Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNDC Money Owed or Compensation for Damage or Loss

MNSD Monetary Order for the Return of the Security Deposit and Pet Damage Deposit

FF Recover the Filing Fee for this Application from the Respondent

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for the return of the security deposit, and a monetary order for reimbursement for rent paid.

Both parties appeared and gave testimony in turn.

Issue(s) to be Decided

The tenant was seeking to receive a monetary order for the return of the security deposit and compensation for rent paid to the landlord for the month of June 2009.

The issues to be determined based on the testimony and the evidence are:

- Whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act. This determination is dependant upon the following:
    - Did the tenant pay a security deposit and pet damage deposit?
    - Did the tenant furnish a forwarding address in writing to the landlord?
    - Did the tenant provide written consent to the landlord permitting the landlord to retain the security deposit at the end of the tenancy?
    - Was an order issued permitting the landlord to retain the deposit?

- Whether the tenant is entitled to monetary compensation under section 67 of the *Act* for damages or loss. This determination is dependant upon answers to the following questions:
    - Has the tenant submitted proof of the existence and monetary amount of the damage or loss?
    - Has the tenant submitted proof that the damage or loss was caused by the respondent through a violation of the Act by the respondent?

The burden of proof is on the applicant.

Preliminary matter: Request by Respondent to Submit Additional Evidence

During the proceedings, the landlord requested an opportunity to submit additional evidence in order to establish how much of a security deposit was paid by the tenant. I find that, pursuant to the Residential Tenancy Rules of Procedure, Rule 4.1, all evidence must be served on the applicant. The respondent must file copies of all available documents, or other evidence at least (5) days before the dispute resolution proceeding or if there is not enough time prior to the hearing, the evidence may be accepted at least two days prior to the hearing. If copies of the respondent's evidence are not received by the Residential Tenancy Branch or served on the respondent as required, the Dispute Resolution Officer must apply Rule 11.6 which deals with the consideration of evidence not provided to the other party or the Residential Tenancy Branch in advance. This rule permits the Dispute Resolution Officer to adjourn a dispute resolution proceeding to receive evidence that a party states was submitted to the Residential Tenancy Branch but was not received by the Dispute Resolution Officer before the dispute resolution proceeding.

In this instance there was no claim by the respondent that the evidence in question was ever submitted to the branch. In fact the landlord's request was to be given more time to submit additional evidence in defense against the tenant's monetary claim for the

return of the security deposit and damages consisting of the re8imbursement for rent paid for the month of June 2009.

Rule 6.1 of the Rules of Procedure states that the Residential Tenancy Branch will reschedule a dispute resolution proceeding if "*written consent from both the applicant and the respondent is received by the Residential Tenancy Branch before noon at least three (3) business days before the scheduled date for the dispute resolution proceeding*."

In some circumstances proceedings can be adjourned after the hearing has commenced. However, there is a mandatory requirement that the Dispute Resolution Officer, (DRO), must look at the oral or written submissions of the parties; and must consider whether the purpose for which the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1 [objective and purpose] and whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether a party had sufficient notice of the dispute resolution proceeding. The DRO must also weigh the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and assess the possible prejudice to each party.

In this instance, the hearing was on the tenant's application submitted on July 13, 2009 with the hearing scheduled for November 3, 2009. I found that there was insufficient support to prove that that the respondent landlord did not have a fair opportunity to make evidentiary submissions on the actual amount of the deposit paid. I found that the respondent knew of the tenant's intention to claim the return of the $1,800.00 security deposit for a number of months and had the landlord intended to dispute this amount, she should have submitted the relevant evidence upon which she wished to rely. I find that the landlord's need for adjournment arose solely due to the respondent landlord's own failure to submit the evidence with her other evidentiary submissions received and served. I also note that, as evidenced in the landlord's written submissions, the landlord confirmed in writing that the tenant had paid $3,600.00 prior to the start of the tenancy;

$1,800.00 of which was for rent for the month of June 2009, and this left the remainder of $1,800.00 for the security deposit. Given the above, I find that the landlord's sudden decision to now dispute the amount of the deposit would not suffice as a reason to order the matter adjourned and further delay the hearing, particularly for the purpose of allowing the respondent a second opportunity to submit evidence that could have been served on the other party and placed into evidence in advance of the hearing. I also find that this would be unfairly prejudicial to the applicant.

Accordingly, as I found that there was not adequate justification under the Act and Rules of Procedure to support imposing an adjournment on the other party, the hearing proceeded. The landlord was permitted, however, to give verbal testimony on the matter.

Background and Evidence

The parties testified that the tenancy began on June 1, 2009. $3,600.00 was paid on April 27, 2009. The tenant testified that the parties entered into a tenancy agreement from afar and when the tenant arrived on May 30, 2009, the tenant evidently felt that the unit was not in a reasonable condition and that the rental unit had been misrepresented by the landlord. The tenant submitted copies of communications discussing the home and copies of advertisements for the rental. The tenant testified that a decision was made not to move in and they verbally advised the landlord that they were terminating the tenancy, requesting the return of their rent and deposit paid. The tenant testified that written notification and a forwarding address was then given to the landlord on June 3, 2009. The landlord disputed the date and testified that she did not receive the request for the return of the rent and deposit in writing until "about two weeks later". The landlord also suggested that the amount of the deposit being claimed was not accurate and that she believed that the tenant had only paid a $900.00 security deposit. Submitted into evidence was a copy of an email from the landlord dated June 4, 2009 stating that she would consider a reduced rental rate but would not consider refunding

the deposit nor the rent. The tenants are requesting the return of $1,800.00 paid as security deposit.

The tenants were also claiming a monetary order of $1,800.00 to compensate for rent paid on the unit that they did not inhabit during the month of June 2009. The basis for this claim, according to the tenant, was that the unit was misrepresented not only did it have intolerable condition problems that were not previously disclosed but the status of the tenant's possession was not as expected. The tenant testified that, in all of the exchanges of information or advertisements, the landlord made no mention of the fact that part of the premises would be shared. The tenant testified that there was not the exclusive possession of the yards nor driveway and the landlord was actually living in a trailer behind the house with access to a mutually shared laundry.

The landlord disputed the tenant's entitlement to the return of the security deposit and the rent already paid. The landlord stated that these payments were non-refundable and this was understood by the tenant.

Analysis

Claim for Damages and Loss

In regards to an Applicant's right to claim damages from the another party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act or tenancy agreement and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the tenant, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the landlord.

I find that while the landlord may have been less-than-candid about the actual living arrangements and the condition of the premises, the tenancy was established and under the Act the tenant could not unilaterally erase the agreement.

Section 16 of the Act states that the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

In regards to how an agreement can end, section 45 of the Act provides that a tenancy agreement can be ended by a tenant by giving the landlord notice to end the tenancy effective on a date that; (a) is not earlier than one month after the date the landlord receives the notice, and; (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy

agreement. I find that section 44(1)(f) also provides that the tenancy can be ended through an application for dispute resolution to obtain an order ending the tenancy.

Based on the evidence and testimony, I find that the landlord and tenant had established a tenancy and that the tenant terminated the tenancy without the required notice. Given this fact, I find that the tenant would not be validly entitled to a full refund of rent paid for the month of June 2009.

In determining whether or not an abatement in the amount of rent charged, I accept the tenant's testimony that the premises were not what they expected and that the landlord may not have disclosed certain aspects of damage to the unit. However, in regards to the condition issues, I find that the tenant had an obligation to thoroughly inspect or investigate the condition and furnishings in the rental unit before committing to the tenancy. I also find that the tenant had an option under the Act to deal with their dissatisfaction about the state of the building and décor by making an application for dispute resolution to pursue an order that the landlord comply with the Act or terms of their agreement under section 62(3) or seeking an early end to the tenancy.

However, in regards to the matter of the living arrangement, in particular the fact that the home featured shared laundry facilities, non-exclusive use of the back yard or driveway and also entailed having another occupant actually living in an structure behind the house on the same grounds, I find that the landlord failure to explain this and make it clear in advance is a serious lapse. I find that in a tenancy agreement, there is a presumption that the tenant will have exclusive use of a property, unless there are specific terms to clearly indicate otherwise. I find that it is incumbent on the landlord to ensure that a tenant understands that the tenancy involves shared services or facilities and that there are common areas. I find that the landlord's communications and advertisements about the rental unit gave no indication of these highly relevant facts and the data given actually created an impression that the tenants would enjoy absolute privacy. I find that in the email dated May 16, 2009, the landlord indicated, "*We used to live in it, and we are moving to Vancouver as soon as possible….No traffic – ever!*. The

landlord's May 15, 2009 email to the tenant also stated that "*this is a high-end property*". The photos sent by the landlord did not even hint that this rental was anything but a single-family situation. Whether intentional or not, the landlord neglected to inform the tenant that the landlord would be living in "a manger's suite in the back", that the landlord's cars would also be parked on the property and that the back yard would contain the landlord's dogs. I find that exclusive possession would be considered to be a material term in a tenancy agreement and the landlord had an obligation to disclose that there would be multiple occupants on the same rural land site, prior to this agreement being ratified. Given the above, I find that there should be a rental abatement of 20% and find that the tenant is entitled to be compensated the amount of $360.00 of the $1,800.00 rent paid for the month of June 2009.

Claim for Return of Security Deposit

Section 17 of the Act permits a landlord to require a security deposit. Section 19 (1) of the Act states that a landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement. I find that the landlord in this instance exceeded the amount of deposit allowed by accepting $1,800.00 which was the equivalent of a full month deposit and was therefore in violation of the Act.

In regards to the return of the security deposit and pet damage deposit, I find that section 38 of the Act is clear on this issue. Within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit or pet damage deposit to the tenant with interest or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The Act states that the landlord can only retain a deposit if the tenant agrees in writing the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the director orders that the landlord may retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make application for an order to keep the deposit.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit and must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I find that the tenant's security deposit with interest was $1,800.00 and that the landlord failed to refund this to the tenant. I find that the tenant is therefore entitled to compensation of double the deposit, amounting to $3,600.00.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of $4,060.00 comprised of $360.00 representing 20% rental abatement for rent paid for the month of June 2009, $3,600.00 for double the security deposit, and the $100.00 paid by the tenant for filing this application. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

November 2009 _____

Date of Decision Dispute Resolution Officer