Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

MNSD

Introduction

This is an application by the tenant for a monetary order for return of double the security deposit, the interest and the filing fee for the claim.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

Preliminary issue

The landlord testified that the Residential Tenancy Act does not apply to this dispute as the landlord shares the bathroom and kitchen facilities with the tenant.

The landlord testified that she rents rooms in the basement unit. The landlord states her father is in a wheelchair and when he comes to visit, they spend their time in the common areas, such as the kitchen, as it is impossible to transport him up the stairs into her family home. The landlord testified that she also has other items that she stored in the basement.

The tenant testified that she pays rent in the amount of $450.00 and she paid the landlord a security deposit in the amount of $200.00. Filed in evidence is a copy of the tenancy agreement signed by the parties.

The tenant testified the landlord lives on the upper floor of this house and the landlords unit is self contained. The tenant states she does not have access to the landlord's home. The tenant states she lives in the basement suite, which has its own entrance and is self contained.

The tenant states the landlord has used the kitchen on occasion to have a meal with her father. The tenant states the landlord has never cooked in the kitchen in the rental unit.

In this case, I find this rental unit is not the landlord's primary residence. The landlord has her own unit, which is self contained. The tenant does not have access to and does not have to share any facilities with the owner.

Further, the landlord entered into an agreement, in which the tenant pays a monthly rent and paid a security deposit. The agreement also requires the tenant to provide the landlord with 30 days notice to end tenancy. These factors indicate that this is a residential tenancy.

Based on the above facts, I find the parties have entered into a residential tenancy agreement. Therefore, I find I have jurisdiction to proceed with today's hearing.

I also find the tenancy agreement signed by the parties is an attempt to avoid the Act.

Section 5 (1) This Act cannot be avoided

> **5** (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
> (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Issue(s) to be Decided

Has there been a breach of Section 38 of the Residential Tenancy Act by the Landlord?

Background and Evidence

The tenant testified she was evicted from the rental unit without any notice on January 22, 2012. The tenant states she went back to the rental unit on January 27, 2012 and in person, gave the landlord a letter which provided written notice of her forwarding address to return the security deposit to. The tenant did not sign over a portion of the security deposit.

The landlord testified she received the tenants forwarding address in writing on January 27, 2012. The landlord states she did not return the deposit as the tenant did not provide her with thirty days notice of ending tenancy. Therefore, the tenant breached the agreement and the agreement states the tenant will forfeit the security deposit. However, the landlord did confirm the tenant was evicted from the rental unit.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find that the landlord has breach of the Act.

The evidence of the landlord was the tenant forfeited the security deposit as the tenant did not provide thirty days notice to end tenancy as required by the tenancy agreement. As this clause is contrary to the provision of the Residential Tenancy Act, I find it has no force or effect as section 5 (1) does not allow the parties to contract outside the Act.

There was no evidence to show that the tenant had agreed, in writing, that the landlord could retain any portion of the security deposit.

There was also no evidence to show that the landlord had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the tenant, to retain a portion of the security deposit.

The landlord has breached section 38 of the Act. The landlord is in the business of renting and therefore, has a duty to abide by the laws pertaining to Residential Tenancies.

The security deposit is held in trust for the tenant by the landlord. At no time does the landlord have the ability to simply keep the security deposit because they feel they are entitled to it or are justified to keep it.

The landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from a Dispute Resolution Officer, or the written agreement of the tenant. Here the landlord did not have any authority under the Act to keep any portion of the security deposit. Therefore, I find that the landlord is not entitled to retain any portion of the security deposit or interest.

Conclusion

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the landlord pay the tenant the sum of $450.00, comprised of double the security deposit ($400.00) on the original amounts held ($200.00), and the $50.00 fee for filing this Application.

The tenant is given a formal Order in the above terms and the Landlord must be served with a copy of this Order as soon as possible. Should the Landlord fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court 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 08, 2012.

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Residential Tenancy Branch