Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD

Introduction

This hearing convened as a result of the Tenant's Application for Dispute Resolution wherein the Tenant requested monetary compensation from the Landlord and return of her security deposit.

The hearing was conducted by teleconference on April 12, 2017 at 3:00 p.m. Only the Tenant called into the hearing. She gave affirmed testimony and was provided the opportunity to present her evidence orally and in written and documentary form, and to make submissions to me.

The Tenant testified that she served the Landlord with the Notice of Hearing and the Application on October 17, 2017 by registered mail. A copy of the registered mail tracking number is provided on the unpublished cover page of this my Decision.

Residential Tenancy Policy Guideline 12--Service Provisions provides that service cannot be avoided by refusing or failing to retrieve registered mail:

> Where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail, does not override the deemed service provision. Where the registered mail is refused or deliberately not picked up, service continues to be deemed to have occurred on the fifth day after mailing.

Pursuant to section 90 of the *Residential Tenancy Act* documents served this way are deemed served five days later; accordingly, I find the Landlord was duly served as of October 22, 2017 and I proceeded with the hearing in their absence.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, not all details of the Tenant's submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Tenant entitled to return of the rent paid for October 2016?

2. Is the Tenant entitled to return of her security deposit?

Background and Evidence

The Tenant provided a copy of her residential tenancy agreement in evidence which confirmed this Tenancy began October 1, 2016 for a 1 year fixed term. The name of the Landlord on the tenancy agreement was noted as the building name, as well as T.M., who personally signed the tenancy agreement, and who was named by the Tenant as Landlord on her Application for Dispute Resolution. Despite being served by registered mail, T.M. did not attend the hearing; consequently, the Tenant's Application was unopposed.

Pursuant to the tenancy agreement, monthly rent was payable in the amount of $675.00 and the Tenant paid a security deposit in the amount of $337.50. The Tenant indicated on her application for Dispute Resolution that she sought the sum of $1,012.50 in compensation from the Landlord representing return of these funds as she was not able to live in the rental unit.

The Tenant stated that she moved into the rental unit on September 29, 2016, which was two days prior to the start of the tenancy. She claimed that immediately upon moving in she had an allergic reaction to the chemicals used to clean the carpet and the walls, and that her reaction resulted in hospitalization. She further stated that after she was released from the hospital she went to work and when she returned to the rental unit she had another reaction again resulting in hospitalization.

The Tenant stated that she then spoke to the Landlord and informed the Landlord that the issue was a result of "off gassing" and that the carpet needed to be cleaned and the walls wiped down with just water, as this was information she had received from the doctor. The Tenant stated that in response the Landlord said "do an end of tenancy, I don't want to deal with you". The Tenant stated that the Landlord also told the Tenant that she did not want any contact with the Tenant and that subsequent to this conversation the Landlord would not return her emails or calls.
The Tenant stated that on October 6, 2016 the Landlord posted a Notice to Enter the rental unit for the purpose of an inspection on October 7, 2016. The Tenant stated that aside from this Notice, she has not received any communication from the Landlord.

Introduced in evidence was a letter from A.R., a Social Determinants of Health Worker, to the Landlord dated October 7, 2016. On this date A.R. again requested that the Landlord address the off-gassing of the chemicals in the carpets. The Tenant testified that she did not receive a response to this letter.

The Tenant testified that she had moved all of her items out of the rental unit by the time the Landlord did their inspection on October 7, 2016.

The Tenant also confirmed that she did not provide the Landlord with her forwarding address in writing as at the time she moved out as she did not have a forwarding address. She confirmed that her forwarding address is as noted on her Application for Dispute Resolution.

Analysis

The Tenant sought return of the rent paid for October 2016 in addition to return of the security deposit paid.

I will first deal with her claim for return of the rent paid for October 2016.

The Tenant testified that she moved her items in the rental unit on September 29, 2016, but was not stay at the rental unit as a result of an allergic reaction she had to the chemicals used to clean the carpet and the walls. She claims that when she informed the Landlord of the steps required to correct the situation, the Landlord simply responded "do an end of tenancy, I don't want to deal with you". The Tenant further alleges that despite sending email messages and text messages to the Landlord, she has not had any response from the Landlord regarding her concerns. She also testified that the letter sent on her behalf by her Social Determinants of Health Worker was also not answered.

The Tenant testified that she had moved all of her items out of the rental unit by the time the Landlord inspected the rental unit on October 7, 2016.

Pursuant to section 16 of the *Residential Tenancy Act,* the rights and obligations of the landlord and the tenant take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

As such, the Tenant was required to end her tenancy in accordance with the *Residential Tenancy Act.* Section 44 of the *Act* provides as follows:

> **44** (1) A tenancy ends only if one or more of the following applies:
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> (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
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> (i) section 45 *[tenant's notice]*;
>
> (i.1) section 45.1 [tenant's notice: family violence or long-term care];
>
> (ii) section 46 *[landlord's notice: non-payment of rent]*;
>
> (iii) section 47 *[landlord's notice: cause]*;
>
> (iv) section 48 *[landlord's notice: end of employment]*;
>
> (v) section 49 *[landlord's notice: landlord's use of property]*;

(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;

(vii) section 50 *[tenant may end tenancy early]*;

(b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;

(c) the landlord and tenant agree in writing to end the tenancy;

(d) the tenant vacates or abandons the rental unit;

(e) the tenancy agreement is frustrated;

(f) the director orders that the tenancy is ended.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

As it was the Tenant ending the tenancy, the Tenant was required to follow section 45 which provides as follows:

45 (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice, and

(b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

(4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

While not specifically argued, the Tenant's submissions suggest she is relying on section 45(3), and alleging that the Landlord breached a material term of the tenancy by not having the rental unit ready for occupation.

The letter provided in evidence by the Tenant's Social Determinants of Health Worker, dated October 7, 2016, does not give notice to end the tenancy, nor does it provide the Landlord with a reasonable period in which to correct the situation; notably, the Tenant testified that she had already moved out by that date.

Residential Tenancy Policy Guideline 8—Unconscionable and Material Terms provides as follows:

> **Material Terms**
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> A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.
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> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
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> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.
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> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
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> - that there is a problem;
> - that they believe the problem is a breach of a material term of the tenancy agreement;
> - that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
> - that if the problem is not fixed by the deadline, the party will end the tenancy.
>
> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

In the case before me, I find that the Tenant failed to comply with the above in that she did not provide the Landlord with a reasonable opportunity and deadline to correct the problem.

I therefore dismiss her request for return of the rent paid for October 2016.

The Tenant failed to provide the Landlord with her forwarding address in writing, and as such has not complied with section 38 of the *Residential Tenancy Act.* The Tenant's application for return of her security deposit is dismissed with leave to reapply should the Landlord not return her deposit or make an application for dispute resolution within 15 days of receipt of the Tenant's forwarding address in writing as required by section 38(1) of the *Act*.

Conclusion

The Tenant's claim for return of the rent paid for October 2016 is dismissed.

The Tenant's claim for return of her security deposit is dismissed with leave to reapply as the Tenant has yet to provide her forwarding address in writing to the Landlord. I note that this Decision does not extend any time limits imposed by the *Residential Tenancy Act.*

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: April 13, 2017

Residential Tenancy Branch