to the Tenants of the five rental units listed in the first application. Service was conducted via registered mail on April 15, 2010, in accordance with section 89 of the *Residential Tenancy Act* (Act).

The amended application and hearing documents were served to the added respondents via registered mail on June 9, 2010, in accordance with section 89 of the Act.

The Landlord, the Owner, the Tenant's Advocate, and four Tenants appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

Are the Landlords entitled to an Order for an additional rent increase pursuant to section 43 of the *Residential Tenancy Act*?

Background and Evidence

The Landlord could not confirm that all participants were given a copy of his amended application and he could not confirm that the respondents were given the same evidence provided to the Residential Tenancy Branch. The Tenants who attended the hearing confirmed they received approximately the same amount of evidence (21 or 22 pages) from the Landlord as noted by me during the hearing.

The Landlord could not provide testimony pertaining to the specific tenancy agreements currently held with the Tenants who occupy the six units in question. He did confirm this rental location consists of four (4) separate buildings with a total of sixty four (64) units. The building applicable to this application consists of eight (8) rental units for which the Landlord has applied for an additional rent increase against six (6) of the eight (8) units. The Landlord's family has owned the property for approximately forty (40) years and this building is approximately thirty (30) years old.

The Landlord and Owner presented their application, arguing that their request is based on a report from CMHC (Canadian Mortgage and Housing Corporation), a value based rent, letters from professional property managers, and comparisons of other rental units.

The Landlord referred to a 2010 "spring" CMHC report which he states lists the average rent for a one bedroom unit, in their city, at $742.00 and a two bedroom unit at $896.00. The Landlord does not believe he submitted a copy of this report in his evidence. He argued that the value of rent is what people are willing to pay and 25% of their tenants are paying the "new rent". He states that the market has told them the new rent is acceptable as 25% of their 64 suites in this complex pay this new amount.

The Landlord then referred to letters he submitted in his evidence from professional property management companies who suggest that rent for a two bedroom unit should be between $875.00 and $900.00 or between $875.00 and $1,100.00. The Owner confirmed these property management reports were provided through an arm's length process and that the Landlords are not affiliated with either property manager.

The Owner commented on a unit that was used as a comparison and argued that he contacted the building manager and confirmed this building, while closer to the lake, charges $780.00 for a one bedroom unit and $900.00 for a two bedroom unit. He noted that these two bedroom units are about 130 square feet smaller at only 860 square feet while their two bedroom units are 990 square feet. He also contacted another complex which is much newer with more amenities and was advised their rents are $1,050.00 for a one bedroom plus den; $1,250.00 for a two bedroom, and $1,460.00 for a penthouse. Although these units are newer they do not have the peace and quiet that their units have. The Landlord's property is located on a cul-de-sac in a park like setting just a half a block away from the city and bus amenities.

The Tenant's Advocate pointed out there was a typing error in her written submission whereby she listed an incorrect surname for the male Tenant added in the Landlord's amended application and she noted the correction. The Advocate then stated that in

addition to the arguments listed in her written submission she wanted to point out that the Tenants were not provided a copy of the CMHC report referred to in the Landlord's testimony. She continued by stating the onus lies with the Landlord to produce proof of specific and sufficient comparisons when using rent paid in other units. After reviewing the Landlord's evidence the Advocate argued there was a lack of detail, there was no specifics provided on the 25% of units that the Landlord claims are paying the higher rent. The Landlord did not provide information pertaining to who pays the utilities in these comparisons, the actual geographical location in relation to the rental units in question, or the "actual" rents paid as opposed to advertised rents. She stated that "fundamentally" it is the Tenants' position that the Landlords simply do not have comparisons with details, such as age, condition, or amenities that match those of the subject rental units.

The Tenants stated that the photo provided by the Landlords is an old photo, and that there is currently a storage box located in the centre of their view, as supported by their photographic evidence.

The Landlords could not provide testimony as to the age of the photo they submitted in evidence however added that the storage unit or box was built approximately three years ago. The Landlords confirmed the property managers who provided assessments did not see the interior of the units in question and only saw unit s.22 prior to their estimates. Unit s.22 had undergone renovations prior to the assessment which included items such as new carpet, new linoleum, painting of walls and possibility renovations to the kitchen cupboards. The Landlords could not speak to all of the work that was done on s.22 prior to the assessment.

The Landlords stated that they could not obtain "actual rents paid" as they could not obtain actual tenancy agreements as this would breach the privacy act. They feel the rents they are seeking are fair. The Landlords provided information on the last three years of rent increases imposed on these Tenants. They have applied for the additional rent increase on six out of the eight units in this building because one of the units agreed to the increase while the other is already at the higher rate.

The Tenants argued that units s.22 and s.22 were newly constructed in approximately 2004 when an addition was attached to their building. These units are completely different in design and age so cannot be used as a comparison. Unit s.22 was fully renovated about six or seven years ago so has differences when trying to compare to the remaining six units.

The Advocate stated in her closing that the Tenants have seen a number of vacancies and with those vacancies the rents gradually come down.

In closing the Landlord wanted the participants to know that they are seeking additional rent increases with the intension to do renovations on the existing units.

Analysis

All of the testimony and documentary evidence was carefully considered.

When seeking an additional rent increase under section 43 (3) of the Act, the Landlord bears the burden of proving that the rent for the rental unit(s) is significantly lower than the current rent payable for similar units, with similar amenities, in the same geographic area. I note that, in accordance with section 23 of the Regulations, if the Landlords are comparing units in one building to rental units in other buildings in the same geographic area, they will need to provide evidence that the condition of the units and the amenities provided for in the tenancy agreements are comparable along with the current rent payable. For the purpose of this decision the definition of "similar or comparable units" means a rental unit of similar geographic location, size, age, construction, state of repair, interior and exterior amenities, utilities, and views.

The *Residential Tenancy Policy Guideline* #37 states that additional rent increases under the section of "Significantly lower rent" will be granted only in exceptional circumstances. It is not sufficient for a landlord to claim a rental unit(s) has a significantly lower rent that results from the landlord's recent success at renting out similar units at a higher rate; such as the Landlords testimony that 25% of their tenants pay the higher rate.

To determine the exceptional circumstances I must consider the relevant particulars of the tenancy, the duration of the tenancy, and the frequency and amount of rent increases given during the tenancy.

The Landlords' documentary evidence consists of two letters received from independent property managers, printouts from on line classifieds listing available rental units, a typed list of why the Landlords believe the rental complex is desirable, photos of the complex, a map of the property in comparison to neighbouring lots, rents charged for units located in the Landlords' other buildings at this complex, and a CMA report from 2009 displaying rents charged in 2008 and 2009 which provides only a dollar amount and no description of the units or amenities.

In regards to the letters from the property management companies I note that these property managers based their opinions after viewing the grounds or exterior property and three rental units. Only one unit viewed s.22 is located in the subject building. The evidence supports that unit s.22 had undergone prior renovations which possibly included new carpet, linoleum, paint, and renovations to the kitchen cabinets. Although the property managers each offered their opinion on rents based on a no pet policy, location, the age restriction, and no smoking policy, there is no mention of the actual age of the building, the construction of the building (e.g. wood vs. concrete), differing views from the different units in the complex, specifics about the geographic location, and most importantly whether their opinions of what the monthly rent should be included or excluded the cost of utilities or other services.

The CMA report submitted in the Landlord's evidence indicates the average monthly rent for a two bedroom unit in their city has decreased from $967 in 2008 to $897 in 2009. This is also indicated when reviewing the letters from the property management companies as the letter dated April 27, 2009 suggests the average rent for a two bedroom unit of approximately 956 square feet to be $975.00 to $1,100.00 while the letter dated January 28, 2010 shows a lesser amount for the two bedroom which is listed between $875.00 and $900.00.

The advertisements provided in the Landlords' evidence do not meet the requirements to be considered comparables for the purpose of this application. These documents do not provide me with specific similarities to the subject units, do not indicate if services offered match those currently offered at the subject units, nor do they provide any indication of where they are geographically located in relation to the subject units.

The Landlords were not able to provide specific information pertaining to the existing tenancies of the subject units. They did however provide a document which outlines the rent increases for the past two to four years which on a balance of probabilities leads me to believe the Tenants have been issued annual rent increases for every year of their tenancy.

The Landlords listed reasons why they feel the rental complex is a desirable place to live. However the Tenants provided opposing evidence and testimony which provides a different view when it comes to issues such as maintenance of the building and the fact that the cost of hydro is not included in the rent for the subject building. Based on the Tenants' evidence the hydro costs for the last twelve months averaged just under $86.00 per month. That being said, if I were to consider the current monthly rent in question plus $86.00 per month for hydro the average rents would be $756.00 for the one bedroom unit and between $836.00 and $861.00 for the two bedroom units.

With regards to the Landlords' closing remark that they are seeking additional rent increases with the intension to do renovations, I note that they did not make application for an additional rent increase for significant repairs or renovations nor was there evidence before me to support this statement.

Based on the aforementioned I find the Landlords have failed to provide sufficient evidence to support their application that the rents in question are significantly lower than rents currently charged for comparable units. Therefore, I dismiss the application.

Conclusion

I HEREBY DISMISS the Landlords' application for an additional rent increase.

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 24, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 744688
Additional File(s):753726

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

SHEILA MARIE BROWN, Landlord(s),
Applicant(s)/Respondent(s)

And

s.22 **Tenant(s),**
Applicant(s)/Respondent(s)

- Regarding a rental unit at: s.22 North Vancouver, BC

Date of Hearing: August 16, 2010, by conference call.

Date of Decision: August 16, 2010

Attending:

For the Landlord: Sheila Brown

For the Tenant: s.22

DECISION

Dispute Codes MND MNSD MNDC FF
MNSD MNDC FF

Introduction

This hearing convened on May 13, 2010, again for the present session on August 16, 2010. This decision should be read in conjunction with my interim decision of May 17, 2010.

Issues(s) to be Decided

Is the Landlord entitled to a Monetary Order under sections 38 and 67 of the *Residential Tenancy Act*?

Is the Tenant entitled to a Monetary Order under sections 38 and 67 of the *Residential Tenancy Act*?

Background and Evidence

During the course of the reconvened hearing the parties reached an agreement to settle these matters.

Analysis

The parties agreed to settle these matters, on the following conditions:

1. the Tenant withdraws her application in full; and

2. the Landlord withdraws her application in full; and

3. the Landlord will retain the full amount of the security deposit of $600.00 plus any accrued interest on the security deposit; and

4. in consideration for this mutual settlement the parties agree that no further claims and no further applications for review will be made by either party whatsoever arising from this tenancy.

Conclusion

The matters were settled therefore I decline to award recovery of the filing fee to either party.

In the presence of the settlement agreement there is no further action required. Therefore, the file is now closed.

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 16, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 744688
Additional File(s):753726

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

SHEILA MARIE BROWN, Landlord(s),
Applicant(s)/Respondent(s)

And

s.22 **Tenant(s),**
Applicant(s)/Respondent(s)

Regarding a rental unit at: s.22 North Vancouver, BC

Date of Hearing: May 13, 2010, by conference call.

Date of Decision: May 17, 2010

Attending:

For the Landlord: Sheila Brown

For the Tenant: s.22

INTERIM DECISION

Dispute Codes MND MNSD MNDC FF
MNSD MNDC FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed seeking a Monetary Order for damage to the unit, site or property, to keep all or part of the pet and or security deposit, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed seeking a Monetary Order for the return of double her security deposit, money owed or compensation for damage or loss under the Act, regulation or tenancy agreement and to recover the cost of the filing fee from the Landlord.

Service of the hearing documents by the Landlord to the Tenant was done in accordance with section 89 of the *Act*, sent via registered mail on approximately December 16, 2009. The Tenant confirmed receipt of the Landlord's hearing documents.

Service of the hearing documents by the Tenant to the Landlord was done in accordance with section 89 of the *Act*, sent via registered mail on May 5, 2010. The Landlord confirmed picking up the hearing documents on May 12, 2010.

The Landlord and Tenant appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

Is the Landlord entitled to a Monetary Order under sections 38 and 67 of the *Residential Tenancy Act*?

Is the Tenant entitled to a Monetary Order under sections 38 and 67 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed testimony included the written fixed term tenancy agreement began on December 30, 2007 and switched over to a month to month Tenancy after January 1, 2009. The monthly rent was payable on the first of each month in the amount of $1,200.00 and the Tenant paid a security deposit of $600.00 on approximately December 20, 2007. The tenancy ended when the Tenant vacated the rental unit on November 30, 2009 after serving the Landlord written notice to end the tenancy on October 26, 2009, which included the Tenant's forwarding address. A written move-in inspection report was not completed in accordance with the Act and was not provided in any of the evidence submitted to the Residential Tenancy Branch for either application. The Landlord's s.22 did however complete a walkthrough of the unit with the Tenant, in the Landlord's absence.

The Landlord testified that the rental unit has not been re-rent and that she attended the rental unit, with s.22 every weekend as well as during the Christmas break. The Landlord stated that s.22 has been occupying the rental unit since February 2010.

The Landlord confirmed receipt of the Tenant's forwarding address on October 26, 2009, that the tenancy ended effective November 30, 2009, and that the Landlord instructed the Tenant to leave the keys inside the rental unit after the Tenant vacated the unit.

The Landlord testified that the first time she attended the rental unit after the end of the tenancy was December 4, 2010 which is when the Landlord found the unit empty, generally tidy, wiped down, the stove had been cleaned, nail holes in the walls from hanging pictures, stains on the mantel piece, the keys left inside the unit as instructed, and damage to the slate flooring in the bathroom and to the installed hardwood floor throughout the unit.

The Landlord referred to her documentary evidence of e-mails and documents and argued that she attempted to contact the Tenant, via e-mail, to schedule a move-out inspection on November 28th or 29th, prior to the end of the tenancy, or later in December 2009, after the end of the tenancy.

The Landlord argued that after several attempts to reach the Tenant via e-mail a letter Dated December 5, 2009 was sent to the Tenant via registered mail in which the Landlord writes "I conducted a walk-through of the apartment on December 4, 2009." This letter also references damaged and missing pieces of hardwood from of a box of

hardwood flooring that was left in the rental unit by the Landlord, stains to the fireplace mantel, and stains to the slate flooring in the bathroom. The Tenant confirmed receipt of the letter on December 8, 2009.

The Landlord confirmed she is seeking a monetary claim of $1,237.92 which consists of $195.50 for the box of hardwood flooring that was damaged, $460.00 for cost of slate tiles, $440.00 to sand and refinish hardwood flooring, plus $138.52 of taxes at 13%. The Landlord testified that these amounts were obtained from estimates she had received from contractors in another city, who have never seen the rental unit, and are based on labour costs and material costs. The Landlord confirmed that these repairs have not been completed.

The Landlord argued that she has a witness who saw that during the tenancy there were pieces of hardwood flooring, from the Landlord's stored box of hardwood, placed under the Tenant's cat litter box. The Landlord stated that she provided pictures of the slate flooring and hardwood flooring, taken at the onset of the tenancy, in support of her testimony that the slate floor was stained or damaged during the course of the tenancy and the hardwood flooring suffered small nicks and scratches during the tenancy.

The Tenant testified and referred to her documentary evidence of videos and the previous dispute resolution hearing in support of her testimony that the rental unit was under renovations from September 29, 2009 to November 30, 2009 and during this time the Tenant had no control of who was coming into or out of the rental unit. The Tenant testified that her video evidence proves that the contractors had materials and tools scattered all over the slate and hardwood floors throughout the rental unit and that contractors had keys to the unit and would often attend the unit to work, leaving the door wide open for anyone to access.

The Tenant pointed out that the Landlord's letter of December 5, 2009, does not mention damage to the installed hardwood flooring and that the Landlord's quotes are from April 2010 which is months after the tenancy has ended, long after the property was listed for sale, viewed by potential purchasers, and several months after the unit has been occupied by the Landlord's s.22 The Tenant also stated that the real estate listing states the unit has new appliances, which would have been delivered after the tenancy ended, and the installation of the appliances could have caused damage to the flooring.

The Tenant confirmed she is seeking the return of double her security deposit, compensation of $600.00 for damage to her antique teak hutch, which was allegedly damaged by a contractor during the renovations to the rental unit when a mirror was

placed up against the hutch, and $600.00 compensation for the loss of her Cat's remains which were left in the rental unit closet and not returned by the Landlord after several requests were sent to the Landlord for the return of her Cat remains.

The Tenant advised the urn containing her Cat remains were in the bedroom closet, on the left side, behind the closet door that was not working properly. The urn was inside a white 5x7 box that had the name "Monopoly" written on the outside.

The Landlord testified that she was not aware the Tenant left the Cat remains in the rental unit therefore she has made no previous effort to locate the remains.

The Tenant stated that she is primarily concerned about having the Cat remains returned and asked that the remains be sent to her via courier, collect, as soon as possible.

At this point the hearing time expired and the parties were advised that the hearing would be adjourned and the matter reconvened at a later date. The Landlord advised that she will be unavailable between June 30 and July 9, 2010 while the Tenant advised she will be unavailable for the entire month of July 2010.

Analysis

Upon closer review of Dispute Resolution Officer (DRO) E. Letain's decision dated December 21, 2009, I note that an order or finding was not made pertaining to the Tenant's security deposit, rather DRO Letain states "This entitles the Tenant to **apply** for the return of double the security deposit and under the Act, the Landlord precluded from claiming against the security deposit." (Emphasis/bolding added by me)

The evidence supports that the Landlord received the Tenant's forwarding address, in writing, on October 26, 2009, that the tenancy ended on November 30, 2010, and the Landlord filed her application for dispute resolution on December 14, 2009.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit. In this case the Landlord was required to either return the Tenant's security deposit in full "or" file for dispute resolution no later than December 15, 2009. Based on the aforementioned I find the Landlord has complied with the Act by filing her application on December 14, 2009.

That being said, I must point out that while I have found the Landlord has made application to retain the security deposit in accordance with the Act, I have not yet made a finding or decision relating to the entitlement of the security deposit.

Regarding the matter of the Cat remains, I hereby order the Landlord to complete a thorough search of the rental unit, no later than May 15, 2010. If the Cat remains are located by the Landlord, the Landlord is ordered to have the remains returned to the Tenant immediately and sent collect via courier. To clarify, the Landlord is required to have the remains delivered to the courier company for delivery to the Tenant at the Tenant's expense. The Landlord is further instructed to leave a message for the Tenant at the telephone number provided in today's hearing, no later than May 15, 2010, advising the Tenant if the remains were located and if so, when the Tenant can expect the courier delivery.

Both parties were advised that I would be considering all of the evidence which was received at the Residential Tenancy Branch prior to today's hearing and that no additional evidence will be accepted regarding these applications.

The hearing time expired and the parties were advised that the hearing would be reconvened at a later date. The Landlord advised that she would not be available between June 30, 2010 and July 10, 2010 and the Tenant advised that she would not be available during the month of July 2010.

Conclusion

This hearing is adjourned to the date specified in the enclosed Notice of Adjourned Hearing.

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: May 17, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 754886

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

VICARS, VICARS, & LOVE dba SHUSWAP MANOR,
Landlord(s),

Applicant(s)

And

s.22

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental unit at: s.22 Kamloops, BC

Date of Hearing: July 21, 2010, by conference call.

Date of Decision: July 21, 2010

Attending:

For the Landlord: Len Ouellette, Agent for the Landlord

For the Tenant: s.22 (Agent for s.22)

DECISION

Dispute Codes RI

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order to allow an additional rent increase for twenty six units.

The Landlord's Agent and an Agent for Tenant in unit s.22 appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

Is the Landlord entitled to an Order to allow an additional rent increase pursuant to section 43 of the *Residential Tenancy Act*?

Background and Evidence

The Agent for Tenant s.22 attended and affirmed that he had not been contacted by any of the other twenty-five Tenants and stated that he was at the hearing to represent only the one Tenant from unit s.22 .

The Landlord's Agent was requested to provide testimony about how and when the twenty six tenants were served notice of the Landlord's application and with the hearing package. The Landlord's Agent confirmed the application was filed on April 12, 2010, and the notices of hearing were picked up around May 3, 2010. The Agent stated that all of the Tenants were served personally by him, some in the presence of the Landlord, and that they were served up to a week after the packages were picked up. The Landlord's Agent could not provide testimony of the date each Tenant was served and he confirmed that he did not track when each respondent was served. The Agent

argued that they were all served when he could catch them at home and he did not know the exact dates.

I explained the requirements of service of hearing documents under the Act and advised the Landlord that we would be proceeding with the hearing today against the respondent from unit # s.22 , who was represented at today's hearing, and I would be dismissing the Landlord's application against the other twenty five respondents with leave to reapply.

The Landlord's Agent became argumentative and continued to interrupt me while I was explaining how we would proceed today. As I attempted to explain the *Residential Tenancy Branch Rules of Procedure* to the Landlord's Agent I began to use the metaphor of how a court proceeding is conducted, when the Landlord's Agent interrupted me to say "this is no court process, this is a kangaroo court". At this point I told the Landlord's Agent that if he continued to disrespect me or this proceeding I would disconnect him from the hearing and would proceed in his absence. He replied by saying "do you even know what you are doing?" I then asked the Landlord's Agent if he wished to proceed with his application and he responded "I don't need your kind of people in my life", and he disconnected from the hearing. (11:19 a.m.)

Analysis

Section 89 of the Act provides the manner in which service of an Application for Dispute Resolution must be conducted while section 59(3) of the *Residential Tenancy Act* (the Act) stipulates that Notices of Dispute Resolution must be served to the respondent(s) within 3 days of filing the application. Section 3.3 of the *Residential Tenancy Branch Rules of Procedure* stipulate that if the respondents do not attend the dispute resolution proceeding, the applicant must prove to the Dispute Resolution Officer that each respondent was served as required under the *Act* and that the person who served the documents must either attend the dispute resolution proceeding as a witness, or submit

as evidence an affidavit of service, sworn by the person who served the documents, informing the Dispute Resolution Officer how and when the service was accomplished.

To find in favour of an application, I must be satisfied that the rights of all parties have been upheld by ensuring the parties have been given proper notice to be able to defend their rights. In the absence of proof that the service of documents has been effected in accordance with the *Act*, I dismiss the Landlord's application against the twenty five absent Tenants, with leave to reapply.

A dispute resolution proceeding, as defined under the *Residential Tenancy Branch Rules of Procedure,* is a legal process initiated by a landlord or a tenant by filing an Application for Dispute Resolution for the purpose of obtaining a legally binding decision from an independent decision-maker. Rule 8.7 provides that the Dispute Resolution Officer may give directions to a party, or to a party's agent or representative, in attendance at a dispute resolution proceeding, who presents rude, antagonistic or inappropriate behaviour. A person who does not comply with the Dispute Resolution Officer's direction may be excluded from the dispute resolution proceeding and the Dispute Resolution Officer may proceed with the dispute resolution proceeding in the absence of the excluded party.

In this case the Landlord's Agent removed himself from the hearing, prior to presenting his application against Tenant s.22 and the hearing proceeded in his absence. Based on the aforementioned I find that the Landlord has failed to present the merits of their application and the application is hereby dismissed without leave to reapply. The Landlord is further prevented from applying for an additional rent increase against Tenant s.22 for twelve months from the date of this decision, in accordance section 62 of the Act.

Conclusion

I HEREBY DISMISS the Landlord's application, against Tenant s.22 without leave to reapply.

I HEREBY DISMISS the Landlord's application against the twenty five remaining Tenants, 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: July 21, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

File No: 762947

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

ALPESH LODAYA, Landlord(s),

Applicant(s)

And

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental unit at: s.22 New Westminster, BC

Date of Hearing: November 29, 2010, by conference call.

Date of Decision: November 29, 2010

Attending:

For the Landlord: s.22

For the Tenant: No One

Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes RI

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order to allow an additional rent increase.

Service of the hearing documents, by the Landlord to the Tenant, was done in accordance with section 89 of the *Act*, served personally on October 8, 2010, at the rental unit.

The Landlord appeared, gave affirmed testimony, were provided the opportunity to present his evidence orally, in writing, and in documentary form. No one attended the teleconference hearing on behalf of the Tenant, despite him being served notice of this hearing in accordance with the Act.

Issues(s) to be Decided

1. Has the Landlord proven entitlement to an additional rent increase, above the legislated amount?

Background and Evidence

The Landlord testified he purchased this rental property on July 30, 2010 and he entered into a new written tenancy agreement with the current Tenant effective August 1, 2010 for a month to month tenancy. Rent is payable on the first of each month in the amount of $1,000.00 which is the amount of rent the Tenant had been paying to the previous owner. The security deposit of $450.00 was transferred to the Landlord during

the sale of the property however the Landlord did not know the date the original deposit was paid by the Tenant.

The Landlord did not know the length of the Tenant's tenancy for certain and estimated it to be about seven or eight years based on a conversation that he stated he had with the Tenant. He also stated that he believes the Tenant has never had a rent increase from the previous owner(s) and said that the Tenant had some sort of deal with the prior owner to keep his rent at $1,000.00.

The Landlord described the rental unit as the upper suite in a house which was renovated about three years ago, prior to his purchasing the property. It is 1297 square feet, three bedrooms, two full baths, living room, dining room, separate kitchen, sundeck, shared laundry, parking for the Tenant's four vehicles and their boat, in suite storage, a storage shed, and access to the private back yard. Utilities are shared 50/50 between the upper Tenant and tenant of the lower suite. He stated the location of the rental unit is in a desirable subdivision of their city, close to transit, shopping, a short transit ride to the sky train, and within walking distance to a main shopping centre. The Tenants have an arrangement where they work together to maintain the yard work.

In support of his application the Landlord testified that the unit is in really good condition and the rent is very low. He stated that he tried to settle the rent increase with the Tenant but the Tenant refused so he applied to the *Residential Tenancy Branch.* He argued that he is pretty sure that this rent is lower than the rent he can get for the unit. He stated that he provided evidence of comparable units in neighbouring cities, that he referred to as being close by, and stated that he could not find comparables of units with two full bathrooms in the same city where the unit is located.

Analysis

Section 37 of the *Residential Tenancy Policy Guideline* #37 states that additional rent increases under the section of "Significantly lower rent" will be granted only in

exceptional circumstances and that it is not sufficient for a landlord to claim a rental unit(s) has a significantly lower rent that results from the landlord's recent success at renting out similar units at a higher rate.

To determine the exceptional circumstances I must consider the relevant circumstances of the tenancy, the duration of the tenancy, the frequency and amount of rent increases given during the tenancy, similar units in the same geographic area.

The Landlord testified that he inherited the Tenant and their tenancy agreement when he purchased the rental unit on July 30, 2010. He argued that he did not know when the tenancy began and that he believed the Tenant had some sort of agreement with the previous owner to keep his rent low. He also stated that the Tenant has never incurred a rent increase. The evidence supports the Tenant paid a security deposit of $450.00 which indicates that his rent at some point should have been $900.00 per month which also supports that the Tenant would have had an increase or increase(s) to bring his rent up to $1,000.00 per month. The Landlord was not able to provide testimony as to the exact start date of the Tenant's tenancy.

The evidence provided by the Landlord for comparable units in support of his application, consists of nineteen pages of advertisements printed off of the internet for rental units advertised in six other cities. I note that there were no advertisements provided for rental units in the same city where the rental unit is located and there was no testimony provided for rent comparables in the same city.

In the absence of comparable rental units in the same geographical city, and in the absence of accurate details pertaining to the Tenant's tenancy information, I find the Landlord provided insufficient evidence to prove there are exceptional circumstances which has caused the Tenant to have significantly lower rent. Therefore, I hereby dismiss the Landlord's application.

Having dismissed the Landlord's application for an additional rent increase, pursuant to # 37 of the *Residential Tenancy Policy Guideline,* I hereby Order the Landlord to comply with the Act and regulations for the permitted annual increase amount for 2011 of 2.3%, after providing the Tenant with proper notice in accordance with section 42 of the Act.

Conclusion

I HEREBY DISMISS the Landlord's application, without 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: November 29, 2010.

L. Bell
Dispute Resolution Officer

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 789925

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

ADKA-TRADING & FINANCE CORP., Landlord(s),

Applicant(s)

And

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental until at: s.22 Kelowna, BC

Date of Hearing: May 30, 2012 and June 26, 2012, by conference call.

Date of Decision: June 27, 2012

Attending:

For the Landlord: Kammerlohr Norberrt

For the Tenant: s.22

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing convened on May 30, 2012 and was reconvened to allow for service of evidence to today's session, June 26, 2012, and dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, to keep all or part of the pet and security deposits, and to recover the cost of the filing fee from the Tenant for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Is the Landlord entitled to a Monetary Order?

Background and Evidence

The parties agreed they entered into a fixed term tenancy agreement that was scheduled to begin April 1, 2012 and end on April 30, 2013. Rent was to be payable on the first of each month in the amount of $775.00 plus $15.00 utilities. On February 27, 2012 the Tenant provided the Landlord with payment of $805.00 which included payment for the $395.00 security deposit, $395.00 pet deposit plus April 1, 2012 utility payment of $15.00. The Tenant provided the Landlord a second payment of $775.00 for prepayment of the first month's rent that was due April1, 2012.

The Landlord submitted a copy of a letter dated March 15, 2012, issued by the Tenant cancelling her lease prior to the start date of the tenancy. The Landlord then pointed to an agreement he had the Tenant sign on March 19, 2012 whereby she signed agreeing to the Landlord keeping the $790.00 deposits ($395.00 + $395.00) plus $750.00 for liquidated damages. He confirmed the Tenant never took possession of the unit and is seeking to keep the deposits because he has lost rent for April 2012.

The Landlord pointed to #5 of their tenancy agreement which provides for liquidated damages of $750.00 and argued that he was entitled to this amount because the

Tenant broke her agreement. He advised that he advertised the unit on the internet on a free site and another site which charged $28.00. He stated that he also advertised the unit in the local newspaper at a cost of $151.00 however he did not submit proof of this cost in his evidence. He stated that this liquidated damages amount was to cover his expenses in re-renting the unit which involves travel time and costs, credit check fees and advertising. He later acknowledged s.22 s.22 travel costs would be at a minimum.

The Landlord confirmed that he was able to re-rent the unit effective May 1, 2012 and that he entered into this agreement with his new tenants on March 29, 2012.

The Tenant confirmed providing the Landlord with her first payment on February 21, 2012 after seeing the rental unit in the evening while the current tenant's possessions were inside. She saw the unit a second time in daylight at which time she saw the unit was full of humidity and she had concerns about the carpet so she requested the Landlord have the carpets replaced with laminate. She argued that the Landlord agreed to change the carpets if she provided him with payment for her first month's rent so he could use it to pay for the new flooring. After she provided the pre-payment for April 2012 rent the Landlord told her he would not be changing out the carpet but that he would make sure it was professionally cleaned.

The Tenant asserted that it was because the Landlord changed his mind about replacing the carpet s.22 that she had to cancel her tenancy agreement. She acknowledged singing the agreement to end which indicated the Landlord would be keeping the deposits and $750.00; however she stated she did not understand what she was signing. She also stated that she was under stress s.22 s.22 and she was distressed and wanted to do things as requested by the Landlord because he was holding all of her post dated cheques. She confirmed that he has since returned these cheques to her.

The Tenant does not recall discussing the liquidated damages clause with the Landlord and argued that he told her to read the agreement and then pointed where she was required to initial and sign. She is of the opinion that the liquidated damages listed is in fact a penalty as it is very high in relation to the costs incurred to re-rent this unit. The Landlord s.22 travel costs are not a factor and the unit was listed on internet sites.

In closing the Landlord argued that he went through all points of the tenancy agreement with the Tenant and that she told him she read them and understood them clearly.

Analysis

I find that in order to justify payment of damages or losses under section 67 of the *Act*, the Applicant Landlord would be required to prove that the other party did not comply

with the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7 of the Act.

Section 5 of the Act stipulates that landlords and tenants cannot avoid or contract out of the Act or Regulations and any attempts to do so are of no effect.

The Act stipulates that a Landlord may required a security and pet deposit for an amount that is not greater than an amount equal to ½ of a month's rent for each deposit. In this case the rent was $775.00 therefore the amount collected by the Landlord for the security deposit of $395.00 and the pet deposit of $395.00 exceed the allowable amount of $387.50 for each deposit.

Section 45(2) of the Act provides that a tenant may end a fixed term tenancy agreement by providing notice to end the tenancy on a date that is not earlier than the end of the fixed term.

In this case the Tenant ended the tenancy prior to the end of the fixed term which caused the Landlord to suffer a loss of rent for the month of April 2012. Accordingly I find the Landlord has met the burden of proof and I award him **$775.00** for loss of April 2012 rent.

The tenancy agreement provided for liquidated damages of $750.00. The *Residential Tenancy Policy Guideline # 4* provides that a liquidated damages clause is a clause in a tenancy agreement where the parties are to agree in advance on the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into. When considering the sum of the liquidated damages the Dispute Resolution Officer will determine if the clause may be held to constitute a penalty which would render the clause unenforceable.

When reviewing the amount being claimed by the Landlord for liquidated damages I have considered the following: (1) the circumstances surrounding the signing of the tenancy agreement as provided by the Tenant; and (2) s.22 for the Tenant; and (3) the amount of $750.00 listed as liquidated damages in relation to the monthly rent of $775.00; and (4) actual costs to re-rent a unit such as advertising and credit checks; and (5) the Landlord entered into a new tenancy agreement ten days after the Tenant cancelled her tenancy.

Based on the aforementioned I find the $750.00 liquidated damages amount constitutes a penalty as it far exceeds a reasonable estimate of what it would cost to re-rent the unit. In this case even if the Landlord had paid $179.00 to advertise the unit and showed the unit to three prospective tenants then had a credit check completed his costs would be far less than $750.00. Accordingly, I find the liquidated damages clause to be unenforceable and I dismiss the Landlord's claim.

The Landlord has partially been successful with his application; therefore I award partial recovery of the filing fee in the amount of **$25.00.**

Monetary Order – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security, pet deposit, and prepaid rent and utilities as follows:

Loss of Rent for April 2012	$ 775.00
Filing Fee	25.00
SUBTOTAL	**$ 800.00**
LESS: Security Deposit plus interest of $0.00	(395.00)
Pet Deposit plus interest of $0.00	(395.00)
Prepaid Utilities	(15.00)
Prepaid Rent $775.00	(775.00)
PLUS: $40.00 reimbursed by the Landlord	40.00
Offset amount due to the TENANT	**$ 740.00**

The Landlord is HEREBY ORDERED to return the balance of $740.00 to the Tenant forthwith.

Conclusion

The Tenants' decision will be accompanied by a Monetary Order in the amount of **$740.00.** This Order is legally binding and must be served upon the Landlord.

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: June 27, 2012.

L. Bell, Dispute Resolution Officer
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

Now that you have your decision...

All decisions are binding and both landlord and tenant are required to comply.

The RTB website (www.rto.gov.bc.ca) has information about:

- How and when to enforce an order of possession:
  Fact Sheet RTB-103: *Landlord: Enforcing an Order of Possession*

- How and when to enforce a monetary order:
  Fact Sheet RTB-108: *Enforcing a Monetary Order*

- How and when to have a decision or order corrected:
  Fact Sheet RTB-111: *Correction of a Decision or Order*

- How and when to have a decision or order clarified:
  Fact Sheet RTB-141: *Clarification of a Decision or Order*

- How and when to apply for the review of a decision:
  Fact Sheet RTB-100: *Review Consideration of a Decision or Order*
  (Please Note: Legislated deadlines apply)

To personally speak with Residential Tenancy Branch (RTB) staff or listen to our 24 Hour Recorded Information Line, please call:

- Toll-free: 1-800-665-8779
- Lower Mainland: 604-660-1020
- Victoria: 250-387-1602

Contact any Service BC Centre or visit the RTB office nearest you. For current information on locations and office hours, visit the RTB web site at www.rto.gov.bc.ca

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

APPLICATION for REVIEW

Pursuant to Division 2, Section 79(2) of the Residential Tenancy Act, SBC 2002, c. 78., as amended.

On May 15, 2012, the Residential Tenancy Branch received an Application for Review from s.22 Tenant(s),.

Subject:

File Number: 790441,
Decision dated: May 08, 2012
Rental Unit: s.22
Burnaby , BC

Other Party: VANCOUVER EVICTION SERVICES and ELIO LUONGO, Landlord(s),

Introduction

The Tenant has applied for a review of the Decision and Orders of Dispute Resolution Officer, K. Lam, dated May 8, 2012. The Decision upheld the Landlord's application for an Order of Possession and a Monetary Order for unpaid rent. The Landlord's Agent appeared at the teleconference hearing; however the Tenant did not appear.

Division 2, Section 79(2) under the *Residential Tenancy Act* says a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

A. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
B. A party has new and relevant evidence that was not available at the time of the original hearing.
C. A party has evidence that the director's decision or order was obtained by fraud.

The Tenant has applied on the grounds that she was unable to attend the hearing because of circumstances that could not be anticipated and/or were beyond her control and she has new and relevant evidence that was not available at the time of the original hearing.

Issues

1. Has the Tenant met the burden of proof to be granted a review or new hearing?

Facts and Analysis

The Tenant provided a copy of the registered mail final notice card as the only evidence in support of her application for review consideration.

The Tenant indicated on her application for review consideration that she did not attend the hearing because she was not aware a hearing was being conducted because she was on vacation. She further states that when she returned she found a notice to pick up registered mail in her mailbox and by the time she attempted to pick up the registered mail package it had been returned to sender.

In response to what testimony or additional evidence she would have provided if she was at the hearing she wrote, among other things: “I have not seen the original complaint, but I can’t imagine that it would pertain to anything other than rent payments”. She continues to provide information pertaining to the length of her tenancy and the type of relationship she has had with her Landlord but does not mentioned specific evidence she would have provided.

Under the grounds of new and relevant evidence the Tenant speaks about the relationship she has with her Landlord and how he dislikes the amount of time she spends travelling. She also speaks about the Landlord mentioning he intends to sell the property.

Residential Tenancy Branch Policy Guidelines suggest that a person requesting a review pursuant to section 79(2)(a) of the *Act* must provide “supporting evidence” to establish that the circumstances which led to the inability to attend the hearing were beyond the control of the applicant and could not have been anticipated. I concur with this guideline.

The Tenant is relying on a Canada Post Final Notice of Registered Mail as the only evidence to corroborate that she was not informed about the hearing because she was away on vacation.

There was no evidence provided to prove the Tenant was away on vacation or the dates she was absent from the property; nor was there evidence to prove the Tenant had new and relevant evidence. Further, there was no evidence provided which proves

the Tenant paid rent or that there were funds in her bank account to cover the rent payment, other than her statement on the application for review consideration.

The evidence supports that the Tenant was in receipt of the final notice of registered mail; however there is no evidence to indicate the date she allegedly attempted to pick it up. The Supreme Court has previously ruled that simply refusing to pick up registered mail does not negate service of hearing documents.

Therefore I find there is insufficient evidence to support the application for review consideration or to prove that the decision or orders issued would have been different had the Tenant attended the May 8, 2012 hearing.

Decision

After careful consideration of the aforementioned, I find that the Tenant's request for review should be rejected as the application does not disclose sufficient evidence of a ground for the review. Accordingly, I HEREBY DISMISS this Application to Review pursuant to sections 81(1)(b) f the *Act*.

The decision and Orders of May 8, 2012, stand and are of full force and effect.

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: May 17, 2012.

L. Bell, Dispute Resolution Officer
Residential Tenancy Branch

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 790441

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78., as amended

Between

Vancouver Eviction Services and Elio Luongo, Landlord(s),

Applicant(s)

And

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental unit at: s.22 Burnaby, BC

Date of Hearing: May 08, 2012, by conference call.

Date of Decision: May 08, 2012

Attending:

For the Landlord: Shelly Allison, Agent

For the Tenant: No One

DECISION

Dispute Codes OPR, MNR, MNDC, MNSD, FF

Introduction

This is an application filed by the Landlord for an order of possession and a monetary order for unpaid rent, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, to keep all or part of the security deposit and recovery of the filing fee.

The Landlord's Agent attended the hearing by conference call and gave undisputed testimony. The Tenant did not attend. The Landlord states that the notice of hearing and evidence package was served on the Tenant by Canada Post Registered Mail on April 20, 2012. The Landlord has included in their evidence a copy of the Canada Post Registered Mail Customer Receipt. At the time of the hearing, the Landlord stated that an online check with Canada Post states that notices were left and that the Tenant has not yet picked up the package and that it would be returned to the sender. The Landlord states that the Tenant is still in possession of the rental unit at the time of the hearing. I am satisfied that the Tenant was properly served with the notice of hearing and evidence package by Canada Post Registered Mail on April 20, 2012 and that the Tenant is deemed under the Act to have received the package on April 25, 2012.

Issue(s) to be Decided

Is the Landlord entitled to an order of possession?
Is the Landlord entitled to a monetary order?
Is the Landlord entitled to retain the security deposit?

Background and Evidence

The Landlord states that the Tenant was served with a 10 day notice to end tenancy dated April 3, 2012 in person on the same date. The Landlord has submitted a copy of a proof of service document which states that the Landlord personally served the Tenant with the document. The notice shows an effective date of April 13, 2012 and that the monthly rent in the amount of $1,400.00 that was due on April 1, 2012 was not paid. The Landlord states that as of the date of the hearing, the Tenant has failed to pay rent of $1,400.00 for April and May of 2012.

The Landlord seeks an order of possession for unpaid rent, a monetary order for $2,800.00 consisting of unpaid rent of $1,400.00 and lost rental income for May 2012 of $1,400.00. The Landlord has also applied to retain the security deposit of $700.00 which was paid on January 1, 2008 to offset the monetary claim.

Analysis

I accept the undisputed testimony of the Landlord's Agent and find that the Tenant was served with a 10 day notice to end tenancy for unpaid rent dated April 3, 2012 in person on the same date. The Tenant did not pay the outstanding rent within 5 days of receiving the notice and did not apply for dispute resolution to dispute the notice and is therefore conclusively presumed to have accepted that the tenancy ended on the effective date of the notice on April 13, 2012. Based upon the above facts, I find that the Landlord is entitled to an order of possession. The Tenant must be served with the order. Should the Tenant fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

As for the monetary order, I find that the Landlord has established a claim for $2,800.00 consisting of $1,400.00 in unpaid rent and $1,400.00 in lost rental income. The Landlord is also entitled to recovery of the $50.00 filing fee. I order that the Landlord retain the $700.00 security deposit and $10.50 in interest which has accrued to the date of this judgement in partial satisfaction of the claim and I grant the Landlord an order under section 67 for the balance due of $2,139.50. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The Landlord is granted an order of possession and a monetary order for $2,139.50. The Landlord may retain the security deposit and accrued interest of $710.50.

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: May 08, 2012.

K. LAM
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 797585

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78, as amended

Between

WILL FRANKLIN LAUDER, Landlord,

Applicant

And

s.22 **Tenant,**

Respondent

Regarding a rental unit at: s.22 North Vancouver, BC

Date of Hearing: January 24, 2013, by conference call.

Date of Decision: January 24, 2013

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

The landlord applied for an order allowing him to serve his application for dispute resolution and accompanying documents (the "Hearing Package") on the respondent tenant by registered mail to the tenant's place of employment.

The evidence of the landlord was that the tenant did not provide him with a forwarding address, but the landlord is aware of the tenant's place of employment. The landlord states in his evidence that he knows that the tenant is employed by Canada Post and also knows the location at which the tenant works.

Having reviewed the submissions of the landlord, I order that he may serve the tenant with the Hearing Package by sending the Hearing Package to the attention of the tenant and have the tenant sign in acknowledgement of receipt of the package. The landlord may also serve the tenant in person at his place of work.

A copy of this decision is to be appended to the Hearing Package served on the tenant.

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: January 24, 2013

E. Nazareth, Arbitrator
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 797585

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78, as amended

Between

WILL FRANKLIN LAUDER, Landlord,

Applicant

And

s.22 **Tenant,**

Respondent

Regarding a rental unit at: s.22 , North Vancouver, BC

Date of Hearing: March 13, 2013, by conference call.

Date of Decision: March 13, 2013

Attending:

For the Landlord: Will Lauder, Landlord

For the Tenant: s.22 Tenant

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:
MNSD, MNR, MNDC, FF

Introduction

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act,* for a monetary order for loss of income, the filing fee and to retain the security deposit in partial satisfaction of his claim. Both parties attended the hearing and were given full opportunity to present evidence and make submissions.

This hearing was initially conducted on November 14, 2012 and a decision was issued that same day. The landlord applied for a review of the decision and was granted a new hearing. The hearing was scheduled for February 15, 2013 and was adjourned to this date – March 13, 2013, to allow the parties additional time to exchange evidence.

The landlord did not file any additional evidence. The tenant filed additional evidence in the form of a USB drive, a copy of which was provided to the landlord.

The tenant stated that he had not received the original evidence filed by the landlord and had no documents at all in front of him during the hearing. The landlord argued that the evidence was attached to the notice of hearing which was served to the tenant at his place of work.

The landlord's evidence consists of email and text correspondence between the two parties. Some of the emails were discussed during the hearing on February 15 and have been used in the making of this decision. As this matter was conducted over two separate days and almost 3 hours of hearing time, I have considered all oral testimony provided by the parties but have not necessarily alluded to all the testimony in this decision.

Issues to be decided

Is the landlord entitled to a monetary order for loss of income, and the filing fee? Is the landlord entitled to retain the security deposit?

Background and Evidence

The tenancy started on April 15, 2012 for a fixed term with an end date of April 30, 2013. Rent was $2,250.00 due on the first day of each month. Prior to moving in the tenant paid a security deposit of $1,125.00 and a pet deposit of $1,125.00.

On July 24, 2012, the tenant gave the landlord notice to end the tenancy effective August 30, 2012. The landlord immediately started looking for a new tenant. The landlord stated that he initially advertised the unit for a raised rent of $2,400.00. A week later on August 23, 2012 the landlord changed the advertisements to indicate that the rent was $2,250.00.

The landlord stated that he had rented this unit at a higher rent in the past and he may have inadvertently used the same advertisement from his files without making the change to the rental amount. When he realized that the unit was advertised at a higher rent, he immediately changed the rent back to the current rent of $2,250.00.

The landlord testified that he advertised the unit multiple times on two popular websites but did not receive a lot of interest. However, he did receive some calls and had some showings. The tenant agreed that there were at least two showings prior to his moving out.

The tenant testified that the evidence he provided shows that the landlord did not advertise enough and did not renew the advertisement regularly on one website. He stated that often the advertisement would be several pages deep on the website. The tenant cited examples of advertisements on dates in September and October that were not on the first page and were as far down as page 11. The tenant stated that this showed that the landlord was not doing his best to mitigate his losses.

The landlord testified that he advertised regularly and used multiple accounts to do so. He stated that using filters to narrow a search would bring his listing to the first page. The tenant responded that upon using filters the advertisements were still several pages deep and most people would look no further than the initial pages.

The tenant also stated that the landlord did not make efforts to find a renter because he was aware that the *Residential Tenancy Act* had provisions to compensate him for his loss of income when a tenant breached the terms of the tenancy agreement.

The landlord testified that the loss of income caused him hardship and he had trouble paying the mortgage. He stated that he made several efforts to find a renter and attributed his lack of success to the seasonal variation in the rental market.

The landlord denied the tenant's allegations that he relied on this application for dispute resolution to cover his loss of income and stated that he did his best to find a new tenant.

The landlord finally found a tenant for February 01, 2013 and is claiming the loss of income he suffered for the months of September 2012 to January 2013.

Analysis

Section 45 of the *Residential Tenancy Act,* states that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and is the day before the day in the month that rent is payable under the tenancy agreement.

By ending the tenancy prior to the end date of the fixed term, the tenant breached the agreement and therefore the landlord is entitled to damages in an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement.

As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenancy could legally have ended the tenancy. In all cases, the landlord's claim is subject to the statutory duty to mitigate the loss by making attempts to re-rent the unit.

Section 7(2) of the *Residential Tenancy Act,* states that a landlord who claims compensation for loss that results from the tenant's non compliance with the tenancy agreement must do whatever is reasonable to minimize the loss.

Having found that the tenant breached the tenancy agreement, I must now determine whether the landlord made reasonable efforts to minimize his losses. In this case, I find that the landlord advertised the availability of the unit on two popular websites and had multiple showings, at least two of which were prior to the tenant moving out. Even though the landlord initially advertised at a higher rent, I accept his explanation that he may have done so in error and that he reverted to the original rent after one week.

The tenant's evidence indicates that the landlord did advertise the unit in the months of September and October which confirms the landlord's attempts to find a new tenant. I find that the tenant's testimony regarding the location of the advertisement on the website is subject to the popularity of the website, over which the landlord had little to no control.

Based on a balance of probabilities, I find that it is more likely than not that the landlord made reasonable efforts to rent the unit because it was not to his advantage to have the unit vacant or to rely on an arbitrator's decision to award him rental losses.

I find that the landlord made efforts to mitigate his losses and despite his efforts he suffered a loss of income in the amount of $11,250.00 which is comprised of rent for the months of September 2012 to January 2013. I further find that the landlord is entitled to the recovery of this loss.

The landlord has proven his case and is therefore entitled to the recovery of the filing fee of $100.00.

Overall the landlord has established a claim for $11,350.00. I order that the landlord retain the security and pet deposits of $2,250.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 of the *Residential Tenancy Act* for the balance due of $9,100.00. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

I grant the landlord a monetary order in the amount of **$9,100.00.**

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: March 13, 2013

E. Nazareth, Arbitrator
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 797585

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78, as amended

Between

WILL FRANKLIN LAUDER, Landlord(s),

Applicant(s)

And

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental unit at: s.22 , NORTH VANCOUVER, BC

Date of Hearing: November 14, 2012, by conference call.

Date of Decision: November 14, 2012

Attending:

For the Landlord: Will Lauder

For the Tenant: s.22

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing was convened in response to an application filed by the landlord seeking a moentary Order, an Order to be allowed to retain the security adn dpet deposits and an Order to recover the fiing fee paid for htis application.

Both parties appeared at the hearing of this matter and gave evidence under oath.

Issue(s) to be Decided

Has the landlord met hte burden of proving his claims.

Background and Evidence

The landlord teswtified that hte parties entered into a fixed term tenancy agreement commencing April 15, 2012 and set to end on April 30, 2013. In spite of this agreement the landlord says that on July 24, 2012 the tenant sent him an email advising that he intended to vacate the rental unit at the end of August. The landlord says the tenant vacated the rental unit on or about August 31, 2012. The landlord says that despite placing advertisements on Craigslist and Kijiji he has been unable to re-rent the premises and it remains vacant to date. The landlord is seeking compensation of $18,000.00 representing 8 months of rental loss for the period September 1, 2012 to April 30, 2013.

The tenant, represented by his agent, testified that the tenant checked Craigslist and saw no advertisements whatsoever for the rental unit. The tenant also submits that she has information that the landlord actually raised the rent he is requesting.

The landlord says he has advertised the rental unit and he has shown it to many prospective tenants but he has been unsuccessful in re-renting the premises. The

landlord says that he is asking the same amount of rent as he always has and that it is a reasonable sum and the same or lower than other similar rentals in the neighbourhood,.

Analysis

Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim where such a claim can be substantiated. In this case the evidence shows that the landlord became aware on July 24, 2012 that the tenant intended to vacate the rental unit on August 31, 2012 instead of April 30, 2013 as agreed in the fixed term tenancy agreement.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed. The arbitrator may require evidence such as receipts and estimates for repairs or advertising receipts to prove mitigation. In this case the landlord has supplied oral testimony that he advertised the rental unit in Craigslist and Kijiji but the tenant says that they saw no such advertisements and the landlord has failed to provide documentary evidence of the advertisements.

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved.

In circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, the landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent in this case the landlord testified that he has kept the rent at the sum set during this tenancy and he has not taken any steps to alter the rent which might help to secure a new tenant.

Overall, based on the lack of documentary evidence of mitigation having been supplied by the landlord to support his oral testimony I am not satisfied that the landlord has mitigated his damages to warrant an award in the sum sought. Further, it is now

November 2012 yet the landlord is seeking loss of revenue up to and including April 2013 prior to which time he may well find a new tenant. Given this, I will not allow a claim for loss of rental income for the period November to April, however, because the evidence shows that the tenant did break a fixed term lease I will allow the landlord a monetary award inclusive of the filing fee in the sum of $2,250.00 which is the sum held by the landlord in the form of pet and security deposits paid by the tenant.

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: November 14, 2012.

D. SIMPSON
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 797585

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78, as amended

Between

s.22 **Tenant(s),**
Applicant(s) /Respondent ON REVIEW

And

WILL FRANKLIN LAUDER, Landlord(s),
Respondent(s) /Applicant ON REVIEW

Regarding a rental unit at: s.22 NORTH VANCOUVER, BC

Date of Review Consideration Decision: April 03, 2013

Date of Original Decision: November 14, 2012
Date of Review Consideration (Granted) December 5, 2012
Date of Review Hearing January 24, 2013
Date of Review Hearing March 13, 2013
Date of Review Consideration Application March 21, 2013

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Basis for Review Consideration

Section 79(2) of the Residential Tenancy Act (Act) states that a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

1. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
2. A party has new and relevant evidence that was not available at the time of the original hearing.
3. A party has evidence that the director's decision or order was obtained by fraud.

Applicant's Submission

The application for review consideration states the decision should be reviewed on the ground(s) of new and relevant evidence that was not available at the time of the hearings and the decision and orders were obtained by fraud.

The Tenant indicates in the Review Consideration Application that he did not receive the Landlord's evidence prior to the third hearing. The Tenant says in the Review Consideration Application that he has evidence in the form of video surveillance cameras that will prove this, but no corroborating evidence was submitted with the Review Consideration Application. The Tenant continued to indicate that he had already sent in video evidence that put into question the Landlord's creditability.

The Tenant sates that he was not given an opportunity for a fair hearing because he did not have an opportunity to cross examine the evidence.

Further the Tenant says in his Review Consideration Application that he can prove the decision and order were obtained by fraud. The Tenant says the information at the original hearing was false and the submitted video evidence Exhibit A proves it. As well the Tenant said the Landlord knew the evidence was false and the Landlord used it to obtain the decision and order. The Tenant did not submit any new corroborating evidence to support these claims.

The Tenant submitted three pages of text rearguing the points made in the decision and giving his opinions on what the legal obligation is in mitigating a loss. Again no additional evidence was submitted to corroborate the Tenants claims outside the evidence already submitted for the hearings.

Analysis

The tenant applied for a review based on new and relevant information and that the Tenant believes the Landlord obtained the decision and order by fraud. The Tenant provided copies of 3 pages of script, in his Review Consideration Application, outlining his concerns. There was no new evidence submitted by the Tenant, but the Tenant referred to previously submitted evidence.

The Tenant's claim that he did not receive a fair hearing because he did not receive the Landlord's evidence is not supported by new and relevant evidence. In the previous decision the Arbitrator decided to accept the service of documents by the Landlord to the Tenant and continue with the hearing. As the Tenant has not provided any new or relevant evidence to contradict the previous Arbitrator's decision I find the Tenant has not established grounds to receive a review hearing based on new and relevant evidence. To be successful under this provision an applicant must provide new and relevant evidence that proves the new information was not available at the time of the hearing may have changed the outcome of the decision. The Tenant indicated he has surveillance video to prove his claim, but he did not submit the video with the application for review consideration.

Consequently I find the Tenant has not provided any new and relevant evidence that was not available at the time of the hearing and that if available would have affected the decision.

Secondly the Tenant says the Landlord obtained the decision and order by fraud. The Tenant submitted two and half pages of text giving his opinion that the Landlord was fraudulent and did not mitigate his loss, but the Tenant did not provide any new evidence that supported his claims. The evidence that the Tenant did refer to was available at the previous hearings and was reviewed by the Arbitrator. The Arbitrator noted there were differing opinions about the situation and disagreement about whether the Landlord had mitigated his loss. The Arbitrator explained the process of mitigating a loss and stated that the Landlord had proven that the loss was mitigated to a sufficient level to receive the Decision dated March 13, 2013. I find that the Tenant is rearguing the dispute, but has not provided any new evidence that proves the Decision and Order were obtained by fraud.

The burden of proving a claim lies with the applicant and if it is just the applicant's word against that of the respondent then the burden of proof is not met. I find the Tenant has not met the burden of proving the landlord has been fraudulent; therefore I dismiss the Tenant's application for a review hearing based on fraud.

Consequently, I find the tenant has not established grounds for a review hearing. The Tenant's review application is dismissed without leave to reapply. The decision and order of Arbitrator E.Nazareth dated March 13, 2013, stand in full effect.

Conclusion

I dismiss the Application for Review Consideration. The decision and order made on March 13, 2013 are confirmed.

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: April 03, 2013

D. Stevenson, Arbitrator
Residential Tenancy Branch

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

APPLICATION for REVIEW

Pursuant to Division 2, Section 79(2) of the Residential Tenancy Act, SBC 2002, c. 78, as amended.

On November 29, 2012, the Residential Tenancy Branch received an Application for Review from WILL FRANKLIN LAUDER, Landlord(s),

Subject:

File Number:	797585,
Decision dated:	November 14, 2012
Rental Unit:	s.22 North Vancouver, BC

Other Party: s.22 Tenant(s),

Introduction

The Landlord has applied for a review of the Decision of Dispute Resolution Officer, D. Simpson, dated November 14, 2012.

Division 2, Section 79(2) under the *Residential Tenancy Act* says a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

A. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
B. A party has new and relevant evidence that was not available at the time of the original hearing.
C. A party has evidence that the director's decision or order was obtained by fraud.

The Landlord relies on sections 79(2)(c) of the *Residential Tenancy Act* (the Act) as the reason for requesting this review stating they have evidence that the Dispute Resolution Officer's decision was determined by fraud.

Issues

1. Has the Landlord provided sufficient evidence to support that the November 14, 2012 decision was determined by fraud?

Facts and Analysis

The application for review consideration contains information under Reason Number C3 that states the following:

- The Tenant claimed that the Landlord was not marketing the property or trying to rent it out to new tenants
- The Tenant had information that the Landlord had raised the rent when he had not
- The Tenant knew the Landlord was marketing the property and was showing it to prospective tenants as the Tenant was involved in scheduling showings
- The Tenant claimed that he had not seen any of the advertisements on craigslist yet somehow stated that he had knowledge that the rent was raised
- The Tenant was not at the hearing and the false information was provided by the Tenant's agent
- The Decision was determined based on the false information that the Landlord was not marketing the property and that they had raised the rent which caused a reduction in the amount awarded to the Landlord

The Landlord submitted into evidence the Application for Review Consideration, a copy of the original decision issued by Dispute Resolution Officer (DRO) D. Simpson, copies of text messages between the Landlord and Tenant arranging showings of the rental unit between July 29, 2012 and August 30, 2012, and several e-mail communications received through the "Craigslist" advisory system arranging showings of the rental unit and displaying the rental amount of $2,250.00.

The Landlord argues that the Dispute Resolution Officer's decision was obtained by fraud because the Tenant's Agent submitted fraudulent testimony that the Landlord did not advertise the rental unit for rent and that he raised the rental amount.

Decision

After careful consideration of the aforementioned, I find that the original Decision may have been different if the Dispute Resolution Officer had this information before her while making her determinations. Therefore I allow the Application for a Review on this basis.

I Order that a new hearing be scheduled; **Notices of hearing are included with this review consideration decision for the Landlord to serve to the Tenant within 3 days of receipt of this decision.**

Each party must serve the other and the Residential Tenancy Branch with any **evidence** that they intend to reply upon at the new hearing. Fact sheets are available at http://www.rto.gov.bc.ca/content/publications/factSheets.aspx that explain evidence

and service requirements. If either party has any questions they may contact an Information Officer with the Residential Tenancy Branch at:

Lower Mainland: 604-660-1020
Victoria: 250-387-1602
Elsewhere in BC: 1-800-665-8779

The Decision made on November 14, 2012, is **suspended** pending the outcome of the new hearing.

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 05, 2012.

L. Bell, Arbitrator
Residential Tenancy Branch

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 800578
Additional File(s):801958

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78, as amended

Between

Vancouver Eviction Services and Surinder Brar, Landlord(s),

Applicant(s)

And

s.22

Tenant(s),

Respondent(s)

Regarding a rental unit at: s.22 Surrey, BC

Date of Hearing: December 10, 2012, by conference call.

Date of Decision: December 10, 2012

Attending:

For the Landlord: Surinder Brar; Shelly Alison (agent)

For the Tenant: s.22

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC CNR OPR OPC MNR MNSD MNDC FF

Introduction

This hearing dealt with applications by the tenants and the landlord. The tenants applied to cancel a notice to end tenancy for cause and a notice to end tenancy for unpaid rent. The landlord applied for an order of possession, a monetary order and an order to retain the security deposit in partial compensation of the monetary order. One tenant, the landlord and an agent for the landlord participated in the teleconference hearing.

Service of the Applications

The landlord confirmed that they had received the tenants' application.

The tenants stated that they had not received the landlord's application. The landlord submitted two registered mail receipts showing each tenant's name and the address of the rental unit. The Canada Post website showed that on November 23, 2012 the landlord's packages were mailed; on November 26, 2012 Canada Post attempted delivery and left a notice card indicating where the items could be picked up; and on December 2, 2012 Canada Post left final notices for pick up. The tenant stated that they did not receive any notices and that their mail often does not get to them. The tenant did not provide any further evidence to support his claim that they have problems receiving their mail.

Deemed service means that the document is presumed to have been served unless there is clear evidence to the contrary. Where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail does not override the deemed service provision.

I found that the landlord had served their applications to the tenants in accordance with section 89 of the Act. The tenants did not provide clear evidence to the contrary and they were therefore deemed served with the landlord's application on November 28, 2012, as per section 90 of the Act. Section 5 of the Act states that the Act cannot be

avoided. I proceeded to hear evidence from the tenant and the landlord on both applications.

Tenant's Conduct in the Hearing

The tenant continually interrupted during the hearing, despite repeated warnings. The tenant refused to answer questions or listen to my explanations, and he became increasingly loud and hostile. Near the end of the hearing the tenant requested an adjournment because they had not received the landlord's application. I denied the request, and attempted to explain to the tenant why I found that they were deemed served. The tenant would not listen, and began shouting. I had heard all necessary evidence from the landlord and tenant at that time, and I ended the teleconference hearing.

Issue(s) to be Decided

Is the landlord entitled to an order of possession?
Is the landlord entitled to a monetary order?

Background and Evidence

The tenancy began on October 1, 2012. Rent in the amount of $700 is payable in advance on the first day of each month. At the outset of the tenancy, the landlord collected a security deposit from the tenant in the amount of $350.

Landlord's Evidence

The tenants failed to pay rent in the month of November 2012 and on November 2, 2012 the landlord personally served the tenants with a notice to end tenancy for non-payment of rent. The tenants further failed to pay rent in the month of December 2012. The landlord requested an order of possession and a monetary order for the unpaid rent and lost revenue.

Tenants' Response

On October 31, 2012, the tenants paid the landlord $700 in cash for November 2012 rent but the landlord did not provide a receipt. The tenants did not provide any bank statements or other evidence to support their claim that they paid the rent. The tenant refused to answer whether they had paid any rent for December 2012.

Analysis

The tenants were served with a notice to end tenancy for non-payment of rent. I find that the tenants did not provide sufficient evidence to support their claim that they paid the landlord November's rent. The landlord cannot provide evidence of non-payment. The tenants refused to say whether they had paid December 2012 rent. I find that the tenants did not pay the rent for November 2012 or December 2012.Based on the above facts I find that the landlord is entitled to an order of possession.

As for the monetary order, I find that the landlord has established a claim for $1400 in unpaid rent and lost revenue. The landlord is also entitled to recovery of the $50 filing fee.

As the tenancy has ended pursuant to the notice to end tenancy for unpaid rent, it was not necessary for me to consider the notice to end tenancy for cause.

Conclusion

The tenants' application is dismissed.

I grant the landlord an order of possession effective two days from service. The tenants must be served with the order of possession. Should the tenants fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

The landlord is entitled to $1450. I order that the landlord retain the security deposit of $350 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of $1100. This order may be filed in the Small Claims 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 *Residential Tenancy Act*.

Dated: December 10, 2012.

S. Okada, Arbitrator
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Pursuant to Division 2, Section 79(2) of the Residential Tenancy Act, SBC 2002, c. 78, as amended.

On April 3, 2013, the Residential Tenancy Branch received an Application for Review from s.22 Tenant(s),

Subject:

File Number: 802827, Additional File(s):803273

Decision dated: April 14, 2013
Rental Unit: s.22 , BC

Other Party: AFFORDABLE HOUSING ADVISORY ASSOCIATION, Landlord(s),

Introduction

Division 2, Section 79(2) under the *Residential Tenancy Act* says a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

A. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
B. A party has new and relevant evidence that was not available at the time of the original hearing.
C. A party has evidence that the director's decision or order was obtained by fraud.

The Tenant has applied for review on the following grounds:

B. A party has new and relevant evidence that was not available at the time of the original hearing; and
C. A party has evidence that the director's decision or order was obtained by fraud.

Issues

Do the Tenants have new and relevant evidence that was not available at the time of the original hearing that would meet the requirements to grant a review?

Do the Tenants have evidence that the director's decision or order was obtained by fraud?

Facts and Analysis

The Decision and Order under review is a decision issued by Arbitrator Nazareth which dismissed the Tenants' claim for monetary compensation and upheld the Landlord's claim for a monetary order for damage or loss in the amount of $9,630.00.

New and Relevant Evidence

Leave may be granted on this basis if the applicant can prove that:

- he or she has evidence that was not available at the time of the original arbitration hearing;
- the evidence is new;
- the evidence is relevant to the matter which is before the Dispute Resolution Officer;
- the evidence is credible, and
- the evidence would have had a material effect on the decision of the Dispute Resolution Officer

Only when the applicant has evidence which meets all five criteria will a review be granted on this ground.

It is up to a party to prepare for an arbitration hearing as fully as possible. Parties should collect and supply all relevant evidence to the arbitration hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in an arbitration hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be evidence.

Evidence which was in existence at the time of the original hearing, and which was not presented by the party, will not be accepted on this ground unless the applicant can show that he or she was not aware of the existence of the evidence and could not, through taking reasonable steps, have become aware of the evidence.

"New" evidence includes evidence that has come into existence since the arbitration hearing. It also includes evidence which the applicant could not have discovered with due diligence before the arbitration hearing. New evidence does not include evidence that could have been obtained before the hearing took place.

Evidence is "relevant" that relates to or bears upon the matter at hand, or tends to prove or disprove an alleged fact.

Evidence is "credible" if it is reasonably capable of belief.

Evidence that "would have had a material effect upon the decision of the Arbitrator" is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

A mere suspicion of fresh evidence is not sufficient.

Residential Tenancy Branch Rules of Procedure stipulates when evidence is to be submitted in support of a claim as follows:

 # 3.4 Evidence to be filed with the Application for Dispute Resolution

To the extent possible, the applicant must file copies of all available documents, photographs, video or audio evidence at the same time as the application is filed.

 # 3.5 Evidence not filed with the Application for Dispute Resolution

a) Copies of any documents, photographs, video or audio evidence that are not available to be filed with the application, but which the applicant intends to rely upon as evidence at the dispute resolution proceeding, must be received by the Residential Tenancy Branch and must be served on the respondent as soon as possible, and at least (5) days before the dispute resolution proceeding as those days are defined the "Definitions" part of the Rules of Procedure. [emphasis added]

In support of their application for review consideration the Tenants submitted the following evidence:

1) A copy of the fire incident report dated January 3, 2013; and
2) A copy of the rental complex fire alarm system inspection report dated January 19, 2011.

Both documents were in existence prior to the March 14, 2013 hearing, as supported by their issuance date, and document (2) was before the Arbitrator at the time of the hearing as it was provided in the Landlord's evidence. Accordingly, I find the above documents submitted as evidence do not meet the test as being new and relevant evidence as they were in existence prior to the hearing and could have been obtained and submitted as evidence by the Tenants.

Based on the forgoing analysis I find the Tenants' application for review consideration must fail on the grounds of new and relevant evidence.

Decision Obtained by Fraud

A party who is applying for review on the basis that the Arbitrator's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the Arbitrator, and that that evidence was a significant factor in the making of the decision. The party alleging fraud must allege and prove new

and material facts, or newly discovered and material facts, which were not known to the applicant at the time of the hearing, and which were not before the Arbitrator, and from which the Arbitrator conducting the review can reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision or order was obtained by fraud. The burden of proving this issue is on the person applying for the review. If the Arbitrator finds that the applicant has met this burden, then the review will be granted.

It is not enough to allege that someone giving evidence for the other side made false statements at the hearing, which were met by a counter-statement by the party applying, and the whole evidence adjudicated upon by the Arbitrator. A review hearing will likely not be granted where an Arbitrator prefers the evidence of the other side over the evidence of the party applying.

The reasons the Tenant relies on for proving this Decision and Order were obtained by fraud are as follows:

(1) *The fire report shows that there is no smoke detector at the time of the incident*
(2) *There was no smoke detector and the landlord lied about it*
(3) *The Landlord provided an outdated inspection of the alarm systems report*
(4) *The Landlord was able to convince the arbitrator that she was in compliance with the municipal by-law*

In this case the original Decision and Order dealt with a fire at the rental unit that was caused by the Tenants leaving a lit candle unattended. The Tenants submitted the fire incident report high-lighting the following items listed on that report:

- ***CODE 7000*** *- NO MANUAL FIRE PROTECTION*
- ***CODE 3000*** *- FIRE ALARM SYSTEM – OFF-SITE MONITORING AGENCY*
- ***CODE 0000*** *- ALARM OPERATION CANNOT BE DETERMINED VISUAL SIGHTING OR OTHER MEANS OF PERSONAL DETECTION*

Based on the aforementioned I find there to be insufficient evidence to prove the decision was obtained by fraud. I make this finding in part because the Arbitrator found the Tenant was negligent when she left a lit candle unattended. I find that the Tenants' interpretation of the fire incident report does not change the fact that they left a candle unattended and that candle started a fire which caused excessive damage to the rental unit complex. Furthermore, I find the Tenants' interpretation of the fire incident report to be unsubstantiated as there was no information provided that pertained to the municipal by-law which they claim was breached by the Landlord nor did they provide proof of the definitions of the fire commissioner report codes used in the report and listed above. The fire incident report clearing indicates that there was a fire alarm system that was

monitored by an off-site agency which was discussed during the March 14, 2013 hearing.

Accordingly, I find that the Tenants have failed to prove new and material facts, or newly discovered and material facts, which were not before the Arbitrator, and from which the Arbitrator conducting the review can reasonably conclude that the new evidence, standing alone and unexplained, was not available at the time of the hearing and would support the allegation that the decision or order was obtained by fraud.

Decision

I find that pursuant to Section 81(b) of the Act that the application for review consideration does not disclose sufficient evidence of a ground for review and discloses no basis on which, even if the submissions in the application were accepted, the decision or order of the director should be set aside or varied.

The Decision and Order made on March 14, 2013 stand.

This decision is legally binding and 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: April 14, 2013

L. Bell, Arbitrator
Residential Tenancy Branch

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 802827

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78, as amended

Between

AFFORDABLE HOUSING ADVISORY ASSOCIATION,
Landlord,

Applicant/Respondent

And

s.22 **Tenants,**

Applicants/Respondents

Regarding a rental unit at: 3100 Ozada Avenue, Coquitlam, BC

Date of Hearing: March 14, 2013, by conference call.

Date of Decision: March 14, 2013

Attending:

For the Landlord: Elzbieta Stankowska, Property Manager

For the Tenant: s.22 Tenant

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: *MNDC, MNSD, MND, FF.*

Introduction,

This hearing dealt with applications by the landlord and the tenant, pursuant to the *Residential Tenancy Act*.

The landlord applied for a monetary order for the deductable of an insurance claim, the filing fee and to retain the security deposit in satisfaction of the claim. The tenant applied for the return of her security deposit and compensation for the loss of her belongings in a fire.

Both parties attended the hearing and were given full opportunity to present evidence and make submissions. The parties acknowledged receipt of evidence submitted by the other and gave affirmed testimony.

Issues to be decided

Is the landlord entitled to a monetary order? Is the tenant entitled to the return of her security deposit and to compensation?

Background and Evidence

The parties entered in to a tenancy agreement on November 02, 2012 for a tenancy that was due to start on December 01, 2012. The monthly rent was $975.00 due on the first of the month and the tenant paid a security deposit of $470.00. The rental unit consists of a three level town house located in a town house complex.

The landlord filed a copy of the tenancy agreement. Clause #28 of the agreement states the following:

The tenant agrees to carry sufficient insurance to cover their property against loss or damage from any cause and for third party liability and the tenant agrees that the landlord will not be responsible for any loss or damage to the tenant's property.

The tenant testified that she started moving in around 9am on the morning of December 01, 2012. The tenant noticed some odour in the rental unit and lit a few candles to neutralize the odour. The tenant and s.22 s.22 were sorting out their belongings on the third floor of the town house at approximately 2 p.m., when they smelt smoke. They came out of the room and noticed that there some of the cardboard boxes were on fire on the bottom floor. They rushed out of the rental unit and contacted neighbours for assistance.

The fire truck arrived and put out the fire. The rental unit was completely destroyed and the there was significant damage to four other townhouses.

The tenant stated that she had emptied some boxes and flattened them in preparation for recycling. She stated that these boxes were piled one on top of the other and some of them may have slid down and come in contact with the flame of a candle. The tenant also stated that the smoke alarm was not activated and therefore the fire was significant in size by the time they smelt smoke in the upper level. The tenant concluded that the smoke detector was inoperative on the day of the fire. The tenant also testified that she lost all her belongings in the fire and was claiming $25,000.00 in damages.

The landlord stated that every unit has a monitored smoke detector and a monitored heat sensor. The monitoring company was put on alert at 14:10 hours on December 01, 2012 and followed procedure by contacting the fire department. The landlord filed a copy of the report from the monitoring company.

The landlord made a claim through their insurance provider. In a letter dated December 06, 2012, the insurance provider informed the landlord that it was determined that the fire originated in the dispute rental unit and was caused by moving boxes that caught fire from a lit candle. The extent of damage was still in the process of being assessed and the occupants of four other units would have to be evacuated in order to start restoration work.

The insurance company sent the landlord an invoice in the amount of $10,000.00 for the insurance deductible. The landlord filed a copy of this invoice and is claiming this amount from the tenant. The landlord has also applied to retain the security deposit of $470.00 in partial satisfaction of the claim.

Analysis

Based on the testimony of both parties and the documents filed into evidence, I find that the tenant was responsible for the fire when she left lit candles unattended in the unit.

The smoke detector and the heat sensor were functional and resulted in the fire department attending the rental unit to fight the fire. The fire caused damage in excess of the deductible of $10,000.00 and therefore the landlord made a claim through her insurance provider and was required to pay the deductible. Since the fire was caused by the negligence of the tenant, I find that she must pay this deductible. Accordingly, I award the landlord $10,000.00.

Since the landlord has proven her case she is also entitled to the recovery of the filing fee of $100.00.

The tenant acknowledged that by signing the tenancy agreement she agreed to carry sufficient insurance to cover her property against loss or damage. Therefore I find that the landlord is not responsible for the damage caused by the fire to the tenant's property. Accordingly, the tenant's claim in the amount of $25,000.00 is dismissed.

Overall the landlord has established a claim of $10,100.00. I order that the landlord retain the security deposit of $470.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 of the *Residential Tenancy Act* for the balance due of $9,630.00. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

I grant the landlord a monetary order in the amount of **$9,630.00.**
The tenant's application is dismissed in its entirety

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: March 14, 2013

E. Nazareth, Arbitrator
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Pursuant to Division 2, Section 79(2) of the Residential Tenancy Act, SBC 2002, c. 78, as amended.

On May 30, 2013, the Residential Tenancy Branch received an Application for Review from Linda Harasim, Landlord(s),

Subject:

File Number: 803330,
Decision dated: April 2, 2013
Rental Unit: s.22
Vancouver, BC

Other Party: s.22 Tenant(s),

Introduction

Section 80 under the *Residential Tenancy Act* stipulates that a party must make an application for review of a decision or order of the director within whichever of the following periods applies:

(a) within 2 days after a copy of the decision or order is received by the party, if the decision or order relates to

(i) the unreasonable withholding of consent, contrary to section 34 (2) *[assignment and subletting]*, by a landlord to an assignment or subletting,

(ii) a notice to end a tenancy under section 46 *[landlord's notice: non-payment of rent]*, or

(iii) an order of possession under section 54 *[order of possession for the tenant]*, 55 *[order of possession for the landlord]*, 56 *[application for order ending tenancy early]* or 56.1 *[order of possession: tenancy frustrated]*;

(b) within 5 days after a copy of the decision or order is received by the party, if the decision or order relates to

(i) repairs or maintenance under section 32 *[obligations to repair and maintain]*,

(ii) services or facilities under section 27 *[terminating or restricting services or facilities]*, or

(iii) a notice to end a tenancy agreement other than under section 46 *[landlord's notice: non-payment of rent]*;

(c) **within 15 days after a copy of the decision or order is received by the party, for a matter not referred to in paragraph (a) or (b)** [emphasis added].

Issue(s) to be Decided

Has the Landlord filed their application for review within the required timeframes stipulated in the *Residential Tenancy Act*?

Analysis

The Landlord has filed an application for a review consideration pertaining to a decision that granted the Tenants a monetary order for the return of double the security deposit. Therefore, the Landlord's application had to have been filed within 15 days after she received a copy of the decision and /or Order, pursuant to section 80(c) of the Act.

The Landlord's application for review consideration was filed with the *Residential Tenancy Branch* on May 30, 2013, and indicates she received the Decision on May 5, 2013, twenty five days after she received the decision.

Based on the foregoing, I find the Landlord did not file her application within the required timeframes stipulated in section 80 of the Act.

Conclusion

As this application for review consideration was not filed within the required timeframes set out in Section 80 of the Act, I HEREBY DISMISS the application, without leave to reapply.

The decision and orders made on April 2, 2013 stand and are of full force and effect.

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: June 05, 2013

L. Bell, Arbitrator
Residential Tenancy Branch

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 803330

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78, as amended

Between

s.22

Applicant(s)

And

Linda Harasim,

Respondent(s)

Regarding a rental unit at: s.22 Vancouver, BC

Date of Hearing: April 02, 2013, by conference call.

Date of Decision: April 02, 2013

Attending:

For the Landlord: Nobody

For the Tenant: s.22 Tenant

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNSD and FF

Introduction

This hearing was convened in response to an Application for Dispute Resolution, in which the Tenant applied for the return of the security deposit and to recover the fee for filing this Application.

The Applicant stated that copies of the Application for Dispute Resolution, the Notice of Hearing, and documents the Applicant wishes to rely upon as evidence were sent to the Respondent, via registered mail, at the service address noted on the Application, on January 10, 2013. Canada Post documentation was submitted that corroborates this statement. In the absence of evidence to the contrary, I accept these documents were served to the Respondent, although she did not attend the hearing.

The Applicant stated that additional documents the Applicant wishes to rely upon as evidence were sent to the Landlord, via registered mail, at the service address noted on the Application, on March 18, 2013. He stated that the Canada Post website shows these documents have not yet been delivered to the Respondent. On the basis of this testimony, I accept that the documents have been served in accordance with section 88 of the *Residential Tenancy Act (Act).*

Issue(s) to be Decided

Is the Applicant entitled to the return of the security deposit?

Preliminary Matter

Although the Applicant makes reference in the details of dispute to requesting a reimbursement "if the room was rented prior to August 31", the Applicant has not specified the amount being claimed. The total amount claimed in this Application for Dispute Resolution is $345.00, which is the amount of the security deposit.

As the Applicant has only claimed compensation of $345.00 and the Applicant did not apply for a monetary Order for money owed or compensation for damage or loss, I find that the Applicant has not provided sufficient details regarding the claim for a rent refund and that matter was not considered at these proceedings. The Applicant retains the

right to file another Application for Dispute Resolution, in which he seeks a monetary Order for money owed or compensation for damage or loss relating to a rent refund.

Background and Evidence

The Applicant stated that he and s.22 entered into a verbal tenancy agreement with the Landlord; that the tenancy began on September 01, 2011; that he agreed to pay monthly rent of $690.00; that only s.22 lived in the rental unit; that he paid a security deposit of $345.00; that s.22 vacated the rental unit on August 18, 2011; that neither the Applicant nor s.22 authorized the Respondent to retain the security deposit; that the Respondent did not return any portion of the security deposit; and that the Respondent did not file an Application for Dispute Resolution claiming against the security deposit.

The Applicant stated that he provided the Respondent with a note, on which he wrote his forwarding address, on July 18, 2011. He stated that he also sent the Respondent his forwarding address, via email, on October 01, 2011. A copy of this email was submitted in evidence.

Analysis

On the basis of the evidence provided by the Applicant and in the absence of evidence to the contrary, I find that the Applicant entered into a tenancy agreement with the Respondent; that he paid a security deposit of $345.00; that the Respondent did not return any portion of the security deposit; that the Respondent did not have written authorization to retain any portion of the security deposit; that the Respondent did not file an Application for Dispute Resolution claiming against the deposit; and that the Respondent received a forwarding address for the Applicant on July 18, 2011 and October 01, 2011.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or make an application for dispute resolution claiming against the deposits. In the circumstances before me, I find that the Respondent failed to comply with section 38(1) of the *Act*, as the Respondent has not repaid the security deposit or filed an Application for Dispute Resolution.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act,* the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Respondent did not comply with section 38(1) of the *Act,* I find that the Respondent must pay the Applicant double the amount of the security deposit.

I find that the Application for Dispute Resolution has merit and that the Applicant is entitled to recover the fee for filing the Application.

Conclusion

The Applicant has established a monetary claim of $740.00, which is comprised of double the security deposit and $50.00 as compensation for the cost of filing this Application for Dispute Resolution, and I am issuing a monetary Order in that amount. In the event the Respondent does not voluntarily comply with this Order, it may be served on the Respondent, filed with the Province of British Columbia Small Claims 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 *Residential Tenancy Act*.

Dated: April 02, 2013

P. Senay, Arbitrator
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Pursuant to Division 2, Section 79(2) of the Residential Tenancy Act, SBC 2002, c. 78, as amended.

On February 19, 2013, the Residential Tenancy Branch received an Application for Review from s.22 Tenant(s).

Subject:

File Number: 803887 , Additional File(s):804338

Decision dated: February 14, 2013
Rental Unit: s.22
Richmond, BC

Other Party: Manjit Kaur Kang, Landlord(s),

Introduction

This review consideration decision is in response to an application for review by the Tenant and a third party not named on the original Tenant's Application for Dispute Resolution or the Landlord's Application for Dispute Resolution. The application for review is filed pursuant to section 79 of the *Residential Tenancy Act (Act)*.

Specifically, the Applicant is requesting a review of the original decision made by Mr. G. Molnar, an Arbitrator with the Residential Tenancy Branch, on February 14, 2013. In his decision Mr. Molnar granted the Landlord an Order of Possession that is "effective immediately". He noted that if the Tenant pays the rent by 4:00 p.m. on February 19, 2013, the Order of Possession could not be enforced until February 28, 2013.

The Tenant named in the Landlord's Application for Dispute Resolution and in the Tenant's Application for Dispute Resolution was present at the hearing on February 14, 2013.

The Applicant is requesting the review on the basis that she was unable to attend the hearing because of circumstances that could not be not be anticipated and were beyond the party's control.

Section 79 of the *Act* reads:

(1) A party to a dispute resolution proceeding may apply to the director for a review of the director's decision or order.
(2) A decision or an order of the director may be reviewed only on one or more of the following grounds:
(a) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control;
(b) a party has new and relevant evidence that was not available at the time of the original hearing;
(c) a party has evidence that the director's decision or order was obtained by fraud.

Issues

Has the Applicant established grounds for a review hearing?

Preliminary Matter

In the Application for Review Consideration the Applicant requested an extension of time to apply for the review.

The evidence shows that the Application for Review Consideration was filed on February 19, 2013, which is the date the female Applicant stated she received it from the male Applicant. As this is less than 2 days after the date the female Applicant received the decision, I find there is no need to consider her request for an extension of time to submit the Application.

Facts and Analysis

The female Applicant declared that she was not able to attend the hearing on February 14, 2013 because she was not notified of the hearing; she was not served with any documents; she is not named on the documents; and that she paid the "dog damage deposit" to the Landlord.

Section 79(1) of the *Act* stipulates that a party to a dispute resolution proceeding may apply for a review. As the female Applicant was not a party to the dispute resolution proceeding, I find that the Landlord was not obligated to serve her with notice of the proceeding; that it is not relevant that she did not attend the hearing and that she does not have the right to file an Application for Review Consideration.

The male Applicant was in attendance at the hearing on February 14, 2013 and I therefore cannot conclude that he was unable to attend.

The female Applicant has asked for clarification of Mr. Molnar's decision. I am unable to provide clarification in this review consideration decision. The Tenant retains the right to file an Application for Correction or Clarification is Mr. Molnar's decision is unclear.

Decision

Section 81 of the *Act* reads:

> (1) At any time after an application for review of a decision or order of the director is made, the director may dismiss or refuse to consider the application for one or more of the following reasons:
>
> (a) the issue raised by the application can be dealt with by a correction, clarification or otherwise under section 78 [*correction or clarification of decisions or orders*];
>
> (b) the application
>
> (i) does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely,
>
> (ii) does not disclose sufficient evidence of a ground for the review,
>
> (iii) discloses no basis on which, even if the submissions in the application were accepted, the decision or order of the director should be set aside or varied, or
>
> (iv) is frivolous or an abuse of process;
>
> (c) the applicant fails to pursue the application diligently or does not follow an order made in the course of the review.
>
> (2) A decision under subsection (1) may be based solely on the written submissions of the applicant.

I find that the Application for Review Consideration should be dismissed, pursuant to section 81(1)(b)(ii) of the *Act*, as there is insufficient evidence of a ground for review.

Mr. Molnar's decision and Orders of February 14, 2013 remain in full force and effect.

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: February 25, 2013

P. Senay, Arbitrator
Residential Tenancy Branch

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 803887 and 804338

In the matter of the *Residential Tenancy Act*, SBC 2002, c.78, as amended

Between

VANCOUVER EVICTION SERVICES and HARBHAJAN KANG

Applicants/Respondents

And

s.22

Respondent/Applicant

And

s.22

Respondent

Regarding a rental unit at: s.22 **Richmond, BC**

Date of Hearing: February 14, 2013

Date of Decision: February 14, 2013

Attending:

For the Landlord: Mr. H. Kang and Ms. S. Allison

For the Tenant: s.22

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OPC, OPR, MNR, MNSD, MNDC, FF

Introduction

In the first application, the second by file number, the tenant applies to cancel a one month Notice to End Tenancy for cause dated January 14, 2013. In the second application, the landlord seeks an order of possession pursuant to the one month Notice and pursuant to a ten day Notice to End Tenancy served February 7th for the admitted non-payment of February rent of $1500.00.

The tenant has not paid the February rent within the five days provided by the ten day Notice and has not applied to cancel that Notice.

The effect and impact of s. 46 of the *Residential Tenancy Act* was explained to the parties and they were able to resolve this matter as follows:

- the landlord will have an order of possession effective immediately and a monetary award of $1500.00 for the unpaid February rent,

- the tenant will have the opportunity to pay the $1500.00 February rent on or before 4:00 o'clock in the afternoon of Tuesday, February 19th, 2013 by tendering it to the landlord's agent, and, if he does so, then the monetary order will be void and this tenancy will end on February 28th 2013 and the order of possession may not be enforced unless the tenant continues to occupy the premises after 1:00 o'clock in the afternoon on that date.

I make no order regarding either filing fee.

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: February 14, 2013

G. Molnar
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

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The RTB website (www.rto.gov.bc.ca) has information about:

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  Fact Sheet RTB-111: *Correction of a Decision or Order*
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  (Please Note: Legislated deadlines apply)

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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Pursuant to Division 2, Section 79(2) of the Residential Tenancy Act, SBC 2002, c. 78, as amended.

On March 15, 2013, the Residential Tenancy Branch received an Application for Review from s.22 Tenant(s),

Subject:

File Number:	804139,
Decision dated:	February 13, 2013
Rental Unit:	s.22 North Vancouver, BC

Other Party: CREIGHTON AND ASSOCIATES REALTY, Landlord(s),

Introduction

Division 2, Section 79(2) under the *Residential Tenancy Act* says a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

A. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
B. A party has new and relevant evidence that was not available at the time of the original hearing.
C. A party has evidence that the director's decision or order was obtained by fraud.

In this application the Tenant relies on section 79(2)(b) of the Act, stating they have new and relevant evidence.

Issues

Has the Tenant filed their application for review within the required time frames set out in section 80 of the *Residential Tenancy Act*?

Facts and Analysis

Notwithstanding all of the above, section 80 of the Act addresses **Time limit to apply for a review**, and provides in part:

> 80- A party must make an application for review of a decision or order of the director within whichever of the following periods applies:
>
> (a) within 2 days after a copy of the decision or order is received by the party, if the decision or order relates to
>
> (i) the unreasonable withholding of consent, contrary to section 34 (2) *[assignment and subletting]*, by a landlord to an assignment or subletting,
>
> (ii) a notice to end a tenancy under section 46 *[landlord's notice: non-payment of rent]*, or
>
> (iii) an order of possession under section 54 *[order of possession for the tenant]*, 55 *[order of possession for the landlord]*, 56 *[application for order ending tenancy early]* or 56.1 *[order of possession: tenancy frustrated]*;
>
> (b) **within 5 days** after a copy of the decision or order is received by the party, if the decision or order relates to
>
> **(i) repairs or maintenance under section 32 *[obligations to repair and maintain]*,**
>
> (ii) services or facilities under section 27 *[terminating or restricting services or facilities]*, or
>
> (iii) a notice to end a tenancy agreement other than under section 46 *[landlord's notice: non-payment of rent]*;
>
> (c) **within 15 days** after a copy of the decision or order is received by the party, for a matter not referred to in paragraph (a) or (b).
>
> [Emphasis added]

In the application for review, the Tenant indicates that the decision was received by mail on February 25, 2013, twelve days after it was sent. The matters in which the Tenant is requesting a review pertain to their request for repairs under section 32 and monetary compensation due to the alleged presence of mold.

Pursuant to the above legislative provisions, the latest time this application for review could be submitted, if the Tenant received the decision on February 25, 2013, is March 12, 2013. The Tenant did not file their application until March 15, 2013.

Decision

As this application for review consideration was not filed within the required timeframes set out in Section 80 of the Act, I HEREBY DISMISS the application for review consideration.

The decision made February 13, 2013 stands and is of full force and effect.

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: February 13, 2013

L. Bell, Arbitrator
Residential Tenancy Branch

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 804139

In the matter of the *Residential Tenancy Act*, SBC 2002, c.78, as amended

Between

s.22

Applicant(s)

And

CREIGHTON AND ASSOCIATES REALTY

Respondent

Regarding a rental unit at: s.22 **, North Vancouver, BC**

Date of Hearing: February 13, 2013

Date of Decision: February 13, 2013

Attending:

For the Landlord: Mr. S. Creighton and Ms. H. Bell

For the Tenant: s.22

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ERP, MNDC, O, FF

Introduction

The tenant applies for relief claiming that her bathroom is deteriorating and is affected by mould growth and that the landlord has failed to attend to the problem in the proper manner.

Issue(s) to be Decided

Does the relevant evidence presented at hearing show, on a balance of probabilities, that the tenant is entitled to the relief she seeks?

Background and Evidence

The rental unit is s a one-bedroom apartment in a twenty-three unit apartment building. The tenancy started in February 2001 and is ending February 28, 2013. The rent is $875.00 per month. The landlord holds a $340.00 security deposit.

The tenant says she's complained about earthy or mouldy smell in her apartment since the Fall of 2012. However, in December she specifically complained about mould in the bathroom. In mid-January the landlord's representatives viewed the bathroom and informed the tenant that it would be renovated immediately.

There appears to have been some misunderstanding or dispute about whether or not the tenant would stay elsewhere during the renovation work. The tenant issued her application on January 18th and then amended it February 4th, the encompass recovery of the cost of a professional environmental report she had commissioned.

The landlord's representative s.22 denies that there was any mould problem with the bathroom. He says the landlord stands ready to repair the shower/tub walls, but that the tenant is not co-operative. He says that any loose tiles had been taped and the shower wall covered with shower curtain so that the tub/shower facilities was and is fully

functional. He says that photos submitted showing a significant number of tiles removed and lying in the tub, were the result of the tenant pulling the tape and plastic interim repair from the wall and pulling tiles off the wall.

Analysis

I consider it most likely that the tenant developed a general concern about mould in her apartment back in September 2012,when she discovered a water leak in a closet. In December she noted a loose soap holder in the wall beside her tub. She was of the view, at least initially, that the dark marking or staining of tile grout could be harmful mould.

I think it most likely that the landlord's representatives attended, viewed the bathroom wall, covered it up with plastic and made plans to renovate. I think the renovation has not occurred due to a misunderstanding or miscommunication for which fault cannot be ascribed to either side. Normally, whether a tenant wished to be at home or not during a bathroom renovation, she is required to stay elsewhere or to "put up with it" and seek compensation later for loss of use or enjoyment of the apartment.

I think it most likely that the photos presented showing about ten or so tiles off the wall and lying in the tub, were taken at or in preparation for the environmental inspector and that the tiles were pulled off so as to better expose the wall and possible mould growth behind it to the inspector.

Unfortunately, the environmental report submitted by the tenant does, in my view, go so far as to say that there is a health danger or risk or that the apartment cannot be used as a habitable space. The report's author states the bathroom tub/shower cannot be used, but I think he means it cannot be used with a big hole in the wall, tiles off and lying in the tub. The author notes that there is a higher concentration of two types of mould inside the apartment than outside. Unfortunately, he offers no indication about what level of mould he's found; what is normal, what, if anything, is dangerous, but for a comment that the stachybotrys fungus is considered "toxigenic."

Having regard to all the circumstances, the facts appear to me to show that the apartment was an older one even when the tenant rented it twelve years ago. It has its leaks and creaks and now requires some remediation, as should be expected. The evidence does not satisfy me that the tenant's tub/shower wall, even uncovered and with various tiles pulled off, poses any risk of fungal toxicity and that, once covered

again with the landlord's plastic sheets and tape, will be reasonably useable for the remaining few weeks of the tenancy.

The tenant was not wrong to commission the environmental report, but the report was of little if any use without reference to any objective standards and so I cannot fairly saddle any of the cost of it on the landlord.

Conclusion

The tenant's application must be dismissed.

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: February 13, 2013

G. Molnar
Residential Tenancy Branch

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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

File No: 805546

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78, as amended

Between

MAGSEN REALTY INC , Landlord(s),

Applicant(s)

And

s.22 **Tenant(s),**

Respondent(s)

Regarding a rental unit at: s.22 Vancouver, BC

Date of Hearing: May 29, 2013, and May 30, 2013, by conference call.

Date of Decision: May 30, 2013

Attending May 29, 2013 :

For the Landlord: Eric Tseng

For the Tenant: s.22

Attending May 30, 2013:

For the Landlord: Eric Tseng

For the Tenant: s.22

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR MND MNSD MNDC FF

Preliminary Issues

When this proceeding began on May 29, 2013, the Tenant testified that she did not receive a copy of the Landlord's application for dispute resolution and she did not receive the Landlord's evidence.

The Landlord testified that he sent the Tenant a copy of his application, along with all the other hearing documents, by registered mail on May 8, 2012. He pointed out that the tracking receipt was provided in evidence to the *Residential Tenancy Branch.* He advised that he sent a second registered mail package with his evidence on May 17, 2013, and the tracking number was provided in his testimony (RW753865691CA).

The Tenant argued that she had no idea what the claim was that was being brought against her but she did know the Landlord was trying to keep her deposit. She pointed to the evidence she had submitted which included a statement from s.22 which states "*As of today May 21, 2013 I have not received any further mail from (Landlord's name). I am off work today and there is no mail".* The Tenant confirmed that her evidence consisted of: the letter s.22 a letter from the Concierge desk; and her written response to the Landlord's claim.

The Canada Post website tracking information was reviewed during the hearing and indicated that the Tenant had been left a notice card on May 21, 2013, the same day s.22 wrote her letter indicating there was no mail. A second and final notice card was left for the Tenant on Monday May 27, 2013.

Upon review of the above information, I favor the evidence of the Landlord over the Tenant's testimony where she states she did not receive a copy of the application and that she was not notified of the registered mail package that was sent with the Landlord's evidence. I favored the Landlord's evidence because it was forthright and credible and supported by Canada Post tracking information.

I find the Tenant's argument that she had no idea what the Landlord was claiming to be improbable given the circumstance discussed. I make this finding, in part, because the

Tenant's written submission included a response to each item the Landlord was claiming. Specifically, that she broke her lease and left early because of an infestation of pests, that pest control was required and not provided, and no move out inspection report was provided which could indicate whether she cleaned the carpet or not. Furthermore, I find that it is not a mere coincidence that s.22 wrote her letter on the same date that Canada Post indicates the first notice card was left for the registered mail that contained the evidence.

I went through each item the Landlord had claimed on his application with the Tenant. She confirmed that she wrote down each item and that she now knew what was being claimed by the Landlord. I informed both parties that this hearing would be adjourned and reconvened on May 30, 2013, at 9:00 a.m. and I instructed the Tenant to attend the post office, with her identification, to pick up the registered mail package containing the Landlord's evidence, prior to the reconvened hearing.

Upon review of the Landlord's application for dispute resolution the Landlord confirmed their intent on seeking money owed or compensation for damage or loss under the act regulation or tenancy agreement, by writing *"to cover "loss of rent" for January, February, and March 2013"* in the details of dispute on their application.

Based on the aforementioned I find the Landlord's intention of seeking to recover the payment for loss of rent, for a period after the tenancy ended in accordance with the 10 Day Notice, was an oversight and/or clerical error in not selecting the box *for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement* when completing the application. Therefore I amend their application, pursuant to section 64(3)(c) of the Act.

Introduction

This hearing dealt with an Application for Dispute Resolution filed on March 5, 2013, by the Landlord to obtain a Monetary Order for: unpaid rent or utilities; for damage to the unit, site or property; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; to keep the security deposit; and to recover the cost of the filing fee from the Tenant for this application.

The parties appeared at the teleconference hearing on May 29, 2013 for thirty minutes and again on May 30, 2013, for forty minutes. They acknowledged receipt of evidence submitted by the other and gave affirmed testimony. The Landlord confirmed that he did not serve the Tenant with a copy of the tenancy he entered into with the new tenants.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

Should the Landlord be granted a Monetary Order?

Background and Evidence

The Landlord submitted documentary evidence which included, among other things, copies of: a monetary order worksheet; the tenancy agreement and addendum; the new tenant's tenancy agreement; photos; receipts; and the tenant ledger.

The Tenant submitted documentary evidence which included, among other things, copies of: her written statement; two witness statements; and a note from the concierge desk indicating her fax was sent May 21st, 2013 and not May 22nd.

The parties confirmed that they entered into a written fixed term tenancy agreement that began on May 8, 2012 and was set to end on May 31, 2013. Rent was payable on the first of each month in the amount of $1,350.00 and on May 8, 2012, the Tenant paid $675.00 for the security deposit. The parties attended inspections and signed the move in condition inspection report form on May 8, 2012 and the move out condition inspection form during the week of January 21 – 25, 2013. The Tenant's forwarding address was provided by e-mail on February 25, 2013.

The Landlord testified that in December 2012 the Tenant told him that she was going to be moving out at which time they told her she could not cancel her contract because there was no evidence that there were cockroaches in the rental unit. She called a couple more times and said she was moving out in January 2013. The Tenant did not pay the full rent for January as she only paid $675.00. The Tenant vacated in January and returned the keys to the Landlord January 28, 2013.

The Landlord stated that they advertised the unit on the internet as soon as it was cleaned up and ready to rent. They were not able to find new tenants until March 13, 2013, when they entered into a new tenancy agreement effective April 1, 2013. They were not able to find a tenant sooner and re-rented the unit at $1,300.00 per month which is $50.00 lower than the Tenant's rent was. They are seeking to recover the unpaid rent for January 2013 of $675.00 plus loss of rent for February and March 2013 for a total amount of $3,375.00.

The Landlord advised that his office lost the move in and move out condition inspection report forms but they provided pictures which clearly show the stains left on the carpet by the Tenant. They had to have the carpets cleaned before they could re-rent the unit

so they are seeking to recover the $224.00 for carpet cleaning as supported by the invoice they provided in their evidence.

The Landlord stated they are also seeking $218.40 to pay for pest control that was not required. He noted that the pest control invoice states that no cockroaches were found and the only thing they found was some pantry moths in the area above the fridge.

The Tenant testified that she actually moved out of the rental unit on January 20, 2013 and not at the end of the month. She stated that she rented a place for a two week period from January 15 – 31, 2013 that is why she only paid half of a month's rent. She questioned why she was not served a 10 Day Notice if she was required to pay the full month's rent. She confirmed she first discussed her moving out with the Landlord in December 2012 and then on January 4, 2013 she told them she was moving out. When asked why she did not return the keys until January 28, 2013, the Tenant advised that she had left possession at the rental unit to be picked up by her friends, so she did not return the keys until all the possessions were gone.

The Tenant argued that she had to move out because the Landlord refused to deal with the cockroach infestation. She argued that the pest control company did not see cockroaches because they only come out at night. She noted that she had seen some during the day but that was only because they were kicked out of the nest. She said she did not seek assistance through dispute resolution to have the Landlord provide pest control because she did not think to do that. She did not put her requests for pest control in writing because she had already decided to move out.

Upon review of the photos provided by the Landlord the Tenant submitted that she was told the carpets had been cleaned before she moved in. She argued they were very old, worn out, and stained carpets. She stated that she did what was required of her, as listed in the move out cleaning list provided to her, because she had rented a steam cleaner and cleaned the carpets at the end of her tenancy. She confirmed that she did not provide receipts or copies of her credit card bill as evidence.

Analysis

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement;
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation;
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

Section 26 of the Act stipulates that a tenant must pay rent in accordance with the tenancy agreement.

Notwithstanding the Tenant's argument that she was no longer residing at the unit as of January 20, 2013, I find she remained in possession of the unit until January 28, 2013. Rent was payable on the first of each month in the amount of $1350.00; however, the Tenant only paid $675.00 towards the January 2013 rent, which I find to be a breach of section 26 of the Act. Accordingly, I award the Landlord unpaid rent in the amount of **$675.00.**

Section 45 of the Act stipulates that a Tenant may end a fixed term tenancy agreement by providing thirty days written notice to end the tenancy effective on a date that is not before the end of the fixed term.

In this case the fixed term did not end until May 31, 2013. The Tenant vacated the unit and relinquished possession of the unit, ending the tenancy on January 28, 2013, when she returned the keys. Based on the foregoing, I find the Tenant ended this tenancy in breach of section 45 of the Act, causing the Landlord to suffer a loss of rent. The Landlord attempted to re-rent the unit as soon as possible and was not able to secure new tenants until March 13, 2013 for a tenancy that is to begin on April 1, 2013.

Based on the foregoing, I find the Landlord has proven they suffered a loss of rental income due to the Tenant's breach of the Act. Accordingly, I award the Landlord loss of rent for February, and March, 2013, in the amount of **$2,700.00** (2 x 1,350.00).

The Landlord has sought to recover $218.00 which was paid for pest control services at the rental unit on February 6, 2013, which was the result of the Tenant's false accusations of the presence of cockroaches.

Notwithstanding the Tenant's witness statements and her argument that cockroaches only come out at night; I favor the Landlord's evidence which included a report from a pest control company and indicates there was no presence of cockroaches found in the rental unit. Based on the evidence before me, I find the Landlord's assertion that the presence of cockroaches was fabricated and later determined to be unfounded, to be probable given the circumstances presented to me during the hearing.

Section 21 of the *Residential Tenancy Regulation* stipulates that in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on

the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

Both parties confirmed they completed condition inspection report forms at move in and move out. The Landlord acknowledged that his office lost the forms and therefore he was relying on the photos provided in his evidence to support the condition of the carpet at the end of the tenancy. The Tenant testified that she was told the carpets had been cleaned prior to the start of her tenancy. Based on the foregoing and in the absence of evidence to the contrary, I accept the photos and submission of the Landlord that the Tenant left the carpets un-cleaned and stained at the end of the tenancy.

Section 37(2) of the Act provides that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

Based on the aforementioned I find the Tenants have breached sections 32(3) and 37(2) of the Act, leaving the rental unit unclean and with some damage at the end of the tenancy.

As per the above, I find the Landlord has met the burden of proof and I award them damages in the amount of **$442.00** ($218.00 pest control + $224.00 carpet cleaning).

I accept the Tenant's submission that she did not receive a copy of the move out form, which means the Landlord's right to claim damages against the deposit, was extinguished. That being said, in this case the Landlord claimed against the deposit for unpaid rent and not damages.

Monetary Order – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security deposit plus interest as follows:

Unpaid January 2013 rent	$ 675.00
Loss of Rent Feb. & March 2013	2,700.00
Damages	442.00
Filing Fee	50.00
SUBTOTAL	$3,867.00
LESS: Security Deposit $675.00 + Interest 0.00	-675.00
Offset amount due to the Landlord	**$3,192.00**

Conclusion

The Landlord has been awarded a Monetary Order in the amount of **$3,192.00**. This Order is legally binding and must be served upon the Tenant. In the event that the Tenant does not comply with this Order it may be filed with the Province of British Columbia Small Claims 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 *Residential Tenancy Act*.

Dated: May 29, 2013

L. Bell, Arbitrator
Residential Tenancy Branch

Residential Tenancy Branch

RTB-136

Now that you have your decision...

All decisions are binding and both landlord and tenant are required to comply.

The RTB website (www.rto.gov.bc.ca) has information about:

- How and when to enforce an order of possession:
  Fact Sheet RTB-103: *Landlord: Enforcing an Order of Possession*

- How and when to enforce a monetary order:
  Fact Sheet RTB-108: *Enforcing a Monetary Order*

- How and when to have a decision or order corrected:
  Fact Sheet RTB-111: *Correction of a Decision or Order*

- How and when to have a decision or order clarified:
  Fact Sheet RTB-141: *Clarification of a Decision or Order*

- How and when to apply for the review of a decision:
  Fact Sheet RTB-100: *Review Consideration of a Decision or Order*
  (Please Note: Legislated deadlines apply)

To personally speak with Residential Tenancy Branch (RTB) staff or listen to our 24 Hour Recorded Information Line, please call:

- Toll-free: 1-800-665-8779
- Lower Mainland: 604-660-1020
- Victoria: 250-387-1602

Contact any Service BC Centre or visit the RTB office nearest you. For current information on locations and office hours, visit the RTB web site at www.rto.gov.bc.ca