



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

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

- a monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 62;
- authorization to obtain a return of the security deposit, pursuant to section 38;
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord and his English language translator and the tenant, his agent and his English language translator attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. Both parties confirmed that their translators had authority to assist them at this hearing. The tenant confirmed that his agent had permission to speak on his behalf at this hearing. The landlord confirmed that he was the friend and former property manager for the landlord owner of this rental unit and that he had authority to speak on the owner's behalf, as an agent at this hearing. This hearing lasted approximately 90 minutes in order to allow both parties to fully present their submissions and due to additional time required by both parties to receive English translation assistance.

The landlord confirmed receipt of the tenant's dispute resolution hearing notice and application. In accordance with sections 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's application.

The tenant stated that he did not know whether he served his written evidence package to the landlord. The landlord said that he did not receive the tenant's written evidence package. The tenant is required to serve all of the written evidence that he intends to rely upon at the hearing to the landlord, as per Rule 3.1 of the Residential Tenancy Branch ("RTB") *Rules of Procedure*. Accordingly, I advised both parties that I could not consider the tenant's written evidence package at this hearing because it was not served to the landlord, only to the RTB.

Issues to be Decided

Is the tenant entitled to a monetary order for compensation for damage or loss under the *Act, Regulation* or tenancy agreement?

Is the tenant entitled to a return of his security deposit?

Is the tenant entitled to recover the filing fee for this application?

Background and Evidence

Both parties agreed to the following facts. Both parties signed a written tenancy agreement on July 19, 2016 for the tenant and his agent to rent the main floor, not the upper second level floor, of a two-level house. Both parties agreed that monthly rent in the amount of \$2,000.00 was payable on the first day of each month and the tenancy agreement was for a fixed term of one year. On July 19, 2016, the tenant and his agent viewed the main floor of the house that he intended to rent, paid a security deposit of \$1,000.00 to the landlord and the landlord continues to retain this deposit. The tenant also paid a \$50.00 deposit to the landlord for five keys and the landlord continues to retain this deposit because the tenant has not returned the keys.

Both parties agreed to the following facts. The tenant and his agent moved into the upper second floor of the house on August 30, 2016, because the landlord said that the main floor was already rented to other tenants. The tenant's agent made a comment during the signing of the tenancy agreement that renting the upper second floor may be a possibility but no written agreement was signed for that to occur. There was a strong, pungent smell on the upper second floor of the house, which the tenant claimed smelled like paint.

The tenant said that there were only two bare mattresses and no other furniture in the unit when he moved in on August 30, 2016. The landlord disagreed, stating that there were three beds, as well as couches, chairs, and other furniture. Both parties agreed that the written tenancy agreement provided for a furnished unit included in rent.

Both parties agreed that the tenant reported the smell and lack of furniture to the landlord on August 30, 2016, upon move-in. The tenant said that he tried to open the windows and air the place out, but the strong smell remained. The landlord said that he advised the tenant that there was nothing he could do until the owner returned from his trip out of the country. He said that the owner was friends with the other tenants occupying the main floor of the house and that they could have easily moved from there, but that the owner had to give permission for this to happen. He said that the

owner was expected back in town on September 20, 2016, but that was delayed to December 2016.

Both parties agreed that the tenant paid half of the first month's rent in the amount of \$1,000.00 to the landlord on August 30, 2016, upon move-in. The tenant said that he paid the landlord because he had just arrived from out of country and he had nowhere else to live. He explained that he advised the landlord that he was only planning to stay for about ten days until he found a new place.

The tenant stated that he vacated the unit on September 2, 2016 when he found an alternate place to live. The landlord said that he does not know when the tenant vacated because he was not there. Both parties agreed that no move-in or move-out condition inspection reports were completed for this tenancy. The tenant claimed that he provided the landlord with a written forwarding address on September 10, 2016, when he left a letter in the landlord's mailbox and the tenant's agent witnessed this service. The landlord denied receiving the letter from the tenant. The landlord confirmed that the tenant did not provide written permission to the landlord to keep any amount from the security deposit. The landlord confirmed that the landlord did not file an application to retain the security deposit.

The tenant seeks a return of his security deposit of \$1,000.00, his keys deposit of \$50.00, his rent of \$1,000.00, as well as the \$100.00 filing fee paid for this application.

The tenant said that he is entitled to the return of \$1,000.00 from rent paid to the landlord because he only lived in the unit for three days. He claimed that he was not given the correct unit that was agreed upon in the written tenancy agreement. He also stated that the landlord failed to rectify his complaints about the smell and lack of furniture or to provide the correct unit for occupancy. The landlord said that the owner was unable to re-rent the unit for months, that the tenant breached the fixed term tenancy agreement and that he is not entitled to rent reimbursement because the unit was furnished even though it had a pungent smell.

Analysis

While I have turned my mind to the testimony of both parties and the tenant's agent, not all details of the submissions and arguments are reproduced here. The principal aspects of the tenant's claims and my findings are set out below.

During the hearing, both parties agreed to settle the keys deposit issue. The tenant agreed to return five keys for the unit to the landlord by way of registered mail to be sent out by March 23, 2017. Within five days of receipt of the five keys, the landlord agreed

to return the tenant's deposit of \$50.00 by way of a cheque addressed to the tenant's name by way of registered mail. Both parties exchanged and confirmed their mailing addresses during the hearing. I order the parties to comply with the above terms.

Reimbursement of Rent

Section 45(2) of the *Act* states that a tenant cannot give notice to end a tenancy before the end of the fixed term. However, section 45(3) of the *Act* states that if a landlord has breached a material term of the tenancy agreement and failed to correct it within a reasonable period after the tenant gives written notice of the failure, the tenant may end a tenancy effective on a date after the date the landlord receives the notice.

I find that the tenant was entitled to end his fixed term tenancy early as there was a breach of a material term of the tenancy agreement. I find that the tenant's verbal notice was sufficient, rather than written notice, because it was such an obvious breach of the parties' tenancy agreement for the landlord to provide the tenant with the wrong rental unit.

I find that the tenant is entitled to the return of a portion of the \$1,000.00 rent paid to the landlord. I find that both parties signed a written tenancy agreement contract for the tenant to rent the main floor of the house, not the upper second floor. While the tenant's agent commented on possibly renting the second floor, nothing was confirmed in writing about this, and it was only the tenant who signed the agreement with the landlord, not his agent. The tenant only agreed to pay rent for the correct unit, which was the main floor of the house, not the upper second floor. Since the tenant had nowhere else to go, having arrived from out of country with all of his belongings, he was forced to remain in the unit until he found alternate accommodation.

Although the tenant informed the landlord that there was a bad smell and a lack of furniture, the landlord refused to address the issue, even though he was the agent for the owner. I accept the tenant's and his agent's evidence that there were only two bare mattresses in the unit, rather than a full furnished unit as claimed by the landlord. The landlord wanted to wait for the owner to return in three weeks in order to ask the other tenants, who were the owner's friends, to move from the main floor. This is something that the landlord could have done on behalf of the owner in order to fulfill the parties' contract. Therefore, I find that the tenant was entitled to end his tenancy earlier than the fixed term of one year.

Since the tenant resided in the rental unit for four days from August 30 to September 2, 2016, I find that he owes rent to the landlord for these days because he had a place to

live. I have pro-rated the monthly rent of \$2,000.00 over 2 of 31 days in August 2016 and 2 of 30 days in September 2016 ($\$2,000.00/31 \text{ days} \times 2 \text{ days} = 129.03$ for August 2016) and ($\$2,000.00/30 \text{ days} \times 2 \text{ days} = \133.33 for September 2016) for a total of \$262.36. I find that the tenant owes the landlord \$262.36 for residing in the unit for four days from August 30 to September 2, 2016. I find that the tenant is entitled to a return of \$737.64 of the \$1,000.00 in rent paid to the landlord.

I find that the tenant is responsible for the full rent for the above four days, rather than a reduced rate, because I find that the tenant did not provide enough notice to the landlord to rectify the complaints, as four days is a short period of time. However, I find that the landlord was not prepared to deal with the above issues until at least September 20, 2016, when the owner was expected to return from his trip, yet this became delayed to December 2016. Ultimately, I find that the above time period was too long for the tenant to have to wait for the landlord to rectify the issues and that the tenant was therefore entitled to breach his fixed term tenancy agreement.

Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the security deposit, within 15 days after the later of the end of a tenancy and the 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 section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. However, 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 (section 38(4)(a)) or an amount that the Director has previously ordered the tenant to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

The tenancy ended on September 2, 2016. The tenant did not give the landlord written permission to keep any part of his deposit. The landlord did not return the deposit or file an application to retain the deposit.

I find that the tenant did not provide a copy of the letter with his written forwarding address. This letter was not in the tenant's evidence that was excluded from the hearing. The landlord denied receipt of the letter. As the tenant is the applicant and is required to prove his claim, I find that he has failed to meet this onus. Therefore, I find that the tenant did not provide his written forwarding address to the landlord and the doubling provision of section 38 of the *Act* has not yet been triggered. I find that the tenant is not entitled to the return of double the value of his security deposit.

Over the period of this tenancy, no interest is payable on the landlord's retention of the tenant's security deposit. In accordance with section 38(6)(b) of the *Act*, I find that the tenant is entitled to a return of the original amount of his security deposit, totalling \$1,000.00, from the landlord.

As the tenant was mainly successful in this application, I find that he is entitled to recover the \$100.00 filing fee from the landlord.

Conclusion

I issue a monetary Order in the tenant's favour in the amount of \$1,887.64 against the landlord. The landlord must be served with the monetary Order as soon as possible. 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.

The above monetary Order includes \$50.00 for the keys deposit. I order the tenant to return the five keys for the house to the landlord by registered mail by March 23, 2017. If the tenant fails to return the five keys, the landlord can deduct \$50.00 from the above monetary order.

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: March 22, 2017

Residential Tenancy Branch