



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MND, MNSD, FF

Introduction

This matter proceeded by way of a conference call hearing, pursuant to the *Residential Tenancy Act* (the “Act”), and dealt with cross Applications for Dispute Resolution by the Landlord and Tenant. The Landlord’s Application requested a monetary order for damage to the unit, site or property, compensation for damage or loss, recovery of the filing fee, and an order to keep all or part of the security deposit and pet deposit. The Tenant’s Application requested a monetary order for compensation for damage or loss.

The Landlord and the Tenant gave affirmed testimony and were provided the opportunity to present evidence orally and in written and documentary form, and make submissions to me.

Preliminary Matter(s)

The Tenant applied for dispute resolution on October 06, 2011 and was provided with a Notice of Hearing package on October 11, 2011. The Landlord applied for dispute resolution on November 09, 2011 and received a Notice of Hearing package on November 14, 2011. The Tenant testified that she was not served by the Landlord with their Application and Notice of Hearing and does not have a copy of it. The Tenant stated that she attended the hearing as it was scheduled to hear her claim and was not aware there was an Application from the Landlord. The Landlord testified that he sent the Application to the Tenant by registered mail. The Landlord did not provide evidence of proof of service on the Tenant, such as a copy of a receipt showing the date the registered mail was sent, proof of the address to which it was sent, and a tracking number.

Section 59(3) of the Residential Tenancy Act, the “Act”, requires that the applicant serve the respondent (in this case the Tenant) with the Application, which includes the Notice of Hearing, within three days.

The Residential Tenancy Branch Rules of Procedures (the “Rules”) require that the parties provide evidence of proof of service. In this case the Tenant disagreed that the Landlord served her with his Application. Documented evidence provided in advance of the hearing would have resolved whether or not the Landlord had served the Tenant by registered mail as he claims. The Act can deem a person served by registered mail

even if they decline to pick up the registered mail from Canada Post. In the absence of evidence of the Landlord's proof of service by registered mail on the Tenant, I cannot determine that the Tenant has been properly served as required by the Act. As a result, the Landlord's Application is dismissed with leave to reapply.

The parties agreed that the Tenant personally served her Application on the Landlord along with the Notice of Hearing she received on or shortly after October 11, 2011.

Issue(s) to be Decided

Is the Tenant entitled to a monetary order for compensation for damage or loss under the Act, regulation, or tenancy agreement?

Background and Evidence

The parties confirmed that the tenancy commenced on February 01, 2011 with a monthly rent of \$1150.00 due on the first day of each month. The parties agree that their tenancy was a one year lease to January 31, 2012. The parties confirmed that a security deposit of \$575.00 was paid and a pet deposit totalling \$150.00 was paid by the Tenant on a payment plan. The Tenant moved out of the rental unit by September 30, 2011.

The parties agree that a Two Month Notice to End Tenancy for Landlord Use was personally posted on the Tenant's door in August 2011 and that the Notice stated that the Tenant was to vacate the rental unit by the end of September 2011.

The Landlord testified that he posted the Notice on the Tenant's door on July 31, 2011. The Landlord stated that he sold his other house and planned to move into the rental unit.

The Tenant states that she was away and does not know when the Notice was posted as she did not receive it until she returned on August 05, 2011. The Tenant states that after receiving the Notice she contacted the Landlord to discuss it immediately and see if she could negotiate with him to stay longer as they had a one year lease. The Tenant states that the Landlord indicated that he needed to move into the rental unit. The Tenant states that she decided to accept the Notice. The Tenant states that she did find a place to move to and she informed the Landlord in mid September that she wanted to set a date to do the move-out inspection as she was preparing to move out by September 30, 2011 as the Notice had indicated.

The Landlord states that he tried to cancel the Two Month Notice after it was issued to the Tenant, but that the Tenant refused to sign a mutual agreement with him. He states that the Tenant was demanding \$3000.00 from him for breaking the lease and asked to be put up in a hotel. The Landlord states that he feels the Two Month Notice is not valid as the Act does not allow him to break a lease agreement he has with a Tenant. The

Landlord states that he rented another place as he believed his Two Month Notice was not valid and because he was not sure that the Tenant was moving out. The Landlord states that he was not aware that the Tenant was planning to leave as she gave him no notice, and he states she only contacted him in mid September to say she was going to move out.

The Tenant states that she had accepted the Notice and did not make an agreement with the Landlord to cancel it. The Tenant stated that the Landlord did show up unannounced at her rental unit after she called him in mid September to schedule a move out inspection. The Tenant stated that she declined to let the Landlord into the rental unit at that time as she was not ready to do the move-out inspection prior to the end of September as she was still in the process of packing and clearing her belongings. The Tenant states that when she had finally moved out at the end of September, she discussed the condition of the rental unit with the Landlord and agreed that she had not had time to clean the carpets, or the oven, or to repaint the walls which she had changed to pink instead of the neutral color before. The Tenant states that she agreed to allow the Landlord to keep the damage deposit of \$575.00 and the pet deposit of \$150.00 which she felt covered his costs. The Tenant states that the Landlord cashed her cheques for the August and September rent. The Tenant states that the Landlord did not reimburse her the one month's rent as required by the Two Month Notice and the Act and she has not allowed him to keep this amount.

The Landlord confirmed that the Tenant had agreed that he could keep the damage deposit and pet deposit and that the Tenant had paid her rent in full to the end of September 2011. The Landlord states that he thought the Tenant had also allowed him to keep the one month's rent to compensate him. The Landlord states that he should be allowed to keep the one month's rent and not reimburse the Tenant as the damage to the unit exceeded the deposits the Tenant has allowed him to keep and because the Two Month Notice was not valid and she broke the one year lease by moving out.

Analysis

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

As the Tenant acknowledged that she was away when the Two Month Notice was served, I will accept that it was served on her on July 31, 2011 as stated by the Landlord. The Tenant has confirmed she received it and that she moved out as a result by the end of September as required by the Notice.

The Landlord indicates that the Two Month Notice to End Tenancy is of no effect due to the one year fixed term tenancy agreement and because he cancelled it. The Act and Policy do not allow a Landlord to withdraw a Notice unless there is consent of the Tenant. Residential Tenancy Policy Guideline 11, Amendment and Withdrawal of Notices, states:

11. Amendment and Withdrawal of Notices

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

I find that the Tenant did not consent to the Landlord's request to withdraw the Two Month Notice. I find that the Two Month Notice was served on the Tenant, that it is a valid Notice, and that the Tenant did not apply for dispute resolution of the Notice, but rather she accepted the Notice and moved out. The Notice is not invalidated by the fact that there is a fixed term tenancy. The Landlord did break the fixed term tenancy agreement by serving the Notice. As the Two Month Notice was served and was in effect, the Tenant moved out according to the date stated on the Notice.

In relation to the Tenant's claim for one month's rent, this is in accordance with the provisions of section 51 (1) of the Act. For the information of the parties section 51 of the Act states:

Tenant's compensation: section 49 notice

51 (1) A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

(1.2) If a tenant referred to in subsection (1) gives notice under section 50 before withholding the amount referred to in that subsection, the landlord must refund that amount.

(2) In addition to the amount payable under subsection (1), if

(a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or

(b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice, the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

As the Tenant has requested the one month's rent in accordance with section 51(1) of the Act, I find that the Tenant is owed one month's rent in the amount of \$1, 150.00.

I order that the Landlord pay \$1,150.00 to the Tenant.

Conclusion

The Landlord's Application is dismissed with leave to reapply.

I find that the Tenant is entitled to a monetary order in the amount of **\$1,150.00**. This order must be served on the Tenant and may be filed in the Provincial Court (Small Claims).

The order accompanies the Tenant's copy of this decision. .

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 01, 2011.

Residential Tenancy Branch