



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD O OLC FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* ("the *Act*") for return of their security deposit pursuant to section 38; an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; any 'other' appropriate compensation or remedy under the *Act*; and authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. The landlord acknowledged receipt of the tenants' application for dispute resolution and the tenant acknowledged receipt of the landlord's evidence submitted for this hearing.

The tenants clarified that their application is for recovery of their security deposit.

Issue(s) to be Decided

Are the tenants entitled to the return of their security deposit? Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This tenancy began on February 1, 2014 for a fixed term of one year. The tenants both testified that, more than 30 days before the end of the fixed term, the landlord told them that he would not renew their lease and that their tenancy would end at the end of the fixed term. Both parties agreed that a security deposit of \$525.00 paid at the outset of the tenancy (February 1, 2014).

The tenants ultimately vacated the rental unit on February 28, 2015. They both testified that the landlord stated he would come for a condition inspection on February 28, 2015

at 12:00 pm. They both testified that they waited until 3:00 pm and attempted to contact him multiple times. They testified that he did not attend or respond to their messages. The landlord testified that he attended to the rental unit at 12:00 pm on February 28, 2015 and the tenants had already left, leaving the keys on the counter. The landlord completed and submitted a condition inspection report. He testified that the rental unit was relatively clean and with no significant damage. However, he submitted a receipt for paint materials and labour indicating that it was necessary to paint the rental unit because the tenants had put approximately 10 holes in the walls and some scratches. He provided undisputed testimony that the rental unit was painted prior to the tenants moving in.

The landlord testified that he did not realize the tenants were intending to vacate the rental unit. He testified that he only became aware of this when they provided a written notice on February 22, 2015. He testified that while he attempted to re-rent the unit for March 1, 2015, he was unable to rent the unit to new tenants until April 1, 2015. The landlord provided no evidence or testimony of efforts to re-rent the unit. He submitted a copy of the new tenancy agreement with a start date of April 1, 2015 but made no application to retain the security deposit.

The landlord testified that he believed that the fixed term tenancy would continue on a month to month basis after the end of the term. He submitted a copy of the residential tenancy agreement. Section 4 of the one page agreement indicates that the rental period for this tenancy is an "annual term". There is no written provision within this particular agreement for a continuing month to month tenancy.

The landlord testified that this residential apartment building is approximately 35 years old. He testified that the tenants' unit had been remodelled before they moved in. He testified that all of his communication regarding the tenancy and condition inspections was very clear to/with the tenants.

Analysis

In this circumstance, the fixed term tenancy appears to have continued for one month after its end. Therefore, the tenants were obliged to provide 30 days' notice to end the tenancy. The tenants testified however that it was agreed-upon that the tenancy would end and that the landlord had been made aware prior to their provision of written notice that they were vacating the rental unit. In fact, the tenants testified that the landlord told them their tenancy could not continue.

I accept most of the evidence submitted by the tenants. I find that the tenants were credible in their testimony. The tenants were both clear and consistent in their testimony. I note that the tenants' version of events seemed both reasonable and plausible. I further note that the landlord seemed to hesitate in answering questions and providing evidence. The landlord's witness did not provide any supporting testimony, indicating only that she had nothing to add to the landlord's testimony. The landlord often made contradicting statements.

The landlord testified that he retained the tenants' security deposit because they did not provide sufficient notice and he had to paint the apartment after they moved out. Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the security deposit in full or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposits, and the landlord must return the tenant's security and pet damage deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security and pet damage deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. In this case, the tenants testified that they did not inform the landlord of their forwarding address until the dispute resolution hearing package was sent to him. The landlord did not make a formal application to the Residential Tenancy Branch to retain the deposit or recover any loss as a result of this tenancy.

Section 38(4)(a) of the *Act* also allows a landlord to 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." The tenants both testified that they did not agree to allow the landlord to retain any portion of their security deposit. As there is no evidence that the tenants have given the landlord written authorization at the end of this tenancy to retain any portion of their deposits, section 38(4)(a) of the *Act* does not apply to the tenants' security deposit.

The tenants seek return of their \$525.00 security deposit. While the landlord submitted information as to why he felt entitled to keep the security deposit, he made no formal application to retain the deposit, even on receipt of the tenant's application.

I do not find that the landlord is entitled to the cost of painting because there were 10 nail holes. Policy Guideline No. 1 provides that the tenant is not responsible for the repair of nail holes unless they are excessive. Some nail holes (for example 10) are

considered reasonable wear and tear and not the responsibility of the tenant at the end of tenancy.

I accept the testimony of the tenants that the landlord had verbally advised that this tenancy would end. However, the tenants did not confirm their acceptance of the end of tenancy until February 22, 2015 when they provided written notice. Furthermore, the landlord did not provide testimony or evidence of any efforts to re-rent the unit before April 1, 2015. I find the landlord has provided insufficient evidence that he mitigated any rental loss and therefore do not find that he is entitled to collect rental loss from the tenants.

I do not find that the landlord was required to return the tenants' security deposit as he had not been provided with a forwarding address by the tenants. Under these circumstances, I do not find that section 38(6) of the *Act* applies: I do not find that the tenants are entitled to a total monetary order amounting to double the value of their security deposit.

The landlord has not shown that he is justified in retaining their deposit. The landlord did not make a proper application to retain the security deposit. **I find that the tenants are entitled to the return of their \$525.00 security deposit.** No interest is payable for this period. Having been successful in this application, I find further that the tenants are entitled to recover the \$50.00 filing fee paid for this application.

Conclusion

I grant the tenants a monetary order in the amount of \$575.00.

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: January 26, 2016

Residential Tenancy Branch

