Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH POOL X LP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNDC, OLC, FF

Introduction

This hearing was convened by conference call in response to an Application for Dispute Resolution (the "Application") made by the Tenant on October 17, 2017 for the return of double the security deposit and for money owed or compensation for damage or loss under the *Residential Tenancy Act* (the "Act").

The Tenant also requested that the Landlord comply with the Act, regulation or tenancy agreement and to recover the filing fee from the Landlord.

Preliminary Issues

The Tenant appeared for the hearing and provided affirmed testimony. The Tenant had named a property manager company and the agent for that company as the respondent in this case. However, the parties appearing for the respondent in this case were an agent for a different property management company and legal counsel for the current owner of the rental unit.

Legal counsel explained that the Tenant has always dealt with the property management company named on his Application, who is no longer the property manager for the company landlord that owns the rental unit. Legal counsel provided the correct legal name for the company that owns the rental unit as the correct Landlord in this case whom this Decision and any subsequent orders issued should be made against. The Tenant agreed to amend his Application to reflect the correct Landlord in this case, as detailed on the style of cause appearing on the front page of this Decision.

The property manager provided affirmed testimony and legal counsel made submissions on behalf of the Landlord. Legal counsel confirmed receipt of the Tenant's Application and his evidence served prior to the hearing.
Legal counsel confirmed that the Landlord had not provided any evidence prior to this hearing. However, the Tenant's evidence was not before me and there was no indication from the audit notes made by the Residential Tenancy Branch for this file that any evidence from the Tenant was received.

The Tenant was unsure whether he had provided a copy of his evidence for this file. The Tenant asked that the hearing be continued just on his oral evidence which I allowed. However, during the hearing I determined that I was not able to make a finding on the Tenant's second portion of the claim without having his evidence before me. As a result, the parties agreed that this portion of the Tenant's Application would be dismissed with leave to re-apply. The Tenant is therefore at liberty to re-apply for loss of use of his balcony during the tenancy.

The hearing continued to deal with the Tenant's request for the return of double his security deposit.

Issue(s) to be Decided

Is the Tenant entitled to the return of his security deposit, and if so, for how much?

Background and Evidence

The parties agreed that this tenancy started in February 2015 for a fixed term of one year which then continued on a month to month basis thereafter. Rent was payable by the Tenant in the amount of $1,360.00 which then then increased during the tenancy to $1,390.00 payable on the first day of each month. The Tenant paid a security deposit of $680.00 at the start of the tenancy.

The Tenant testified that he provided written notice in July 2016 to end the tenancy for August 31, 2016 which is the date that he vacated the rental unit. The Tenant testified that he served the Landlord's agent at the time with a forwarding address on a letter dated September 26, 2016 which he placed into the Landlord's agent's mail slot.

The Tenant testified that despite repeated reassurance from the Landlord's agent that he would be given the money back, he did not get his security deposit back until one day after he had made the Application. The Tenant explained that the Landlord had deducted $21.08 from the security deposit and the Landlord had no written consent to make this deduction. Therefore, the Tenant seeks to recover the double penalty provided for by the Act.
The property manager confirmed receipt of the Tenant's letter containing his forwarding address on September 27, 2016 and that a cheque for the return amount was prepared on September 28, 2016. However, this was not sent to the Tenant until October 11, 2016.

Legal counsel submitted that the deduction from the security deposit was made because the Tenant was in rental arrears. Legal counsel submitted that the Tenant had not provided any evidence that he had not consented to the deduction that was made and that the deducted amount had been returned to the Tenant within the 15 days provided by the Act. Legal counsel referred me to the set off provisions in the policy guideline when making my findings in this case.

The Tenant confirmed that he had not given any consent, written or otherwise, for the Landlord to make any deduction from his security deposit and disputed that he owed any rental arrears to the Landlord.

Analysis

The Act contains comprehensive provisions on dealing with a tenant's security deposit. Section 38(1) of the Act states that, within 15 days after the latter of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit or make an Application to claim against it. Section 38(4) (a) of the Act provides that a landlord may make a deduction from a security deposit if the tenant consents to this in writing.

I accept the undisputed evidence that the tenancy ended on August 31, 2016 through the Tenant's written notice. I also accept the agent for the Landlord received the Tenant's forwarding address on September 28, 2016 after being served with it pursuant to Section 88(f) of the Act.

There is no evidence before me that the Landlord made an Application within 15 days of receiving the Tenant's forwarding address or obtained written consent from the Tenant to withhold $21.08 from the Tenant's security deposit for unpaid rent. The Landlord bears the burden to prove they have authority to make deductions from a security deposit; this burden does not rest with the Tenant to prove that he did not consent.

Therefore, I am only able to conclude that the Landlord failed to comply with Sections 38(1) and 38(4) (a) of the Act. The Landlord is in the business of renting and therefore, has a duty to abide by the laws pertaining to residential tenancies. The security deposit was held in trust for the Tenant by the Landlord. At no time does a landlord have the ability to simply keep the security deposit because they feel they are entitled to it or are justified to keep it.

If a landlord and a tenant are unable to agree to the repayment of a security deposit or to deductions to be made from it, the landlord must file an Application within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

It is not enough that a landlord feels they are entitled to keep the security deposit, based on unproven claims. A landlord may only keep a security deposit through the authority of the Act, such as an order from an Arbitrator, or with the written agreement of the Tenant. Here the Landlord did not have any authority under the Act to keep the remaining portion of the Tenant's security deposit.

Section 38(6) of the Act stipulates that if a landlord does not comply with Section 38(1) of the Act, the landlord must pay the tenant double the amount of the deposit. Policy Guideline 17 provides for three examples on how security deposits are to be offset. I find example A best demonstrates how the security deposit is to be calculated in this case:

"Example A: A tenant paid $400 as a security deposit. At the end of the tenancy, the landlord held back $125 without the tenant's written permission and without an order from the Residential Tenancy Branch. The tenant applied for a monetary order and a hearing was held. The arbitrator doubles the amount paid as a security deposit ($400 x 2 = $800), then deducts the amount already returned to the tenant, to determine the amount of the monetary order. In this example, the amount of the monetary order is $525.00 ($800 - $275 = $525)."

[Reproduced as written]

Based on the foregoing, I find the Landlord is to provide the Tenant with relief in the amount of $701.08 ($680.00 x 2 – ($680.00 – $21.08)).

As the Tenant had to file this Application to recover this amount, I find the Tenant may recover the $100.00 filing fee pursuant to Section 72(1) of the Act. Therefore, the Tenant is issued with a Monetary Order for a total balance of $801.08.

This order must be served on the Landlord. The Tenant may then file and enforce the order in the Small Claims Division of the Provincial Court as an order of that court if the Landlord fails to make payment. Copies of the order are attached to the Tenant's copy of this Decision. The Landlord maybe held liable for any enforcement costs incurred by the Tenant to obtain this relief.

Conclusion

The Landlord has breached the Act by failing to deal properly with the Tenant's security deposit. Therefore, the Tenant is awarded a total of $801.08 which comprises of double the amount back after deducting the amount already returned, and the filing fee.

The Tenant has leave to re-apply for monetary compensation for repairs to the balcony. The Landlord is at liberty to apply for any alleged rental arrears in this tenancy.

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: April 20, 2017

Residential Tenancy Branch