



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes: MNDC, MNSD,FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant for a monetary order. The tenant is seeking two month's rent as compensation under section 51(2) of the Act, The tenant is also seeking compensation under section 38 of the Act for a refund of double the security deposit, half of which had already been repaid, and reimbursement for the value of the tenant's possessions not returned by the landlord.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

Issue(s) to be Decided

Is the tenant entitled to the equivalent of two months compensation under section 51(2)?

Is the tenant entitled to a refund of double the security deposit?

Is the tenant entitled to damages for items not returned by the landlord?

Preliminary Matter: Respondents Named

The tenant's application had named as respondent, a realty corporation, identified as agent of the landlord. However, at the outset of the hearing, it was established that this corporation was no longer involved in the tenancy in any respect. Accordingly, the tenant's style of cause was amended to remove the name of this corporation as a respondent..

In addition, the tenant had also failed to include, as respondent, one of the co-owners, who had signed the tenancy agreement. The tenant testified that this was an oversight.

Accordingly, the tenant's style of cause was amended to add the name of this landlord as a respondent.

The co-owner in question did attend the hearing, despite not receiving his own copy of the Notice of Hearing and tenant's application.

Preliminary Matter: Jurisdiction

The parties testified that, when the tenancy began, in January 2011, it involved the rental of a room to the tenant, along with access to common areas. The use of the kitchen and bathrooms were shared between the tenant and other residents and also shared by the residing landlords who are owners of the property.

Section 4(c) of the Residential Tenancy Act states that the Act does not apply to the following: (c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation, (my emphasis)

At the outset of the hearing, the respondents argued that because they were the owners of the residence and lived there with the tenant occupying a portion of the unit and sharing the kitchen and bathrooms, this tenancy was not governed by the Residential Tenancy Act.

Given the above, I find that when this tenancy relationship started, it was not considered to be a tenancy relationship that fell under the parameters of the Act because the landlord resided in the building and shared the kitchen and bathroom at that time. Under these circumstances, I would therefore lack any statutory jurisdiction to hear or consider this application.

However, at some point during the tenant's occupation of the unit, the owners relocated and no longer resided within the rental premises as occupants, although they did reserve space in one of the rooms for their use. Therefore, the landlords no longer shared the kitchen and bathrooms with the tenants. The date that the landlords gave up their occupancy at the dispute address and relinquished it as their primary residence, was not firmly established during the hearing. That being said, all parties agreed that, by the time the landlord issued the Two Month Notice to End Tenancy for Landlord's Use, the landlord was no longer in residence and lived at another address.

For the purpose of determining the question of jurisdiction, I must consider whether or not the original contract, that entailed sharing the kitchen and bathrooms with the owner, still remained in force for the entire duration of the tenancy, or whether altering that particular term changed the tenancy agreement to the extent that the original agreement did not survive the change in circumstances created by the landlord's relocation, and therefore necessitated a new agreement.

I find that section 14(1) of the Act states that a tenancy agreement can be amended to add, remove or change a term, other than a standard term, only if both parties agree.

In this instance, I find that the landlord's relocation served to change the fundamental nature of this particular tenancy. Section 4 of the Act clearly distinguishes a tenancy where kitchen and bathrooms are shared with the owner, as completely distinct from a tenancy in which the kitchen and bathrooms are *not* shared with the owner of the building.

For this reason, I find that the term in the tenancy agreement requiring the sharing of the kitchen and bathroom with the owners, must be considered a material term of the contract.

A *material term* is a term that the parties had both agreed was so important that the most trivial breach of that term would give the other party the right to end the agreement. The question of whether or not a term is material goes to the root of the contract and must be determined in every case based on the facts and circumstances surrounding the creation of the tenancy agreement in question.

A violation or unilateral alteration, of a material term in the contract by one party would entitle the other party to terminate the agreement under section 47, (by the landlord), or section 45(3), (by the tenant). I find that a tenancy agreement will not survive a change in, or elimination of, a material term because it significantly alters the basic nature of the contract.

Given the above, I find that there was a change of a material term of the original tenancy agreement, when the accommodation converted from sharing the kitchen and bathroom with the owners of the rooming house to a different kind of accommodation that did not entail having the owners living on site. I find that there is no way that the tenancy original agreement could still be seen to apply to these parties under the circumstance.

I find that, when the tenant continued to rent the room, and the landlords continued to accept the rent, after the landlords had moved, the parties had clearly consented to a new tenancy being formed with all of the same terms, except for the material term requiring the tenant to share the kitchen and bathrooms with the owner.

I find that the establishment of this new tenancy, which is governed by the Act, was also confirmed by the landlord's action in issuing a Two Month Notice to End Tenancy for Landlord's Use under section 49 of the Act.

Accordingly, I find that I have statutory jurisdiction to hear and determine this dispute.

Background and Evidence

The tenant's tenancy began in June 2011. The rent was \$650.00 and a security deposit of \$325.00 was paid. The tenancy was terminated for landlord's use effective March 30, 2013, at which time the tenant moved out and gave the landlord a written forwarding address. The security deposit of \$325.00 was refunded by the landlord on April 30, 2013.

The tenant testified that the landlord failed to return the tenant's security deposit within the required 15 days under the Act and the tenant is therefore claiming an additional \$325.00 refund.

The landlord acknowledged that the deposit was returned beyond the 15-day deadline.

The tenant testified that the landlord issued a Two Month Notice to End Tenancy for Landlord's Use effective March 31, 2013. The tenant testified that the equivalent of one month free rent was granted in compensation for the Two Month Notice to End Tenancy for Landlord's Use.

The Two Month Notice indicated that the landlord required the use of the rental unit for a close family member. The tenant testified that he never disputed the Notice and moved out in compliance with the Notice. However, according to the tenant, the landlord did not utilize the rental unit for the stated purpose once the tenant had vacated, and, in fact, the landlord sought a new tenant.

The tenant testified that this landlord is now obligated under the Act to compensate them the equivalent of two months' rent in the amount of \$1,300.00, because the landlord failed to use the rental unit for the purpose stated for ending the tenancy.

The landlord acknowledged that their intended use for the unit was changed due to circumstances that they had not foreseen.

In regard to the tenant's claim for his possessions, the tenant testified that he had left certain furnishings in the unit, some of which have since been returned by the landlord. However, the tenant discovered that the landlord had discarded his dresser, which he valued at \$150.00. The tenant is claiming compensation.

The landlord acknowledged that the dresser was left and stated that it was stored for approximately two months, but the tenant advised the landlord to get rid of it as he could not pick it up. The landlord testified that the dresser was discarded pursuant to the tenant's instructions.

Analysis

Security Deposit

With respect to the return of the tenant's security deposit, I find that the Act states the landlord can only retain a deposit if the tenant agrees to this in writing at the end of the tenancy. If the permission is not in written form and signed by the tenant, then the landlord has no right to keep the deposit.

However, a landlord may be able to keep the deposit to satisfy a liability or obligation of the tenant if, after the end of the tenancy, the landlord makes an application for dispute resolution and successfully obtains a monetary order to retain the amount from the deposit to compensate the landlord for proven damages or losses caused by the tenant.

The landlord must either make the application or refund the security deposit within 15 days after the tenancy had ended and the receipt of a written forwarding address.

In this instance, I find that the landlord received the tenant's written forwarding address on March 30, 2013 and although the landlord had returned the tenant's \$325.00 security deposit on April 30, 2013, this occurred beyond the statutory 15-day deadline under the Act. I find that the deposit was not returned in compliance with the Act and the tenant is therefore entitled to further compensation of \$325.00.

Two Month Notice to End Tenancy for Landlord's Use

The tenant is claiming compensation under section 51(2) of the Act. .

Section 49(3) of the Act provides that a landlord may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

When a Two-Month Notice to End Tenancy for Landlord's Use has been issued under section 49 and the landlord fails to utilize the rental unit for the purpose stated in the Notice, then section 51(2) of the Act imposes additional compensation to the tenant.

Section 51(2) states that, in addition to the one month compensation for the final month of the tenancy 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, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

In this instance, I find that the landlord failed to utilize the rental unit for the purpose stated in the 2-Month Notice, to end the tenancy so that a close family member could reside in the unit.

I find that the landlord's family member did not occupy the rental unit as stated in the Notice. Accordingly, I find that under the Act the tenant must be compensated \$1,300.00, which is the equivalent of 2 month's rent.

Return of Tenant's Property

In regard to the tenant's monetary claim for the loss of the dresser, I accept the landlord's testimony that they were following the tenant's instructions when they discarded the dresser.

In any case, section 25 (2)(a) of the Act permits a landlord to dispose of property abandoned by the tenant in the unit in a commercially reasonable manner if the landlord reasonably believes that the property has a total market value of less than \$500,

Accordingly, I find that the tenant's \$150.00 claim for the loss of the dresser has no merit and must be dismissed.

Based on the testimony and evidence, I find that the tenant is entitled to total monetary compensation in the amount of \$1,675.00 comprised of \$325.00 for double the security deposit, \$1,300.00 for compensation under section 51(2) of the Act and the \$50.00 cost of the application.

I hereby issue a monetary order in the amount of \$1,675.00 in favour of the tenant. This Order is final and binding and must be served on the landlord in person or by registered mail. If unpaid, it may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The remainder of the tenant's application is dismissed without leave.

Conclusion

The tenant is partly successful in the application and is granted an additional security deposit refund and compensation under section 51(2) equivalent to two month's rent as the landlord failed to use the rental unit for the stated purpose after issuing a Two Month Notice to End Tenancy for Landlord's Use.

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: July 25, 2013

Residential Tenancy Branch