Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the "Application") made by the Tenants for: the return of double the security deposit; money owed or compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), regulation or tenancy agreement; and to recover the filing fee from the Landlords.

Legal counsel for the Landlords appeared for the hearing with one of the Landlords. One of the Tenants appeared for the hearing with an agent who acted for all the Tenants named on the Application. The Tenants' agent called one witness during the hearing. Legal counsel made submissions during the hearing and all other participants provided affirmed testimony.

Legal counsel confirmed that the Landlords had received the Tenants' Application and their documentary evidence. However, the Tenants' agent denied receipt of the Landlords' documentary evidence provided prior to the hearing. Legal counsel explained that she had served a copy of the evidence to the Tenants by registered mail and sent this to them on September 2, 2015. However, pursuant to Rule 3.15 a respondent's evidence must be **received** by the applicant seven days before the date of the hearing. Therefore a respondent needs to account for the time it takes to send the evidence in accordance with the deemed service provisions of the Act. This is also explained in the information sheet on the dispute resolution process which the Landlords were served.

As the evidence provided by the Landlords was not before the Tenant and the Tenants' agent for this hearing, I declined to consider this evidence. However, I informed legal counsel and the Landlord that they were at liberty to provide the documentary evidence as oral testimony. The Tenants' agent did consent to the use of the tenancy agreement which was provided by the Landlords for this hearing.

The hearing process was explained to the parties and they had no questions about the proceedings. Both parties were given a full opportunity to present their evidence, make submissions to me, and cross examine the other party and the witness on the evidence provided. I have carefully considered the oral evidence provided by the parties in this case and the Tenants' documentary evidence. However, I have only documented that evidence which I relied upon to making findings in this decision.

Issue(s) to be Decided

- Are the Tenants entitled to monetary compensation payable under Section 51(2) of the Act?
- Did the Tenants provide the Landlord with their forwarding address for the return of their security deposit?
- If so, are the Tenants entitled to double the return of their security deposit?

Background and Evidence

The parties agreed that this tenancy started on December 1, 2011 for a fixed term of three years which expired on November 30, 2014. The tenancy was intended to renew after this point for another three year term. Rent under the agreement was $1,000.00 payable on the first day of each month. At the time the tenancy agreement was entered into, the Tenants paid the landlord named on the tenancy agreement, who now appears at this hearing as the Tenants' agent, a security deposit of $1,000.00.

The Tenants' agent and the tenancy agreement verified the fact that the tenancy was entered into between the three Tenants named on the Application and the Tenants' agent. The Tenant's agent confirmed that he was a former part owner of the rental property with the two Landlords named on the Application.

The parties confirmed there was a legal dispute between the Tenants' agent and the two Landlords over the ownership of the rental unit. This dispute began in 2010 before the Tenants' agent entered into the rental agreement with the Tenants. As a result of protracted litigation between the Tenants' agent and the two Landlords, full ownership of the rental property was granted to the two Landlords on February 23, 2013.

When the two Landlords assumed full control over the rental property, they sought to end the Tenants' tenancy with a 2 Month Notice to End Tenancy for Landlord's Use of Property (the "Notice") effective for November 30, 2014, which was the end of the fixed term portion of the tenancy agreement.

The Notice was issued to the Tenants for the following reason: "*The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother or child) of the landlord or the landlord's spous*e".

The Notice was not disputed by the Tenants. As a result, the Landlords used a property management company which applied for an Order of Possession for the rental unit pursuant to the undisputed Notice. A hearing was held with a different Arbitrator on November 12, 2015 (the file number of which appears on the front page of this decision). The Tenants verbally disputed the Notice during the hearing. However, the Arbitrator who conducted the hearing determined that as the Tenants had failed to dispute the Notice, the Landlords were entitled to end the tenancy on the effective date of the Notice. The Landlord testified that he did obtain full possession and control of the rental unit on November 30, 2014.

The Tenant's agent testified that after the tenancy had ended he went to serve the property management company with the Tenants' forwarding address for the return of their security deposit. However, they informed him that they were no longer acting for the Landlords. The Tenants' agent testified that he then went to the Landlord's address on December 5, 2015 and after getting no answer he attached a letter on the door which detailed the Tenants' forwarding address. In the same letter the Tenants demanded the Landlord to complete a move out condition inspection of the rental unit. A copy of this letter was provided into evidence.

The Landlord acknowledged that he resides at the address to where the Tenants' agent claimed he posted the letter. However, he denied receipt of the letter stating that at the time it was alleged to have been posted on his door, he was out of the province on business and did not return until December 20, 2014.

In addition, legal counsel submitted that the Landlords were not part of the tenancy agreement and that no security deposit was paid to the Landlords by the Tenants. Neither has this money been provided to the Landlords by the Tenants' agent when his ownership of the property had terminated.

The Tenant appearing for the hearing testified that he observed the Tenants' agent post the letter containing the forwarding address to the Landlord's door. Legal counsel submitted that had the Landlord received anything from the Tenants, he would have submitted it to her straightaway. The Landlord testified that he learnt of the letter when it was served to his legal counsel as part of the Application package. The Tenants now claim that as the Landlords failed to deal properly with their security deposit, they now seek double the return as per the penalty provided by the Act.

The Tenants also applied for monetary compensation under Section 52(2) of the Act because the Landlords failed to use the property for the use indicated on the Notice. The Tenants' agent explained that he hired a private investigator to attend the rental unit at the end of March 2015 because he suspected that the Notice had been issued in bad faith. The private investigator learned that the rental unit had been re-rented out. The Tenants' agent submitted that it was re-rented to someone unrelated to the Landlords despite the Arbitrator for the previous hearing cautioning the Landlord that they must use the property for the use indicated on the Notice. The Tenants' agent confirmed the name of the new renter.

The Tenants' agent called the private investigator he hired to give testimony as a witness. The witness testified that he went to the rental unit on March 30, 2015 and spoke to the occupant residing at the rental unit. The witness testified that the occupant explained she was renting the property from the Landlords since February 1, 2015 and had no family relationship with them. The witness provided the name and date of birth of the renter, details which were provided by her.

Legal counsel cross examined the witness and asked the witness to verify his qualifications as a private investigator which he did. Under cross examination the witness confirmed that he had not gone into the rental unit when he spoke to the renter. Legal counsel submitted that the witness was reading his evidence from a piece of paper and this undermined his credibility.

In response to the Tenants' claim for 2 months compensation, Legal counsel asked questions of the Landlord. The Landlord testified that the person renting the rental unit started her tenancy on February 1, 2015. However, this person was the Landlord's wife's cousin and that there was no formal tenancy agreement between them and occupancy had been given to her on a causal family basis.

The Landlord testified that at the time he gave the Notice, it was given in good faith as he intended to occupy the rental unit. He wanted to reside there with his two children because it was a larger property that was more conducive in allowing them to enjoy more outdoor activities. The Landlord testified that he was unable to occupy the rental unit because when he took possession of it, the Tenants left the property in a deplorable condition which was not habitable. The Landlord testified that the Tenants undertook unauthorised construction during the tenancy and caused so much damage to the rental unit that the city issued a stop work order on the property.

The Landlord testified that he contacted the city who advised of the remediation work that was required to remedy the construction issues. The Landlord testified that he

employed a contractor to carry out the remediation work which included, but was not limited to: repairing damaged walls, fixing plumbing problems, mould remediation and kitchen replacement. The Landlord testified that the work took him three months to complete. The Landlord also testified that his son was involved in an accident which severely disabled his son. As a result, the rental unit would not have been able to accommodate his disability which was another reason why they could not move into the rental unit.

The Landlord testified that the renter currently occupying the rental unit starting renting it on February 1, 2015. The Landlord was questioned by me on how the renter was able to move into the rental unit on February 1, 2015 when the tenancy ended at the end of November 2014 and he had testified that it took him three months to renovate the property. The Landlord responded by explaining that the renter had moved into another property in the same location before the work had been completed.

I also asked the Landlord the date the accident his son was involved in had occurred. The Landlord testified that this was on April 28, 2015, which was approximately three months after the rental suite had been rented out. I asked legal counsel whether they had any evidence relating to the no occupancy order issued by the city to which she responded that she did have evidence but it was in her office. I also asked legal counsel whether the Landlords had completed a move out condition inspection report to which she replied no.

Legal counsel confirmed her submission that the Notice was issued to the Tenants in good faith and the Landlord had every intention of occupying the rental unit up until they received possession of it from the Tenants.

The Tenants' agent submitted that the Landlords had provided no evidence of damage to the rental unit or evidence of a stop work order issued by the city. The Tenants' agent submitted that there were indeed two units located on the rental property but one had been condemned as it had been used for a drug operation and this may have been the property the Landlord was referring to that had a stop work order.

The Tenants' agent stated the rental unit had been renovated and not damaged as evidenced by their testimony in the previous Arbitrator's decision. The Tenants' agent submitted that he had knowledge of this because he was a previous part owner of the property. The Tenant and the Tenants' agent testified that the rental unit was left in an undamaged state. The Tenants' agent argued that he had made numerous requests for the Landlord to complete a move out condition inspection report and even requested this in his letter of December 5, 2015.

Legal counsel cross examined the Landlord and the Tenants' agent on litigation matters related to the ownership of the rental unit. In particular, legal counsel argued that it was the Tenants' agent that retained the Tenants' $1,000.00 security deposit and none of these funds has been provided to the Landlords. Legal counsel submitted that because the Tenants' agent currently retains the Tenants' deposits he is responsible for returning these monies to the Tenants.

Analysis

I have carefully considered the evidence of both parties on the balance of probabilities in making a determination of the Tenants' monetary claim. I first turn my mind to the Tenant's claim for compensation provided by Section 51(2) of the Act.

> ***51*** *(2) In addition to the amount payable under subsection (1), if*
>
> > *(a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or*
> >
> > *(b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,*
>
> *the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.*
>
> [Reproduced as written]

There is no doubt that the rental unit was not used by the Landlords for the intended use that was indicated on the Notice. The evidence is clear that the rental unit is currently being occupied by a person who is not either the mother, father or child of the Landlords or their spouses; these were the only parties that could have taken occupancy of the rental unit for the reason indicated on the Notice pursuant to Section 49(1) of the Act.

The Landlord testified that the rental unit was not occupied by them because it was damaged to such an extent that the city had placed a stop work order on the rental unit and that it took three months for the Landlord to remediate it. However, the Landlords failed to provide sufficient supporting or corroborating evidence to show that the Tenants had left the property in a deplorable condition. The Landlords also failed to complete a move out condition inspection report with the Tenants at the end of the

tenancy. This document would have provided credible and accurate evidence to reflect the state of the rental unit at the end of the tenancy.

I find that if the rental unit had been damaged by the Tenants to the extent testified to by the Landlord then it would have been reasonable to expect that the Landlords would have had at evidence to reflect the severity of these damages. I find that significant evidence, such as a stop work order relating to the actual rental unit, would have been imperative evidence to submit prior to this hearing to support the Landlord's testimony, which it was not.

Furthermore, I place considerable doubt and little credibility on the Landlord's testimony in relation to the reasons why he failed to take occupancy of the rental unit. The Landlord testified that this was partly due to his son's accident which left him disabled and that the rental unit could not be made fit for occupancy due to this disability. However, when the Landlord was asked by me when this accident occurred, I determined that it happened three months after the renter took occupancy of the rental unit. Therefore, I am only able to conclude that the Landlord's son's accident would not have been a factor in the Landlord's decision not to re-rent the rental unit, as this event had not occurred at that time.

In addition, the Landlord testified that he completed significant repairs to the rental unit for three months. In the absence of any evidence to support the nature of the alleged damages, I find it hard to believe that it took three months to remedy damages to the rental unit during a time when the Landlord wanted to take expedient possession of the rental unit for him and his family.

The evidence suggests that in the three months following the ending of the tenancy on November 30, 2014, the Landlord had placed a renter in the rental unit only two months after, namely on February 1, 2015. I find this evidence conflicted with the Landlord's evidence that it took three months to repair the rental unit. Furthermore, I find that even if I did accept the Landlord's evidence that it took three months for the rental unit to be made fit for occupancy, which I do not, then I find there is no evidence to show that the Landlord was prevented from taking occupancy after the rental unit was remediated, which he and his family did not do.

With respect to the conflicting oral evidence provided by the parties in relation to the use of the rental unit after the tenancy had ended, I find the Tenants' agent and the witness testimony more credible and believable. I preferred this evidence over the Landlord's testimony which I find lacked credibility due to the inconsistencies documented above.

The Act establishes compensation payable to a tenant when a landlord fails to use the rental unit within the six months following a Notice. Notwithstanding the Landlord's argument that he intended to use the property for his own use in good faith at the time the Notice was given, I find the Landlord failed to do so. I find the reasons provided by the Landlord in this hearing are not sufficient for me to determine that the Landlord should avoid the compensation requirements of the Act. Therefore, I find the Tenants are entitled to two month's rent payable under the Act in the amount of **$2,000.00**.

I now turn my mind to the Tenants' claim for double the amount of the security deposit. Section 38(1) of the Act states that, 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, the landlord must repay the security deposit or make an Application to claim against it. In this case, I must first determine if the Tenants have satisfied their requirement to provide the Landlord with their forwarding address.

In this respect, both parties provided conflicting oral testimony as to whether the Landlord received the Tenants' forwarding address which was claimed to be served by the Tenants' agent on the Landlord's door. Section 90(c) of the Act establishes that a document served by posting it to the door, is deemed to have been received three days later. However, the deemed service provisions of the Act are not always conclusive and can be rebutted if there is clear evidence that a party has not been served. Therefore, I make the following findings in this respect.

Having determined that the Landlord's oral testimony lacked credibility in my analysis on the two month compensation, I find that after weighing up the evidence of both parties on the balance of probabilities, I prefer the evidence of the Tenant and the Tenant's agent. I base this on the fact that the Tenants' agent's testimony was corroborated by the Tenant's affirmed testimony that he witnessed the letter containing the forwarding address being posted to the Landlord's door on December 5, 2014. The Tenants' agent also provided a copy of the letter which detailed the Tenants' forwarding address and the Landlord confirmed the address where the Tenants' agent posted the letter was his place of residence.

The Landlord stated that he himself was out of town on business on the date the notice was claimed to have been posted to his door. However, the Landlord failed to provide sufficient evidence to support or verify this claim or whether the entire family or household occupants were also out of town with him. Given the other inconsistencies in the Landlord's evidence, I find that the Landlord failed to provide clear rebuttal evidence that he was not served with the Tenants' forwarding address.

Therefore, I conclude that the forwarding address was served to the Landlord on December 5, 2014 by posting it to his door. For the above reasons, I find the deeming provisions of the Act apply to this case and the Landlord is deemed to have been served the Tenants' forwarding address on December 8, 2014. Accordingly, the Landlords had until December 23, 2014 to make an Application to keep the Tenants' security deposit or repay it in accordance with Section 38(1) of the Act, neither of which was done.

Legal counsel explained that the tenancy agreement was executed and entered into with the Tenants by the Tenants' agent who was the Landlord at that time. Legal counsel relies on the fact that the Landlords were not part of the tenancy agreement and that no security deposit was paid to the Landlords by the Tenants; neither has this money been provided to the Landlord by the Tenants' agent when the ownership of the property had terminated.

In this respect I turn to the definition of a Landlord in the Act. Section 1 of the Act defines a landlord in relation to a rental unit as the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord, exercises powers or performs duties under this Act, the tenancy agreement or a service agreement.

It is undisputed that the Landlords took full ownership of the rental unit from the Tenants' agent on February 23, 2013 who at that time was the Landlord on the written tenancy agreement. It is also undisputed that after ownership of the rental unit was taken by the Landlords they then issued the Tenants with the Notice. Therefore, I find that the Landlords meet the definition of the Act as they exercised powers under the Act in relation to ending of the tenancy agreement. Accordingly, the Landlords were then responsible for dealing with the Tenants' security deposit in accordance with the Act.

In relation to legal counsel's submissions that the Landlords were not paid the security deposit by the Tenants, or that the Tenants' agent did not transfer this money to the Landlords when the litigation regarding the ownership of the rental unit was over, I refer to Section 93 of the Act. This states that the obligations of a landlord under this Act with respect to the security deposit run with the land or reversion.

I have determined that the Landlords meet the definition of a landlord under the Act> Therefore, irrespective of a legal dispute as to where the Tenants' security deposit went between the landlords in the disbursements of the land title transfer, I find the Landlords have a duty to deal with the Tenants' security deposit in accordance with Section 93 of the Act.

Section 38(6) of the Act stipulates that if a landlord does not comply with Section 38(1) of the Act, the landlord **must** pay the tenant double the amount of the deposit. Based on the foregoing, I find that the Tenants are to be awarded double the return of their security deposit in the amount of **$2,000.00**.

As the Tenants have been successful in this matter, I also award the Tenants their filing fee of **$50.00** pursuant to Section 72(1) of the Act. Therefore, the total amount awarded to the Tenants is **$4,050.00** ($2,000.00 + $2,000.00 + $50.00).

The Tenants are issued with a Monetary Order which must be served on the Landlords. The Tenants may then file and enforce this order in the Provincial Court (Small Claims) as an order of that court if the Landlords fail to make payment in accordance with the Tenants' written instructions. Copies of this order are attached to the Tenants' copy of this decision.

Conclusion

The Landlords have breached the Act by failing to deal properly with the Tenants' security deposit and not using the property for the reason the tenancy was ended. Therefore, the Landlords are ordered to pay the Tenants $4,050.00.

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 14, 2015

Residential Tenancy Branch