Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, OLC, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. The tenants stated that the landlord was served with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail. The tenants were unable to provide a date. The landlord confirmed receipt of the tenant's notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on June 29, 2016. The landlord stated that the tenants were served with the landlord's submitted documentary evidence via Canada Post Registered Mail on December 2, 2016. The tenants disputed that no evidence was received, but clarified that since filing the application for dispute the tenants have since moved and have not updated the Residential Tenancy Branch or the Landlord with their new mailing address.

I accept the undisputed affirmed evidence provided by both parties and find that the landlord has been properly served with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail as claimed pursuant to section 88 and 89 of the Act. The landlord is deemed served as per section 90 of the Act on June 29, 2016.

Although the tenants failed to receive the landlord's documentary evidence via Canada Post Registered Mail, I find that the tenants are deemed sufficiently served as the tenants failed to update their mailing address as they have moved since filing the application for dispute. As such, the tenants are deemed sufficiently served as per section 90 of the Act 5 days later on December 7, 2016. It was clarified with both parties during the hearing that if necessary the specific details of the landlord's documents would be described to the tenants to allow them an opportunity to respond.

At the outset of the hearing the tenants clarified that they are seeking a monetary order for return of double the security deposit and recovery of the filing fee. The tenants do not seek any orders for the landlord to comply with the Act, regulations or tenancy agreement.

I note that during the hearing the tenants stated that between the filing of the application and the scheduled hearing date, the tenants had moved without providing a new mailing address. The tenants have now provided this during the hearing and the Residential Tenancy Branch File shall be updated.

Issue(s) to be Decided

Are the tenants entitled to a monetary order for return of all or part of the security deposit and recovery of the filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

Both parties agreed this tenancy began on February 1, 2015 on a fixed term tenancy ending on July 31, 2015 and then thereafter on a month-to-month basis as shown by the submitted copy of the signed tenancy agreement. The monthly rent was $825.00 payable on the 1st day of each month. A security deposit of $412.50 was paid on January 24, 2015.

Both parties agreed that the tenancy ended on August 31, 2015 and that the landlord accepted the tenants' forwarding address via email on August 31, 2015.

Both parties agreed that the landlord failed to return the entire $412.50 security deposit by applying charges against it for utility and cleaning charges. Both parties agreed that the landlord returned $72.56.

The landlord stated that signed and dated addendum condition #4 states

> *The rental unit has been completely cleaned and carpet has been steam-cleaned before the tenant(s) move into the rental unit. Before move-out, the tenant(s) must clean the rental unit and steam-clean the carpet or pay the landlord(s) to clean the rental unit and the carpet from the security deposit.*

The landlord stated that this addendum condition is the tenants' written consent to allow the landlord to offset the utility and cleaning costs against the security deposit.

The tenants disputed this claim stating,

> *The landlord decided that it was not clean enough and hired a cleaning service after the tenants had moved out, taking the cost from the security deposit without any written or verbal consent. Landlord also deducted Hydro and water bills from security deposit before he even received any bill, choosing an amount and saying it would be adjusted when the bill arrived. The tenants never gave written or verbal consent and were never sent the bill…*

The landlord in his direct testimony confirmed that since the end of the tenancy on August 31, 2015, the landlord has not filed an application to dispute the return of the security deposit nor has the landlord applied for a monetary claim for compensation for losses of the utilities or cleaning costs.

Analysis

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to subsection 38(6) of the Act equivalent to the value of the security deposit. However, pursuant to paragraph 38(4)(a) of the Act, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy.

I find that both parties have agreed that the tenancy ended on August 31, 2015 and that the tenants provided their forwarding address via email on August 31, 2015, which was accepted by the landlord.

The landlord relies upon addendum condition #4 which the landlord stated is the tenants' written consent to withhold the $412.50 security deposit as it was signed by both parties at the beginning of the tenancy on January 24, 2015.

On the landlord's claim that the tenants provided written consent to offset the cost of utilities and cleaning against the security deposit. I find that the landlord has failed as I find it as an unconscionable and unenforceable term. Although it is undisputed that the parties entered into an agreement where the unit was to be completely cleaned and steam-cleaned as agreed upon as per clause #4 of the signed addendum to the signed tenancy agreement, the landlord has failed to apply for dispute resolution as the tenants disputed that the rental unit was not sufficiently cleaned or steam-cleaned for which the landlord has withheld a portion of the security deposit. I find that this term is strictly for the benefit of the landlord and fails to correct any damage or loss caused by the tenants. Clause #4 of the signed tenancy agreement addendum states that cleaning and steam-cleaning is required by the tenants solely because the rental unit carpet was completely cleaned and the carpet has been steam-cleaned before the tenant moved in. Residential Tenancy Branch Policy Guideline #8, Unconscionable Terms states,

> *Under the Residential Tenancy Act and the Manufactured Home Park Tenancy Act, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.*
> *Terms that are unconscionable are not enforceable*[1]

I find that this term is grossly unfair as it does not allow the tenants to dispute the claims that the tenant left the rental unit dirty requiring cleaning and that there was unpaid utilities. I find that as this was in dispute by the tenants, the landlord's term is unenforceable. I note that the landlord cannot rely on this condition as written consent to withhold the return of the security deposit. I also find based upon the landlord's own direct testimony that he failed to apply for dispute seeking a monetary order for compensation or money owed for the utility and cleaning costs.

As such, the landlord has failed to comply with section 38 of the Act by failing to return the $412.50 security deposit, failing to obtain the consent of the tenant to withhold the security deposit and for failing to apply for dispute resolution to offset the security deposit against any claims in losses.

I note that both parties confirmed that the landlord returned $72.56 of the original security deposit to the tenants. As such, I credit this amount to the landlord and order that the landlord must return the remaining $339.94.

I also find that as the landlord has failed to comply with section 38 (1) of the Act that section 38 (6) applies in that the landlord is liable for an amount equal to $412.50 (the security deposit. As such, the tenants have established a claim for $412.40 as per section 38 (6) of the Act.

The tenants have established a total monetary claim of $752.44.

The tenants are also entitled to recovery of the $100.00 filing fee.

Conclusion

The tenants are granted a monetary order for $852.44.

This order must be served upon the landlord. Should the landlord fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and 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: December 22, 2016

Residential Tenancy Branch