Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNDC, MNSD, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant seeking a monetary order and compensation for damage or loss under the Act and an order for the return of the tenant's security deposit retained 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.

Preliminary Matter

Jurisdiction

At the outset of the hearing the landlord challenged my jurisdiction to hear and consider this dispute on the basis that this tenancy meets the criteria to be exempted from the Residential Tenancy Act.

The landlord testified that he is the owner of the residence and also resides in the home. The landlord pointed out that that the tenant occupied a portion of the home and had their own kitchen, but shared an upstairs bathroom with the owner.

The landlord made reference to the tenant's demand letter dated September 9, 2013, a copy of which is in evidence. The landlord contends that the contents of this letter clearly confirms that the bathroom was shared. The landlord also

pointed out that the second receipt he issued to the tenant for payment of $2,200.00 contained the following notation,

> "*towards shared accommodation in owner occupied home*"

The landlord stated that the tenant signed this receipt, which, according to the landlord, functions to verify that the tenancy was shared accommodation and therefore supports the landlord's claims that this dispute would be beyond the jurisdiction of the Act.

The landlord pointed out that, whether or not there was another bathroom on the premises reserved for his own use, he required the use of the upper bathroom. The landlord testified that he occupied a room near the bathroom in question and never would have consented to being restricted to using a different bathroom located on another floor. The landlord stated that his guests were also permitted to use the upper bathroom on occasion as well.

The tenants disputed the landlord's claim that he was entitled to share their bathroom. The tenants stated that they had entered into a tenancy agreement in which the bathroom has not supposed to be shared with the landlord. The tenants stated that they were aware that the landlord had his own private bathroom to use. The tenants pointed out that there were no personal items belonging to anyone else stored in their bathroom.

The tenants stated that the notation the landlord had scripted on the receipt he issued for their rent payment, dated September 3, 2013, cannot be considered as an enforceable tenancy term as such, as this was not agreed to as a valid term of this tenancy when the consented to move in. The tenant's position is that the landlord placed the notation on the receipt as a tactic solely to avoid the application of the Residential Tenancy Act.

The tenants argued that the rental unit was advertised specifically listing features included in the $795.00 rent, such as "*1 bathroom*". In support of this testimony, the tenants enclosed a copy of an advertisement dated August 7, 2013 with photos of the kitchen and other rooms.

The advertisement for the suite included the following description:

> "*Bright suite available on main floor of large house. Excellent location with great front window view, fireplace and private entrance…."*

The tenants stated that they relied on this advertisement, which makes absolutely no mention of sharing their bathroom.

The landlord denied having any knowledge of the contents of this advertisement. Although the landlord's phone number is provided in the advertisement as the contact for this rental, the landlord stated that the advertisement was placed by someone else on his behalf.

The landlord's position is that the rental advertisement, relied upon by these tenants, does not constitute their actual agreement and the tenants should not have relied on the features listed. The tenant pointed out that some of the features, such as the fireplace, did not apply to the tenancy. The landlord testified that a precise tenancy agreement was verbally negotiated in person with the tenant. The landlord stated that this verbal tenancy agreement included a term that the bathroom would be shared with the owner/landlord and, according to the landlord, the tenant fully understood this fact.

The landlord stated that, although there was never any written tenancy agreement signed by the parties, the situation in the home, including a shared bathroom, was fully explained to the tenant from the very start. The landlord testified that this was settled before the tenancy was established and before the first $500.00 payment of rent was accepted on August 9, 2013.

The landlord pointed out that 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*). The landlord's position is that this exemption renders the tenancy outside the jurisdiction of the Act.

In considering whether tenancy terms are valid and enforceable, I find that section 6(3) of the Act deals with this situation. Section 6(3) states that a term of a tenancy agreement is not enforceable if:

a) the term is not consistent with the Act or Regulations,

b) the term is unconscionable, or,

c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

I find that a verbal tenancy agreement in which the two parties dispute any of the agreed-upon terms is obviously not clear, because the term is verbal and the verbal term is disputed. As such I find that the purported term agreeing to a shared bathroom falls under section 6(3)(c). I find that this term is unclear and therefore cannot be considered to be a valid and enforceable term of the verbal tenant agreement between these two parties.

In cases where there is no written agreement and the tenancy terms are not sufficiently clarified in writing, I find it necessary to rely on standard terms required under section 12 of the Act, which provides the following:

"*The standard terms are terms of every tenancy agreement*

(a) whether the tenancy agreement was entered into on or before, or after, January 1, 2004, and

(b) whether or not the tenancy agreement is in writing."

Section 2 of the Act states: " Despite any other enactment but subject to section 4 *[what this Act does not apply to]*, this Act applies to tenancy agreements, rental units and other residential property.

Given the above, and, on a balance of probabilities, I conclude that there was apparently no genuine meeting of the minds in negotiating the contract with respect to the issue of sharing the tenant's bathroom with this landlord. I find that the landlord has not proven that this matter had been fully resolved and agreed-upon prior to the tenant committing to the rental in August 2013.

I find that, a tenancy term that was not mutually agreed upon from the outset, cannot be unilaterally imposed by either party, after-the-fact. While I accept that the owner actually did make use of the tenant's bathroom once the tenancy was in place, I find that because this use occurred *after* the tenancy began this fact does not function to establish that the tenants had ever consented to this arrangement during the initial negotiations at the time the tenancy was established. In fact, I find evidence that the tenants objected to various issues that arose only after they had already moved in.

I find that section 14(1) states that a tenancy agreement may not be amended to change or remove a standard term at all. A tenancy agreement <u>can</u> be amended to add, remove or change a term <u>other than a standard term</u> but only if both parties agree. (my emphasis)

I accept the tenant's testimony and evidence that the earliest representations put forth, by the landlord, with respect to the features of the rental unit, do not clearly indicate that the tenant's bathroom would be shared.

With respect to the tenant's allegation that the landlord is attempting to avoid the Act, by purposely imposing terms that would place this tenancy outside of the legislation, I find that section 5 of the Act does provide that landlords or tenants

may not avoid or contract out of the Act or Regulation and that any attempt to avoid or contract out of the Act or Regulations is of no force or effect.

However, in the case before me, I do not find it necessary to make any determination about whether or not the landlord's motive is to purposely avoid the Act.

Based on the evidence and proven facts before me, I do find the following:

1. the landlord has failed to meet the burden of proof to establish that there was a valid ***mutually agreed-upon*** term that the tenancy was to include a shared bathroom with the owner,
2. this tenancy relationship ***is*** governed by the Residential Tenancy Act,
3. the disputed terms of the verbal tenancy agreement reached between these two parties are not sufficiently clear to allow them to be enforced,
4. the standard tenancy terms required under section 12(b) of the Act will apply, as required under the legislation, and
5. As Arbitrator, delegated by the Director, I do have the statutory authority and jurisdiction under the Act to hear and determine this dispute.

Service

The Landlord acknowledged that he received several pieces of registered mail from the tenant prior to the hearing. However, the landlord denied that the contents of any of the mail he received contained a copy of the tenant's application for dispute resolution or the Notice of Hearing. According to the landlord, he only found out about the hearing by calling the Residential Tenancy Branch.

The tenant pointed out that the registered mail was sent in accordance with the Act and that there is valid proof of it having been sent. The tenant provided the Canada Post tracking numbers and also provided evidence that at least one of their registered mail envelopes they had sent to the landlord at the address provided by the landlord, had been returned to them as unclaimed by Canada Post. This original unopened envelope was place in evidence showing the correct address and the Canada Post stamps and notations verifying the=at the mail was not picked up by the recipient. The tenant testified that the Notice of Hearing documents were enclosed in additional registered mail sent on October 11, 2013 and this was verified on record as having been successfully delivered to the landlord.

On a balance of probabilities, I accept that the landlord did receive the Notice of Hearing documents.

In any case, I find that the landlord is in attendance at the hearing today and the point about service is largely moot. Notwithstanding the landlord's claim that he allegedly did not discover there was a hearing until he contacted Residential Tenancy Branch, I find that the landlord was properly served with the documents.

Participants

The landlord challenged the standing of the 2 applicants attending the hearing and pointed out that he had only issued receipts to one party, with the same surname as the two applicants, who was not present at this hearing.

The applicants stated that they were involved in the tenancy and were duly representing the third co-tenant.

Based on a balance of probabilities, I accept that the applicants do have standing as they provided specific evidentiary material that confirms their involvement as participants in this dispute or, at the very least, acting agents of the missing party.

Issue(s) to be Decided

- Is the tenant entitled to the return of the security deposit pursuant to section 38 of the Act?
- Is the tenant entitled to monetary compensation under section 67 of the *Act* for damages or loss?

Background and Evidence

The tenant submitted into evidence, proof of registered mail sent, a typewritten chronology describing events that transpired, copies of communications, copies of advertisements, photos, illustrations and copies of receipts, including one for payment of $500.00 dated August 9, 2013 and a receipt for $2,200.00 paid to the landlord on September 3, 2013.

The tenant testified that, when they were negotiating the tenancy, the landlord demanded payment of a security deposit and three months rent in advance.

The tenant made reference to total payments of $2,700.00 to the landlord verified by a receipt for $500.00 dated August 9, 2013 and a receipt for $2,200.00 dated September 3, 2013.

The tenants testified that although they agreed to the tenancy on August 9, 2013, for monthly rent of $795.00, the landlord set the rent at $800.00 per month and charged them a prorated amount of $700.00 for the month of August 2013. The tenant pointed out that the prorated amount is too high. In any case, the tenant feels entitled to a refund of this rent because the landlord did not comply with the Act and agreement from the outset..

The tenant testified that the landlord demanded advance rent for September and November 2013 and charged $800.00 for each month.

The tenant testified that, as soon as they moved into the unit, they found numerous deficiencies and problems. The tenant testified that, on September 9, 2013, they sent a registered letter to the landlord listing their concerns. A copy of this letter is in evidence.

The tenant testified that they pointed out the landlord's failure to comply with the tenancy agreement. The tenant advised the landlord that they felt it necessary to move out and demanded that the landlord refund all of the funds they had paid. The tenants testified that this registered letter was not accepted by the landlord and was returned to them by Canada Post. A copy of the returned communication and envelope was in evidence. The tenants stated that they provided their forwarding address to the landlord at that time.

The tenants stated that the landlord's refusal to comply with the agreement and his insistence that additional terms be imposed, resulted in the tenants being forced to end the tenancy at great inconvenience to their family and to relocate without sufficient notice.

The tenants are claiming a refund of $700.00 for rent paid for August 2013, reimbursement of $1,700.00 for the two months rent paid in advance for September and October 2013, a refund of double the security deposit totaling $800.00, $137.18 for the cost of hotel accommodations and the $50.00 cost of this application.

The landlord disputed the tenant's monetary claims. The landlord testified that he fully complied with the verbal tenancy agreement in every respect. The landlord stated that the rental rate for the unit was $900.00, not $800.00 as claimed by the tenants.

The landlord testified that no security deposit at all was ever paid by the tenants.

The landlord 's testimony was that he did not pro-rate rent for August to reflect the fact that the tenant took possession mid-month. According to the landlord, he had charged the tenants full rent of $900.00 for August, 2013, despite the fact that the tenancy did not start until later in the month.

The landlord acknowledged that he did collect $900.00 rent in advance for each of the months of September and October 2013, thereby totaling the $2,700.00 collected from the tenants reflected by the receipts. The landlord's position is that he is entitled to charge rent in advance and that the tenants validly owed this rent.

Analysis

Claim for Damages and Loss

In regard to an Applicant's right to claim damages from the another party, Section 7 of the Act states that if a tenant or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying tenant 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 and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

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, and
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 tenant, 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 landlord.

Based on the evidentiary submissions and the testimony of the tenants, I accept that the monthly rental rate agreed-upon for this unit would likely be consistent

with the amount advertised on August 7, 2013. For this reason, I accept the tenant's testimony with respect to the rental rate agreed-upon and do not accept the landlord's testimony that the parties had verbally set the rent at $900.00 per month. Accordingly, I find that the rent agreed to be paid for each month was $795.00.

I accept the testimony of both parties and the evidence that confirms that the tenants paid the landlord a total of $2,700.00 in two installments. I find that this amount represents a $400.00 security deposit, $700.00 as a prorated amount of rent for a portion of August 2013, $800.00 charged for September 2013 and advance rent of $800.00 collected by the landlord for October 2013.

Ending the Tenancy

In regard to the tenant's allegation that the landlord's numerous violations of the agreement and the Act forced an end to the tenancy as of the 5th of September 2013, I find that section 45(3) of the Act does permit a tenant to end a tenancy in situations where the landlord has failed to comply with a material term of the tenancy agreement.

Section 13 of the Act states that a landlord must prepare must prepare in writing every tenancy agreement entered into on or after January 1, 2004. In the case before me, the landlord did not comply with this portion of the Act.

Given that it appears the parties actually failed to reach a mutual agreement from the beginning, with respect to the most basic and fundamental terms of this tenancy, such as the rental rate and the owner's entitlement to use the tenant's bathroom, in addition to numerous serious violations of the Act with respect to imposing additional charges and collecting rent in advance, I find that the "*material terms*" of this agreement were compromised. In fact, I find that determining what the enforceable terms of the agreement are is impossible due to a lack of a workable understanding of the "agreement" from the outset.

For this reason, I accept the tenant's position that they were justified in ending the tenancy because of the landlord's failure to properly define and comply with material terms. I accept that the tenants felt they were forced to move out on September 5, 2013, for what they considered to be unliveable conditions. I find that the tenancy was officially terminated in writing as of September 30, 2013.

Compensation Claims for August and September 2013

In regard to the $700.00 rent charged for the month of August, 2013, I find that in calculating the prorated amount that would genuinely be owed for the final 22

days of the month, the charge should have only been $575.00. Therefore I find that the tenant was subjected to excessive charges in the amount of $125.00, above the allowable rent and this amount must be refunded to the tenant.

The tenant has also requested a retroactive rent abatement of $100% for August 2013, for the tenant's loss of quiet enjoyment and the landlord's failure to provide all of the services and facilities promised.

Section 28 of the Act 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 accept that the tenant did suffer a loss of value to the tenancy under section 28 and I find that some abatement is warranted.

Therefore, in addition to the refund of $125.00 for the overcharged rent for August 2013, I find that the tenant is also entitled to a rent abatement of 30% of the $575.00 owed, for further compensation to the tenant of $172.50.

In regard to the tenant's claim for 100% abatement of the $800.00 charged for the month of September 2013, I find that the tenant vacated the unit on September 5, 2013, and would owe the landlord rent for that limited period in the amount of $130.68. Accordingly I find that the tenant is entitled to a total abatement of $669.32 rent for the month of September 2013.

Monetary Claim for Rent Paid for October 2013

In regard to the tenant's claim for $800.00 for advance rent collected by the landlord for the month of October 2013, I find that the landlord is not entitled to collect or retain any rent paid for a period during which the tenant has permanently ceased to occupy the unit. In this instance, I find that the tenancy ended on September 30, 2013. Accordingly I find that tenant is entitled to

compensation of $800.00 for the rent collected by the landlord for the month of October 2013.

Claim for Alternate Accommodation

In regard to the tenant's request for reimbursement for the hotel charges incurred by the tenant after vacating the unit, I find that this claim does not meet the test for damages, and therefore must be dismissed.

Security Deposit Claim

In regard to the return of the security deposit, I find that section 38 of the Act is clear on this issue. Within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit or make an application for dispute resolution claiming against the security deposit.

The Act states that the landlord can only retain a deposit if the tenant agrees in writing the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the director orders that the landlord may retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make application for an order to keep the deposit.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit and must pay the tenant double the amount of the security deposit.

Accordingly I find that the tenant is entitled to be paid double the security deposit of $400.00 totalling $800.00.

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of $2,616.82, comprised of $125.00 for overcharged pro-rated rent for August 2013, $172.50 rent abatement for loss of value of the tenancy during August 2013 , $669.32.00 rent abatement for September 2013, $800.00 rent refund for October 2013, $800.00, representing a refund of double the security deposit, and the $50.00 fee paid by the tenant for this application.

I hereby grant the tenant a monetary order for $2,616.82.This order is final and binding. The order must be served on the Respondent and 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 to reapply.

Conclusion

The tenant is partly successful in this application and is granted a Monetary Order for the refund of over paid rent, a retroactive rent abatement and double the security deposit.

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: January 08, 2014

Residential Tenancy Branch