Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing dealt with the tenants' application for a Monetary Order for return of double the unreturned security and/or pet damage deposit and recovery of overpaid rent. The landlord did not appear at the hearing. The tenants provided a copy of a registered mail receipt, including tracking number and address used for service, as proof the hearing package was sent to the landlord via registered mail on April 27, 2015. The tenants testified that the registered mail was returned to them because it was unclaimed by the landlord. The tenants testified that the service address used to send documents to the landlord appears on the tenancy agreement, appears on the cheque the tenants were given by the landlord on October 1, 2014, and that they had not been provided any other service address for the landlord. The tenants also testified that they sent their evidence to the landlord via regular mail on September 1, 2015 and again via registered mail on September 14, 2015. The tenants orally provided a registered mail tracking number as proof of service of the tenants' evidence and a search of the tracking number showed that this registered mail package was successfully delivered to the landlord.

Section 90 of the Act deems a person to have received documents five days after mailing even if the person refuses to accept or pick up their mail. Upon review of the tenancy agreement, the cheque issued to the tenant by by the landlord on October 1, 2014 and the registered mail receipt of April 27, 2015 I am satisfied the tenants sent the hearing package to the landlord in a manner that complies with the Act. Accordingly, I find the landlord is deemed to have received the hearing package five days later pursuant to section 90 of the Act and I continued to hear from the tenants without the landlord present.

I was also satisfied the landlord has received the tenant's evidence and I have considered it in making this decision.

Issue(s) to be Decided

1. Are the tenants entitled to doubling of the unreturned security and/or pet damage deposit?
2. Are the tenants entitled to recover overpaid rent from the landlord?

Background and Evidence

In September 2013 the parties executed a written tenancy agreement for a fixed term tenancy set to commence October 1, 2013 and end on September 30, 2014. The tenants paid a security deposit of $675.00 on September 16, 2013. The tenancy agreement provides that the tenants were to pay rent of $1,350.00 on the 1st day of every month.

On October 18, 2013 the parties executed another document entitled “Addendum to rental contract of [address of rental unit]”. This document reflects that the landlord was giving the tenants consent to have a dog in the unit and that they have agreed to the following changes or additions to the “original agreement”:

- The rent would increase to $1,375.00 per month (an increase of $25.00 per month).
- A pet damage deposit would be paid and that the sum of deposits would be $1,375.00.
- The tenants would be responsible for repairing damage caused by the dog, dog hair would be removed from furniture, and the rug in the rental unit would be removed.

The tenants testified that they began paying the increased rent of $1,375.00 starting November 1, 2013 and they continued to do so until their last month of tenancy which was September 2014.

The tenants submitted that they participated in a move-in inspection with the landlord but that she provided them with only one page of the move-in inspection report. The tenants testified that they participated in a move-out inspection with the landlord on September 30, 2014 and on October 1, 2014 and that the landlord did not prepare or give them a move-out inspection report saying it was unnecessary. The tenants stated the landlord was satisfied with the condition of the rental unit and on October 1, 2014 gave them a cheque in the amount of $680.00 which represented return of their security deposit of $675.00 plus $5.00 for interest. The tenants testified that the landlord also gave them cash in the amount of $800.00 on October 1, 2014 which represented return

of the $700.00 pet damage deposit and return of $100.00 since they had paid $200.00 for a move-in fee. The tenants confirmed that they were not asked and they did not give any written consent for deductions from the security deposit.

I heard from the tenants that the landlord asked that the tenants to not cash the $680.00 cheque right away as her funds were low due to the teacher's strike. The tenants obliged. Then on October 4, 2014 the landlord emailed the tenants to state she found damage in the rental unit and that she would "not be issuing a cheque for the dog deposit". The landlord also asked for them to return the $800.00 "security deposit" she had already refunded to them (a subsequent text message from the landlord indicates the amount should read $700.00 and not $800.00). The tenants responded via email the following day indicating that they did not agree with the landlord's position. The tenants confirmed to me that they did not return the $700.00 as requested by the landlord and they did not try to cash the $680.00 cheque as they did not want to incur bank fees for a dishonoured cheque.

On October 11, 2014 the tenants wrote a letter to the landlord requesting she re-issue a cheque in the sum of $680.00 and send it to their forwarding address. The letter included the tenant's forwarding address in two placed. The letter was mailed to the landlord at her service address on October 14, 2015 as evidenced by a receipt for postage. The tenants submitted that they sent the same letter again in November 2014 via regular mail although they did not retain the receipt for postage. I noted that the letter and receipt for postage were not in the evidence package before me. I asked the tenant to read the entire letter aloud to me during the hearing which she did. The letter was lengthy and detailed. I ordered the tenants to provide me with a copy of the letter shortly after the teleconference call ended along with the receipt for postage. The tenants complied with my order and the requested documentation was received at the Branch very shortly after the teleconference call. I confirmed that the letter submitted as evidence is the same as the letter read aloud during the hearing and does include the tenant's forwarding address in two places.

The tenants submitted that the landlord did not respond to the letter sent to the landlord twice and the landlord did not provide them with a negotiable cheque for the portion of the security and/or pet damage deposit that remains outstanding. Nor, has the landlord filed an Application against them for their deposit that she continues to hold. By way of this Application, the tenants requested the $680.00 cheque for the deposit and interest or $1,360.00.

In addition to the above claim, the tenants seek to recover the additional rent they paid every month for the months of November 2013 through September 2014, or $275.00,

on the basis the rent increase was illegal. The tenants confirmed that they were never served with a Notice of Rent Increase by the landlord.

Documentary evidence provided by the tenants included copies of: the tenancy agreement; the "addendum" signed October 18, 2013; rent receipts and a receipt for the security deposit; the front side of the cheque for $680.00 dated October 1, 2014; the emails and text messages exchanged between the parties in early October 2014; a transcription of a conversation the parties had on October 1, 2014; and, the letter dated October 11, 2014 along with a receipt for postage dated October 14, 2014.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

Section 38(1) of the Act provides that unless a landlord has a legal right under the Act to retain any or all of the security deposit or pet damage deposit, a landlord must either return the deposit to the tenant or make an Application for Dispute Resolution to claim against the deposit within 15 days from the day the tenancy ended or the date the landlord received the tenant's forwarding address in writing, whichever day is later. Where a landlord does not comply with section 38(1) of the Act, section 38(6) requires that the landlord must pay the tenant double the deposit.

In this case, I was not provided any information to suggest the tenants extinguished their right to return of the deposits and they did not give the landlord written consent to make any deductions from the deposits. Rather, it would appear the landlord extinguished her right to claim against the deposits for damage since she did not fulfill her obligation to prepare and give the tenants condition inspection reports at the beginning and end of the tenancy.

I accept the undisputed evidence before me that the landlord gave the tenants a cheque in the amount of $680.00 on October 1, 2014 and the cheque was non-negotiable. I also accept the undisputed evidence that the tenants sent their forwarding address to the landlord in writing by way of a letter written on October 11, 2014 and mailed to the landlord on October 14, 2014. Pursuant to section 90 of the Act, the landlord is deemed to have received their forwarding address five days after mailing which would be October 19, 2014. Accordingly, I find the landlord had until December 3, 2014 to either refund the remaining balance of the deposits to the tenants or file an Application for Dispute Resolution. In failing to do either one of these options, I find the landlord failed

to comply with section 38(1) of the Act and I find the tenants entitled to doubling of the unreturned balance of the deposits under section 38(6) of the Act.

Although the cheque given to the tenants on October 1, 2014 was in the amount of $680.00 and included $5.00 in interest the interest rate payable on deposits for the relevant time period was 0% meaning no amount was payable for interest. Accordingly, I double the amount of $675.00 for an award of $1,350.00.

With respect to rent increases, the Act provides that they must be accomplished in a manner that complies with Part 3 of the Act (sections 40 through 43). In this case, the parties attempted to change the terms of tenancy, including a rent increase, by mutual agreement on October 18, 2013. The Act does permit parties to change terms of tenancy by mutual agreement under section 14; however, section 14 also specifically prohibits changing of certain terms, including rent increases. This part of section 14 is intended to ensure rent increases are accomplished under the rent increase provisions of sections 40 through 43. This interpretation is further supported by sections 6 and 41 of the Act. Section 41 states “A landlord must not increase rent except in accordance with this Part” and section 6(3)(a) states: “A term of a tenancy agreement is not enforceable if the term is inconsistent with this Act or the regulations”.

The rent receipts submitted as evidence support the tenants’ submission that they paid the rent increase. Since the tenants began paying an increased amount of rent during their tenancy, it is before me to determine whether the increase was accomplished in a manner that complies with sections 40 through 43.

Section 42 of the Act provides the following requirements with respect to how and when a rent increase may be accomplished. It provides, in part:

> **42** (1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:
>
> (a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first established under the tenancy agreement;
>
> (2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.
>
> (3) A notice of a rent increase must be in the approved form.
>
> [reproduced as written with my emphasis added]

In this case, the rent increase was collected less than 12 months after the rent was first established by the tenancy agreement. Further, the landlord did not serve the tenants with a Notice of Rent Increase in the approved form. Therefore, the timing and notice requirements were not met and the rent increase paid by the tenants did not comply with section 42 of the Act.

Although the tenants had consented to the $25.00 rent increase in writing when they signed the document dated October 18, 2013, their consent to the amount of the increase does not negate the timing and notice requirements for rent increases that are imposed upon the landlord by the Act. Also of important consideration is that the parties had not ended the original tenancy agreement and entered into a new agreement with new terms. Rather, it is clear from the wording of the document signed on October 18, 2013 that they were attempting to change the terms of the original tenancy agreement and as stated previously parties cannot agree to change a term to reflect a rent increase and avoid Part 3 of the Act.

Section 43(5) of the Act provides for what happens if a landlord collects a rent increase that is non-compliant with the Act. It states: “If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.” In this case, the tenancy has ended and the tenants no longer pay rent to the landlord; therefore, I find they are entitled to recover the overpaid rent by way of a Monetary Order against the landlord. I find the tenants have established that they overpaid rent by $275.00 during their tenancy and I award the tenants that amount.

As the tenants were largely successful in their Application, I further award the tenants recovery of the $50.00 filing fee they paid for their Application.

In light of all of the above, the tenants are provided a Monetary Order calculated as follows:

Double security and/or pet damage deposit	$1,350.00
Recovery of overpaid rent	275.00

Filing fee	50.00
Monetary Order	$1,675.00

To enforce the Monetary Order it must be served upon the landlord and it may be filed in Provincial Court (Small Claims) to enforce as an Order of the court.

Conclusion

The tenants have been provided a Monetary Order in the total amount of $1,675.00 to serve and enforce upon the landlord.

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: October 01, 2015

Residential Tenancy Branch