



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Corrected Decision

Dispute Codes: MNDC, MNSD, OLC, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for a monetary order for money owed or compensation for damage or loss under the Act and an order for the return of the 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.

Issue(s) to be Decided

- Is the tenant entitled to the return of the security deposit under section 38 of the Act?
- Is the tenant entitled to additional compensation under section 67 of the *Act*?

Background and Evidence

Submitted into evidence was a written statement from the tenant with the details of the claim, copies of communications, photos, written statement by the landlord, witness statements, a copy of the tenancy agreement, a copy of the move-in and move-out condition inspection reports and photos of the suite.

The tenancy began in March 2013 and ended on March 31, 2014. Rent was \$1,600.00 and a \$800.00 security deposit was paid.

The tenant testified that when they agreed to enter into the tenancy, the landlord made a commitment to have repairs completed prior to the tenants moving in. The tenant testified that the repairs were not completed and the landlord took months to finish some repairs, starting a particular project and then leaving it unfinished for extended periods of time. The tenant stated that there were ongoing electrical problems,

plumbing issues, loose window panes, flooring issues, safety concerns about a damaged woodstove, boarded-up doors and unfinished interior areas.

The tenant testified that the landlord left discarded building materials such as rotting wood, metal roofing pieces, drywall and other debris strewn about the property. The tenant pointed out that this created a serious hazard for the tenants and their young children. The tenant stated that a chimney had been torn down but was left in the yard for over a month before the material was finally removed. The tenant testified that they were forced to arrange some of the clean-up themselves.

According to the tenant, despite repeated complaints to the landlord, their entire tenancy was negatively affected and devalued by this chronic situation, despite paying the full rent every month. The tenant testified that they felt forced to move before the end of the fixed term tenancy and gave the landlord written Notice of their intent to move and the reasons why. A copy of this communication is in evidence.

The tenant's position is that the landlord failed to fulfill a material term of the contract and was in violation of the Act during most of their tenancy and the tenant is therefore requesting a retro-active rent abatement of \$100.00 per month in compensation for devalued tenancy, totaling \$1,200.00.

The tenant testified that the landlord also failed to refund their security deposit within the required 15 days. The tenant seeks a refund of double the \$800.00 security deposit.

In addition, the tenant also claims reimbursement of a penalty fee of \$800.00 that they say was charged by the landlord before the landlord would agree to show the unit to prospective renters and permit the tenant to move out. The tenant pointed out that the landlord suffered no financial loss because another renter moved in immediately.

In defense against the tenant's claims, the landlord stated that no promises of repairs were made when the contract was negotiated, as the rental unit had already been re-floored and painted prior to move in. The landlord testified that the tenant demanded numerous repairs and enhancements and their requests were honoured. The landlord stated that the need for some repairs stemmed from damage caused by the tenant.

According to the landlord the construction debris was unavoidable and delays were caused by the tenant as he was forced to accommodate limits imposed by them.

The landlord testified that the tenants apparently contacted building inspectors, Electrical Safety Authority, Health Officer and the Fire Department, which further delayed much of the repair and renovation projects.

The landlord testified that the tenant was not forced to move due to a material breach by the landlord, but merely wanted out of the contract so the tenant could move to another place at less cost with better pastures. The landlord is of the opinion that the tenant was attempting to manipulate the situation to justify breaking the lease. The landlord does not agree with the tenant's claim for a rent abatement.

In regard to the security deposit, the landlord stated they did refund a portion of the deposit within 15 days, but the cheque was returned un-cashed. The landlord testified that the tenant refused to do the move out inspection and it was done with an agent of the tenant. The landlord testified that the unit was in need of repairs and cleaning which this is why only \$258.21 was sent and \$541.79 of the security deposit was kept. The landlord does not agree with the tenant's claim for double the security deposit.

In regard to the tenant's allegation that the landlord demanded a "penalty" fee of \$800.00 to end the lease, the landlord pointed out that the tenant first approached the landlord expressing an intention to move out and terminate their lease before the end of the fixed term. The landlord testified that the landlord agreed that the landlord would be willing to end the lease if the tenant paid one month rent of \$1,600.00 and, if a particular person renting a different unit from the landlord at that time would agree to move in.

The landlord testified that the tenant at their own initiative negotiated and countered the offer by writing the landlord a cheque for \$800.00. The landlord pointed out that the tenant's claim that the landlord did not suffer a loss is also not accurate. The landlord testified that there was a loss of revenue of \$1,200.00 due to the resulting vacancy left when the other renter moved from their unit into the tenant's unit.

Analysis

Security Deposit

With respect to the return of the security deposit, 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 to the tenant or; b) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The Act provides that the landlord can only retain a deposit if, at the end of the tenancy, the tenant agrees in writing it can be kept to satisfy a liability or of the tenant, or if, the landlord obtains an order through dispute resolution permitting the landlord to retain the deposit to satisfy a monetary claim against the tenant.

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.

I find that the tenant's security deposit being held by the landlord was \$800.00. I accept the landlord's evidence confirming that they did attempt to refund a portion of the tenant's deposit in the amount of \$258.21, within 15 days. However, I also find that the landlord retained \$541.79 of the deposit beyond 15 days, without making an application and obtaining an order to do so.

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 or any pet damage deposit, and must pay the tenant double the amount of the security deposit.

I. I find that the tenant is therefore entitled to compensation of \$258.21 of the original security deposit and this must be paid to the tenant. I further find that the tenant is entitled to a refund of double the \$541.79 wrongfully withheld by the landlord past the 15 days amounting to \$1,083.58 for a total refund of \$1,341.79.

Claim for Damages and Loss

In respect to an Applicant's right to claim damages from another party, Section 7 of the Act states that if a landlord or tenant does not comply with this 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 and to order payment under these circumstances.

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. Once that has been established, the claimant must provide evidence to verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant took reasonable steps to mitigate the damage or losses that were incurred.

I find section 32 of the Act requires a landlord to provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, having regard to the age, character and location of the rental unit to make it suitable for occupation by a tenant.

I accept the tenant's evidence that repairs were necessary and that certain improvements were also promised by the landlord as part of the agreement to enter into a tenancy. I find that the landlord did take action to resolve the issues, and in this regard, I find that the landlord did comply with section 32 of the Act.

However, these parties are bound by both the Act and the tenancy contract. In regard to the terms of the tenancy contract, I find that the tenants paid full rent with a valid expectation that all of the repairs and renovations would be completed without delay. I find that, the tenants were forced to endure some deficiencies in the condition of the house and the yard over a substantial period of time. This included materials left on the property and unfinished areas remaining in the home. I find that this devalued the tenancy and the tenant is therefore entitled to some compensation. I set the amount of abatement at 5% of the rent each month, or \$80.00 per month for 10 months totaling \$800.00.

Claim for \$800.00 Paid For Ending the Tenancy

I find that the parties freely negotiated an amount to terminate the tenancy early and the tenant paid the \$800.00 negotiated. I find that the landlord had no right to threaten to withhold their responsibility to make a reasonable effort to find a replacement tenant in order to demand payment. However, a landlord is free to make a request for compensation which may be accepted or rejected by tenants.

At the same time, I find that the tenant wanted to terminate their tenancy early despite being legally bound to a fixed term. I find that, if the tenants had intended to terminate the tenancy early for violation of a material term, they had the option under the Act to seek an order to do so. However, the tenants did not make an application before ending the tenancy themselves.

I accept the landlord's position that the tenants entered into a mutual agreement with the landlord and willingly paid \$800.00 compensation to the landlord for the benefit of terminating before expiry of the fixed term. I find that the fact the

landlord may or may not have suffered a loss to be irrelevant as this was pursuant to a mutual agreement not a legal claim for damages and loss. For the reasons above, I dismiss the portion of the tenant's claim seeking a refund of the \$800.00 paid by the tenant to the landlord to end the tenancy early.

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of \$2,191.79.00, comprised of \$1,341.79 for the security deposit, a portion of which was doubled, \$800.00 rent abatement representing \$80.00 per month and the \$50.00 cost of this application

I hereby grant the tenant a monetary order against the landlord for \$2,191.79. This 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 if not paid. The remainder of the tenant's application is dismissed without leave.

Conclusion

The tenant is successful in the application and is granted a monetary order for a refund of double part of the security deposit and for a retro-active rent abatement.

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: September 23, 2014

Corrected: November 3, 2014

Residential Tenancy Branch

