Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing was convened by way of conference call in response to a Landlord's Application for Dispute Resolution (the "Application") filed on August 17, 2016 for a Monetary Order for: unpaid rent and utilities; to keep the Tenant's security and pet damage deposits; for money owed or compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), regulation or tenancy agreement; and to recover the filing fee from the Tenant.

Both parties appeared for the hearing and provided affirmed testimony. The parties were informed as to how the hearing would proceed and no questions were asked on the hearing process.

Preliminary Issues

The Tenant confirmed receipt of the Landlord's Application and the Landlord's extensive package of documentary and photographic evidence by registered mail on August 25, 2016. The Tenant stated that she had provided 200 pages of documentary evidence prior to this hearing on February 10, 2017 to both the Landlord and to the Residential Tenancy Branch ("RTB"). However, this evidence was not before me at the time of the hearing.

The Landlord confirmed receipt of the Tenant's evidence. The Landlord confirmed that it had been served to her late and objected to the use of it as it related mostly to accusations of fraud.

The Tenant stated that she had submitted the evidence on February 10, 2017 because she was told by the RTB that it was within the service deadlines. The Tenant was informed that her evidence was late pursuant to the RTB Rules of Procedure (the "Rules").

When the Tenant was asked the reasons why she had served so much evidence to the Landlord and to the RTB late, she explained that she had heart and blood pressure issues which were exacerbating her anxiety and stress levels. The Tenant testified that she had provided a medical report to show that she was taking medication for these issues. The Tenant stated that she also had a learning disability which affected her ability to respond to such a large amount of evidence served to her by the Landlord. In addition, the Tenant testified that she was out of the country for several months dealing with a serious issue concerning her daughter.

The RTB Rules require a party to serve evidence as soon as possible and sets strict deadlines regarding the service of evidence prior to a hearing. These time limits are in place to ensure that a party receives evidence that allows for sufficient time to consider it and provide rebuttal evidence. In addition, the time limits seek to ensure that evidence being relied upon by a party reaches the Arbitrator prior to a hearing take place.

Rule 3.15 of the Rules state that a respondent must serve evidence to the applicant and to the RTB seven days prior to the hearing. In this case, I find the Tenant failed to abide by the time limits for the service of evidence. The RTB may not refuse evidence and has a duty to accept evidence; an acceptance of evidence by the RTB does not mean that it will be considered in a hearing. It is down to an Arbitrator to decide whether to accept late evidence.

In this case, I declined to accept the Tenant's documentary evidence for the following reasons. The Tenant received the Landlord's Application and evidence at the end of August 2016. Therefore, the Tenant had over five months to gather and respond to the evidence submitted by the Landlord. While I acknowledge that the Tenant may have had medical issues, as many people do, I find the Tenant failed to satisfy me of how her medical issues impinged or prevented her from gathering evidence during the entire five month period that was allotted to her.

Furthermore, if the Tenant had known of her pre-existing medical issues, or of any learning disabilities, then the Tenant had a duty and reasonable expectation that she would have consulted with an agent, advocate, or lawyer to assist her with gathering her evidence in a timely manner. I also apply this finding to the Tenant's unsupported claim that she was out of the country dealing with an issue with her daughter. I find the Tenant received the Landlord's Application and evidence while she was in the country and failed to establish that (a) an emergency existed in another country which spanned the entire five month period she was required to submit and serve evidence and (b) why, if she was faced with such an emergency over this period of time, did she not take

reasonable steps to request an adjournment of the proceedings by contacting the RTB or by consent with the Landlord.

Based on Tenant's failure to satisfy me that there were exceptional circumstances that prevented the Tenant from submitting her evidence in a timely fashion, I find it would be prejudicial to the Landlord to allow consideration of a large amount of documentary evidence. However, I did not prevent the Tenant from providing that evidence into oral testimony.

While both parties provided extensive evidence over the two hour hearing, I have only documented that evidence which I relied upon to make findings in this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to unpaid rent, unpaid utilities, and costs associated with changing the locks to the rental unit?
- Is the Landlord entitled to keep the Tenant's security deposit, pet damage deposit, and the key deposit in partial satisfaction of the monetary claim?

Background and Evidence

The Landlord testified that this tenancy for a rental unit in a residential building started on July 1, 2016 for a fixed term of one year which was scheduled to end on June 30, 2017; at that point the Tenant was required to move out of the rental unit. Rent under the written tenancy agreement was $2,700.00 payable on the first day of each month.

The Tenant stated that the tenancy started on July 3, 2016 but the Landlord made the Tenant sign the agreement with a date of July 1, 2016. The Tenant confirmed her understanding of the terms and agreement as well as the addendums as reflected by her initials on each page of the tenancy agreement.

The parties confirmed that the Tenant paid a: security deposit of $1,350.00 and a pet damage deposit of $500.00 on June 29, 2016; and a key deposit of $200.00 on July 4, 2016, all of which the Landlord still retains. These are herein referred to as the "Deposits" in this Decision. The Landlord testified that she completed a move-in Condition Inspection Report (the "CIR") on July 1, 2016.

The Landlord testified that the Tenant paid rent for the first month of the tenancy. However, six days later she was informed by text message that the Tenant had signed the tenancy agreement prematurely because she was going to be away for a couple of

months. The Landlord testified that she informed the Tenant that she was required to honor the fixed tenancy agreement that had been signed and that she had a duty to end the tenancy pursuant to the Act with proper written notice. The Landlord testified that she got no written notice from the Tenant or the return of any keys and assumed that the tenancy was to continue as per the signed agreement.

The Landlord testified that she could not do anything at that point because the Tenant had paid rent for July 2016. As a result, the Landlord provided the Tenant with written notice of entry to take effect on August 2, 2016 for the purpose of seeing whether the Tenant was residing there.

The notice of entry and photographic evidence of it being posted to the rental unit door was provided into evidence. The Landlord testified that when she affected entry on August 2, 2016 the Tenant had not moved in as none of her belongings were there. The Landlord explained that the Tenant had not paid rent for August 2016 and had not paid utilities from the onset of the tenancy as the utilities had not been put into the Tenant's name. In addition, the Tenant had not returned the keys to the Landlord at that point.

The Landlord explained that on this basis, she made a determination that the rental unit had been abandoned by the Tenant. The Landlord then proceeded to change the locks at a cost of $130.00 which the Landlord seeks to recover from the Tenant. The Landlord provided an invoice for this amount but stated that she was in the process of obtaining an official receipt to verify this loss.

The Landlord testified that on August 3, 2016 she received a letter in the mail from the Tenant which contained all the keys to the rental unit and a demand letter for monies owed to the Tenant and the Tenant's forwarding address for the return of the Deposits. That letter still did not detail a date for the tenancy to end on. The Landlord stated that she advertised the rental unit on two popular websites for re-rental for September 1, 2016 because it was too late for the August 2016 period. As a result, the Landlord now seeks to recover unpaid rent for August 2016 in the amount of $2,700.00. The Landlord also claims $27.02 for unpaid hydro utilities. However, the Landlord confirmed that she had not provided the actual utility bills detailing the hydro amounts consumed during the duration of the tenancy into evidence.

The Tenant disputed the Landlord's claim for the changing of the locks on the basis that the Landlord submitted a fraudulent receipt for this cost. The Tenant submitted that on this basis the Landlord's credibility, character, and evidence should not be believed. The Tenant testified that she should not be held accountable for the cost of the tenancy because she had only entered into the agreement with the Landlord on the basis that

she was promised the use the two boardrooms located in the lower level of the residential building. The Tenant explained that she planned to conduct and host monthly workshops and seminars for large groups of people as part of her business.

The Tenant explained during her viewing of the rental unit with the Landlord, she spoke to the building concierge about the use of the boardrooms who confirmed that all she was required to do was to book them out for her use. The Tenant confirmed that she had not obtained anything in writing from the Landlord or from the building management that reflected the use of the boardrooms as part of this tenancy. The Tenant also confirmed that this had not been documented on the tenancy agreement either.

The Tenant testified that it was only after she had entered into and signed the tenancy agreement was she informed by the building manager that the use the Tenant wanted the boardrooms for was contrary to the strata by-laws. The Tenant explained that the building manager and the Landlord informed her that she could use the boardrooms for her purpose but would have to limit this to occasional use only. The Tenant testified that she was told by the Landlord to sneak clients into the building, ignore the strata by-laws, and not advertise the seminars or workshops, otherwise she could face eviction.

The Tenant stated that because the Landlord had misrepresented the rental unit and she would have to go against the strata by-laws to use the boardrooms in order to get the related income, she contacted the Landlord by text message on June 6, 2016 and asked whether she could sublet the rental unit or get a roommate, which the Landlord refused. The Tenant stated that after consulting with her lawyer, she even offered the Landlord $500.00 to get out of the fixed term lease, which the Landlord also refused.

The Tenant testified that on July 26, 2017 she called the Landlord and informed her that she was ending the tenancy and was sending the keys back to her by registered mail. The Tenant testified that she also sent the Landlord an email on the same day advising that the tenancy was to be ended due to the misrepresentation by the Landlord. The Tenant testified that the Landlord was informed by Canada Post that the package was ready to be picked up on July 27, 2017 but the Landlord did not pick up the package containing the keys and a copy of the July 26, 2016 email until August 3, 2016 by which time the Landlord had already changed the locks.

The Tenant argued that she also did not take occupancy of the rental unit because the Landlord failed to do agreed repairs in the rental unit. The Tenant argued that the Landlord failed to mitigate the loss from the fixed term tenancy by not advertising the rental unit which could have easily been rented in a high demand market for July 15 or August 1, 2016, therefore there would have been no loss to the Landlord.

The Tenant submitted that the Landlord failed to provide the Tenant with a copy of the single original tenancy agreement she signed on July 3, 2016 despite repeated requests by text message for a copy. The Tenant stated that the Landlord insisted that the Tenant had been provided with a copy at the start of the tenancy but she only got a copy when she went to the rental unit on July 20, 2016 and discovered a copy had been placed inside the rental unit; the Tenant asserted that this must have been placed there by the Landlord after she illegally entered the rental unit.

The Tenant asserted that the failure of the Landlord to provide her with a copy of the tenancy agreement meant that the tenancy agreement was not binding on the parties and she was disadvantaged by not knowing what her rights were or what breaches of the tenancy agreement the Landlord had committed.

In response, the Landlord referred me to the Tenant's initials on each page of the tenancy agreement and addendum to demonstrate that the Tenant had a full understanding of the agreement she was entering into. The Landlord then referred me to her text message evidence in which the Tenant states on July 6, 2016 she will be unable to move into the rental unit until August or September 2016 because she was travelling and that she was premature in signing the tenancy agreement.

The Landlord rebutted the Tenant's evidence and asserted that the tenancy was solely for the rental of the unit and did not include any exclusive access to the boardrooms in the building as part of the agreement or in the original advertisements of the rental unit which were provided into evidence. The Landlord explained that the Tenant only brought up the issue of the boardroom after she realized that she was not going to be able to break out of the fixed term tenancy using other methods she was insisting on like subletting and getting a roommate for which she was not given any consent for.

The Landlord again referred to her text message evidence to show that she explained to the Tenant that on the day she signed the tenancy agreement, the building manager had informed her that she was restricted from using the boards rooms to occasional use twice a year and that the Tenant would be discreet about this to enable her to do this for her benefit. The Landlord argued that this was not evidence that the tenancy agreement was signed on the basis that the Tenant would have full and exclusive access to the boardrooms and that this text message showed otherwise.

The Landlord explained that she refused the offer for the Tenant to pay her $500.00 to break out of the fixed term lease and informed the Tenant that she would contact the RTB to obtain information about what was to happen next.

The Landlord stated that after she contacted the RTB she replied to the Tenant by text message informing that the fixed term can only be ended pursuant to the provisions of the Act which included either a mutual agreement to end the tenancy or a proper notice to end the tenancy in writing.

The Landlord testified that the Tenant refused to provide proper notice to end the tenancy and did not agree with a proposal she had offered the Tenant to end the tenancy mutually after a new renter was found to take on the rental unit. The Landlord confirmed to the Tenant that she was obligated to honor the tenancy and that it could only end if the Tenant were to send a proposal to end the tenancy in writing by email as text message was not proper notice. However, no proposal to end the tenancy for the Landlord's consideration was sent to the Landlord.

The Landlord explained that she then engaged in a series of text message exchanges up until July 12, 2016 with the Tenant in which she continually informed the Tenant that she was required to give proper written notice to end the tenancy and that this could not be done via text message.

The Landlord explained pursuant to the text message conversation between the parties she had already provided the Tenant with a copy of the tenancy agreement on the day it was signed. The Tenant disputed throughout the hearing stating that she had made multiple requests for this in the same text message exchange.

The Landlord confirmed receipt of the Tenant's email which was sent to the Landlord on July 26, 2016 with an attached demand letter which was dated June 6, 2016. The Landlord stated that she did not read that email but acknowledged receipt of the same demand letter that was sent to her by the Tenant via registered mail with the keys which she received on August 3, 2016.

During the hearing, the Tenant submitted that she had emailed the Landlord on July 6, 2016 with the demand letter ending the tenancy. However, the Landlord disputed this stating that the Tenant sent no email to her on July 6, 2016 and the only email that was sent was on July 26, 2016 which the Landlord did not read or open and did not respond to. The Landlord provided a copy of that email into evidence for this hearing.

Analysis

In relation to the timing of the Landlord's Application for the Tenant's Deposits, I accept the evidence that the Tenant provided her forwarding address in the demand letter that was sent to the Landlord by registered mail pursuant to the service provisions of the

Act. I find the Landlord received the Tenant's forwarding address on August 3, 2016 and filed the Application correctly on August 17, 2016 within the 15 day time limit stipulated by Section 38(1) of the Act.

I first turn my mind to the Landlord's claim for utility bills. I find the Landlord failed to meet the burden to prove this portion of the claim because the exact utility bills for the costs sought were not provided into evidence. Therefore, as I am unable to verify the costs being claimed, I dismiss this portion of the Application.

In relation to the Landlord's claim for the changing of the locks, I find that at the time the Landlord changed the locks, the Tenant had already sent the keys back to the Landlord in the mail. I accept that while the Tenant claimed that she verbally informed the Landlord by phone prior to the changing of the locks that she was sending the keys back is unproven, I find the Tenant should not be held liable for this cost as the locks had been changed while the keys were still in transit back to the Landlord. Therefore, this portion of the Landlord's Application is also dismissed.

With respect to the Landlord's claim for unpaid rent for August 2016 in the amount of $2,700.00, I make the following findings. The Tenant seeks to argue that the tenancy agreement is null and void because the Landlord falsely represented the agreement in providing the Tenant with the building boardrooms to conduct work from. I reject the Tenant's evidence and assertions in this respect. I find that if the single most important factor for the Tenant agreeing to enter into this tenancy agreement hinged on the use of the boardrooms, the Tenant had the responsibility for taking adequate and diligent steps in obtaining written consent from the strata staff to use the facilities in the manner she was seeking to do so or to have this reflected clearly as a material term of the tenancy agreement. The Tenant did not do this.

There is insufficient evidence to show that the signed tenancy agreement and the advertisement for the rental unit showed that the use of the boardrooms was included in this tenancy and was part of the rent. I am only able to conclude that while the Tenant would have been eligible to use the boardrooms of the residential building she was renting in, this would have only been limited to the use stipulated by the building strata rules in any case.

I find the purpose for which the Tenant was seeking to use the boardrooms for business and financial gain went well above and beyond that of a residential purpose and is more akin to commercial use. The Tenant signed a residential tenancy agreement and not a commercial lease. If the Tenant wanted to use the building boardrooms in the manner she testified to, this would have had to be done as a separate commercial tenancy

agreement with the strata management and would be independent to the residential tenancy agreement for the rental unit.

I find the Tenant also provided insufficient evidence that she was unable to take occupancy of the rental unit due to repairs the Landlord was required to complete at the start of the tenancy. In this case, I accept the Landlord's evidence that the repairs that were required after the tenancy was entered into did not restrict or impinge on the Tenant's ability to take occupancy of the rental unit.

In relation to the above two findings, I also find that if the Landlord had failed to complete repairs to the rental unit or had falsely represented what was to be included in the signed agreement, the Tenant's recourse would have been to bring an Application against the Landlord to request repairs be done or to have the tenancy agreement set aside; the Tenant did not have unilateral authority to end the tenancy based on these reasons alone.

With respect to the Tenant's assertion that the Landlord did not provide her with a copy of the tenancy agreement, I find the Tenant has failed to satisfy me that the Landlord did not provide one. The Landlord's text message evidence indicates that the Tenant was provided a copy of the tenancy agreement on the day it was signed although the Tenant disputed this.

The Act requires a landlord to provide a tenant with a tenancy agreement within 21 days of it being entered into. Based on the disputed evidence before me and I am unable to conclusively determine whether or not the Tenant was provided with a copy of the tenancy agreement. However, the Tenant argues that the alleged failure of the Landlord to provide a copy of the tenancy agreement rendered the agreement null and void. I reject this assertion.

The Act is silent on the consequences of a landlord failing to give the tenant a copy of the agreement and since tenancies under the definitions of the Act can be established by oral agreement alone, it would be improper to conclude that this tenancy was non-binding on this basis. In such cases, the standard terms would have still applied.

Furthermore, as stated above, the remedy for a tenant when faced with a situation in which a landlord has failed to provide the tenant with a copy of a tenancy agreement is to apply for dispute resolution for the landlord to comply with the Act; accordingly an Arbitrator can then order the landlord to provide the tenant with a copy if it is determined that the landlord has not done so.

In addition, the issue before me is whether the tenancy was ended pursuant to the Act. The Tenant confirmed her understanding that she was bound to a fixed term tenancy agreement. Therefore, I find the Tenant provided insufficient evidence of how she was disadvantaged by not having a copy of the tenancy agreement before July 20, 2016 with respect to her obligation to the ending of the tenancy; information relating to fixed term tenancies is widely available on the RTB website and through the RTB free phone information line.

As I turn my mind to the parties' evidence with respect to how the tenancy was ended, I take into account the following provisions of the Act. Section 16 of the Act states that the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

The evidence before me is that the Tenant signed a fixed term contract which was slated to start on July 1, 2016 and that the Tenant paid rent for the first month as well as the Deposits. Therefore, I find the Tenant cannot rely on her failure to occupy the rental unit as a means to invalidate her obligations under the tenancy agreement.

Section 44 of the Act lays out the methods in which a tenancy may end. In particular: Section 44(1) (a) (i) states that a tenancy may end with a tenant's notice to end tenancy; Section 44(1) (c) states that the landlord and tenant may agree in writing to end the tenancy; and Section 44(1) (d) states a tenancy ends if the tenant vacates or abandons the rental unit. The Act requires that a tenant giving a notice to end the tenancy is required to provide this in writing and it must be signed and dated, give the address of the rental unit, and state the effective vacancy date of the notice.

I have taken the above provisions of the Act into consideration, and I find that based on the evidence before me, the Tenant did not provide sufficient or proper notice to the Landlord to end the tenancy prior to the Landlord deeming the rental unit was abandoned on August 2, 2016.

I find the Tenant failed to provide the Landlord with anything conclusive in writing to inform of the date the tenancy was to end. It was essential that the Landlord received proper written notice with an effective vacancy date as this would then have triggered the Landlord's obligation to re-rent the rental unit. I find there is insufficient evidence before me that the parties were able to reach agreement to end the tenancy mutually. As the Tenant had paid rent for July 2016 and retained control and possession of the rental unit by having all the keys and means of access to it, the Landlord would not have been in a position to determine that it had been abandoned, even though the Tenant

was not occupying the rental unit. I also find the demand letter the Tenant provided which the parties argued over the date it was sent (July 6 or July 26, 2016), still contained no effective vacancy date the tenancy was to end on.

I find that based on the evidence before me, the Landlord was only able to correctly deem the rental unit had been abandoned on August 2, 2016 based on: the Tenant's failure to pay rent for that month; the Tenant was not occupying the rental unit; and, the Tenant had indicated in the text message conversation that she had no intention to return to the rental unit.

Having examined the Landlord's text message evidence, I find the Tenant failed to give proper notice under the Act to end the tenancy. Accordingly, I find the Landlord's obligation to re-rent the rental unit would not have started until August 2, 2016. Had the Tenant given proper notice to end the tenancy or engaged into an agreement with the Landlord to end the tenancy properly, the Landlord's duty to mitigate rent loss would have been triggered at that point.

I make this finding not based on the credibility of the Landlord's evidence but rather on the lack of action on the Tenant's part in not ending this tenancy properly and then failing to pay August 2016 rent when it was due. Accordingly, I find the Landlord mitigated loss by re-renting the rental unit for September 2016 as I accept the Landlord's oral evidence that the rental unit was not able to be re-rented straightaway because the efforts had not started until after August 1, 2016. Therefore, I award the Landlord $2,700.00 in unpaid rent.

As the Landlord has been successful in the majority of the claim, I also award the Landlord the $100.00 filing fee pursuant to Section 72(1) of the Act. Therefore, the Landlord is granted a total award of $2,800.00.

As the Landlord already holds $2,050.00 in the Tenant's Deposits, I order the Landlord to retain this amount in partial satisfaction of the total amount awarded pursuant to my authority under Section 72(2) (b) of the Act. No interest is payable on the Deposits.

The Landlord is issued with a Monetary Order for the remaining balance of $750.00. This order must be served on the Tenant and may then be filed and enforced in the Small Claims Division of the Provincial Court as an order of that court if the Tenant fails to make payment. Copies of the order are attached to the Landlord's copy of this Decision.

I note that the parties both made verbal requests during the hearing for costs associated with preparation for this hearing. In this respect, I caution both parties that costs associated with preparation for dispute resolution proceedings by any party, such as printing costs, lawyer fees, mailing costs, and travel time, cannot be awarded under the Act.

Conclusion

The Tenant breached the fixed term tenancy agreement and failed to pay rent. Therefore, the Landlord may keep the Tenant's Deposits and is issued with a Monetary Order for the remaining balance of $750.00 for unpaid rent and recover of the filing fee. This Decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: February 17, 2017

Residential Tenancy Branch