Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with an Application by the Tenant for a monetary order for return of double the security deposit paid to the Landlord and for the return of the filing fee for the Application.

Both parties appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

Has there been a breach of Section 38 of the Act by the Landlord?

Background and Evidence

The parties entered into a standard form, written tenancy agreement on or about December 14, 2012. The rent was $1,250.00 per month, payable on the first of each month.

The Tenant and a co-tenant (who was not named in the Application), paid the Landlord a security deposit of $625.00 on or about December 15, 2012. The Tenant vacated the rental unit on or about April 25, 2013, and the tenancy apparently ended on May 1, 2013.

The Tenant provided the Landlord with a written notice of the forwarding address to return the security deposit to, by mailing it to the Landlord on or about February 3, 2014. In evidence the Tenant provided a copy of the letter.

The Tenant did not sign over a portion of the security deposit, although he testified that at the end of the tenancy he agreed the Landlord could deduct the amount of carpet cleaning from the security deposit. The Tenant testified that they did not agree on a fixed amount for the carpet cleaning.

The Tenant testified that the Landlord did not perform an incoming or outgoing condition inspection report in writing. He said there was a walkthrough done, but he had nothing in writing from the Landlord.

In reply, the Landlord testified he had performed these written condition inspection reports and had them stored in a file cabinet at home. The Landlord acknowledged he did not understand he could submit evidence in this matter, despite the fact this information is provided to all participants in the hearing package and Notice of Hearing documents.

The Landlord testified that the rental unit was brand new when the Tenant and the other renter took possession of it. He alleged no one else had lived in the rental unit prior to the Tenant. He alleged the unit was in pristine condition.

The Landlord testified that after the Tenant moved out he found pinholes in the walls and the walls were not cleaned. He testified that the carpet was filthy and the Tenant had not cleaned the stove top. The Landlord explained this was a special sized stove and oven and he then alleged that the Tenant had "trashed" the cooktop. He alleged the Tenant had also not cleaned the fridge.

The Landlord testified that the Tenant had made a verbal agreement that the Landlord could have the stove and unit cleaned and deduct these costs from the security deposit.

In reply, the Tenant disagreed and testified he had no recollection of giving the Landlord oral permission to do all this cleaning and deduct it from the security deposit. He reiterated that he agreed to carpet cleaning, but did not agree to the other things as stated by the Landlord. He testified he told the Landlord they were not responsible for normal wear and tear and testified they shook hands on this.

The parties disagreed over who attended the rental unit to help the Tenant with cleaning.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find that the Landlord is in breach of the Act.

There was no evidence to show that the Tenant had agreed, in writing, that the Landlord could retain any portion of the security deposit. Written agreement is required by the

Act in section 38, and in paragraph 4 of the tenancy agreement signed by the parties, in order for the Landlord to retain any portion of the security deposit.

While the parties may have verbally agreed to carpet cleaning, I note that the Act requires the signing over a portion of the security deposit to be in writing and section 5 of the Act precludes the parties from agreeing to avoid or contract outside of the Act. In fact, the standard form condition inspection report has instructions and space for the parties to make just such an agreement regarding the deposit.

There was also no evidence to show that the Landlord had applied for arbitration within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenant, to retain a portion of the security deposit, as required under section 38 of the Act and paragraph 4 of the tenancy agreement.

As the Landlord did not submit any evidence of having performed the condition inspection reports in accordance with the Act, and the Tenant testified none had been done in writing, I find the Landlord has failed to prove he performed these reports in writing and in accordance with the Act.

By failing to perform incoming or outgoing condition inspection reports in accordance with the Act, the Landlord extinguished the right to claim against the security deposit for damages, pursuant to sections 24(2) and 36(2) of the Act.

Therefore, I find the Landlord has breached section 38 of the Act, and paragraph 4 of the tenancy agreement.

The Landlord is in the business of renting, and therefore, has a duty to abide by the laws pertaining to residential tenancies.

The security deposit is held in trust for the Tenant by the Landlord. At no time does the Landlord have the ability to simply keep the security deposit because they feel they are entitled to it or are justified to keep it.

In other words, it is not enough that the Landlord feels they are entitled to keep the deposit based on unproven or unsubstantiated claims.

If the Landlord and the Tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the Landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

The Landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from an Arbitrator, or with the written agreement of the Tenant. Here the Landlord did not have any authority under the Act to keep any portion of the security deposit. Therefore, I find that the Landlord is not entitled to retain any portion of the security deposit.

I also note that the Landlord may not make a monetary claim through the Tenants' Application. The Landlord has to file its own Application to keep the deposit with the 15 days as explained above. The Landlord may still file an application for alleged damages and cleaning; however, the issue of the security deposit has now been conclusively dealt with in this hearing.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the Landlord pay the Tenant the sum of **$1,300.00**, comprised of double the security deposit (2 x $625.00) and the $50.00 fee for filing this Application.

Conclusion

The Tenant is given a formal Order in the above terms and the Landlord must be served with a copy of this Order as soon as possible. Should the Landlord fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

This decision is final and binding on the parties, except as otherwise provided under the Act, and 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: August 14, 2014

Residential Tenancy Branch