Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with the tenants' Application for Dispute Resolution seeking a monetary order.

The hearing was conducted via teleconference and was attended by both tenants and the landlord.

The landlord noted at the start of the hearing that he had filed a claim against the deposits too late for the files to be crossed. Upon review of the electronic file I note the landlord submitted his Application for Dispute Resolution on September 9, 2016 and a hearing has been set for March 8, 2017.

Issue(s) to be Decided

The issues to be decided are whether the tenants are entitled to a monetary order for double the amount of the security deposit; registered mail fees; and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 67, and 72 of the *Residential Tenancy Act (Act).*

Background and Evidence

The tenants submitted into evidence the following relevant documents:

- A copy of a tenancy agreement signed by the parties on August 21, 2015 for a 5 month fixed term tenancy beginning on September 1, 2015 for a monthly rent of $900.00 due on the 1st of each month with a security deposit of $450.00 and a pet damage deposit of $450.00 paid;
- A copy of a letter dated December 22, 2015 from the tenants to the landlord provided their forwarding address. The tenants submitted that this letter was sent to the landlord on the same date and it was sent by registered mail. The landlord confirmed receiving this letter on December 27, 2015.

The landlord stated that he has withheld the tenants' security deposit and pet damage deposit because the tenants failed to attend the move out condition inspection. In support of his position the landlord submitted the following relevant evidence:

- A copy of a typewritten letter providing notice of his intention to complete a move out inspection with the tenants at 7:00 p.m. on December 1, 2015;
- A copy of a text message time-stamped as December 1, 2015 at 12:37 from the tenant JS indicating that he had left the keys in the mailbox and indicating the landlord could return the security deposit to their forwarding address;
- A copy of a typewritten letter providing notice of intention to offer the tenants a second opportunity for a move out inspection to be completed on December 4, 2015 at 7:00 p.m.

The landlord submitted that the tenants were supposed to be out of the rental unit on November 30, 2015 but they weren't so he posted his typewritten letter advising of the 1st opportunity for an inspection on December 1, 2015 at 7:00 p.m. on the rental unit door. He stated that he noticed it had been removed very soon after he posted it.

The landlord stated that when the tenants did not show up for this scheduled time he posted the second notice on the door for a 2nd scheduled inspection on December 4, 2015 at 7:00 p.m.

The tenants testified that they had not received any notice on November 30, 2016 from the landlord for a move out inspection. They stated they did not return to the property after they had left on December 1, 2015 after approximately 3:00 p.m. The tenants submitted that they had not received this 2nd notice either.

The tenants seek return of double of both the security and pet damage deposits; their filing fee and the cost of registered mail, for a total of $1,911.00.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Section 88 of the *Act* allows a landlord to serve a document to a tenant by leaving a copy with the person; sending a copy by mail or registered mail to the address at which the tenant resides; sending a copy by mail or registered mail to a forwarding address provided by the tenant; leaving a copy at the residence with an adult who apparently

resides with the tenant; by leaving a copy in a mailbox or mail slot for the address at which the tenant resides; by attaching a copy to a door or other conspicuous place at the address at which the tenant resides; or by transmitting a copy by fax number provided as a service address by the tenant.

I accept that the landlord attempted to serve the tenants with notice of a move out condition inspection by posting the notice on the door. In the absence of any evidence or testimony to the contrary Section 90 states that a document given or served in accordance with Section 88 or 89 of the *Act* is deemed to be received if given or served by:

- Mail, on the 5th day after it is mailed;
- Fax, on the 3rd day after it is faxed;
- Attaching a copy of the document to a door or other place, on the 3rd day after it is attached; or
- Leaving a copy of the document in a mail box or mail slot, on the 3rd day after it is left.

When one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position.

In the case before me the landlord has the burden to prove the tenants were informed of the inspection. The tenants testified that prior to vacating the rental unit and leaving the keys they did not receive the typewritten notice of the landlord's scheduled inspection for December 1, 2015. The landlord has provided no evidence that can establish the tenants actually received the notice of inspection.

Section 44(1) of the *Act* stipulates a tenancy ends only if one or more of the following applies:

a) The tenant or landlord gives a notice to end the tenancy in accordance with one of the following:
    i. Section 45 (tenant's notice);
    ii. Section 46 (landlord's notice: non-payment of rent);
    iii. Section 47 (landlord's notice: cause);
    iv. Section 48 (landlord's notice: end of employment);
    v. Section 49 (landlord's notice: landlord's use of property);
    vi. Section 49.1 (landlord's notice: tenant ceases to qualify;
    vii. Section 50 (tenant may end tenancy early);
b) The tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
c) The landlord and tenant agree in writing to end the tenancy;
d) The tenant vacates or abandons the rental unit;

e) The tenancy agreement is frustrated; or
f) The director orders the tenancy is ended.

Based on the evidence submitted by both parties, I find the tenants vacated the rental property and returned possession on December 1, 2015 between 12:30 and 3:00 p.m. As such, I find that at the time the landlord served the 2nd notice for the inspection the tenants no longer resided at the rental unit. Therefore, I find the landlord could not use the rental unit address as one for service by posting the notice on the door where the tenants reside.

In addition, Section 35 of the *Act* requires that the landlord and tenant must complete an inspection of the condition of the rental unit before a new tenant begins to occupy the rental unit on or after the day the tenant ceases to occupy the rental unit or on another mutually agreed upon date. The landlord must offer the tenant at least 2 opportunities with the second offered time being offered in writing and **in the approved form**.

Section 17 of the Residential Tenancy Regulation stipulates that the landlord must offer a first opportunity to schedule the condition inspection by proposing one or more dates and times. If the tenant is not available at the time proposed the tenant may propose another time that the landlord must consider. If the time proposed by the tenant is not acceptable the landlord must propose a second opportunity by providing the tenant a written notice in the approved form. The approved form is available on the Residential Tenancy Branch website.

As the landlord used his own typewritten notice and not the approved form and did not serve the notice according to Section 88 of the *Act*, I find the landlord has failed to comply with the requirements under Section 35 of the *Act* and Section 17 of the Regulation.

Section 36(2) stipulates that the right of the landlord to claim against the deposits for damage to the residential property is extinguished if the landlord has not complied with the requirements of Section 35 of the *Act* and Section 17 of the Regulation; or does not participate in the inspection.

Pursuant to Section 26(2) I find the landlord has extinguished his right to claim against the deposit.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

As per the landlord's testimony I accept the landlord received the tenants forwarding address in writing on December 27, 2015. When combined with my finding above that the tenancy ended on December 1, 2015 I find the landlord had until January 11, 2016

to either return the deposits or file an Application for Dispute Resolution seeking to claim against the deposit to comply with the requirements under Section 38(1).

From the landlord's submission I find the landlord file his claim against the deposits on September 9, 2016, substantially later than January 11, 2016. Therefore, I find the landlord has failed to comply with his obligations under Section 38(1) and the tenants are entitled to double the amount of both deposits, pursuant to Section 38(6).

In regard to the tenants claim for $11.00 for registered mail costs I note the Act does not allow for the reimbursement of costs associated with pursuing a financial claim against the landlord with the exception of recovering the filing fees for the Application itself. Therefore, I dismiss the tenant's claim for these costs.

Conclusion

I find the tenants are entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **$1,900.00** comprised of $1,800.00 for double the pet damage and security deposits and the $100.00 fee paid by the tenants for this application.

This order must be served on the landlord. If the landlord fails to comply with this order the tenants may file the order in the Provincial Court (Small Claims) and be 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: September 19, 2016

Residential Tenancy Branch