



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF (Landlords' Application)
 MNSD, MNDC, FF (Tenants' Application)

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the "Application") made by both the Tenants and the Landlords.

The Landlords applied for a Monetary Order for unpaid rent, to keep the Tenants' security deposit and to recover the filing fee from the Tenants. The Tenants applied for: return of their security deposit; money owed or compensation for damage or loss under the *Residential Tenancy Act* (the "Act"); and, to recover the filing fee from the Landlords.

One of the Tenants appeared for the hearing and provided affirmed testimony as well as documentary evidence prior to the hearing. There was no appearance by the Landlords despite the fact that the Landlords' Application was scheduled to be heard at the same time as the Tenants' Application in this hearing. As there was no appearance for the Landlords during the 40 minute duration of the hearing, I dismissed the Landlords' Application without leave to re-apply.

I then turned my mind to the service of the Tenants' Application to the Landlords. The Tenant testified that she served each Landlord with a copy of her Application and the Notice of Hearing documents by registered mail on November 20, 2014. The Tenants provided a copy each Canada Post tracking receipt as evidence to verify this method of service.

Section 90(a) of the Act provides that a document is deemed to have been received five days after it is mailed. A party cannot avoid service through a failure or neglect to pick up mail. As a result, based on the undisputed evidence of the Tenants, I find that each Landlord was served pursuant to Section 89 (1) (c) of the Act and is deemed to have received them on November 25, 2014. The hearing continued to hear the undisputed evidence of the Tenant as follows.

Issues to be Decided

- Are the Tenants entitled to the return of water utilities paid during the tenancy?
- Are the Tenants entitled to the return of double the amount of their security deposit?

Background and Evidence

The Tenant testified that this tenancy started on May 21, 2014 for a fixed term of six months due to expire on November 30, 2014. Rent was payable in the amount of \$1,500.00 on the first day of each month. The Tenants paid \$1,000.00 on May 20, 2015 as a security deposit which the Landlords still retain.

The Tenants provided a residential tenancy agreement into evidence. Under section 3 of the agreement concerning rent, the agreement documents that water is included in the rent and that the Tenants will pay 50% of the heat and power to the rental unit.

The Tenant testified that two months into the tenancy she was informed by the property agent that they were required to pay water. The Tenant informed the property agent that water was included in the rent as per the tenancy agreement. However, the property agent informed the Tenants that he would speak to the owner about this.

The Tenant testified that they did not hear anything back from the property manager and without knowing their rights in this case, they paid a total of \$323.00 in water charges for the remaining duration of the tenancy. The Tenants provided a copy of the city water bill indicating this amount. The Tenant testified that they had paid this amount to the property agent during the tenancy when they were not obligated to do so under the agreement. Therefore, they seek the return of \$323.00 for water utilities paid by them during the tenancy.

The Tenant testified that during the tenancy there were issues of unauthorised entry by the property agent, pest control issues, and lack of internet and cablevision. As a result, the Tenants provided the Landlords with written notice to end the tenancy. The Tenant testified that on September 29, 2015 she placed the written notice to end the tenancy into a white envelope along with the October 2014 rent cheque underneath the mat by the front door of the rental unit. The Tenant explained that this was the agreed normal practice of placing rent cheques underneath the mat at which point the property agent would come by and collect them.

The Tenant testified that the property agent routinely picked up the rent cheques after the day they were payable and could cash them on different days of each month when it was convenient to him.

The Tenant testified that on October 5, 2014 she received a text message from the property agent explaining that the rent for October 2015 did not include utilities. The Tenant submits that this meant the property manager must have picked up the letter which contained the notice to end tenancy and the October 2014 rent. The Tenant testified that there was text message correspondence that occurred between her and the property agent in which they arranged a move out inspection to occur on October 30, 2014 as well as the Tenants' willingness to accommodate viewings for the re-rental of the property. The Tenant testified that at no point during the month of October 2014 did any viewings take place to re-rent the property for November 2014.

When the Tenant was asked about providing the Landlord with a forwarding address in writing for the purpose of getting their security deposit back, the Tenant testified that this was provided to the Landlord in their notice to end tenancy; however, the Tenants did not produce a copy of this into evidence. The Tenant referred to a text message in the Landlords' Application which was sent to the property agent by the Tenant on November 13, 2015; the Tenant writes in the message that it is a follow up notification for the return of the security deposit and again provides the forwarding address and requests double the amount back. As a result, the Tenants now seek double the return of their security deposit.

I note in the Landlords' evidence, the Landlords explain that they did not receive the Tenant's notice to end the tenancy until October 5, 2015 because the Tenants failed to inform them of the notice. The Landlords also submit that they did not get the Tenant's forwarding address in writing and it only came to them by text message on November 13, 2014.

Analysis

In relation to the Tenant's Application for the return of \$323.00 for water utilities, I accept the Tenant's oral testimony that they paid this amount for water during the tenancy and that this was contrary to the terms of the signed tenancy agreement which stated that water was to be included in the rent. Therefore, I find the Tenants are entitled to the return of **\$323.00**.

In relation to the Tenants' Application for double the return of their security deposit, I make the following findings. Section 38(1) of the Act requires a landlord to make an Application within 15 days after the latter of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing if they intend to claim against it and not return it. Section 38(6) of the Act provides that if a landlord fails to make an Application within the 15 day time limit then the landlord must pay the tenant double the amount of the security deposit.

In their written evidence, the Landlords dispute the fact they were provided a forwarding address. In this case, the Tenants failed to provide insufficient evidence that the Landlords had been provided with a forwarding address in writing on September 29, 2015 in the written notice to end tenancy. I find that the oral testimony of the Tenant is not sufficient to satisfy me that the Tenant included the address in the notice to end tenancy and that the property agent received this on October 5, 2015.

However, what the evidence does suggest is that by November 13, 2014 the Tenants had provided the Landlords with their forwarding address by text message. While text message is not a proper method of service under the Act, the Landlords did make an Application on November 25, 2015 to keep the Tenants' security deposit. Whether the Landlords made their Application using the address on the Tenant's text message of November 13, 2015 or whether they used the address when they were served with the Tenants' Application is now a moot issue. This is because, either way, I find the Landlords made their Application within the 15 day time period provided by Section 38(1) of the Act.

As I have determined that the Landlords complied with Section 38(1) of the Act, I find the doubling penalty provided by Section 38(6) of the Act is no longer relevant. Therefore, I continue to analyse the Tenants' Application for the return of the \$1,000.00 security deposit paid at the start of the tenancy.

While the Landlord did make an Application within the required time limits of Section 38(1) of the Act, the Landlord failed to appear for the hearing and explain their evidence in relation to the monetary claim to keep the Tenants' security deposit. Therefore, I rely on the Tenants' evidence to make findings in this case.

The Act does not permit the Landlord or Tenant to break a fixed term tenancy. The Tenant testified that she gave written notice to the property agent on September 29, 2015. I accept the Tenant's oral testimony that they provided written notice to end tenancy on this date. Accordingly, I find the Tenant cannot be held responsible for the delay created by the property agent arriving on October 5, 2015 to collect the rent cheque at which point the property agent would have been put on notice that the tenancy was going to end on October 30, 2014. In the alternate, I also accept that the Tenants should have taken more appropriate and diligent steps to serve the Landlords with a written notice to end the tenancy using proper means under the Act rather than relying on a communication channel of leaving correspondence under the mat of their rental property.

Section 7(2) of the Act states that where a party is making a claim for compensation for damage or loss that results in the other's non-compliance of the Act, they must do whatever is reasonable to minimise that damage or loss. This statutory duty to mitigate

loss applies in claims by landlords for lost rent. Therefore, even if I accept that the Landlords did not receive notice from the Tenants to end their tenancy until October 5, 2015, this would have left the Landlords 26 days to re-rent the suite for November 2014 for which the Landlords seek to claim for lost rent in their Application. The Landlords provided no evidence as to what they did in these 26 days and what efforts they made to mitigate loss by attempting to re-rent the property for November 2015. Furthermore, the Landlords failed to appear for the hearing to provide evidence on this issue.

In the absence of such evidence, I find that the Landlords have failed to comply with Section 7(2) of the Act. Therefore the Landlords do not have a basis to claim for November 2015 lost rent. Accordingly, I order the Landlord to return the Tenants' security deposit back to them forthwith in the amount of **\$1,000.00**.

As the Tenants have been successful in their Application, I also award them the filing fee of **\$50.00** pursuant to Section 72(1) of the Act. Therefore, the total amount awarded to the Tenants is **\$1,373.00** (\$1,000.00 + \$323.00 + \$50.00). The Tenants are issued with a Monetary Order for this amount pursuant to Section 67 of the Act. This order must be served on the Landlords and may then be filed in the Provincial Court (Small Claims) and enforced as an order of that court if payment is not made in accordance with the Tenants' instructions. Copies of this order are attached to the Tenants' copy of this decision.

Conclusion

The Landlords' Application is dismissed without leave to re-apply as they failed to appear for the hearing. The Tenants' Application is granted in the amount of \$1,373.00 which comprises of the return of the security deposit, water charges and the filing fee.

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: July 06, 2015

Residential Tenancy Branch

