



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, FF

Introduction

This review hearing was convened as a result of a review consideration decision dated March 25, 2015 within which the original decision and monetary order were suspended. The Landlord's application made pursuant to the *Residential Tenancy Act* (the "Act") seeks the following Orders:

1. An Order of Possession – Section 55;
2. A Monetary Order for unpaid rent - Section 67;
3. An Order to retain the security deposit - Section 38; and
4. An Order to recover the filing fee for this application - Section 72.

The Landlord and Tenant were each given full opportunity to be heard, to present evidence and to make submissions. The Landlord confirmed that an order of possession was no longer sought.

Preliminary Matter

The Landlord states that it delivered an evidence package to the Residential Tenancy Branch two days in advance of the hearing. The Landlord states that the evidence consists of the Landlord's copy of the letter produced by the Tenant as evidence. The Landlord did not provide a copy of this evidence to the Tenant. The Rules of Procedure require a party to serve the other party with any evidence they wish to rely upon at the hearing. As the Tenant has not received this evidence and as the evidence was available for earlier provision I find that to accept this evidence now would prejudice the Tenant and I decline to consider the package.

Issue(s) to be Decided

Is the Landlord entitled to the monetary amounts claimed?

Background and Evidence

The tenancy started on May 1, 2013 and ended on December 30, 2014. Rent of \$1,200.00 was payable monthly on the first day of each month. At the outset of the tenancy the Landlord collected \$600.00 as a security deposit.

The Landlord states that for August 2014 rent the Parties agreed that the Landlord would assume half the rent for this month and that the Landlord would retain the security deposit for Tenant's share of the remaining half. The Landlord claims unpaid rent for August 2014. The Tenant states that the Landlord agreed to reduce the rent by half but that the Tenant paid the Landlord in cash for the remaining half. The Tenant states that nothing was signed giving the Landlord the authority to keep the security deposit and that the Tenant wants its return. The Tenant states that she is waiting for this matter to be resolved before she makes her application for dispute resolution to claim, among other things, return of the security deposit.

The Landlord states that the Tenant failed to pay December 2014 rent. The Landlord states that on December 5, 2014 the Tenant brought a letter to the landlord setting out complaints and that the Landlord signed this letter to agree that she received it. The Landlord states that no agreement was made to end the tenancy on this date. The Landlord states that her copy of the agreement does not contain the additional handwriting setting out the payment of cash or the end of the tenancy. The Witness, a daughter of the Landlord, states that she was present when the Tenant brought the letter and that as her mother was not able to read the contents, the Tenant asked the daughter to read it to the mother. The Witness states that there was nothing written on this letter about cash being paid for rent and no discussions were held about ending the tenancy. The Witness states that the Tenant brought a cheque for December 2014 on this same occasion. The Landlord states that the cheque was returned as the Tenant put a stop payment on it. The Landlord states that the Tenant was served then with a 10 day notice to end tenancy by posting the notice on the door of the unit. The Landlord states that she has no witness to this posting. The Landlord states that it was agreed that the Tenant could move out at the end of December but that this occurred after the notice was served

The Tenant states that the rent cheque for December 2014 was given to the Landlord sometime near the end of November 2014 but that the Landlord called and said the cheque was lost and asked the Tenant to pay cash. The Tenant states that she used to pay rent by cash as this is

what the Landlord wanted but the Landlord kept messing things up so the Tenant then started to pay by cheque. The Tenant described the meeting at the Landlord's home on December 5, 2014 and giving the Landlord the cash. The Tenant states that nobody read the letter to the Landlord and that the Landlord's children were not in the room during her discussions with the Landlord. The Tenant states that she did stop the December 2014 rent cheque after being told it was lost. The Tenant states that no notice to end tenancy was ever given to the Tenant. The Tenant states that the Landlord did not rent the unit out as the Tenant reported the unit to the city and the unit was shut down until repairs were made.

Analysis

Section 38 of the Act provides that a landlord may 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. There is no written authorization from the Tenant for the Landlord to retain the security deposit. As such I find that the Landlord still holds the security deposit.

Section 26 of the Act provides that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement. The Tenant's evidence of payment of August 2014 rent was as compelling as the Landlord's evidence of non-payment. However the Landlord provided no accounting evidence for the collection of the rent throughout the tenancy and no receipts for cash payments. As the Landlord carries the burden of proof, I find that the Landlord has failed on a balance of probabilities to establish that the Tenant owes unpaid rent for August 2014 and I dismiss this claim.

It is undisputed that the Tenant's cheque for December 2014 was returned. The Tenant provided no supporting evidence of any cash payment to replace this cheque such as a bank statement showing a withdrawal. I note that the handwriting on the letter provided by the Tenant and indicating the receipt of cash is lighter than the handwriting stated by the Landlord to be present when it was signed and appears to have been squeezed in. Given this evidence I find that the Tenant's evidence of payment is not credible. I find therefore that the Landlord has substantiated on a balance of probabilities that the December 2014 rent was not paid and that the Landlord is entitled to **\$1,200.00**. As the Landlord has been substantially successful with

the application I find that the Landlord is entitled to recovery of the **\$50.00** filing fee for a total entitlement of **\$1,250.00**.

As the Landlord still holds the security deposit of **\$600.00** plus zero interest, I deduct this amount from the entitlement leaving **\$650.00** owed by the Tenant.

Conclusion

The original decision is set aside and is of no effect.

I Order the Landlord to retain the security deposit plus interest of \$600.00 in partial satisfaction of the claim and I grant the Landlord an order under Section 67 of the Act for **\$650.00**. If necessary, this order may be filed in the Small Claims Court and enforced as an order 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: May 08, 2015

Residential Tenancy Branch

