Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of double their security deposit pursuant to section 38; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord confirmed that he received a copy of the tenants' dispute resolution hearing package sent by the tenants by registered mail on October 4, 2013. The landlord also confirmed that he received a copy of the tenants' written evidence package from the tenants. I am satisfied that the tenants served the landlord with the above documents in accordance with the *Act*.

Issues(s) to be Decided

Are the tenants entitled to a monetary award for the return of double their security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*? Are the tenants entitled to obtain a monetary award for losses or damages arising out of this tenancy? Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

The tenants entered into written evidence a copy of the 6-month fixed term Residential Tenancy Agreement (the Agreement) between the female tenant, one of her relatives, and the landlord, signed on April 18, 2012. This Agreement allowed the tenants to take possession of the rental unit, the upper level of a two level duplex, on May 1, 2012. At the expiration of the fixed term, the tenancy continued as a periodic tenancy until the

tenants vacated the rental unit as per their notice to end this tenancy on April 30, 2013. Monthly rent was initially set at $1,250.00, payable in advance on the first of each month, plus hydro and heat. By the end of the tenancy, the monthly rent had increased to $1,350.00. The landlord continues to hold the $625.00 security deposit for this tenancy.

Although the tenants participated in a May 1, 2013 joint move-out condition inspection, the landlord did not prepare a joint move-out condition inspection report.

The tenants applied for a monetary award of $1,965.65. This amount included their request for a return of double their security deposit due to the landlord's failure to return their security deposit in accordance with section 38 of the *Act*. Their application for a monetary award also included a request for the reimbursement of $715.65. This was the amount the tenants maintained they had overpaid for utilities during the course of this tenancy due to the landlord's requirement that they open a hydro and gas account under their name, although the meters for these utilities included a rented area in the lower suite of their building for which they were billed.

The landlord did not enter any written evidence for consideration during this hearing. He referred to a signed agreement of January 7, 2013 between the tenants, the tenant in the lower suite and the landlord. In this agreement, entered into written evidence by the tenants, the tenants agreed to pay 60% of the heat and gas bills, with the tenant in the lower suite agreeing to pay the remaining 40% of the monthly hydro and gas bills commencing on the next set of utility bills.

Analysis – Security Deposit

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the security deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain that deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the security deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security deposit if "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."

In this case, the parties agreed that this tenancy ended on April 30, 2013. The female tenant testified that on May 10, 2013, she placed the tenants' forwarding address in writing in the landlord's mailbox as part of a May 10, 2013 letter. The tenants entered into written evidence a copy of the May 10, 2013 letter to the landlord containing their forwarding address. The male tenant, the female tenant's son, testified that he attended at the landlord's property on May 10, 2013, when he watched the female tenant place the letter in the landlord's mailbox. The landlord testified that he did not receive the female tenant's May 10, 2013 letter as he was out of town at that time. The landlord maintained that he did not return the tenants' security deposit because he believed that the tenants were not entitled to obtain a full return of their security deposit as they had more people living in the rental unit than was set out in their Agreement and there was some damage to the washer. The landlord confirmed that he did not apply for dispute resolution to retain any portion of the tenants' security deposit. He also testified that he did not obtain the tenants' written authorization at the end of this tenancy to retain any portion of their security deposit.

Based on the sworn testimony and sections 88(f) of the *Act*, I find that the tenants have demonstrated to the extent required that they provided the landlord with their forwarding address in writing on May 10, 2013. In accordance with section 90(d) of the *Act*, the landlord was deemed served with the tenants' forwarding address in writing on May 13. 2013, the third day after it was left in his mailbox. The landlord had 15 days after May 13, 2013 to either return the tenants' security deposit in full or apply for dispute resolution for authorization to retain any portion of that deposit.

I find that the landlord has not returned the security deposit in full within 15 days of being deemed to have received the tenants' forwarding address. The tenants are therefore entitled to a monetary order amounting to double their security deposit with interest calculated on the original amount only. No interest is payable over this period.

Analysis – Application to Obtain a Return of Utility Payments

I have also considered the tenants' application to obtain a recovery of $715.65 in utility bills that they maintain they overpaid as a result of the landlord's actions.

Section 7(1) of the *Act* establishes that a landlord who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the tenant(s) for damage or loss that results from that failure to comply.

In considering this element of the tenants' claim, I have given regard to the terms of the original Agreement in which the tenants were required to assume the costs of hydro and gas for this rental unit. The tenants gave undisputed sworn testimony and written

evidence that they were advised when they moved into the rental unit that they would be responsible for their heating and hydro costs. They also gave undisputed sworn testimony that the landlord told them that they would need to take out their own account with the utility companies to obtain this service. The tenants did not discover until after they noticed the high level of their utility costs that there was only one utility meter and account for this duplex, and that they were being held responsible for the costs of their own rental unit and the lower level suite below them.

The landlord testified that the lower level suite was not rented when this tenancy began. He maintained that after the tenants raised their concerns about the high cost of their utilities, he arranged a meeting with the upper and lower level tenants. Both sets of tenants and the landlord signed an agreement on January 7, 2013 that the tenants would pay 60 % of the heating and hydro bills, while the lower level tenant agreed to pay the remaining 40%.

Subsection 6(3)(b) of the *Act* establishes that "a term of a tenancy agreement is not enforceable if…the term is unconscionable." In considering this portion of the tenants' claim, I have considered the following portions of Residential Tenancy Branch Policy Guideline #1, which addresses the responsibilities of landlords and tenants with respect to shared utility service.

> ***SHARED UTILITY SERVICE***
>
> *1. A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable as defined in the Regulations.*
>
> *2. If the tenancy agreement requires one of the tenants to have utilities (such as electricity, gas, water etc.) in his or her name, and if the other tenants under a different tenancy agreement do not pay their share, the tenant whose name is on the bill, or his or her agent, may claim against the landlord for the other tenants' share of the unpaid utility bills...*

As I noted at the hearing, I find that the landlord's requirement that the tenants were responsible for opening a hydro and heating account under their name for premises that included billing for the lower rental suite was unconscionable. In accordance with the above noted provisions of section 2 of RTB Policy Guideline #1 on Shared Utility Service, I find that the tenants are allowed to claim against the landlord for the portion of the utility bills that were applicable to the lower suite in this duplex and which were neither paid by the landlord nor the tenant in the lower rental suite.

For these reasons, I have considered the tenants' calculations of the utility costs that they maintain were increased as a result of the landlord's imposition of terms that I find unconscionable in their Agreement. I note that the tenants have entered into written evidence two separate estimates of their overpayment of utility bills for hydro and heating.

In their May 10, 2013 letter to the landlord after this tenancy had ended, the female tenant calculated the tenants' overpayment of hydro at $359.93 (i.e., $240.47 + $119.46 = $ 359.93) for the period until April 19, 2014. She also included calculations of four gas bills totaling $166.15, until April 18, 2014. In her May 10, 2013 letter, the tenant requested a total of $526.08, less a $100.00 cheque of March 6, 2013, received by the tenants from the landlord for these utilities. As the tenants gave undisputed sworn testimony that they have not cashed the March 6, 2013 cheque, and that cheque is no longer negotiable, the female tenant's request of May 10, 2013 was for a total of $526.08, plus 40% of the utility bills covering the period from April 18 to April 30, 2013.

As part of the tenants' written evidence package, the female tenant submitted a second estimate of the tenants' overpayment of these utility bills. This second set of calculations extended from May 2012 when this tenancy began until the end of their tenancy on April 30, 2013. In these calculations, the female tenant maintained that the tenants' overpayment of their utilities totalled $715.65 over the course of their tenancy.

I have given careful consideration to the tenants' two sets of calculations for the overpayment of their utilities. I find that the second higher set of calculations rely to a certain extent on the estimate that the tenants' utility bills for the months prior to September 2012 when the lower suite became tenanted would be based on the same 60/40 split in costs as were agreed to by the three parties to the January 2013 agreement regarding the sharing of these costs. While this 60/40 split in costs appears reasonable after January 2013, I do not accept the tenants' claim that this sharing of costs was reasonable while the lower suite was being refurbished prior to September 2012. For this reason, I find that the most reasonable estimate of cost sharing for these utilities is the 60/40 arrangement worked out between the parties in January 2013 for commencement in February 2013.

I allow the tenants a monetary award of $526.08 for overpaid utilities arising out of the landlord's unconscionable requirement that the tenants open a hydro and gas heating account under their name for the entire duplex, including the lower level rental suite that they did not occupy during their tenancy. I also find that the tenants are allowed a monetary award of $20.56 for hydro and $13.39 for gas, the amounts cited for the period from April 18-30, 2013 in the tenants' second set of calculations.

As the tenants have been successful in their application, I allow them to recover their filing fee from the landlord.

Conclusion

I issue a monetary Order in the tenants' favour under the following terms, which allows the tenants to recover double their security deposit from the landlord, a monetary award for losses arising out of this tenancy and for the recovery of their filing fee:

Item	**Amount**
Return of Double Security Deposit as per section 38 of the Act ($625.00 x 2 = $1,300.00)	$1,300.00
Monetary Award for Overpaid Utilities ($526.08 + $20.56 = $13.39 = $560.03)	560.03
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	**$1,910.03**

The tenants are provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: January 20, 2014

Residential Tenancy Branch