Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, MNDC, FF

Introduction

This hearing dealt with applications from the landlord and the tenant pursuant to the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of double her security deposit pursuant to section 38; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The landlord's agent (the agent) confirmed that he received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on July 3, 2012. The tenant confirmed that she received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on July 4, 2012. I am satisfied that the above packages and the parties' respective evidence packages were served to one another in accordance with the *Act*.

At the hearing, the agent objected to the tenant's identification of him as the respondent in the tenant's application for dispute resolution. He noted that the residential tenancy agreement for this tenancy was between the tenant and his wife, the sole landlord. Although he and his wife keep the same address and he was identified as her agent on the landlord's application, he maintained that the tenant's application was invalid because it identified an incorrect respondent.

Although I have given the agent's position in this regard careful consideration, I find a number of reasons to accept that the tenant's application is in order and should not be dismissed for a failure to identify the correct respondent. Section 1 of the *Act* defines a landlord as "the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord, (i) permits occupation of the rental unit under a tenancy agreement, or (ii) exercises powers and performs duties under this *Act*, the tenancy agreement." Under this broad definition, the agent operating on behalf of his wife who entered into the tenancy agreement with the tenant as the landlord is also a landlord for the purposes of this *Act* and can be named as a respondent in the tenant's application. In addition, I note that the tenant's application is to obtain a return of her security deposit for this tenancy, amounts that the agent confirmed continue to be withheld from the tenant. The landlord testified that his wife is aware of the tenant's application and has delegated responsibility for representing her at this hearing. Finally, the landlord (and agent) have also applied for authorization to retain the tenant's security deposit. Consequently, the matter of the tenant's security deposit is also properly before me by way of the landlord's own application and not by way solely of the tenant's application challenged by the agent. I accept that the tenant's application is properly before me.

Issues(s) to be Decided

Which of the parties are entitled to the tenant's security deposit? Is the tenant entitled to a monetary award equivalent to the amount of her security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*? Is the landlord entitled to a monetary award for losses and damage arising out of this tenancy? Are either of the parties entitled to recover their filing fees from one another?

Background and Evidence

This periodic tenancy commenced on February 1, 2012. Monthly rent was set at $800.00, payable in advance on the first of each month. The landlord continues to hold the tenant's $400.00 security deposit paid on January 12, 2012.

The tenant entered into written evidence a copy of a note dated April 31, 2012 (a date that does not exist) which she said that she left at the landlord's residence for the agent when she could not locate the landlord or her husband, the agent. This note read as follows:

> *This is to inform you I will be moving out end of May or June 1. I will clean, return keys and get damage deposit when I vacate...*

The agent testified that he did not receive this notice to end this tenancy until he found it in his mailbox by approximately May 6, 2012. He said that the tenant did not mention that she was planning to leave by the end of May 2012, when she paid her May 2012

rent early in May. The tenant said that the landlord and agent were out of the country for much of May 2012. The landlord entered undisputed written evidence that the tenant identified May 31, 2012 as the end date for her tenancy in a May 22, 2012 email to the agent. The parties agreed that the tenant vacated the rental unit by May 31, 2012.

The agent testified that he and the tenant participated in a joint "walk through" of the rental unit. He said that no joint move-in condition inspection report was prepared by the landlord at that time as the rental unit was new when the tenancy began. The tenant denied that this joint walk-through occurred.

The agent testified that the tenant refused his emailed requests to conduct a joint move-out condition inspection of the rental unit. He entered into written evidence copies of the emails that demonstrated his unsuccessful attempt to schedule a joint move-out condition inspection. However, he confirmed that neither he nor the landlord sent the tenant any written request to conduct a joint move-out condition inspection. He said that he conducted his own move-out condition inspection on May 31, 2012, but did not prepare a move-out condition inspection report. He said that he took photographs at that time and subsequently obtained invoices and receipts to demonstrate that the tenant damaged the rental unit by the end of this tenancy. He submitted these photographs and receipts in support of the landlord's claim for a monetary award.

The tenant applied for a monetary award of $800.00 for double her security deposit. She maintained that the landlord had not returned her security deposit within 15 days of receiving her forwarding address in writing. She supplied a copy of her June 4, 2012 registered letter containing her forwarding address. The agent confirmed that he received her registered letter on June 5, 2012.

As noted below, the landlord's application for a monetary award of $2,200.00 included a request for recovery of $800.00 of one month's lost rent due to the tenant's failure to provide adequate notice regarding her intention to end this tenancy. He said that the damage caused by the tenant during this tenancy prevented him from obtaining a tenant for June 2012 until the repairs had been completed. He said that he began advertising the availability of the premises between June 10 and 12, 2012. He testified that a new tenant took occupancy of the premises on July 15, 2012.

Item	Amount
1 Month's Loss of Rent	$800.00
Unclogging of Drain due to Tenant's Alleged Negligence	250.00
General Contracting Repairs	1,064.00
Receipt for Parts/Supplies	86.25
Painting	260.00
Total of Above Items	**$2,460.25**

The landlord's application included a request for reimbursement of $250.00 for the unclogging of a drain that occurred during this tenancy. The remainder of the invoices and receipts in support of the landlord's monetary claim were for expenses incurred at the end of this tenancy:

Analysis - Tenant's Application to Obtain a Return of Double Security Deposit

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant."

In this case, the evidence is that the landlord testified that he received the tenant's forwarding address in writing on June 5, 2012. Therefore the landlord's obligations to return the tenant's security deposit in full commenced that day.

I find that the landlord has not returned the security deposit within 15 days of receipt of the tenant's forwarding address in writing. The landlord did not apply for dispute resolution for authorization to retain the tenant's security deposit until June 29, 2012, well after the expiration of the 15-day time limit for doing so. The agent confirmed that the tenant has not provided her written authorization to retain any portion of her security deposit. Under these circumstances, I find that the tenant is entitled to a monetary

order amounting to double her security deposit with applicable interest calculated on the original amount only. No interest is payable over this period.

Analysis - Landlord's Application

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. Section 45(1) of the *Act* requires a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for June 2012, the tenant would have needed to provide her notice to end this tenancy before May 1, 2012. Section 52 of the *Act* requires that a tenant provide this notice in writing. In accordance with section 90(d) of the *Act*, the tenant's deposit of her written notice to end tenancy in the landlord's mail slot on or about April 30, 2012 would not be deemed received until May 3, 2012. Her notice to end tenancy did not identify a specific date when she was planning to end her tenancy. Under these circumstances, I find that the tenant's failure to provide adequate notice to end her periodic tenancy entitles the landlord to a monetary award for unpaid rent for June 2012.

There is undisputed evidence that the tenants did not pay any rent for June 2012. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

In this case, the landlord was aware by at least May 22, 2012 and likely by May 5, 2012 when the agent confirmed receiving the tenant's handwritten notice to end tenancy that the tenant was planning to end her tenancy by May 31, 2012 or June 1, 2012. The agent testified that he took no efforts to try to re-rent the premises until between June 10 and 12, 2012, once the repairs to the tenant's rental unit had been completed. While he was able to rent the premises to another tenant by July 15, 2012, I am not totally satisfied that the landlord took all necessary steps to mitigate the tenant's loss of rent for June 2012. While some of the delay in locating a new tenant might be attributable to

the condition of the rental unit by the end of this tenancy, the landlord did not commence efforts to re-rent the premises during any portion of May 2012, after the tenant had issued her notice to end this tenancy. Under these circumstances, I find that the landlord has only partially discharged the duty to mitigate the tenant's losses under section 7(2) of the *Act*. As such, I find that the landlord is entitled to recover one-half of the loss of rent for this rental unit for June 2012. This results in a monetary award in the landlord's favour in the amount of $400.00 for the loss of rent for June 2012.

Turning to the landlord's claim for a monetary award for damage arising out of this tenancy, I note that when disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful. Although I recognize that the agent saw no need to prepare a joint move-in condition inspection report because he claimed that the rental unit was new, the *Act* still requires the preparation of a move-in condition inspection report by the landlord. I also note that the tenant testified that no such joint move-in condition inspection occurred.

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy.

The landlord's email evidence does not satisfy the requirement that the landlord provide two opportunities for inspection of the rental premises at the end of a tenancy. The agent testified that he conducted a move-out condition inspection on May 31, 2012, after the tenant vacated the rental unit. However, as he did not prepare a move-out condition inspection report as required by the *Act,* he could not forward a copy of that report to the tenant.

Section 36(1) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

> ***36*** *(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit...for damage to residential property is extinguished if the landlord*
>
> > *(a) does not comply with section 35 (2) [2 opportunities for inspection],*

> *(b) having complied with section 35 (2), does not participate on either occasion, or*
>
> *(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...*

Similar provisions are in section 24 of the *Act* extinguishing a landlord's right to claim against a security deposit if the landlord does not hold a joint move-in condition inspection or provide a move-in condition inspection report.

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-in and move-out condition inspection reports, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is limited. However, section 37(2) of the *Act* requires a tenant to "leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear."

The parties entered conflicting evidence regarding the condition of the rental unit when this tenancy ended. The landlord provided photographs and invoices of repairs conducted after the tenancy ended. The tenant disputed the landlord's claim that damage arose out of this tenancy with the exception of a shower head that she said likely worsened during the course of her tenancy. The tenant maintained that some of the items in the rental unit never did work properly during her tenancy. Without move-in and move-out condition inspection reports, it is difficult to compare the condition of the premises between the beginning and end of this tenancy.

Based on the oral, written and photographic evidence of the parties, I find on a balance of probabilities that the tenant did not comply with the requirement under section 37(2)(a) of the *Act* to leave the rental unit "reasonably clean and undamaged" as some repair was likely required by the landlord after the tenant vacated the rental unit. The tenant agreed that the damage to the shower head worsened during her tenancy and did not dispute the agent's $220.00 estimate for the amount of that repair, included in the landlord's invoices. For that reason, I find that the landlord is entitled to a monetary award of $220.00 for the repair of damage to the shower head in this rental unit and a further $180.00 in damage arising out of this tenancy.

As both parties were successful in their applications, I make no order with respect to the recovery of their respective filing fees for their applications.

Conclusion

I issue a monetary award in the tenant's favour in the amount of $800.00. This award includes the tenant's recovery of her original $400.00 security deposit and a monetary award of $400.00 for the landlord's failure to comply with the provisions of section 38 of the *Act*.

I issue a monetary award in the landlord's favour in the amount of $800.00. This award enables the landlord to recover $400.00 in loss of rent, $220.00 for the repair of the shower head in the rental unit, and $180.00 in additional damage arising out of this tenancy.

Both parties bear the costs of their filing fees for their applications.

As the monetary awards issued in the parties' favour offset one another, I issue no monetary Orders to either party as a result of their applications.

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: September 10, 2012

Residential Tenancy Branch