Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

The tenant attended the hearing. The landlord's agent attended the hearing. Both parties were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Scope of Proceedings

The tenant's application does not indicate that she is also seeking compensation for damage or loss under the Act. While, not perfectly pleaded, the issues before me were understood by the landlord. Further, the tenant included the full amount of the monetary order requested in both her application and monetary order worksheet.

Paragraph 64(3)(c) allows me to amend an application for dispute resolution.

As the landlord understood the tenant's application there is no undue prejudice to the landlord in amending the tenant's application. On this basis, I amend the tenant's application to include a request for a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67 of the Act.

Prior Hearing and Review

This application was previously heard by a different arbitrator. The landlord did not attend the hearing. The landlord applied for and was granted a review hearing on the basis of paragraph 79(2)(a) of the Act. The review hearing is a hearing *de novo*.

Issue(s) to be Decided

Is the tenant entitled to a monetary award for the return of her security deposit? Is the tenant entitled to a monetary award equivalent to the amount of her and security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the Act? Is the tenant entitled to a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

The tenancy formally began 1 September 2014. Monthly rent was $1,100.00. There is no written tenancy agreement. The landlord collected a security deposit in the amount of $500.00 at the beginning of the tenancy. No condition inspection report was completed at the beginning of this tenancy.

The rental unit was a furnished suite. The entrance to the rental unit is common with the landlord's. Access may be achieved by key or by code. There is a second unit in the residential property that is occupied by AR. The landlord occupies a third unit in the residential property.

The tenant paid for five months of rent. Rent for September paid by cheque dated 15 September 2014 was returned for insufficient funds. The agent testified that the landlord was concerned the tenant would not pay rent for September or January. The tenant testified that her rent for January 2015 was delivered to the landlord on or about 1 January 2015 by way of cheque. The tenant testified that she was not sure exactly what time the cheque was left.

On 22 December 2014, the tenant sent an email to the landlord informing the landlord that she wished to end the tenancy stating, "I should move for January." The tenant

testified that she did not intend to vacate the rental unit at this time as her new accommodations were not yet ready for occupation. The tenant admitted on cross examination that she was mistaken when she testified in the prior arbitration that she had provided her notice to vacate the rental unit on 15 December 2014.

On 30 December 2014, the tenant's brother wrote to the landlord in response to her requests for January's rent and stated, *"[the tenant] thought she wouldn't have to pay for Jan.*" and "*The issue is she doesn't have any money as [the university] pushed her to pay for Dec and Jan in advance*."

The agent testified that in late December the landlord suspected the tenant had left the rental unit. The agent testified that the landlord was not spending a lot of time in the residential property as the landlord's husband had been hospitalised and was in serious condition.

At 2225 on 1 January 2015, the tenant's brother wrote to the landlord:

> [the tenant] is still a legal tenant until the end of January 2015 that means nobody is allowed to get into her unit until the end of January 31st 2015.

The agent testified that on 2 January 2015 at approximately 1800 the landlord slipped under the door a notice of entry for 3 January 2015. The agent testified that when the landlord entered the rental unit she saw the notice and a previous notice on the floor and assumed that they were not read. The agent took the original notices. The tenant never saw the notices. The agent testified that when the landlord entered she did not see any of the tenant's belongings. The agent testified that she removed the slip covers on the sets to have them professionally cleaned. The agent testified that the landlord opened cupboards and there were no belongings there. The agent admits the landlord moved a vacuum from the rental unit to the laundry area and swept some shells off the floor. The agent testified that this is the only time the landlord entered the rental unit. The agent testified that at this time the rental unit was completely usable as a rental unit and the seats were useable without their slip covers. The agent denies the landlord ever packed up the tenant's belongings and says that this is impossible as there was nothing there to pack.

The tenant testified that on 10 January 2015 she attended at the rental unit to pick up a medical item for her mother. The tenant testified that she discovered the cover to the couch had been removed and that items had been removed from cupboards. The tenant testified that her belongings were removed to the laundry room in particular two bags of clothing and a vacuum. The tenant testified that her belongings were still in the cupboard. The tenant testified that it was her intent to remain in the rental unit until her

new residence was ready. The tenant testified that she spent a few nights at her brother's residence.

The tenant testified that she and a friend attended at the rental unit on 13 January 2015 to remove the remainder of her belongings. The tenant testified that she saw the landlord that day and expressed concern that the landlord had entered into the rental unit. On 13 January 2015, the tenant left a letter containing her forwarding address in the landlord's mailbox. The tenant also returned her keys to the landlord that day.

The agent testified that the tenant was not asked to return her keys to the rental unit. The agent testified that there are two ways to enter into the rental unit: by key or by code. The agent testified that the codes to the entry were never changed and the tenant always had a means of access.

On 13 January 205 the landlord emailed the tenant confirming that the rental unit was available to her until the end of the month and asking the tenant to drop off keys at the end of the month.

The tenant testified that she began occupying her new residence on or about 15 January 2015. The tenant testified that prior to this point the new residence had not yet been furnished.

I was provided with a written statement from AR. AR stated that he used the same laundry area as the tenant. AR stated that he used the washer and dryer two or three times per week in December and January. AR noted that there were no additional boxes placed in the laundry area in December or January.

The tenant claims for $1,638.00:

Item	**Amount**
Return of Security Deposit	$500.00
Subsection 38(6) Compensation	500.00
Compensation for Landlord's Entry (18d)	638.00
Total Monetary Order Sought	**$1,638.00**

Submissions

The landlord submits that the tenant is not credible and has given misleading evidence. In particular, the landlord points to the discrepancies in the tenant's testimony in respect of the belongings that were in the rental unit.

The landlord submits that the she was concerned that she would not have rent for both September and January. The landlord submits that removing the notices from the rental unit does not invalidate an otherwise valid notice.

The landlord submits that the tenant has an obligation to act in good faith and that by failing to attend a condition move out inspection the tenant has extinguished her right to the security deposit and, in the alterative, the doubling provision in subsection 38(6) of the Act.

Analysis

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to subsection 38(6) of the Act equivalent to the value of the security deposit. However, pursuant to paragraph 38(4)(a) of the Act, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy.

The tenant has provided her forwarding address in writing to the landlord. It has been more than fifteen days since the later of the date the tenancy ended and the date the tenant provided her forwarding address in writing. The landlord has not yet returned the tenant's security deposit, does not have written authorization to retain the deposit, and does not have an order of the Residential Tenancy Branch authorizing any amount to be retained.

The landlord has argued that the tenant's right to return of the security deposit was extinguished by her failure to attend the condition move out inspection. The parties agree that no condition move in inspection was conducted. Pursuant to paragraph 24(2)(a) of the Act a landlord's right to claim against a security deposit is extinguished by failure to offer a condition inspection at the beginning of the tenancy.

Residential Tenancy Policy Guideline, "*17. Security Deposit and Set off*" provides guidance in this situation:

> 8. In cases where both the landlord's right to retain and the tenant's right to the return of the deposit have been extinguished, the party who breached their obligation first will bear the loss. For example, if the landlord failed to give the tenant a copy of the inspection done at the beginning of the tenancy, then even though the tenant may not have taken part in the move out inspection, the landlord will be precluded from claiming against the deposit because the landlord's breach occurred first.
>
> [emphasis added]

As the landlord breached her obligation first, she bears the loss of extinguishment. Accordingly, the tenant was entitled to return of her security deposit. The tenant has proven her entitlement to $1,000.00 for return of her security deposit and compensation pursuant to subsection 38(6) of the Act.

Paragraph 29(1)(b) of the Act addresses a landlord's right to enter a rental unit. It states that a landlord may enter a rental unit where:

> at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the purpose for entering, and the date and time of entry.

Regular documents, when required to be given from one party to another, must be delivered pursuant to section 88 of the Act. Delivery by slipping under the door is not a contemplated method of service. Pursuant to paragraph 88(g) of the Act, a document may be given by affixing the document to a door or other conspicuous place. Pursuant to paragraph 88(f) of the Act a document may be given by leaving a copy in a mail box or mail slot for the address at which the person resides. In accordance with paragraphs 90(c) and (d) of the Act, a document delivered by posting to a door or other conspicuous place or by placing in a mailbox or mail slot is deemed served on the third day after its delivery.

If I were to accept the landlord's method of service, I would consider it analogous to the methods in paragraphs 88(f) and (g). Accordingly, order for the notice to be effective and to comply with the deemed service provisions in section 90 of the Act, the notice must have been given four days prior to entry. By the landlord's own evidence, the landlord did not provide sufficient time for service. As no proper notice was given, the landlord was not entitled to enter the unit when she did and in doing so she breached the Act.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

In determining compensation to be awarded, I must consider the actual effect of the breach on the tenant. It is clear that by the end of the tenancy the relationship between the parties had soured. On the basis of the evidence before me, I find it more likely than not that the tenant was not actually residing in the rental unit when the landlord entered the unit; however, the tenant was still fully entitled to possession of the rental unit at that time. By the landlord's own admission she did interfere with some of the tenant's belongings; however, I find on the basis of the corroborating evidence by AR that this interference was much less than the tenant advanced. In particular, I do not find the tenant's evidence regarding the landlord packing up belongings to be credible. The tenant testified that her new unit was prepared as of 15 January 2015. From the tenant and her brother's emails it is clear that she was entitled to occupation of her new rental unit at some point in January. I find that it was more likely than not that the tenant always intended to begin occupying the rental unit on or about 15 January 2015. On the basis of this evidence, I find that the intrusion was minor and that the tenant made much more of the intrusion because of the soured relationship and her desire to not pay full rent for two units in January.

Where no significant loss has been proven, but there has been an infraction of a legal right, an arbitrator may award nominal damages. Based on this, I award the tenant nominal damages of $50.00 for the landlord's unlawful entry.

As the tenant has been successful in her application she is entitled to recover her filing fee from the landlord.

Conclusion

I issue a monetary order in the tenant's favour in the amount of $1,100.00 under the following terms:

Item	Amount
Return of Security Deposit	$500.00
Subsection 38(6) Compensation	500.00
Compensation for Landlord's Entry (18d)	50.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	**$1,100.00**

The tenant is provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial 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 subsection 9.1(1) of the Act.

Dated: January 08, 2015

Residential Tenancy Branch