Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord's Application: MNR, MNDC, MNSD, FF
Tenant's Application: MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Tenant for the return of a security deposit plus compensation equal to the amount of the deposit due to the Landlord's alleged failure to return it as required under the Act. The Tenant also applied for compensation for damage or loss under the Act or tenancy agreement and to recover the filing fee for this proceeding.

The Landlord applied for a Monetary Order for unpaid rent and utilities, for compensation for damage or loss under the Act or tenancy agreement, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts. The Landlord filed his application on January 13, 2012 and was required pursuant to s. 59 of the Act to serve it on the Respondent within 3 days or no later than January 16, 2012. The Landlord said he served his Application and Notice of Hearing on the Tenant in person on February 28, 2012 and that due to the death of a close family member, he was unable to serve the documents within the time limits set out under s. 59. However, the Landlord also admitted that his family member passed away at the end of January 2012 and therefore I conclude that this circumstance did not prevent the Landlord for serving his hearing package within the required time limits. Consequently, the Landlord's application is dismissed on the terms set out in the Conclusions.

During the hearing, counsel for the Tenant sought to amend the Tenants application by seeking an overpayment of rent in the amount of $17, 300.00 as well as additional compensation in the amount of $3,250.00. I find however, that it would not be appropriate to allow the Tenant to amend her original application 'to claim an additional $20,000.00 when the Landlord has had no notice of it and no reasonable opportunity to respond. Consequently, I did not allow the Tenant to amend her application to include these claims.

Issue(s) to be Decided

1. Is the Tenant entitled to the return of her security deposit and if so, how much?
2. Is the Tenant entitled to other compensation and if so, how much?

Background and Evidence

This tenancy started on December 15, 2008 and ended on November 29, 2011 when the Tenant moved out. Rent was $1,000.00 per month until October 1, 2010 when the Tenant began paying $900.00 per month. The Tenant paid a security deposit of $500.00 at the beginning of the tenancy. The rental unit is a basement suite in a house. The Landlord also resided in another suite in the rental property.

The Parties agree that at the beginning of the tenancy, the Landlord advised the Tenant that the property would eventually be demolished but that it was unclear when that would occur. The Tenant said the Landlord also advised her at the beginning of the tenancy that when the property had to be demolished, he would give her 2 months rent as compensation which the Landlord denied. The Parties also agree that the Landlord served the Tenant on October 28, 2011 with a 2 Month Notice to End Tenancy for Landlord's Use of Property which alleged that the Landlord had all the permits and approvals needed to demolish the rental property. This Notice was to take effect on December 31, 2011.

The Tenant said the Landlord approached her on November 2, 2011 with a Mutual Agreement to End the Tenancy on December 1, 2011. The Tenant said the Landlord advised her that if he moved out by this date, he would be entitled to compensation and would give her free rent for November 2011 and pay her an additional $900.00 compensation for December 2011. The Tenant said she had some reservations about signing the agreement because the agreement to pay her compensation was not written on the form but the Landlord assured her that once he received his compensation he would pay her $1,400.00 (representing the $900.00 and her $500.00 security deposit). The Landlord denied this and claimed that he and the Tenant signed the Mutual Agreement to End the Tenancy because the Tenant had found other accommodations for December 1, 2011. The Landlord also claimed that he would have been entitled to compensation from the owner of the rental property whether he moved out at the beginning or at the end of December 2011.

The Tenant claimed that at the beginning of the tenancy, the Landlord had already filled out a Condition Inspection Report and asked her to sign it. The Landlord claimed that both he and the Tenant participated in the move in inspection. The Landlord claimed however, that he told the Tenant on November 2, 2011 that he would be doing a move out inspection with the owner of the property on December 5, 2011 and gave the Tenant a Final Notice of Opportunity to Schedule a Condition Inspection for that day. The Landlord said the Tenant told him she did not feel it was necessary and did not attend the move out inspection. The Landlord said he also asked the Tenant on November 29, 2011 when she returned keys to him if she wanted to do a final "walk through" and she declined his offer. The Tenant denied that the Landlord gave her a Final Notice to Schedule a Condition Inspection. The Tenant argued that the Landlord never told her that it was necessary for her to attend a move out inspection and she assumed one was not necessary given that the property was going to be demolished.

The Parties each provided copies of correspondence (by text messaging) between them after the tenancy ended. The Tenant claimed that the text messages show that she continually tried to get the Landlord to meet up with her so he could pay her the $1,400.00 he had agreed to but he kept putting her off. The Tenant said the Landlord then advised her on December 13, 2011 that he had "received a portion of the deposit back" and therefore intended to deduct half of the amount that had been deducted from him ($225.00) from the Tenant's deposit. The Parties agree that the Tenant sent the Landlord her forwarding address by text message on December 13, 2011. The Parties also agree that the Tenant did not give the Landlord written authorization to keep the security deposit and that it has not been returned to her.

Analysis

Section 38(1) of the Act says that a Landlord has 15 days from either the end of the tenancy or the date he receives the Tenant's forwarding address in writing (whichever is later) to either return the Tenant's security deposit or to make an application for dispute resolution to make a claim against it. If the Landlord does not do either one of these things and does not have the Tenant's written authorization to keep the security deposit then pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit.

The Parties agree that the Tenant vacated the rental unit on November 29, 2011 and gave her forwarding address to the Landlord via text message on December 13, 2011. The Landlord claimed he was advised by an Information Officer at the Residential Tenancy Branch that text messaging did not constitute "writing" for the purposes of s. 38(1) of the Act and in reliance on that advice, he did not return the Tenant's deposit. However, the Landlord also claimed in his text messages to the Tenant that he was not returning her security deposit because she left some belongings behind in the rental unit, did not clean up some garbage outside and did not return all copies of her keys. The Landlord further argued that the Tenant had forfeited her right to the return of the security deposit because she did not participate in a move out inspection. Section 36 of the Act says that the right of a tenant to the return of a security deposit is extinguished if the Landlord complied with s. 35(2) of the Act *[2 opportunities for inspection]*, and the Tenant has not participated on either occasion.

I find that there is no merit to the Landlord's argument that text messaging is not a valid form of writing for the purposes of s. 38 of the Act and I specifically note that there is no authority under the Act, Regulations or Policy Guidelines for such an assertion. I also do not give any weight to the Landlord's argument that he kept the security deposit due to deficiencies in the condition of the rental unit and property at the end of the tenancy. The Landlord made no claims for compensation for cleaning or repairs on his application for dispute resolution but instead sought only to recover an alleged amount for unpaid rent and utilities. Furthermore, although the Landlord alleged that the owner

of the rental property deducted amounts from his security deposit due to alleged deficiencies in the rental property at the end of the tenancy, the Tenant submitted a copy of an e-mail dated February 29, 2012 from the owner of the rental property who stated that the Landlord's security deposit was refunded to him in full.

I also find that there is no merit to the Landlord's argument that the Tenant forfeited her right to the return of the security deposit because she did not participate in a move out inspection. The Landlord has the burden of proof on this issue and therefore he must show on a balance of probabilities that he provided the Tenant with 2 different opportunities to participate in a move out inspection, the 2nd opportunity being on a Notice to Schedule a Condition Inspection. This means that if the Landlord's evidence is contradicted by the Tenant, the Landlord will need to provide additional, corroborating evidence to satisfy the burden of proof. The Landlord said on November 2, 2011, he gave the Tenant a Final Notice to Schedule a Condition Inspection for December 5, 2011 which the Tenant denied. Given the contradictory evidence of the Parties and in the absence of any corroborating evidence from the Landlord, I find that the Landlord has not proven that the Tenant was served with this document. Consequently, I find that there is insufficient evidence to conclude that the Landlord complied with s. 36(2) of the Act and s. 17 of the Regulations and as a further consequence I find that the Tenant's right to the return of the security deposit was not forfeited.

In summary, I find that the Landlord received the Tenant's forwarding address in writing on December 13, 2011 but did not return her security deposit of $500.00 and did not have the Tenant's written authorization to keep the security deposit. The Landlord filed an application for dispute resolution on January 13, 2012 to make a claim against the security deposit however, I find that it was not filed within the 15 day time limit required under s. 38(1) of the Act and as indicated above, it was dismissed because the Landlord's failed to serve it within the time limits set out under s. 59 of the Act. As a result, I find that pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit or $1,000.00 to the Tenant with accrued interest of $0.35 (on the original amount).

Section 51 of the Act says that a Tenant who receives a 2 Month Notice to End Tenancy for Landlord's Use of Property is entitled to receive from the Landlord compensation equivalent to one month's rent payable under the tenancy agreement. The Parties agree that the Tenant was served with a 2 Month Notice on October 28, 2011 and that the Tenant did not pay rent for November 2011, the last month of the tenancy. The Tenant argued however, that the Landlord verbally agreed to pay her the equivalent of 2 months compensation. The Landlord denied this and claimed that the Tenant was under the mistaken assumption that a 2 Month Notice meant 2 months of compensation.

During the hearing, counsel for the Tenant argued that a Tenant who received a 2 Month Notice was entitled to compensation equal to 2 months rent. However, when the content of s. 51(1) was explained to her, counsel for the Tenant argued in the alternative that the Tenant was entitled to additional compensation on the basis that the

tenancy agreement was illegal and of no force or effect. In essence, the Tenant claimed that the Landlord had always represented himself as the owner of the rental property when the truth was that he was renting from the owner of the property. The Tenant also claimed that she discovered after the tenancy ended that the Landlord was not supposed to sublet the rental property and that this made her tenancy agreement "illegal" and void. Counsel for the Tenant also argued that because the Tenant was paying more for rent than the Landlord was paying to the owner of the property, the Tenant was entitled to recover ½ of the rent payments she made during the tenancy and ½ of the compensation received by the Landlord ($6,500.00) from the owner for ending his tenancy agreement early. The Tenant argued in the further alternative that the Landlord verbally agreed to pay her compensation equal to 2 months rent.

As stated in the introduction of this Decision, the Tenant made no application for compensation for an overpayment of rent or for ½ of the compensation paid to the Landlord by the owner of the property at the end of the tenancy. However, if the Tenant is arguing that the $900.00 was to be paid to her as her share of the compensation payable to the Landlord by the owner then I find as follows. I find that there is no basis upon which to conclude that the tenancy agreement was invalid; Counsel for the Tenant provided no authority for the assertion that a term prohibiting the Landlord from subletting would render a sub-tenancy agreement invalid and I am not aware of any. Furthermore, the copy of the tenancy agreement between the Landlord and the owner (submitted as evidence by the Tenant) does not prohibit the Landlord from subletting but instead states that the Landlord may sublet with the written consent of the owner. The fact that the Landlord may not have had the written consent of the owner to sublet does not automatically invalidate the tenancy agreement with the Tenant.

In any event, even if the tenancy agreement was invalid as counsel for the Tenant argued (and I specifically find that it was not), counsel for the Tenant provided no authority for the proposition that this alone would have entitled the Tenant to share in the compensation paid to the Landlord by the owner of the property at the end of the tenancy.

The Tenant further argued that her dealings with the Landlord leading up to the end of the tenancy and the correspondence between her and the Landlord after the tenancy ended show that there was an agreement that he would pay her $1,400.00 on or after December 5, 2011. The Tenant said the Landlord advised her on November 2, 2011 that she would be entitled to receive November rent free plus compensation of $900.00 if she agreed to move out by December 1, 2011 which the Landlord denied. The Tenant provided transcripts and the Landlord provided photographs of the same text messaging correspondence between them, the following of which I find significant:

- On December 13, 2011 in response to the Landlord's advice that he would deduct $225.00 from her security deposit, the Tenant wrote, "I've been expecting $1,400.00 as discussed." The Landlord responded, "yes, you paid a deposit of $500."

- Later the same day, the Tenant wrote that she wanted to pick up the money from the Landlord and stated, "I do not trust Canada Post with $1,400.00." The Landlord did not respond to this message but instead replied to another text message.

- On December 27, 2011 the Tenant wrote, "please let me know your new (*physical*) address is so I can get at least the $900.00 that is owed to me for moving out." The Landlord replied by stating that his *mailing address* was still the rental unit address.

- The same day, the Tenant sent two further messages asking the Landlord if he had sent her the $900.00 and if not where it was or what was the hold up. It is only following these 3 messages from the Tenant on December 27, 2011 that the Landlord denied any agreement to compensate the Tenant for more than 1 month's rent.

I am not persuaded by the Landlord's argument that he would have received compensation whether he moved out early or not and that the compensation was for something else (which he claimed was confidential). The Mutual Agreement between the Landlord and owner expressly states that the compensation is in consideration for Landlord agreeing to terminate the Lease on December 5, 2011. I also find that the Tenant's text messages to the Landlord (reproduced above) show that the Tenant made it clear that she had an expectation of receiving $900.00 plus her security deposit "as discussed" and at no time prior to December 27, 2011 did the Landlord suggest that this expectation was unfounded.

Finally, where the evidence of the Parties differed, I preferred the evidence of the Tenant overall as I found the Landlord lacking in credibility on a number of issues. Firstly, I find that the Landlord sought to mislead the DRO at the beginning of the hearing about why he did not serve his hearing package on time. Secondly, I found the Landlord to be evasive on a number of issues. The Landlord claimed a number of times that he was not able to disclose certain information because he was allegedly subject to a confidentiality clause in the Mutual Agreement to End Tenancy between himself and the property owner. However, there is no such clause in that Agreement and no evidence of one in any other agreement. In fact, I find this was likely not the case given that the owner of the rental property disclosed to the Tenant, particulars of the Mutual Agreement to End Tenancy with the Landlord as well as a copy of their tenancy agreement and particulars about the Landlord's security deposit. Thirdly, I find that the Landlord attempted to deceive the Tenant when he told her that he was deducting $225.00 from her security deposit because the property owner had not returned all of his security deposit. For all of the above-noted reasons, I find on a balance of probabilities that the Landlord did agree to give the Tenant free rent for November 2011 plus $900.00 if she agreed to move out by December 1, 2011 instead of December 31,

2011 (as provided for on the 2 Month Notice) so that he could receive compensation of $6,500.00 from the property owner.

Consequently, I find that the Tenant has made out a monetary claim for $1,900.00. I also find that the Tenant is entitled pursuant to s. 72(1) of the Act to recover from the Landlord the $50.00 filing fee she paid for this proceeding.

Conclusion

The Landlord's application to keep the security deposit and to recover the filing fee for this proceeding is dismissed without leave to reapply. The balance of the Landlord's application is dismissed with leave to reapply.

A Monetary Order in the amount of **$1,950.35** has been issued to the Tenant and a copy of it must be served on the Landlord. If the amount is not paid by the Landlord, the Order may be filed in the Provincial (Small Claims) Court of British Columbia 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: March 12, 2012.

Dispute Resolution Officer