

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with cross applications. The landlord applied to retain a portion of the security deposit for over-holding of the rental unit. The tenants applied for return of double the security deposit. Both parties requested recovery of the filing fee paid for their respective applications from the other party. Both parties appeared at the hearing and were provided the opportunity to be heard and to respond to the other party's submissions.

Issues(s) to be Decided

1. Have the tenants established an entitlement to double the security deposit?
2. Has the landlord established an entitlement to compensation from the tenants for overholding?
3. Award of the filing fee.

Background and Evidence

The parties provided undisputed testimony as follows. The tenancy commenced in October 2007 and the tenants paid a \$1,000.00 security deposit at that time. The tenants were required to pay rent of \$2,000.00 on the 1st day of every month. The landlord gave notice to end the tenancy as of September 30, 2009 as the landlord sold the property. The tenants gave their forwarding address to the landlord by way of a letter dated August 18, 2009. The tenants were compensated the equivalent of one month of rent for landlord's use of property. In October 2009 the landlord repaid \$772.50 of the security deposit to the tenants.

The tenants testified that they had vacated the rental unit September 28, 2009 and waited at the rental unit on September 30, 2009 in order to participate in a move-out

inspection with the landlord. After waiting a few hours, the landlord did not appear and the tenants left the rental unit and delivered the keys to the rental unit to the landlord's mailbox. On October 15, 2009 the tenants made this application as the security deposit had not yet been returned. The tenants stated that a move in inspection report was not prepared, nor did the tenants give the landlord written consent to make any deductions from the security deposit.

The landlord testified that she had instructed the tenants to leave the keys to the rental unit in her mailbox as stated a letter to the tenants dated August 27, 2009 but she observed people still in the rental unit when she drove by 1:30 p.m. on September 30, 2009. The landlord did not enter the rental unit but drove by the unit a few times before requesting a friend attend the property. The landlord stated that at 4:15 or 4:30 the friend advised that the rental unit was vacant. The landlord found the keys to the rental unit in her mailbox when she returned home that evening at 7:30 p.m.

The landlord provided copies of correspondence between the parties, including:

- The landlord's 2 Month Notice to End Tenancy dated July 18, 2009;
- The tenants' letter of August 18, 2009 providing the tenant's written forwarding address;
- A letter dated August 24, 2009 whereby the landlord informs the tenants "the premises will be inspected after vacating time of 1:00 p.m. on September 30, 2009....The keys to the rental premises are then to be deposited to the mailbox at [the landlord's address]...";
- The landlord's letter dated October 14, 2009 that accompanied the refund cheque of \$772.50 with the notation that is was mailed October 15, 2009;
- The landlord's letter dated October 15, 2009 that accompanied the refund of \$18.84 in deposit interest.

The landlord explained that a move-in inspection was not performed on the date of move-in due to a family emergency and the tenants were aware of the situation; however, the parties met October 20, 2007 to discuss any repair issues. The landlord

acknowledged that no inspection report was prepared at the commencement or end of the tenancy and that the tenants had not authorized the landlord to make any deduction from the security deposit.

Upon enquiry, the landlord stated that she did not enter the rental unit on September 30, 2009 because of a previous dispute with the male tenant. I only heard from the parties briefly about a previous dispute as the parties could not agree about the nature of their previous dispute. The landlord explained that she calculated the amount deducted from the security deposit as \$65.00 per hour for 3.5 hours with \$65.00 being the landlord's hourly contract and 3.5 hours is the amount of time the landlord spent waiting for the tenants to leave the rental unit on September 30, 2009.

Analysis

Section 38 of the Act provides for the return of security deposits. The Act permits a landlord to obtain a tenant's written consent for deductions from the security deposit, including damages if the landlord has met the move-in and move-out inspection report requirements. In this case, the tenants had not consented to any deductions from the security deposit.

Since the landlord did not have the tenants' consent for a deduction for overholding and I did not find evidence that the tenants had extinguished their right to return of the security deposit, pursuant to section 38(1) of the Act the landlord was required to either return the security deposit to the tenants or make an application for dispute resolution claiming against the security deposit within 15 days from the later of the day the tenancy ended or the date the landlord received the tenants' forwarding address in writing.

I find that the tenancy ended September 30, 2009 and since the tenants had already provided a forwarding address to the landlord in writing, the landlord had until October 15, 2009 to return the security deposit and interest. I accept that by October 15, 2009

the landlord had mailed \$772.50 of the security deposit and interest to the tenants. Therefore, I find the landlord had retained \$227.50 of the security deposit after October 15, 2009 without the legal right to do so.

Where a landlord fails to comply with section 38(1) of the Act, the landlord must repay the tenant double the security deposit pursuant to section 38(6) of the Act. As the landlord had \$227.50 of the tenants' security deposit after October 15, 2009 the landlord is ordered to pay the tenants double that amount, plus the filing fee paid by the tenants. The tenants are provided a Monetary Order in the total amount of \$505.00 [$(\$227.50 \times 2 + \$50.00)$] to serve upon the landlord and enforce in Provincial Court (Small Claims)

With respect to the landlord's claim I find the landlord did not establish that the tenants were overholding the rental unit. Rather, I accept that the tenants had vacated the rental unit before September 30, 2009. Further, the Act requires both parties to participate in a move-out inspection and upon reading the landlord's letter of August 24, 2009 I find the tenants had a reasonable expectation that they would participate in a move-out inspection with the landlord starting after 1:00 p.m. on September 30, 2009.

I reject the landlord's position that she did not enter the rental unit on September 30, 2009 for at least three hours due to the actions of the tenants as there was insufficient evidence of that the landlord ought to be fearful of the tenants and even if the landlord felt uncomfortable, the landlord was at liberty to be accompanied by another person or send an agent on her behalf.

Conclusion

The landlord's application has been dismissed. The tenants have been awarded a Monetary Order in the amount of \$505.00 to serve upon the landlord and enforce in Provincial Court (Small Claims).

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 02, 2010.

Dispute Resolution Officer