



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

This was the tenant's application under the *Residential Tenancy Act* (the "Act") for return of a security deposit and recovery of the application filing fee. The tenant's application also indicated that she sought "other" relief and the following was included in the details section of the application: "I was not given a legal eviction notice or amount of time to move. I was only given a verbal notice on nov 01/16, stating I had to move-out because the landlords parents were moving into my suite."

Both landlords and the tenant appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and had the opportunity to present their evidence orally and in written and documentary form, to make submissions to me, and to respond to the submissions of the other party. Service of the tenant's application and of the evidence submitted by both parties was not at issue.

At the end of the hearing the female landlord advised of the correct spelling of her first name and I have amended the style of cause accordingly.

Issue(s) to be Decided

Is the tenant entitled to return of the security deposit?

Is the tenant entitled to any relief based on the allegation of illegal eviction?

Is the tenant entitled to return of the application filing fee?

Background and Evidence

A copy of the tenancy agreement was submitted by the tenant. It shows that the tenancy began October 1, 2015 as a month to month tenancy and that monthly rent of

\$750.00 was due on the first of each month. The female landlord testified that she collected the first and last month's rent from the tenant at the beginning of the tenancy.

The tenant testified that she paid a security deposit of \$375.00 around the beginning of the tenancy. The female landlord disagreed with this and said that she waived the security deposit. The tenancy agreement submitted by the tenant did not include the third page, which deals with the security and pet damage deposits. I therefore ordered both parties to provide me with the third page of the tenancy agreement by close of business on the day of the hearing. Both parties did so. (The landlords also provided a rent receipt for January, 2016 with their copy of the tenancy agreement. It is not clear why they included this document and I have not considered it in any event because it was submitted late and the tenant has not had an opportunity to respond to it.)

Both copies of the tenancy agreement indicate that a security deposit of \$375.00 was due on October 7, 2015. It also indicates that a pet deposit is not payable: a zero (0) is written to indicate the amount of the pet deposit, and the male landlord has added his initials. The landlords' written submissions include a statement that the parties "discussed a damage deposit but I waived it as shown in the agreement. . . A mistake this first time landlord will never make again. [The tenant] lived with her teen age son and a dog."

It was agreed that the tenant made all payments at the beginning of the tenancy in cash. The tenant says the landlord did not issue receipts. The landlord said she wrote receipts out in the tenant's receipt book which remained in the tenant's possession. The landlord submitted banking statements for September, October and November of 2015. The October and November statements show a deposit of \$700.00 around the middle of each month, which the landlord said showed her deposit of cash received from the tenant for rent. The landlord said that although the tenancy agreement requires the payment of rent on the first of the month, in fact the tenant regularly paid mid-month. She also said that although the tenancy agreement says rent is \$750.00 the tenant paid less because of another arrangement with the landlord around shared cable. The landlord pointed the absence of any deposit for \$375.00 in September – November as evidence that no security deposit was paid at the beginning of the tenancy.

The tenant said that she moved out on November 28, 2016 in response to the landlord's verbal notice to end the tenancy and that the landlords ended her tenancy illegally. The landlords said that the tenant ended the tenancy. They say that they only asked the tenant to vacate an upstairs room which the tenant and/or her family member paid an

additional amount to occupy and that the arrangement involving the upstairs room was outside of the tenancy agreement.

The landlords submitted a condition inspection report which was unsigned by the tenant at move-out. The landlords complained that the rental unit was left unclean and damaged and neither the tenant nor her niece returned to clean it although they said that they would do so. The landlords testified that they attempted to contact the tenant but she refused to respond to phone or text. The female landlord also said that in fact the tenant had not been responsive to the landlords since September, after the landlord advised she was unhappy that the tenant's mother was also living in the unit and there had been an increase in the hydro bill. Since then, the landlords said, the tenant's niece had been handling all communication with them.

The tenant did not sign over a portion of the security deposit. It was agreed she provided her forwarding address to the landlords by email in early January, 2017.

Analysis

I conclude that the tenant paid a security deposit at the beginning of the tenancy. This is consistent with the tenancy agreement, which the landlord omitted to provide initially. A landlord is responsible for preparing a written tenancy agreement as per s. 13 of the Act. These landlords have done so and their tenancy agreement states that a security deposit is required. The female landlord mentioned that the tenant had a dog. It may be that the landlord's memory of having waived the security deposit is mistaken and that she actually waived the pet deposit. Certainly this is what is indicated on the tenancy agreement.

The landlords' bank statements do not establish that a deposit was not paid simply because they do not record a deposit of \$375.00. They do not even support the landlord's testimony that the tenant paid both first and last month's rent at the beginning of the tenancy. Lastly, a landlord is required under s. 26(2) of the Act to issue receipts for all payments made in cash. If the landlord has breached the Act by failing to issue receipts, any uncertainty as to payments made should be resolved in the tenant's favour.

The Act contains comprehensive provisions dealing with security and pet damage deposits. Section 38 requires that the landlord handle the security deposit as follows:

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.

...

(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.

(Emphasis added)

Based on the testimony and the documentary evidence, I find that the landlords are in breach of the Act. There was no written agreement that the landlords could retain any portion of the security deposit, and the landlord did not apply within 15 days of receipt of the tenant's forwarding address to retain the security deposit, as required by s. 38.

Sections 23 and 35 of the Act require the landlord and the tenant to conduct move-in and move-out inspection reports. If a tenant fails to participate, she may waive her right to claim the security deposit back from the landlord. However, the landlord must first take certain steps to involve the tenant in the inspections. Section 35, together with Part 3 of the *Residential Tenancy Regulation*, require a landlord to offer the tenant two opportunities for the inspection, the second of which must be in the approved form (the Notice of Final Opportunity). If the tenant does not cooperate, the landlord must complete the condition inspection report without the tenant and deliver the report to the tenant within certain timelines.

Although the female landlord said that the tenant was unresponsive to phone and text, she also said that the tenant's niece had been the sole contact since September and the landlord indicated on the condition inspection report that the niece was a tenant.

The female landlord also testified that she and the tenant work at the same place. It was also agreed that as of January 1, 2017, the landlords had the tenant's new address.

The landlords could have delivered the tenant a Notice of Final Opportunity through her niece or in person at her workplace. They did not issue this notice in the approved form and they did not attempt to contact the tenant by means other than phone (including text) although other avenues were available to them. There is also no evidence that the landlords delivered the condition inspection report to the tenant upon receipt of her forwarding address, as required by s. 18(1)(b) of the Regulation.

Based on the above, I find that the landlords failed to meet their obligations under the Act and Regulations with respect to the condition inspection report before the tenant failed to meet her obligations. A landlord is in the business of renting and must comply with the Act and Regulations. The Residential Tenancy Branch policy guidelines suggest that when both parties have breached the Act the first to do so is the one who loses.

The landlords may still file an application for unpaid rent and/or damages. However, the issue of the security deposit has now been conclusively dealt with in this hearing.

Having made the above findings, I must order, pursuant to sections 38 and 67 of the Act, that the landlord pay the tenant the total sum of **\$850.00**, comprised of double the security deposit (2 x \$375.00) and the \$100.00 fee for filing this application.

No additional compensation is owed to the tenant based on her allegation that she was illegally evicted. The landlords have included in their evidence text correspondence from October 26, 2016 with the tenant's niece, who also lived in the rental unit and/or the upstairs bedroom. In that correspondence the landlords ask "did you decide what you and aunty going to do? Live all together in basement or are you getting your own place? Cuz I need my room clean out for first of dec" (reproduced as written). In response the niece says: "Will all be out by December 1st." The tenant did not offer any evidence to establish that the landlords were actually attempting to end the tenancy for the rental unit.

Based on this evidence and the testimony of both parties I find that the landlords only asked the tenant to vacate the upstairs room. If the tenant believed that the landlords were evicting her illegally, she could have remained in the suite and disputed the eviction. Had she done so, she may have had an additional remedy under the Act.

Conclusion

The tenant is given a formal order for \$850.00 representing return of double the security deposit and the application filing fee. The landlords must be served with a copy of this order as soon as possible. Should the landlords fail to comply with it, it may be filed in the Small Claims division of the Provincial Court and enforced as an order of that Court.

The claims of the tenant regarding an illegal eviction are dismissed without leave to reapply.

This decision is final and binding on the parties, except as otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the Act.

Dated: March 6, 2017

Residential Tenancy Branch