Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking a monetary order.

The hearing was conducted via teleconference and was attended by the landlord and the tenant's agent.

The landlord testified the tenant was served with the notice of hearing documents and this Application for Dispute Resolution, pursuant to Section 59(3) of the *Residential Tenancy Act (Act)* personally on or before July 19, 2013 in accordance with Section 89. The landlord testified that he saw her in the community outside of a coffee shop and he served her with the hearing documents at that time.

The landlord further submitted that he served the tenant with his evidence on October 10, 2013 via registered mail. The tenant's agent submits that the tenant did not receive the notice of hearing documents at all from the landlord. The agent submits that when she received the landlord's evidence on October 16, 2013 she contacted the Residential Tenancy Branch to get the call in information for the hearing. The tenant's agent sought an adjournment for the tenant to prepare.

With permission of the parties I reviewed, online, the tracking information from Canada Post regarding the service of the landlord's evidence. Canada Posts that the package was accepted by Canada Post on October 10, 2013; that a notification was provided to the tenant on October 11, 2013 and a final notice provided to the tenant on October 16, 2013.

In the absence of the tenant and the tenant's agent having any direct knowledge of the landlord's service of the tenant in July 2013 of the hearing documents, I find the

landlord's testimony is not directly disputed and accept the tenant was served with notice of hearing documents on or before July 19, 2013.

As to the landlord's evidence, Residential Tenancy Branch Rule of Procedure #3.5 stipulates that evidence not served at the time of the Application must be served to the other party no later than 5 days prior to the start of the hearing. Allowing 5 days for mail delivery, pursuant to Section 90 of the *Act*, I find the landlord serving his evidence on October 10, 2013 allowed delivery to have occurred by October 15, 2013 and as such, in accordance with Rule 3.5

While I accept the tenant did not actually receive the landlord's evidence until October 16, 2013 I note that Canada Post had originally informed the tenant the evidence package was available for pickup on October 11, 2013 and it was the tenant who failed to pick up the package prior to the 5 day deadline for service.

Based on the above, I find that the tenant has been sufficiently served with the documents pursuant to the *Act*.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent; for damage to the rental unit; for compensation for damage or losses; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 37, 38, 67, and 72 of the *Act.*

Background and Evidence

The parties agree the tenancy began on July 1, 2011 as 1 year fixed term tenancy scheduled to end on June 30, 2012 for the monthly rent of $925.00 due on the 1st of each month with a security deposit of $462.50 paid.

The tenant submits she provided the landlord with her forwarding address on July 2, 2013. The landlord testified that he received the tenant's forwarding address in writing prior to the end of June 2013. The landlord submitted his Application for Dispute Resolution seeking to compensation and to retain the security deposit on July 16, 2013.

The landlord submits the tenant failed to vacate the rental unit by June 30, 2012 and as such the landlord did not get possession back of the rental unit until July 2, 2012. The

landlord submits that the tenant's boyfriend had still been in the unit as late as 6:00 p.m. on July 2, 2012.

The landlord submits that as a result the tenant who was intending to move into the rental unit could not do so until after the landlord had the rental unit cleaned. The landlord put the new tenant up in a local hotel until the unit was ready on July 4, 2012 at a cost of $372.50. The landlord also prorated the new tenant's rent for July 2012 in the equivalent of $35.00 per day for three days for a total of $105.00, based on the new tenant's rent of $1,050.00 per month. The landlord provided a receipt from the new tenant in the amount of $477.50.

The landlord testified that the rental unit required cleaning and a replacement carpet because of pet urine at a cost of $500.00. However the landlord did not provide copies of move in or move out Condition Inspection Reports. The tenant's agent submits that the landlord did not complete either a move in or move out inspection.

The tenant's agent testified that the tenant indicated that the landlord was not being truthful and other than stating that the tenant had indicated to him that she had vacated the rental unit by June 30, 2013 but could not answer any specific questions as to the date that the tenant and/or her boyfriend removed their belongings; cleaned the rental unit; or returned possession to the landlord.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Section 37 of the *Act* requires a tenant who is vacating a rental unit to leave the unit no later than 1 p.m. on the day the tenancy ends and to leave it reasonably clean, and undamaged except for reasonable wear and tear, and give the landlord all keys or other means of access that are in the possession and control of the tenant and that allow access to and within the residential property.

As the tenant's agent had no direct knowledge and could provide no details as to the actual events at the end of the tenancy, I accept the landlord's testimony as undisputed and find the tenant failed to vacate the rental unit in accordance with the requirements of the tenancy agreement and the *Act*.

As a result, I find the landlord suffered a loss incurred by having to put up his new tenants in a hotel and a loss of a per diem amount of rent for the period of overholding that occurred because the tenant failed to return possession in a timely manner. However, while I acknowledge the landlord granted a per diem reduction to the new tenants based on their current rent I find the tenant can only be held accountable for a per diem rate based on her own rent amount of $925.00 or $30.00 per day for a total of $90.00 plus the cost of the hotel stay.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

Despite the tenants' submission that because the landlord had extinguished his right to claim against the deposit for damage to the rental unit they are entitled to double the amount of the security deposit, I find no such entitlement exists.

As per Section 38(1) the landlord **must** either return the deposit or make an application for dispute resolution claiming against the security deposit. Section 38(6) states that if the landlord does not comply with Section 38(1) **then** the landlord must pay the tenant double the amount of the security deposit.

Section 38(2) stipulates that Section 38(1) does not apply if the tenant has extinguished their right to claim the deposit under Sections 24 or 36. Section 38(3) addresses the landlord's right to retain any amounts previously awarded by an arbitrator.

Section 38(4) stipulates that a landlord may retain from a deposit either any amounts agreed upon by the tenant or after the end of the tenancy are ordered by an arbitrator. Section 38(5) states that if the landlord has extinguished their right to claim against the deposit for damage they cannot retain any amount agreed upon by the tenant. There is no reference in 38(5) to a similar condition to orders made by an arbitrator.

Section 38(6) is not contingent, in any way, on Sections 24 or 36 and the landlord's extinguishment of their right to claim against the deposits. There is nothing in Section

38 that requires the landlord to double the amount of the deposit if they have complied with Section 38(1) regardless of the extinguishment of their right to claim against the deposit.

However, as the landlord testified he received the tenant's forwarding address before June 30, 2013 I find the latest he could either return the deposit in full or file an Application for Dispute Resolution to claim against the deposit would have been July 15, 2013.

As the landlord filed his Application on July 16, 2013 I find the landlord has failed to comply with the requirement under Section 38(1) and the tenant is entitled to double the deposit in accordance with Section 38(6).

Conclusion

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **$512.50** comprised of $372.50 costs to provide alternate accommodation to the new tenant; $90.00 for overholding of this tenant and the $50.00 fee paid by the landlord for this application.

I order the tenant is entitled to monetary compensation pursuant to Section 38(6) in the amount of **$925.00**. I order the tenant may deduct this amount from the amount of $512.50 owed to the landlord in partial satisfaction. I grant a monetary order to the tenant in the amount of **$412.50**.

This order must be served on the landlord. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) and be 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: October 21, 2013

Residential Tenancy Branch