Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes: MNSD, MNDC

Introduction

This Dispute Resolution hearing was convened to deal with an application by the tenant for a monetary order for the refund of double the security deposit.

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.

Preliminary Matter: Evidence & Adjournment

The tenant testified that she received late evidence from the landlord on October 20, 2013, to which she hoped to respond. This evidence consisted of copies of emails between the parties in which the tenant stated that she would forfeit her security deposit to the landlord to cover unpaid rent. The tenant pointed out that there were subsequent emails in which the consent to allow the landlord to keep her security deposit was rescinded by the tenant. The tenant stated that she would have submitted copies of the additional emails to counter the landlord's evidence. However, according to the tenant, there was not sufficient time for her to serve her response to the landlord's evidence and still comply with the mandatory service deadlines for evidence under the Act.

For this reason, the tenant requested an adjournment at the outset of the hearing to afford her an opportunity to submit the evidence refuting the landlord's evidence.

1.Applicant's Evidence

> Pursuant to the Residential Tenancy Rules of Procedure, Rule 3.1, all evidence must be served by the applicant on both the respondent and the Residential Tenancy Branch. Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the

dispute resolution proceeding as those days are defined the “Definitions” part of the Rules of Procedure.

b) If the time between the filing of the application and the date of the dispute resolution proceeding does not allow the five (5) day requirement of a) to be met, then the evidence must be received by the Residential Tenancy Branch and served on the respondent *at least two (2) days before the dispute resolution proceeding*. (My emphasis)

I find that the tenant made the application on July 25, 2013, and served the hearing package within 3 days of filing the application. I find that the package was served well before the hearing and should have included any evidence upon which the applicant tenant intended to rely. I find that the tenant’s evidence consisted of a copy of the tenancy agreement which was served on the respondent and submitted into evidence at that time.

2. Respondent’s Evidence

In regard to the Respondent’s obligations, I find that Rule 4 of the Residential Tenancy rules of Procedure states that copies of all available documents, photographs, video or audio tape evidence the respondent intends to rely upon as evidence at the dispute resolution proceeding must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute resolution proceeding.

In this instance, I find that the respondent served evidence consisting of a copy of some email communications between the parties dated January 23, 2013. I find that the evidence package arrived at Residential Tenancy Branch on October 17, 2013 and was confirmed as received by the tenant on October 20, 2013. Accordingly, I find that this evidence was received 10 days prior to the hearing date and met the 5-day deadline under the Rules and is not considered to be “late” evidence under the Rules.

3. Applicant’s Subsequent (Rebuttal) Evidence

The applicant tenant’s position is that, having received the respondent/landlord’s evidence on October 20, 2013, she did not have enough time to send in rebuttal evidence and have it received by the respondent/landlord and the Residential Tenancy Branch *at least* 5 days prior to the hearing. The tenant testified that this evidence would have consisted of copies of subsequent emails showing that she did not agree to the landlord keeping the security deposit.

The "*Definitions*" portion of the Rules of Procedure states that when the number of days is qualified by the term "*at least*" *then the first and last days must be excluded,* and if served on a *business*, it must be served on the previous business day.

Weekends or holidays are excluded in the calculation of days for evidence being served on the Residential Tenancy Branch.

I note that section 90 of the Act provides direction for when a document is deemed to have been served, as follows:

> (a) if given or served by mail, on the 5th day after it is mailed;
>
> (b) if given or served by fax, on the 3rd day after it is faxed;
>
> (c) if given or served by attaching a copy of the document to a door or other place, on the 3rd day after it is attached;
>
> (d) if given or served by leaving a copy of the document in a mail box or mail slot, on the 3rd day after it is left.
> (my emphasis)

I find that, upon receiving the respondent/landlord's evidence on October 20, 2013, had the tenant submitted her rebuttal evidence by mailing it on October 21, 2013, the next day, it would be deemed to have been received by the on October 26, 2013. I find that this would have been 3 days prior to the hearing, not counting that mailing day of October 26 and the hearing day of October 30, 2013. I find that this meets the evidence deadline of "*at least two days prior to the hearing*" specified under rule.

In any case, the tenant did not submit nor serve the rebuttal evidence at all, even beyond the deadline for service.

I find that the tenant had an opportunity at any time prior to the hearing to submit all copies of relevant emails that she felt should be in evidence, including the ones under dispute.

I note that the *Landlord and Tenant Fact Sheet* contained in the hearing package makes it clear that "*copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by RTB as soon as possible*.." (My emphasis)

The information sheet given to applicants states that, at the time the application for the hearing is made, the relevant evidence should be served as well. I find

that all of this evidentiary material was known by the tenant and under the tenant's control when she filed the application and could have been included as evidence along with the initial mailing of the application.

Given the above, I accept that the respondent landlord's evidence was properly served within the deadlines and that it was received by Residential Tenancy Branch on October 17, 2013 and by the tenant on October 20, 2013.

4. Applicant's Request for Adjournment

With respect to the tenant's request for an adjournment to submit additional evidence, I find that the Rules of Procedure state that, if copies of the evidence are not served on the respondent or the applicant as required, and if the evidence is relevant, the Dispute Resolution Officer must decide whether or not accepting the evidence would prejudice the other party, or would violate the principles of natural justice. The other party must be given an opportunity to review the unseen evidence before the application can be heard. This would necessitate a determination about whether or not the matter should be adjourned to a future date to allow service of the evidence.

I have already found that the evidence from the landlord was properly served with the statutory deadlines. However, I do accept the tenant's allegation that it may not have been submitted by the landlord "*as soon as possible*".

If copies of the applicant's evidence are not received by the Residential Tenancy Branch or served on the respondent as required, the Dispute Resolution Officer must apply Rule 11.6 which deals with the consideration of evidence not provided to the other party or the Residential Tenancy Branch in advance. This rule permits the Dispute Resolution Officer to adjourn a dispute resolution proceeding to receive evidence that a party states was submitted to the Residential Tenancy Branch but was not received by the Dispute Resolution Officer before the dispute resolution proceeding.

Rule 6.1 of the Rules of Procedure states that the Residential Tenancy Branch will reschedule a dispute resolution proceeding if "*written consent from both the applicant and the respondent is received by the Residential Tenancy Branch before noon at least three (3) business days before the scheduled date for the dispute resolution proceeding*."

In this instance, I find that the tenant did not ask the other party for an adjournment nor did the tenant submit a request for an adjournment in advance.

In some circumstances proceedings can be adjourned after the hearing has commenced. However, there is mandatory requirement that the arbitrator, must look at the oral or written submissions of the parties; and must consider whether the purpose for which the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1 [objective and purpose] and whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether a party had sufficient notice of the dispute resolution proceeding. The arbitrator must also weigh the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and assess the possible prejudice to each party.

I find that the applicant did not submit complete evidence that was available at the time of her application. I further find that the applicant tenant also later declined to submit the rebuttal evidence, even though she felt it would be relevant, under the mistaken belief that it would arrive later than the Rules of Procedure permitted. I find insufficient support to prove that that the applicant/tenant did not have a fair opportunity to make her evidentiary submissions. Accordingly, I found that there was not adequate justification under the Act and Rules of Procedure to support imposing an adjournment on the other party.

Given the above, the tenant's request for adjournment to submit additional evidence was denied. However, in denying the tenant's request for adjournment, I did permit the tenant to give verbal testimony about the content of the later emails she would have submitted into evidence in rebuttal to the landlord's evidence.

Issues to be Decided

Is the tenant entitled to the return of the security deposit pursuant to section 38 of the Act?

Background and Evidence

The tenancy began on September 1, 2012 as a one-year fixed term and a copy of the tenancy agreement was submitted into evidence showing rent at $1,100.00. A security deposit of $550.00 was paid. The tenancy was terminated early by the tenant effective February 10, 2013.

The tenant testified that the landlord failed to refund the security deposit, despite requests to do so and the tenant is seeking a refund of double the security deposit, in the amount of $1,100.00.

The landlord argued that the tenant did not provide a forwarding address at any time prior to making the application. The landlord also pointed out that, the tenant provided written permission for the landlord to keep the security deposit. The landlord made reference to a copy of a January 23, 2013 email in evidence, in which the tenant specifically states:

> *"In order to fund the move I am not going to pay January rent, it is the only way I can move, and again, I feel awful about it. I will forfeit my damage deposit in hopes that it shows I do care about breaking the lease and not paying the full month's rent. I intend to be out of the property by February 10, 2013.*"
>
> (Reproduced as written)

The landlord testified that the tenant did not pay rent for January or February 2013. The landlord pointed out that, despite this, they gave the tenant a good reference to help her find another place.

The tenant acknowledged that she never provided the landlord with a written forwarding address at the end of the tenancy.

The tenant admitted that she did send the January 23, 2013 email, but argued that later emails to the landlord further clarified that the tenant was *not* granting the landlord permission to retain the security deposit.

The tenant also stated that she later found out that the rental property was in foreclosure and that her landlord was no longer the owner of the property. The tenant testified that, some of her personal possessions were still left in the residence after the effective date she gave terminating the tenancy, effective February 10, 2013 and when she returned to remove the items, the property had been secured with a new lock by the bank and she had to make special arrangements for access.

Analysis

With respect to the return of the security deposits and pet damage deposits, I find that section 38 of the Act requires that, within 15 days after the tenancy ends and the landlord receives the tenant's forwarding address in writing, the landlord must either:

> a) repay the security deposit or pet damage deposit to the tenant with interest or;

b) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

However, section 38(4) of the Act states:

> *A landlord may retain an amount from a security deposit or a pet damage deposit if,*
>
> > *(a) 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, or*
> >
> > *(b) after the end of the tenancy, the director orders that the landlord may retain the amount*.

In this instance both parties acknowledged that the tenant did not provide a written forwarding address and also had sent a communication that appears to be signing her security deposit over to the landlord. The tenant has taken the position that the apparent consent was later rescinded. Although I do not doubt that there were further email exchanges between these two parties, I still find that the mail sent on January 23, 2013 effectively granted the landlord permission to retain the deposit in partial satisfaction of rental arrears owed for January and part of February 2013. I find that the tenant is bound by the written permission she gave allowing the landlord to retain the $550.00 security deposit.

Moreover, even without this emailed permission, I find that the landlord would have no obligation to refund the deposit until a written forwarding address was sent.

Based on the evidence before me, I have determined that the tenant's application seeking a monetary order for the security deposit has no merit. I hereby dismiss the tenant's application without leave.

Conclusion

The tenant is not successful in the application as the security deposit was already surrendered to the landlord in writing and the tenant's claim is dismissed.

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 30, 2013

Residential Tenancy Branch