



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: MNSD MNDC FF

Introduction

This hearing dealt with applications by the tenant and the landlord. The tenant applied for return of the security deposit and pet deposit and a monetary order for money owed under the Act, regulation or tenancy agreement. The landlord applied for an order to keep all of the security deposit and pet deposit and a monetary order for money owed under the Act, regulation or tenancy agreement. Both parties applied for recovery of their respective filing fees.

After the conclusion of the hearing, the landlord submitted further evidence which is inadmissible and which I therefore did not consider.

Issue(s) to be Decided

Is the tenant entitled to double recovery of the security and pet deposits?

Is the landlord entitled to loss of revenue for the month of July 2008?

Is the landlord entitled to liquidated damages?

Background and Evidence

The undisputed evidence is as follows. On April 22, 2008 the landlord and the tenant signed a tenancy agreement for a one year fixed term tenancy to commence on July 1, 2008. The copy of the tenancy agreement submitted by the landlord as evidence includes a handwritten clause at the bottom of the second page indicating as follows: "Any early breach of tenancy prior to lease end term shall render liquidated damages

penalty to landlord of \$850 – one month's rent." A further handwritten note on the third page of the agreement indicates that the security and pet deposits "confirm commitments thereby becoming non-refundable upon signage." On April 22, 2008 the landlord received from the tenant a \$425 security deposit, a \$425 pet deposit and \$850 for rent for July 2008. On June 13, 2008 the tenant notified the landlord via registered mail, personal delivery to the landlord's residence and email that the tenant did not intend to take possession of the rental unit. The tenant provided her written forwarding address and requested return of the security and pet deposits as well as the \$850 paid for July's rent. The landlord did not return the monies requested, and on July 11, 2008 the tenant applied for dispute resolution. The landlord responded with a cross-application on August 22, 2008.

The tenant's evidence is that the landlord did not provide her with a copy of the lease until she received the landlord's package of evidence for the dispute resolution proceeding, and the tenant therefore could not recall whether the additional handwritten notes on the tenancy agreement were there when she signed it. The tenant did not recall the landlord informing her verbally about the liquidated damages or non-refundable deposits clauses but states that she would not have agreed to such terms if they had been brought to her attention. The tenant claims recovery of the security and pet deposits as well as the \$850 paid for July's rent.

The landlord's evidence is that the landlord attempted on more than one occasion to arrange to meet with the tenant to provide her with a copy of the tenancy agreement but the tenant was uncooperative. The landlord states that the tenant wished to back out of the tenancy for arbitrary reasons. The landlord was out of town from mid-June 2008 to July 22, 2008. Upon his return the landlord took all necessary steps to secure a new tenant for August 1, 2008. The landlord relies on the additional terms in the tenancy agreement to claim \$850 for the security and pet deposits and \$850 for liquidated damages. The landlord also claims \$850 in lost revenue for July 2008.

Analysis

In regard to the security and pet deposits, Section 38 of the Residential Tenancy Act requires that 15 days after the later of the end of tenancy and the tenant providing the landlord with a written forwarding address, the landlord must repay the security deposit or make an application for dispute resolution. If the landlord fails to do so, then the tenant is entitled to recovery of double the base amount of the security deposit. I find that the tenancy did not commence, and that the tenant provided her forwarding address in writing on June 13, 2008. I further find that the landlord has failed to repay the security deposit or make an application for dispute resolution within 15 days of receiving the tenant's forwarding address in writing. The additional handwritten note in the tenancy agreement which defines the deposits as non-refundable is contrary to the Act and is therefore an invalid term. The tenant is therefore entitled to recovery of the security and pet deposits in the amount of \$850, accrued interest of \$5.40, and double the base amount of the security deposit in the amount of \$850, for a total of \$1705.40.

In regard to the amount of \$850 that the tenant paid for July's rent, I find that the landlord has not provided adequate evidence that he mitigated his loss by attempting to re-rent as soon as possible, and therefore the landlord is not entitled to claim for this amount. The tenant is entitled to recovery of the \$850 paid for July's rent.

In regard to the landlord's claim for liquidated damages, the landlord has characterized this amount as a "penalty," rather than a genuine pre-estimate of loss at the time the contract is entered into, and as such the term regarding liquidated damages in this tenancy agreement is invalid. The landlord is not entitled to the liquidated damages amount claimed.

Conclusion

The landlord's application is dismissed.

The tenant has established a claim for \$2555.40. The tenant is also entitled to recover the \$50 filing fee for this application. I grant the tenant an order under section 67 for the balance due of \$2605.40. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated September 23, 2008.