



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNDC, OLC, RPP, LRE, & FF

Introduction

This hearing dealt with the tenants' application seeking compensation due to loss or damage suffered due the alleged breach of the tenancy agreement and *Act* by the landlord's agent (the agent). The tenant also requested that the landlord be ordered to comply with the *Act*, that the landlord return the tenant's personal property and that conditions be set on the landlord's right to enter the rental unit.

There were two preliminary issues related to a late submission of evidence by the agent and a request for an adjournment by the agent. With respect to the late submission of evidence, it was agreed that the agent's submission would be accepted and the tenant would be provided with the opportunity to respond to the evidence.

In considering the agent's request for an adjournment I considered the criteria provided in rule 6 of the rules of procedure. The agent submits that after receiving a copy of the tenant's evidence on October 22, 2010, she determined that she should have legal counsel to assist with her response to the tenant's claim.

I do not find that the agent took sufficient or reasonable steps prior to the hearing to seek legal assistance and find it is prejudicial to the tenant if I now accept the landlord's request for an adjournment. I am satisfied that the landlord had sufficient notice of the claim being made against him and more than two months to seek out any advice or representation.

I denied the agent's request for an adjournment and proceeded with the hearing.

The original hearing went beyond the scheduled time and the hearing was adjourned to be reconvened at a later date. The tenants submitted a response to the landlord's late evidence prior to the reconvened hearing held on November 25, 2010.

Issue(s) to be Decided

Did the landlord's agent breach the covenant of quiet enjoyment by accessing the tenant's rental unit on August 19, 2010?

Has the tenant established that the landlord's agent took the tenant's personal possessions?

Has the tenant established a monetary claim due to loss of quiet enjoyment and exclusive possession of the rental unit?

Background and Evidence

The parties entered into a tenancy agreement commencing on January 15, 2009 for the monthly rent of \$1,800.00 and a security deposit of \$900.00. No written tenancy agreement was provided into evidence.

The tenants are seeking compensation for the sum of \$3,050.00 due to the landlord's agents' breach of their quiet enjoyment of the rental unit. This sum is comprised of \$500.00 due to invasion of privacy, \$2000.00 for stolen mail, \$500.00 for loss of exclusive possession and recovery of the \$50.00 filing fee paid for this application.

In August 2010 the events leading to this dispute took place. On August 9, 2010 the tenants left the rental unit to go on vacation. They made arrangements with their son to look after the rental unit during their absence. The agent was not notified that the tenants were going away.

In a sworn affidavit dated November 15, 2010 the tenants' son declared that he first attended the rental unit on August 11, 2010 to collect the mail. On August 12, 2010 the tenants' son suffered an injury at work and was unable to attend the rental unit again until August 18, 2010. The tenants' son states that there was not as much mail as expected but what was in the mail box was collected and placed on the kitchen counter with the mail collected a week earlier.

On August 19, 2010 the tenants' son received a phone call from a constable with the R.C.M.P. According to the tenants' son, the officer was calling from in the rental unit. The officer explained that he was in the rental unit with the landlord and there was concern about tenants' failure to pay the rent and the absence of the tenants.

The tenants' son went to the rental unit after this telephone call but at this point there was no one in the rental unit. The tenants' son states that there were notices posted on the doors of the rental unit from the landlord seeking entry into the rental unit. The tenants' son stated that he observed the following differences in the rental unit from his previous visit on August 18, 2010:

- Kitchen cupboards were open and things appeared to have been moved in the cabinets; and
- All the mail which had been placed on the kitchen counter was gone.

The tenants' son states that he contacted the officer to discuss the missing mail. The officer did not have any knowledge of mail in the kitchen. When the tenants' son returned home he was contacted by the agent who was aggressively seeking answers as to why the tenants failed to pay the rent.

The tenants confirmed that they also received a call from the R.C.M.P. constable on August 19, 2010. The officer left a message on their cell phone indicating that the officer was in the kitchen of the rental unit with the agent and requesting that the tenants call the agent. The tenants speculate that the message was left by the officer at about 4:00 p.m.

According to the tenants' sworn affidavit, the officer and agent accessed the rental unit through the screen door off the deck of the rental unit. Both the tenants and their son also questioned how the officer obtained their son's telephone number because it was not listed in his name.

When the tenants return home from vacation they made the following observations:

- The living room light and television which has been left on for security purposes were now turned off;
- The kitchen cupboards were left half open when they had been previously closed;
- Doors to bedrooms which were previously closed were now open; and
- There was no personal mail addressed to the tenants other than "junk mail" or magazines.

In addition, the notices were still posted to the doors of the rental unit. One notice was for access to the rental unit in 24 hours and the second notice was a 10 day Notice to End Tenancy Due to Unpaid Rent.

The tenants submit that bills which they were expecting did not arrive during their absence. The tenant contacted one bill provider and was informed by the company that the bill was sent on its unusual schedule. In addition, tenants learned from neighbours that the agent had been observed at or near the rental unit on a number of occasions and had attended the rental unit with a locksmith. As a result of this information the tenants have filed a report with the R.C.M.P about stolen mail.

The tenants also testified that they subsequently began to be hassled by a creditor due to an outstanding bill from four years ago. The tenants stated that they do not understand how the creditor has obtained their unlisted telephone number and allege that the agent has allowed or provided their personal information to creditors. This is despite the fact that the creditor told the tenants that the number was provided by the tenants' husband.

The tenants confirmed in their testimony that their son was looking after the rental unit in their absence and was to place the mail on the kitchen counter. According to the tenants testimony their son was accessing the rental unit through the sliding door off the deck which is why it was unlocked. It was not clear from the evidence whether the tenants' son ever had a key to the rental unit or whether the tenants' son lost the key.

The tenants presented a witness at the hearing. I note that the witness is the husband of the neighbour whose evidence is reflected in the tenants' sworn affidavit. The witness confirmed that he did not personally know the tenants prior to the events in August 2010, except by sight since they lived across the street. The witness testified that he was aware that the tenants were on vacation and during their absence observed people at the rental unit. The witness testified that he observed individuals looking into the mailbox, observed individuals taping notices to the door of the rental unit, saw the agent with a locksmith at the property and then the landlord accompanied by a police officer. I note that the witness discussed a mailbox which is attached to the side of the rental unit while in the tenants' affidavits they discuss a community mailbox. The witness stated that he observed the agent taking mail out of the mailbox attached the rental unit but could not confirm whether the mail was returned or taken by the person.

The landlord's agents responded to the tenants' claims through a written statement dated October 4, 2010 and by oral testimony. While one agent of the landlord's evidence was affirmed oral testimony, the other written statement was not sworn.

According to the agents of the landlord, they were informed that the tenants had failed to pay the rent on August 12, 2010. The monthly rent was due on the 1st of the month.

The landlord's agents attempted to contact the tenants by telephone and when that was not successful the agents went to the rental unit on August 14, 2010 to investigate. The agents stated that the doorbell to the rental unit was rung, but no one ever answered the door. From the written statement it is clear that the agents investigated around the rental property because they observed a television which was on in a bedroom. The agents also checked the mailbox, which had mail in it and heard music playing from the car park. It seems the agents returned to the rental unit over the next three days and observed that the television remained on. During this period the agents submit that the mailbox had been emptied.

On August 18, 2010 the agents posted a notice to the door of the rental unit. The notice read as follows:

"Today is August 18, 2010 the rent is not paid to August 10 this is a 24 our notice if there is no response to us tomorrow we will go in the house, maybe with police please call us back a.s.a.p."

[Reproduced as Written]

The agents left two telephone numbers on the bottom of the notice. In addition, on August 18, 2010 the agents contacted the male tenant's place of employment inquiring as to whether the tenant was still employed. The tenant's employer would not provide any information other than to confirm that the tenant was an employee.

On August 19, 2010 the agents returned to the rental unit with two witnesses. They observed that the notices were still posted to the door of the rental unit and the television was still on. The agents investigated around the rental property into the backyard to look into the rental unit. Through the windows a vacuum cleaner was observed lying on the floor and back sliding patio door was not locked.

The agents submit that at this point they were seriously concerned about the safety and wellbeing of the tenants and choose to enter the unit. One of the agents went through all the rooms in the unit to check for the tenants and determined that the rental unit was empty.

At this point the agents concern was now their property which was left unlocked. The agents decided to have the locks changed; however, the locksmith would not complete the work. At this point one of the agents of the landlord decided to involve the local police. The other agents and witnesses were no longer involved.

At approximately 3:30 p.m. on August 19, 2010 the female agent of the landlord and a police officer entered the rental unit again. According to the written statement of the female agent the police officer investigated the rental unit and then accessed the tenants' phone where apparently the telephone number for the tenants' son was obtained. There is also a reference that the officer attempted to access the internet.

Through discussion with tenants' son the officer learned that the tenants were on vacation and the son was taking care of the home in their absence. The police officer was also provided the cell phone number for the tenants and attempted to call them resulting in the telephone message which was left on the tenants' cell phone.

At that point the landlord's agents and the police officer left the rental unit. The female tenant confirms the conversation later in the day with the tenants' son and wrote that she:

"...told him that not paying rent and leaving for vacation without notifying us is simply unacceptable. And on top of that the house is being left unlocked..."

[Reproduced as Written]

The agent confirms that the 10 day Notice to End Tenancy Due to Unpaid Rent was posted on the door of the rental unit that evening.

Both parties confirmed that the outstanding rent owed for August 2010 was paid on August 23, 2010.

The landlord's agents deny taking or disturbing any of the tenants' personal property or information or running a credit check with the tenants' information. The male agent of the landlord testified that when he investigated the rental unit no personal property of the tenants was disturbed or taken. The agents submit that they were very concerned about both their rights and the tenants' rights under the circumstances. The agents stated that the tenants' son confirmed that the patio sliding door was left unlocked because he had lost the key.

Counsel for the landlord submits that the tenants' monetary claim relates to invasion of privacy and trespass to land; however, the landlord had a right to access the rental unit. Although counsel acknowledged that the *Act* limits the landlord's right to enter a rental unit, under certain and reasonable circumstances it is allowed. All the evidence, from both sides, agrees that notice was posted before the landlord entered the rental unit.

Counsel submits that the landlord's agents had concern that something had befallen the tenants and they took all reasonable steps before entering the rental unit to discern what had happened. Counsel submitted that if the tenants' intent was to give the impression that the home was being occupied and used, they were successful, but this contributed to the landlord's agents concerns when the tenants could not be contacted. With respect to the tenants' allegation to theft of mail and personal information, counsel submits that the tenants failed to demonstrate that any mail was taken. Counsel noted that the tenants' witness could not confirm that any mail had been taken. In addition, counsel submits that the agents had no reason or motive to take the tenants' mail.

In addition, respecting the tenants' monetary claim, counsel argued that the tenants have not provided any evidence of their damage or loss. Counsel submits there is no evidence linking the tenants' calls from creditors to any action by the landlord.

Counsel for the landlord submits that the landlord had to make a judgement call given the circumstances and attempted to balance the tenants' right to privacy with the landlord's right to protect their property or lawful interests. Counsel argued that there is no basis for the tenants' complaints and no quantifiable damages have been proven even if a breach has been established.

Counsel for the tenants' argued that the landlord's agents acted unreasonably in the circumstances and severely impacted the tenants' privacy. The landlord failed to give proper notice before entering the rental unit and should have been aware that the notice posted on the door on August 18, 2010 would not be deemed as having been received until 3 days later.

The landlord's agent also attempted to have a locksmith change the locks to the rental unit, which the locksmith would not do, as there was no basis for the tenant's request under the *Act* or regulations.

Counsel argued that the landlord's agents invaded the tenant's privacy by their actions and the landlord's libel to damages as a result.

The tenants argued that they pay rent for the right of exclusive possession of the rental unit and freedom from interference. The tenants expressed that they are now terrified that their personal documents have been viewed by numerous strangers and suspect that their personal information has been used inappropriately by the landlord's agents.

The tenants argued that the landlord's agents acted without just cause in proceeding to invade the rental unit, with a locksmith and the police, because the tenants were late

with the rent. The tenants are also outraged that the landlord's agent would contact their employer and send a 10 day Notice to End Tenancy Due to Unpaid Rent to their place of employment. The tenants' expressed how the actions of the landlord's agents have left them feeling violated.

Analysis

Based on the testimony and evidence provided, and on a balance of probabilities, I find as follows:

Section 28 of the *Act* provides that every tenant is entitled to the right of quiet enjoyment. The right to quiet enjoyment includes, but is not limited to, the right of reasonable privacy, freedom from unreasonable disturbance, exclusive possession of the rental unit and use of the common areas for reasonable and lawful purposes.

At common law, the covenant of quiet enjoyment "promis(es) that the tenant . . . shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of quiet enjoyment protects the tenant's right to freedom from serious interferences with his or her tenancy."

Section 29 reflects a tenant's right to quiet enjoyment by limiting the manner and frequency in which a landlord may rent a rental unit. This reflects the balance which must be met between a tenant's right to quiet enjoyment and a landlord's right and obligation to maintain and repair the rental unit.

The tenants are seeking damages arising out of breaches in tort by the landlord's agents. However, the standard and law to be applied under the *Act* is whether damages have been established due to a breach of the tenants' right to quiet enjoyment. In determining whether a tenancy has been devalued as a result of a breach of the covenant of quiet enjoyment, the seriousness of the situation must be considered and the degree in which the tenants have been unable to use the rental unit and the length of time over which the situation has existed. Damages can be found due to actions which negatively affect the use and enjoyment of the rental unit.

The tenants are seeking compensation for the sum of \$3,050.00 due to the landlord's agents' breach of their quiet enjoyment of the rental unit. This sum is comprised of \$500.00 due to invasion of privacy, \$2000.00 for stolen mail, \$500.00 for loss of exclusive possession and recovery of the \$50.00 filing fee paid for this application.

When making a claim for damages under a tenancy agreement or the *Act*, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or *Act*, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

I do not accept the tenants' claim that the landlord's agents stole or otherwise took their mail. While I accept that the tenants' son recalls picking up the mail and placing in within the kitchen, there is no evidence to show that the agent took that mail. While in the tenants' mind it seems reasonable and natural to assume that the landlord took the mail, I can find no motive for the landlord to do so. On the balance of probabilities I find it is more likely that the mail was misplaced or not sent. In addition, I find that the evidence establishes that the rental unit was left unlocked for an unspecified number of days when the tenants' son left the back patio door unlocked and this also opens up the possibility that another individual accessed the tenants' mail. In the absence of compelling evidence demonstrating that the agent took the mail, I find that the tenants have not established this portion of their claim.

I also find that the tenants have not shown that the agent used the tenants' personal information to complete a credit check or some other more direct action, to alert the tenants' creditors of their present location. I find that the tenants' experience of having a creditor calling them following the events in August 2010 to be mere coincidence. There was no evidence to suggest that the information was obtained through the landlord or his agents and some of the evidence suggested that the information was gathered from actions of the tenants. Again, I find that there is a multitude of possible ways a creditor was able to gain the tenants' current contact information and in the absence of compelling evidence demonstrating that the information was taken or provided by the landlord or his agents, I find that the tenants have not established this portion of their claim.

I do find, however, that the tenants' personal information was used by the police on August 19, 2010 in an attempt to ascertain the tenants' circumstances. I also accept the agent's actions precipitated the involvement of the police.

I find that the landlord's agents did breach the tenants' right to reasonable privacy and exclusive possession during the week of August 16, 2010 and more specifically on August 19, 2010.

Unfortunately, the tenants' son did not help the situation when he failed to contact the landlord's agents on August 18, 2010 and by leaving the back patio door unlocked. The tenants' son acknowledged seeing the notices posted on the door of the rental unit and could have called the landlord's agents or called his parents to contact the landlord before the events of August 19, 2010.

If the landlord's agents had simply posted a notice to the door of the rental unit and waited the allotted three days for the notice to be considered as served and entered the rental unit for the purpose of ascertaining the wellbeing and safety of the tenants, there likely would not have been a breach of the *Act*.

I find that the landlord's agents were overzealous in their investigation of the tenants' failure to pay the rent and overstepped their rights under the *Act*. The landlord's agents had a specific remedy under the legislation relating to non-payment of rent. The agents patrolling of the tenants' rental unit, checking the mailboxes, calling the tenants' place of employment and looking through the windows of the rental unit was beyond what is reasonable and represents a breach of section 28.

The landlord's agents aggravated this situation with the events of August 19, 2010 by entering the rental unit on two occasions. I find it unreasonable that the landlord's agents accessed the rental unit with a total of 5 individuals and then returned again to the rental unit with a locksmith and then the police.

While these actions were not long in duration, I find that the invasion of the tenants' privacy and right to exclusive possession of the rental unit was significant and impacting. I find that the tenants are entitled to compensation for the sum of **\$500.00** due to the landlord's breach.

I also Order that the landlord reimburse the tenants the \$50.00 filing fee paid for this application.

As I have not concluded that the landlord's agents took any of the tenant's personal property, I dismiss this portion of their claim. At the hearing the tenant also confirmed that they are no longer seeking an Order that conditions be set on the landlord's right to enter the rental unit.

Conclusion

I have granted the tenants' application in part and have awarded the tenants **\$550.00** due to a significant infringement of their right to quiet enjoyment. I have issued the

tenants a monetary Order for this sum. The tenants have the authorization to deduct this sum from their next month's rent, after the notice has been served upon the landlord or the landlord's agents.

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 16, 2010.

Dispute Resolution Officer