Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF, O

Introduction

This hearing dealt with the tenant's application for a Monetary Order for return of double the security deposit; compensation for loss of quiet enjoyment; and compensation pursuant to section 51 of the Act for the landlord's failure to use the rental unit for the purpose stated on a 2 Month Notice to End Tenancy. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

At the outset of the hearing the landlord's lawyer requested an adjournment. The lawyer explained that the landlord had enlisted his services the day before the scheduled hearing date. The lawyer submitted that this was due to the landlord's language barrier, not understanding there are time limits in these matters, and a misunderstanding of other requirements. The tenant objected to an adjournment, pointing out that she served the landlord with notification of this proceeding more than four months prior.

A party to a dispute may request an adjournment and the Arbitrator will determine whether to grant the adjournment request. Rule 7.9 of the Rules of Procedure provide criteria that I am to consider in deciding to allow or disallow a request for adjournment. Below, I have reproduced Rule 7.9.

7.9 Criteria for granting an adjournment

Without restricting the authority of the arbitrator to consider other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

I am of the view that if a party has difficulty understanding English in its written form that upon being served with an Application for Dispute Resolution and other related documents the party would take reasonable steps to seek assistance from someone who will interpret the documentation for them. I did not hear any submission from the landlord as to when he sought the assistance from someone to interpret the documentation for him. Rather, I only heard that landlord waited until the day before the hearing to enlist the services of a lawyer to represent him at the hearing. Therefore, I found that the landlord's request for adjournment is the result of his own negligence and I denied the landlord's request for adjournment.

As the hearing neared an end the landlord's lawyer requested an adjournment once again so as to have the opportunity to provide evidence as to payment or non-payment of rent. After hearing from both parties with respect to this claims being made by the tenant, I had reservations as to whether this issue of payment or non-payment of rent was a relevant issue to this case. However, in any event, I was of the view that the landlord has had ample opportunity to provide all relevant evidence prior to the hearing and through his own negligence failed to do so. Therefore, I denied the landlord's second request for adjournment.

The tenant's evidence package included digital evidence on an USB stick. The tenant had provided a description of the content on the USB stick; however, she had not confirmed with the landlord whether he could view the content prior to the hearing as is required under Rule 3.10 of the Rules of Procedure. At the outset of the hearing the landlord's lawyer confirmed that he was able to view the content with the exception of a file identified as being a video of the inspection of the rental unit. I have not viewed the content of the USB stick as the tenant failed to confirm it was accessible by the landlord prior to the hearing and there appears to be difficulty in accessing one or more files.

It should be noted that during the hearing the landlord chose not to testify or provide his version of events directly to me despite giving him the opportunity to do so. Rather, all of the landlord's submissions were made orally through his lawyer. Accordingly, in

making reference to the landlord's submissions in this decision they are as provided by the landlord's lawyer and not direct testimony.

Issue(s) to be Decided

1. Has the tenant established an entitlement to return of double the security deposit?
2. Has the tenant established an entitlement to compensation for loss of quiet enjoyment?
3. Has the tenant established an entitlement to compensation provided under section 51(2) of the Act?

Background and Evidence

It was undisputed that the tenancy commenced in July 2014 and the tenant paid a security deposit of $275.00. The monthly rent of $550.00 was due on the last day of the preceding month. The tenancy was to end on April 30, 2015; however, the tenant did not return possession of the unit until May 3, 2015.

Below, I have summarized each of the tenant's claims against the landlord and the landlord's position.

1. Return of double security deposit

It was undisputed that on May 3, 2015 the tenant provided the landlord with her forwarding address in writing by leaving it in the landlord's mailbox along with the keys to the rental unit and a void cheque for the landlord to return the tenant's security deposit to her. It was undisputed that the landlord did not refund any portion of the security deposit to the tenant. Nor did the landlord file an Application for Dispute Resolution to make a claim against it.

The tenant testified that she did not authorize the landlord to retain any part of her security deposit in writing. However the tenant stated that she orally authorized the landlord to deduct $20.00 per day from her security deposit for each day she over-held the rental unit by way of a message left on the landlord's phone. The landlord indicated that he did not recall that message.

The landlord was of the position that the tenant owed him rent so he retained the security deposit. The landlord acknowledged that he did not have any discussion with

the tenant about applying the security deposit toward unpaid rent. The tenant denied that she owed the landlord any rent.

The landlord's lawyer submitted that the $60.00 authorized deduction should be deducted before doubling the security deposit.

2. Landlord's failure to use rental unit for purpose stated on 2 Month Notice

The tenant testified that the tenancy ended pursuant to a 2 Month Notice to End Tenancy for Landlord's Use. The tenant testified that she initially filed to dispute the 2 Month Notice but that at the hearing she withdrew her request to dispute it as she decided to move out. The tenant provided the file number for that proceeding and I have referenced that file number on the cover page of this decision. During the hearing I accessed the decision issued for the previous proceeding and read from pertinent sections for the benefit of the parties, in particular the landlord's lawyer as he did not appear to be aware of a previous proceeding.

The tenant testified that she withheld rent for April 2015 as she was entitled to do for receiving a 2 Month Notice. This claim before me is for the equivalent of two months' rent that is payable under section 51(2) of the Act. Section 51(2) of the Act provides for additional compensation to the tenant where the landlord does not use the rental unit for the purpose stated on the 2 Month Notice served upon the tenant.

The tenant provided a copy of the 2 Month Notice as evidence for this proceeding. The reason for ending the tenancy that appears on the 2 Month Notice is: "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 spouse."

The tenant testified that shortly after her tenancy ended she determined the rental unit had been re-rented. The tenant determined this by communicating with two neighbours in the summer months of 2015 who have a view of the property and they saw a moving truck and people that did not appear to be the landlord's relatives. The tenants explained that the people that moved into the rental unit after her tenancy ended were red-headed Caucasians whereas the landlord and his family are of East Indian origin.

The landlord did not deny that the rental unit was re-rented shortly after the tenancy ended. Rather, the landlord took the position that he did not serve the tenant with the 2 Month Notice, that he had never seen that 2 Month Notice before, and the tenancy ended due to unpaid rent. The landlord's lawyer pointed out that the 2 Month Notice is not signed and the name of the tenant is missing.

The tenant responded by stating that she submitted a copy of the 2 Month Notice that the landlord served her. The tenant described how she was in the backyard of the property and had been speaking with the landlord's wife when the landlord's granddaughters handed him the 2 Month Notice and he threw it at the tenant. The tenant suspects that the landlord's son or daughter-in-law had prepared the 2 Month Notice as they usually prepared paperwork for the landlord. The landlord maintained his denial of giving the tenant a 2 Month Notice.

3. Loss of quiet enjoyment

The tenant testified that when the landlord's wife was out of the country in October 2014 the landlord telephoned her at work and made sexual advances toward her. After that event the landlord attended her place of employment and complained about her leaving windows open. The tenant testified that she wrote a letter to the landlord and his wife on December 5, 2014 and put it in the landlord's mailbox. The letter describes a dispute concerning open windows and the sexual advances.

The tenant testified that after giving the December 5, 2014 letter there would be banging at her door and whenever she would be outside of her rental unit, the landlord or the landlord's family members would frequently ask her when she was moving out. The tenant explained that she no longer wanted to reside there but that she did not have the financial resources to move at that time. The tenant seeks to be compensated the equivalent of 100% of the monthly rent multiplied by six months, representing October 2014 through April 2015 for the harassment.

The landlord denied the allegations of sexual harassment. The landlord denied seeing the December 5, 2014 letter until served with the paperwork for this proceeding. The landlord acknowledged conversations about the tenant moving out but claimed it was because she was leaving the windows open and had not been paying rent.

The tenant acknowledged there were discussions about windows being open but denied that she failed to pay rent.

Analysis

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

1. Return of double security deposit

Unless a landlord has a legal right to retain the security deposit, section 38(1) of the Act provides that a landlord must either return the security deposit to the tenant or make an Application for Dispute Resolution to claim against it 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 security deposit.

In this case, the tenancy was over and the tenant had provided a forwarding address to the landlord in writing on May 3, 2015. Accordingly, the landlord had 15 days from then to either refund the security deposit to the tenant; make a claim against it by filing an Application or obtain the tenant's written authorization to retain it. The landlord did not do either one of these options. Rather, the landlord acknowledged that he did not even have a discussion with the tenant about retaining her security deposit for unpaid rent. Regardless as to whether the landlord is of the view that the tenant owes him rent, the landlord must prove that and obtain an Arbitrator's authorization to retain the security deposit by filing an Application for Dispute Resolution if the tenant will not give the written consent. Therefore, I find the landlord violated the Act with respect to handling of the security deposit and I find the tenant entitled to doubling of the deposit.

In light of the above, I award the tenant $550.00. I deduct $60.00 from that award as so authorized by the tenant during the hearing. I have not deducted $60.00 prior to doubling because the landlord did not have the tenant's written consent for that deduction and he did not recall receiving the tenant's oral authorization for the deduction.

2. Landlord's failure to use rental unit for purpose stated on 2 Month Notice

When a landlord ends a tenancy by way of a 2 Month Notice to End Tenancy for Landlord's Use the landlord is bound to use the rental unit for the stated purpose. Failure to use the rental unit for the stated purpose entitles the tenant to additional compensation under section 51(2) of the Act.

Section 51(2) provides:

> (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
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> (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,
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> 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.
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> [Reproduced as written with my emphasis underlined]

Compensation under section 51(1) is equivalent to one month's rent and every tenant whose tenancy ends because they have received 2 Month Notice is entitled to that compensation. Compensation under section 51(2) is payable in addition to compensation under section 51(1) and is intended, in part, to dissuade landlords from ending a tenancy for their own use and then using it for a different purpose such as re-renting the unit.

In this case, the landlord denied serving the tenant with a 2 Month Notice. Accordingly, the issue is whether the landlord served the tenant with the 2 Month Notice the tenant claims she received from the landlord that she provided as evidence. Upon consideration of this matter, I find that I prefer the tenant's version of events over that of the landlord's. I have made this finding considering a number of factors, including:

- The tenant provided a very detailed recollection of the day she was served, including where she was when she was served, the people that were present, the events leading up to the service, and the manner in which the landlord served her.
- The tenant had filed to dispute the 2 Month Notice and the tenant had provided evidence that she served the landlord with notice of that proceeding by registered mail as seen in the decision issued for that proceeding.
- The decision issued for the previous proceeding includes specific reference to a 2 Month Notice being served upon the tenant, a tenant's right to compensation

for receiving a 2 Month Notice, the tenant's statement that she withheld rent for April 2015 because she had received a 2 Month Notice. The decision further outlines the consequences for the landlord if the landlord does not use the rental unit for the stated purpose and the tenant was given leave to reapply for such compensation.

- A copy of the decision issued for the previous proceeding was sent to the landlord by the Residential Tenancy Branch and the landlord did not seek a review of that decision.
- The landlord alleged that the tenant failed to pay rent and that is the reason for ending the tenancy but the landlord provided no corroborating evidence to support his positon and the tenant denied owing any rent.

All these things considered, I find I prefer the tenant's submission that the landlord served her with a 2 Month Notice over the landlord's denial of doing so. Accordingly, I find the landlord was bound to fulfill the stated purpose by having the rental unit occupied by him, his spouse or his close family member in order to avoid the consequences provided under section 51(2) of the Act.

Since the landlord acknowledged that the unit was re-rented within six months of the tenancy ending I find the tenant entitled to additional compensation equivalent to two months' rent as provided under section 51(2) of the Act, or $1,100.00.

3. Loss of quiet enjoyment

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 section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

i. That the other party violated the Act, regulations, or tenancy agreement;
ii. That the violation caused the party making the application to incur damages or loss as a result of the violation;
iii. The value of the loss; and,
iv. That the party making the application did whatever was reasonable to minimize the damage or loss.

Under section 28 of the Act every tenant has the right to quiet enjoyment. Quiet enjoyment includes the right to:

> (a) reasonable privacy;
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> (b) freedom from unreasonable disturbance;
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> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
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> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline 6: *Right to Quiet Enjoyment* provides policy statements with respect to finding breach of quiet enjoyment. The policy guideline provides, in part:

> • **Basis for a finding of breach of quiet enjoyment**
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> Historically, on the case law, in order to prove an action for a breach of the covenant of quiet enjoyment, the tenant had to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord's actions that rendered the premises unfit for occupancy for the purposes for which they were leased. A variation of that is inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control.
>
> The modern trend is towards relaxing the rigid limits of purely physical interference towards recognizing other acts of direct interference. Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment. Such interference might include serious examples of:
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> - entering the rental premises frequently, or without notice or permission;
> - unreasonable and ongoing noise;
> - persecution and intimidation;
> - refusing the tenant access to parts of the rental premises;
> - preventing the tenant from having guests without cause;
> - intentionally removing or restricting services, or failing to pay bills so that services are cut off;

- forcing or coercing the tenant to sign an agreement which reduces the tenant's rights; or,
- allowing the property to fall into disrepair so the tenant cannot safely continue to live there.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

I accept the tenant's position that sexual advances by one's landlord are certainly inappropriate in a landlord/tenant relationship especially when the landlord is married and sexual advances from the landlord were unwanted by the tenant in this case based upon the letter dated December 5, 2014 and her testimony to me.

I also accept that frequent banging on one's door by the landlord or his family members would also be unreasonably disturbing; however, I was not provided specific dates and times as to when she was allegedly disturbed by such activity and I am uncertain as to how often this happened.

Despite hearing of disturbing behaviour, I find the tenant's request for compensation equivalent to 100% of her monthly rent for six months is unreasonable. At its face, it is apparent that there is a failure to mitigate losses as a party is required to do if they intend to seek compensation from the other party. If the tenant was suffering significant and/or recurrent disturbances I find there is a lack of evidence to demonstrate that she took steps to curb further disturbances and her loss of quiet enjoyment. For example: the tenant did not give the landlord another letter to indicate she was being unreasonably disturbed by banging or ongoing questions about when she is leaving. Nor, did the tenant file an Application for Dispute Resolution to seek resolution until after she received the 2 Month Notice in March 2015.

Also of consideration is that quiet enjoyment of a rental unit is only one component of a tenant's rights. From what I can tell, the tenant still had use of the rental unit during the relevant months and continued to use it for normal daily activities such as sleeping, bathing and cooking.

In light of the above, I find the tenant's claim for compensation of $3,300.00 (or 100% of her rent for six months) is not sufficiently supported by the evidence, is unreasonable, and there is an apparent failure to minimize losses if there were on-going breaches by the landlord. Therefore, I dismiss this portion of the tenant's claim.

Filing fee and Monetary Order

Since the tenant's application had merit with respect to the first two portions of her claim I award the tenant recovery of the $100.00 filing fee from the landlord.

The tenant is provided a Monetary Order to serve and enforce upon the landlord calculated as follows:

Double security deposit	$ 550.00
Less: authorized deduction for over-holding	(60.00)
Compensation under section 51(2) of the Act	1,100.00
Filing fee	100.00
Monetary Order for tenant	$1,690.00

Conclusion

The tenant was partially successful in her claims against the landlord and has been provided a Momentary Order in the sum of $1,690.00 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: August 18, 2016

Residential Tenancy Branch