Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MSD, FF

Introduction

The tenants apply to recover the doubling penalty imposed by s. 38 of the *Residential Tenancy Act* (the "*Act*") and an amount retained by the landlord for water charges.

All parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Has the landlord complied with s. 38? Has the landlord wrongfully retained money from the tenants' deposit money?

Background and Evidence

The rental unit is the four bedroom upper level of a house. There is a second suite below, not relevant to this proceeding.

The tenancy started in November 2015. The monthly rent was $1750.00, due on the first of each month, in advance. At the start of the tenancy the tenants paid an $875.00 security deposit and an $875.00 pet damage deposit (the "deposit money").

It would appear that in early 2016 the landlord was contemplating a sale of the property. On February 8, 2016 the landlord and the tenants entered into a Mutual Agreement to

End Tenancy in the form provided by the Residential Tenancy Branch, agreeing to bring the tenancy to an end on April 30, 2016.

In an addendum to the agreement the parties set out other parts of their agreement. The pertinent points of the addendum were that the landlord would pay the tenant $7000.00. The landlord would advance the tenants $1750.00 towards a security deposit and pet damage deposit ($875.00 each) required for their new residence (the "advance money"). It was specifically stated that the advance money was not a return of their deposit money and that the advance money would be deducted from the $7000.00 amount to be released after the closing date of the sale.

The agreement states that if after the move out inspection there were no repairs or cleaning required, the deposit money would be returned after the closing.

The tenants vacated at the end of April. They provided the landlord with a forwarding address in writing on the same day.

The landlord mailed the tenants a cheque in the amount of $6333.37 on May 13. The tenants received it on May 17.

The landlord testifies that the $6333.37 amount was the $7000.00 agreed to in the addendum to the Mutual Agreement to End Tenancy, less $666.63 owed to the local water district.

The tenants were not aware of the water charge at that time but agreed at hearing that the water charge was there responsibility under the tenancy agreement (shared 1/3 and 2/3 with the lower tenant) and that the $666.63 was an accurate figure.

The landlord did not have the tenants' written authorization to recoup the water charge from the deposit money.

The landlord says that at the end of the tenancy there was no deposit money being held. He refers to a text message with the tenant Mr. K. on February 18, 2016 in which Mr. K. asks "do u want to keep the $1750 deposit for this months rent? Save sending it back and forth." The landlord replies, "If you are ok with that that works for me."

Thus, the landlord says, the deposit money was applied to March rent and there was no deposit money owed at the end of the tenancy.

The tenants say that the $1750.00 referred to in the texts was the advance money, not the deposit money and so the landlord still owed them the deposit money at the end of the tenancy. They say the landlord failed to repay them that money within the 15 day period imposed by s. 38 of the *Act* and therefore they should have the benefit of the doubling penalty in that section, entitling them to an additional $1750.00.

Analysis

The first question is: what money is being referred to in the text of February 19?

I find that the parties were referring to the advance money. A full reading of the texts that day shows that the landlord first texted, "Hey C [*landlord name redacted for privacy*], you I just heard. Pretty stressful stuff for sure. Thanks for letting me know, I'll get you that deposit once I return this weekend. Did you secure a place." This text, sent in February, well before the end of the tenancy and the accounting of the deposit money, could only be referring to the advance money to be applied to a security deposit or pet damage deposit at the tenants' new residence.

The tenant Mr. K. replies: "Just pending on the deposit. But he doesn't seem too worried." This text shows that the "deposit" is the security and/or pet damage deposit required of the tenants for their new residence; the deposits that the advance money was to be directed to.

When the tenant Mr. K. next texts: "Do u want to keep the $1750 deposit for this months rent? Save sending it back and forth," he was clearly referring to the advance money. If the landlord sent the advance money and the tenants did not need it for the new residence because the new landlord "doesn't seem too worried" then the tenants would merely be turning around and paying it back to the landlord as rent.

As a result, at the end of the tenancy the landlord had applied the advance money to March rent and still held the tenants' deposit money in the amount of $1750.00. Since had applied the advance money to the March rent, he owed the tenants $5250.00 under the addendum agreement ($7000.00 less the $1750.00 advance money).

The relevant portions of s. 38 of the *Act* provide:

> 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.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that
(a) the director has previously ordered the tenant to pay to the landlord, and
(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,
(a) 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, or
(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(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.

This tenancy ended on April 30, 2016 and the landlord agrees he received the tenants' forwarding address on that day. As found above, the landlord did not have the tenants' written authorization to keep any portion of the deposit money for the water bill. He had until May 15 to repay the deposit money or make an application to keep it, in order to avoid the doubling penalty.

The landlord posted the addendum payment (less water charge) on May 13. Section 90 of the *Act* states that a document sent by mail is deemed to have been received on the 5th day after it is mailed. The tenants received it on May 17, the fourth day after it was mailed.

Sometimes legislation will state that a payment is considered to have been made when it has been posted. The *RTA* contains no such provision. Under s. 38 a landlord is required to *repay* the deposit money within 15 days, not just post it.

The landlord had failed to comply with the requirements of s. 38. As a result, he is responsible to account to the tenants for double the amount of the $1750.00 deposit money remaining at the end of the tenancy: $3500.00.

After accounting for the $5250.00 balance of the $7000.00 addendum payment after subtraction of the $1750.00 advance money applied to March rent and accounting for the doubled deposit amount of $3500.00, then as of 15 days after April 30, 2016, the landlord owed the tenants $8750.00.

He has paid $6333.37, leaving a balance due of $2416.03.

I deduct from that amount the admitted water bill of $666.63. The tenants are owed the remainder of $1750.00.

As they have been successful on their application I award the tenants recovery of the $100.00 filing fee.

Conclusion

The tenants' application is allowed. There will be a monetary order against the landlord in the amount of $1850.00

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: November 02, 2016

Residential Tenancy Branch