Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

Decision

Dispute Codes:

MNSD

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for an order for the return of the portion of the security deposit wrongfully retained by the landlord.

Both the landlord and the tenant appeared and each gave testimony.

Issue(s) to be Decided

The tenant was seeking to receive a monetary order for the return of the security deposit that the tenant considers as having been wrongfully retained by the landlord.

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

- Whether the tenant is entitled to the return of double the security deposit pursuant to section 38 of the Act. This determination depends upon the following:
    - Did the tenant pay a security 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?
    - Did the landlord make application to retain the deposit for damages within 15 days of tenancy end or receipt of the forwarding address?

The burden of proof is on the applicant to prove the deposit was paid and not returned The burden is on the respondent landlord to prove that it otherwise had authorization under the Act to keep the deposit.

Background and Evidence

Both parties acknowledged that the deposit of $495.00 was paid when the tenancy began in November, 2008. The parties testified that only $247.05 was refunded after the end of the tenancy and that the landlord received the tenant's forwarding address on October 22, 2010.

No evidence was submitted by either party. The tenant is seeking compensation of double the security deposit under section 38(6)(b).

The landlord testified that the tenant left the unit with some cleaning and repair issues and extinguished her right to the return of her deposit by failing to participate in the move-out inspection.

Analysis

The Act states that the landlord can only retain a deposit if the tenant agrees to this in writing. In the alternative, the landlord can make an application for dispute resolution to obtain an order to retain part, or all, of the deposit.

Section 38 (1) of the Act provides that, except as provided in subsection (3) or (4) (a), within 15 days after the later of: (a) the date the tenancy ends, and; (b) the date the landlord receives the tenant's forwarding address in writing, the landlord must either: (c) repay any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations; or (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

However, section 38(2) provides that subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

36(1) states that the right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if: (a) the landlord complied with section 35 (2) *[2 opportunities for inspection]*, and; (b) the tenant has not participated on either occasion.

Based on the evidence, 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.

In regard to the tenant's cooperation in the move-out condition inspection, section 35 of the Act requires that the landlord and tenant together must inspect the condition of the rental unit on or after the day the tenant ceases to occupy the rental unit or on another mutually agreed or on another mutually agreed day.

Both sections 23(3) for move-in inspections and section 35 for the move-out inspections state that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. The Act places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and both the landlord and tenant must sign the condition inspection report. The landlord must give the tenant a copy of that report in accordance with the regulations. Part 3 of the Regulations goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted.

With respect to the landlord's allegation that the tenant did not cooperate, the Act has provisions that anticipate such situations. In particular, section 17 of the Regulation details exactly how the inspection must be arranged as follows:

> (1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.
>
> (2) If the tenant is not available at a time offered under subsection (1),
>
> > (a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and
> >
> > (b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.
>
> (3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.
>
> The Act states that the landlord must make the inspection and complete and sign the report without the tenant if: (a) the landlord has complied with subsection (3), and (b) the tenant does not participate on either occasion.

In this instance, the landlord was alleging that the tenant did not cooperate with efforts to schedule a move-out inspection and the move-out inspection was thwarted by the tenant's non-cooperation.

However, I find that the landlord did not submit sufficient evidence to prove that it was in compliance with the required procedure with respect to arranging the move-out inspection. Based on the testimony, I find the that the landlord cannot rely on section 36(1) to establish that the tenant had extinguished her right to claim the deposit by refusing to participate in the move-out inspection.

In any case, this is not the landlord's application and monetary claims by the landlord relating to damages cannot be heard nor considered as the hearing was convened to deal with the *tenant's* application under section 38 of the Act.

That being said, I must point out that the landlord is at liberty to make a separate application if the landlord wants to initiate a formal claim for compensation for damages and loss pursuant to section 67 of the Act.

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

In the matter before me, I find that under section 38, the tenant is entitled to be paid double the portion of security deposit, $247.95 wrongfully retained by the landlord, in the amount of $495.90 plus interest of $1.24 totalling $497.21.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of $497.21 and I hereby issue a monetary order for this amount in favour of the tenant. 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.

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 2011.

Residential Tenancy Branch