Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing was convened as a result of the tenant's application for dispute resolution seeking remedy under the *Residential Tenancy Act* (the "*Act*"). The tenant applied for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement, for the return of double her security deposit, and to recover the cost of the filing fee.

The tenant, the landlord and an agent for the landlord (the "agent") appeared at the teleconference hearing and gave affirmed testimony. During the hearing the parties presented their evidence. A summary of their testimony is provided below and includes only that which is relevant to the hearing.

The agent confirmed that the landlord received the tenant's documentary evidence and that the landlord had the opportunity to review that evidence. The agent confirmed that the landlord did not serve the tenant with their documentary evidence and as a result, that evidence was excluded from the hearing as the tenant was ready to proceed and the tenant filed her application on November 27, 2015.

The agent then requested an adjournment which was denied as the agent claimed a family member passed away and that they were out of the country; however, the landlord received the package back in December of 2015 which I find does not justify an adjournment on May 26, 2016, the date of the hearing. Furthermore, I have considered the criteria for adjournments in the Rules of Procedure and find that the agent has not met the criteria for an adjournment and that there would be greater prejudice to the tenant by granting an adjournment.

Issues to be Decided

- Is the tenant entitled to a monetary order under the *Act,* and if so, in what amount*?*
- Is the tenant entitled to the recovery of the cost of the filing fee under the *Act?*

Background and Evidence

The parties agree that a month to month tenancy began on August 15, 2011, for $1,000.00 per month in rent, and that in July 2013, the tenant took over the suite also and a new tenancy agreement was formed for a total rent of $1,600.00 per month. The tenant's original security deposit of $500.00 paid in 2011 was increased by $300.00 to $800.00 in July of 2013 when the

new tenancy agreement was formed between the parties. The parties agree that the tenant vacated the rental unit on July 2, 2015.

The tenant's monetary claim of $6,658.84 is comprised of the following:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. Utility bill repayment	$2,658.84
2. Return of security deposit	$800.00
3. Rent X 2 pursuant to section 51(2) of the *Act*	$3,200.00
TOTAL	**$6,658.84**

Regarding item 1, the tenant has claimed for compensation dating back to 2011 and did not file her application until November of 2015 which was several months after the tenancy ended. This portion was dismissed during the hearing due to insufficient evidence and due to the tenant failing to comply with section 7 of the *Act* which requires the applicant to minimize the damage or loss by doing what is reasonable under the *Act*. I find the tenant breached section 7 of the *Act* by failing to bring a claim for compensation sooner than several months after the tenancy ended and instead, permitted the claimed to increase between 2011 to July of 2015.

Regarding item 2, the tenant testified that if she is entitled to double the return of her security deposit under section 38 of the *Act* she does not agree to waive her right to double the return of her security deposit under the *Act*. The parties agreed that neither an incoming nor an outgoing condition inspection were conducted during the tenancy contrary to sections 23 and 35 of the *Act*. Furthermore, the tenant testified that she mailed her written forwarding address and mailed it to the landlord via registered mail on October 5, 2015 and provided a registered mail tracking number in evidence which is included on the cover page of this Decision for ease of reference. The agent denied that the landlord ever received the written forwarding address of the tenant which is inconsistent with the Canada Post registered mail tracking website which confirms that the registered mail package was successfully delivered on October 7, 2015. The parties confirmed that the tenant's security deposit has not been returned as of the date of the hearing.

Regarding item 3, the tenant is seeking two extra months of compensation pursuant to section 51(2) of the *Act* due to the landlord failing to comply with the reason stated in the 2 Month Notice to End Tenancy for Landlord's Use of Property (the "2 Month Notice") dated July 2, 2015, a date of which was confirmed by the parties as an error and "should have been dated May 15, 2015" as the incorrect date was on the 2 Month Notice. Although only page one of the two-page 2 Month Notice was submitted in evidence, the parties agreed that the 2 Month Notice indicated the reason for ending the tenancy as:

> "The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse)"

[reproduced as written from a standard 2 Month Notice to End Tenancy for Landlord's Use of Property]

The tenant submitted in evidence an ad posted November 2015 from a popular internet classifieds website that supports the rental unit being posted. The ad shows the rental unit address, and says that it was listed "4 days ago" and the printout is dated November 16, 2015 and was for $1,200.00 per month. The agent did not deny that the landlord may have had the ad listed as claimed.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act.* Accordingly, an applicant must prove the following:

1. That the other party violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the tenant to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act,* regulation, or tenancy agreement on the part of the landlord. Once that has been established, the tenant must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the tenant did what was reasonable under the *Act* to minimize the damage or losses that were incurred.

Item 1 – As indicated above, this portion of the tenant's claim as dismissed during the hearing as I find the tenant breached section 7 of the *Act* for the reasons stated above. As a result, this portion of the tenant's claim is **dismissed without leave to reapply.**

Item 2 – There is no dispute that the tenant vacated the rental unit on July 2, 2015. There is also no dispute that the landlord failed to complete an incoming and outgoing condition inspection report which results in the landlord extinguishing all rights to claim against the tenant's security deposit. Furthermore, I afford no weight to the agent's testimony that the landlord did not receive the tenant's written forwarding address as I find the agent's testimony to directly contradict the registered mail tracking information which indicates that the registered

mail was signed for on October 7, 2015 after being mailed on October 5, 2015 as testified to by the tenant. Therefore, I prefer the tenant's testimony as it is consistent over that of the agent's testimony which is contradictory.

The agent confirmed that the landlord continues to hold the security deposit of the tenant, has not filed an application to retain the security deposit, was not given permission by the tenant to keep any portion of the security deposit and do not have an order from an Arbitrator giving them permission to retain any portion of the security deposit. Section 38 of the *Act* applies which states:

> **Return of security deposit and pet damage deposit**
>
> **38** (1) Except as provided in subsection (3) or (4) (a), **within 15 days after the later of**
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
>
> **the landlord must do one of the following:**
>
> **(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;**
>
> **(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.**
>
> (6) **If a landlord does not comply with subsection (1)**, the landlord
>
> (a) may not make a claim against the security deposit or any pet damage deposit, and
>
> **(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.**
>
> [my emphasis added]

In the matter before me, I find that the landlord did receive the tenant's written forwarding address on October 7, 2015 and did not repay the security deposit within 15 days of October 7, 2015 which would have been October 22, 2015. Given the above, I find the landlord breached section 38 of the *Act* by failing to return the security deposit in full to the tenant by October 22, 2015. Therefore, I find the tenant has met the burden of proof and is entitled to the return of double her original security deposit of $800 for a total of **$1,600.00** which has accrued no interest to date**.**

I caution the landlord to comply with section 23 and 35 of the *Act* in the future.

Item 3 – Section 51(2) of the *Act* states:

Tenant's compensation: section 49 notice

51 (1) A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

(1.2) If a tenant referred to in subsection (1) gives notice under section 50 before withholding the amount referred to in that subsection, the landlord must refund that amount.

(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.

[my emphasis added]

Based on the evidence before me, I find the tenant has provided sufficient evidence that the landlord advertised the rental unit for rent at $1,200.00 within four days of November 26, 2015 which is less than five months after the effective date of the 2 Month Notice and is not for a use stated as the purpose in the 2 Month Notice. Therefore, I find the tenant is entitled to the **equivalent of double the monthly rent which is double $1,600.00 for a total amount of compensation of $3,200.00** owed by the landlord to the tenant for breaching section 51(2)(b) of the *Act.*

As a majority of the tenant's application had merit, I grant the tenant the recovery of the filing fee in the amount of **$100.00.**

Monetary Order – I find that the tenant has established a total monetary claim in the amount of **$4,900.00** comprised of $1,600.00 for item 2, $3,200.00 for item 3 and $100.00 for the recovery of the cost of the filing fee. I grant the tenant a monetary order pursuant to section 67 of the *Act* in the amount of **$4,900.00**.

Conclusion

Item 1 is dismissed without leave. Items 2 and 3 are successful.

The tenant has established a total monetary claim of $4,900.00 as described above. The tenant has been granted a monetary order under section 67 in the amount of $4,900.00. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: June 20, 2016

Residential Tenancy Branch