



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNSD, MNR, FF

Introduction

The hearing was convened to deal with an application by the tenant for the return of the security deposit under the Act. The tenant was also seeking reimbursement for the \$50.00 fee paid for this application.

This Dispute Resolution hearing was also convened to deal with a cross application by the landlord for a monetary claim of \$6,793.35, for rent owed, loss of rent, compensation for additional occupants and the tenant's failure to comply with the tenancy agreement during the tenancy.

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 testimony and relevant evidence that was properly served.

Only the evidence and testimony relevant and material to the issues under dispute and the findings in this matter are described in this decision.

Issues to be Decided for the Tenant's Application

Is the tenant entitled to return of double the security deposit under the Act?

Issues to be Decided for the Landlord's Application

Is the landlord entitled to compensation under section 67 of the *Act* for rent owed, loss of rent and other damages?

Background and Evidence

The burden of proof is on the tenant to establish that the deposit was paid and not refunded. The landlord has the burden of proof to show that compensation for rent, damages and loss was warranted and supported by the evidence submitted.

Submitted into evidence by the tenant was a copy of the tenancy agreement, a copy of the "*Moving Out Notice*" dated April 29, 2013, stating the tenant would be moving out on May 31, 2013, a copy of the tenant's written forwarding address requesting return of the security deposit, dated July 9, 2013 and an invoice from the moving company confirming that the tenant's possessions were moved from the unit on June 10, 2013.

Submitted into evidence by the landlord were a written statement of facts and details of the landlord's monetary claims, a copy of the tenancy agreement, with specific sections highlighted and a copy of the tenant's April 29, 2013 notice to move on May 31, 2013.

The tenancy began on November 15, 2011. The rent was \$550.00 and a security deposit of \$275.00 had been paid.

The tenant testified that, although the forwarding address was sent to the landlord on July 9, 2013, the landlord had not returned the security deposit within fifteen days. In fact, the landlord has not returned the deposit to date. The tenant feels entitled to a refund of double the deposit, pursuant to the provisions in section 38 of the Act.

The tenant testified that he was asked to move by the landlord and agreed to vacate the rental unit, as he was told that the unit was not permitted to be rented as a legal suite by the municipality. The tenant admitted that, although he agreed to vacate by May 31, 2013, he over-held the unit leaving possessions in the suite until June 10, 2013. According to the tenant, he did so with the landlord's consent as he was having surgery. The tenant admitted that he did not pay any rent for the month of June 2013.

The tenant had submitted evidence including a copy of the written Notice to End Tenancy and the invoice from the movers for the move on June 10, 2013.

The landlord testified that the tenant remained in the unit until June 10, 2013 without paying any rent for the month of June and, as a result, the landlord lost rent of \$550.00 for the entire month of June 2013. The landlord testified that they did attempt to rent the unit for June 2013 and advertised the vacancy immediately. No evidence was submitted to confirm this testimony. However, the landlord is claiming the \$550.00 in compensation for the month.

The tenant agreed that he did owe rent for the 9-day over-holding period from July 1 to July 10, 2013. The tenant disagreed with the landlord's claim of losses for the entire

month of June 2013. The tenant pointed out that the municipality had determined that the rental unit was not a legal suite and that was the basis for his agreeing to vacate the unit. The tenant's position is that there was no loss incurred by the landlord as the unit was supposedly not a legal suite and could not be rented as such.

The landlord argued that they could have re-rented the unit for June 2013 because the municipality had, by that time, authorized the suite to be rented. No copy of this municipal approval was in evidence. The landlord said a loss of rent did occur.

In addition to the claim for rent, and loss of rent, the landlord is also seeking further compensation based on a term in the tenancy agreement. According to the landlord, the tenant permitted another occupant to move in and reside in the rental unit without following the terms of the tenancy agreement which was a clear violation of the contract. The landlord testified that numerous terms in the tenancy agreement limited occupants strictly to the tenant who signed the agreement. The amount of rent varied, according to the number of occupants. The landlord pointed out that the agreement states:

"Tenants: Exclusively Only The Tenants Named Hereunder. No Exceptions."

The landlord pointed out that the agreement also has a clause that states:

"The accommodation rented is strictly only for the above mentioned tenants. The tenant shall not allow any person to stay in the rented accommodation without the written approval and the rent adjustment made by the landlord and prepaid in advance. ANY PERSON STAYING MORE THAN TWO CONSECUTIVE NIGHT OR FOUR NIGHTS PER MONTH WILL BE DEEMED AS STAYING LONGER THAN THE PERMITTED TIME. THE TENANT AGREES TO COMPENSATE THE LANDLORD FOR THE VISITOR MINIMUM AT \$25.00 PER NIGHT OR \$100.00 Per week whichever is greater."

The landlord testified that the tenant violated the above agreement by letting his fiancé move in with him for approximately 3 and a half months without permission of the landlord and without compensating the landlord.

The landlord is claiming compensation of \$1,225.00 for the three and a half months during which the tenant had added an additional occupant. No evidence, other than the landlord's testimony, was submitted to confirm the alleged additional occupant.

The tenant acknowledged that he had an overnight guest on occasion, but denied that any other occupant had moved into the unit. The tenant testified that his fiancé had her own residential address. The tenant disputes the claim for additional rent because, he feels that there is no legal basis for the landlord to monitor his visitors and charge him extra for his guests.

Analysis: Tenant's Application

The tenant made application for the return of the security deposit and section 38 of the Act deals with this issue. Section 38(1) states that within 15 days of the end of the tenancy and receiving the tenant's forwarding address a landlord must either:

- repay any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations OR
- make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that because the tenancy was ended and the forwarding address was deemed to have been provided in mid-July 2013, the landlord was required to either return the deposit or made an application for dispute resolution within the following 15 days. However, the landlord's application for dispute resolution was not processed until October 17, 2013, well beyond the fifteen-day deadline.

Section 38(6) provides that, if a landlord does not act within the above deadline, the landlord; (a) may not make a claim against the security deposit or any pet damage deposit, and; (b) must pay the tenant double the amount of the security deposit.

Based on the above, I find that the tenant is entitled to receive double the \$275.00 security deposit for entitlement to a total refund of \$550.00.

Analysis: Landlord's Application

Rent Owed for Over-Holding 9 Days

With respect to the tenant remaining in the unit for 9 days in June, 2013, I find that the tenant was required to leave on May 31, 2013, pursuant to the Notice he signed. I find that under section 26 of the Act a tenant must pay rent.

Accordingly, I find that the tenant owes the landlord pro-rated rent for the nine-day period in the amount of \$162.74.

Loss of Rent Remainder of June 2013

In regard to the landlord's claim for the loss of rent for the remainder of June 2013, and other damages, I find that an applicant's right to claim damages from the other party is dealt with under section 7 of the Act, which states that if a landlord or tenant does not comply with the Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount of, and order a party to pay, compensation to the other party. It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage,
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the person claiming compensation, in this case the landlord, to 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 respondent.

In regard to the landlord's claim for compensation for rent owed for the entire month of June 2013, I find that the landlord would need to prove that the landlord made a reasonable effort to re-rent the unit without delay and must also prove that re-renting the unit at that time was permitted by the municipality. The landlord's loss of rent must be proven to have been caused solely by the tenant and not other factors.

I accept the tenant's testimony that the landlord had initiated the ending of the tenancy because the rental unit was not considered to be a legal suite by the municipality. In the absence of evidence proving otherwise, I find on a balance of probabilities that the unit could not likely be re-rented during the month of June 2013, because of restrictions imposed by the municipality that resulted in the ending of this tenancy. I find that the clearance from the municipality was probably required before the unit could be rented. Although the landlord gave testimony that this clearance did occur, I find that the landlord did not offer sufficient evidence to prove that permission to rent the unit was obtained.

For this reason, I find that the landlord's claim for reimbursement of loss of potential revenue for the remainder of June 2013, has not satisfied elements 2 and 3 of the test for damages and therefore must be dismissed.

Additional Rent For Extra Person

Section 62 (1) of the Act grants a Dispute Resolution Officer the authority to determine any disputes in relation to matters that arise under the Act or a tenancy agreement.

With respect to terms in a tenancy agreement that make the amount of rent contingent upon the number of occupants, I find that section 13(2)(f)(iv) of the Act states that every tenancy agreement must include:

"the amount of rent payable for a specified period, and, if the rent varies with the number of occupants, the amount by which it varies"

In this instance I find that the tenancy agreement between these two parties did attempt to restrict occupants to only one tenant and also included terms with regard to specific additional charges to be based on the number of occupants, if more were permitted to move into the unit by the landlord. I find that this would be in compliance with the Act.

However, I find that the wording of this tenancy term in the agreement before me, purports to impose an "extra charge for visitors" as stated in the landlord's written testimony. (my emphasis)

I find that, although tenancy terms in an agreement to restrict the number of occupants and to charge additional rent for additional occupants **are** permitted under the Act, the Act does not allow a landlord to restrict guests, charge for visitors or otherwise interfere with a tenant's use and quiet enjoyment of the suite.

I find that the term in question does violate the Act by restricting visitors and charging extra rent for a tenant's visitors. This conclusion is based on the fact that the agreement specifically uses the word "visitors" in the tenancy term that purports to impose additional rent.

In any case, even if the term in the agreement had only applied to additional occupants, and not to visitors, I find that the tenant has denied that he ever allowed another occupant to permanently move in with him as a co-tenant, but acknowledged that he has had overnight visitors.

Section 30 (1) of the Act states that, a landlord must not unreasonably restrict access to residential property by (a) the tenant of a rental unit that is part of the residential property, or (b) a person permitted on the residential property by that tenant.

Section 28 of the Act also protects a tenant's right to quiet enjoyment and states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

I find that the landlord has asked for enforcement of tenancy terms that the landlord feels are justified because both parties had freely agreed to them in the contract, including the charges applicable for visitors.

However, section 5 of the Act states that 1) Landlords and tenants may not avoid or contract out of this Act or the regulations and any attempt to avoid or contract out of this Act or the regulations is of no effect. Section 6(3)(a) states that a term of a tenancy agreement is not enforceable if the term is inconsistent with the Act or the regulations.

I find that, even if I accept that both parties agreed to the terms of the contract, and even if I also found that these terms were violated by the tenant, the Act states that any terms in an agreement that are not in compliance with the Act, such as restricting or charging for visitors, cannot be enforced pursuant to section 5 and 6 of the Act.

Given the above, I find that the landlord, in seeking compensation by relying on a term in the tenancy agreement that contravenes the Act, cannot succeed in the claim due to the fact that the noncompliant tenancy term is unenforceable.

Accordingly, I find that the landlord's claim for additional rent must be dismissed.

I find that the written tenancy agreement between these parties also contains numerous other noncompliant terms that contravene the Act, including, late payment charges of \$10.00 per day, maximum number of 2 visitors allowed, maximum stay of 2 hours for

each visitor, no visitors allowed after 9:00 p.m., all lights to be turned off by 9:30 p.m., fines and extra charges imposed for transgressions of the tenancy terms and a 24-hour eviction clause for smoking.

I encourage the landlord to follow the Act and regulations in creating future tenancy agreements. The Residential Tenancy Act website contains a sample agreement to be used that is compliant with the legislation and can be used as a guide.

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of \$550.00 comprised of double the \$275.00 security deposit.

Based on the testimony and evidence presented during these proceedings I find that the landlord is entitled to total monetary compensation of \$162.74 for the 9 days rent in June, during which the tenant had possession of the unit. The remainder of the landlord's application is dismissed without leave.

In setting off the two amounts by deducting the landlord's award of \$162.74 from the tenant's award of \$550.00 I find that the remainder owed to the tenant is \$387.26.

Accordingly I hereby issue a monetary order in favour of the tenant for the remainder of \$387.26. This order must be served on the landlord by registered mail or in person and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Neither party is entitled to be reimbursed for the costs of their applications.

Conclusion

Each party is partly successful in the application seeking monetary compensation and the two amounts were set off with the remainder awarded to the tenant in a monetary order.

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: November 04, 2013

Residential Tenancy Branch

