Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNR MNSD FF

Introduction

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

- a monetary order for unpaid rent and utilities pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenants confirmed receipt of the landlord's application for dispute resolution ('application'). In accordance with section 89 of the *Act*, I find that the tenants were duly served with the landlord's application. As both parties confirmed receipt of each other's evidentiary materials, I find that these documents were duly served in accordance with section 88 of the *Act.*

Preliminary Issue - Adjournment of Hearing

During the hearing, the tenants requested an adjournment of the hearing as they did not have time to review the landlord's evidence, which they received on March 29, 2017.

The landlord replied that she had filed her application for dispute resolution in October of 2016, and have not made any amendments to her Application. She felt it would be prejudicial to her as she had made her Application six months ago, and that should be sufficient for both parties to prepare for the hearing.

During the hearing, I advised both parties that I was not granting an adjournment of this hearing. I made this decision after taking into consideration the criteria established in Rule 7.9 of the RTB *Rules of Procedure*, which includes the following provisions:

Without restricting the authority of the arbitrator to consider the other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- *the oral or written submissions of the parties;*
- *the likelihood of the adjournment resulting in a resolution;*
- *the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment: and*
- *whether the adjournment is required to provide a fair opportunity for a party to be heard; and*
- *the possible prejudice to each party.*

In reaching my decision, I note that the tenants had acknowledged that they had received the landlord's evidence fifteen days prior to the hearing date. I find that this is sufficient time for the tenants to have reviewed the landlord's evidence. I find that the tenants did not provide a reason for why they did not have time to review the landlord's evidence. I, therefore find that an adjournment is not justified, and would be prejudicial to the landlord who was prepared to proceed with the hearing. Accordingly, the adjournment was not granted, and the hearing proceeded as scheduled.

Issue(s) to be Decided

Is the landlord entitled to retain all or a portion of the tenants' security deposit in satisfaction of their monetary claim?

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to recover the filing fee from the tenants for this application?

Background and Evidence

This month-to-month tenancy commenced in October of 2013. Monthly rent was set at $1,050.00, payable in advance on the first of each month. The tenants moved out on September 30, 2016, and the landlord still holds the $525.00 security deposit.

The landlord requested a monetary order for unpaid rent ($1,050.00), as well as to retain the tenants' security deposit in order to cover the cost of cleaning and painting the suite ($525.00) for a total monetary claim of $1,575.00 plus the cost of the filing fee.

The landlord testified to the following. On May 31, 2016 she received a text message from one of the tenants notifying her that the tenants planned on moving out at the end of 2016. The landlord decided to move back into her rental suite. She planned to move back in July, and give the tenants a 2 Month Notice to End the Tenancy for Landlord's

Own Use ('2 Month Notice'). The landlord notified the tenants in writing of her intentions, and the tenant JP requested three months instead of two, which the landlord agreed to. The landlord did not issue a 2 Month Notice to the tenants, but instead sent a typed later to the tenants, dated July 2, 2017. The letter is addressed to both tenants stating that "this letter will serve as 60 days notice to vacate the suite you are renting from me. I apologize that I have to provide notice but I am moving back to my house to live in this suite you currently occupy". The landlord submitted a copy of this letter in her evidence.

On August 5, 2016, the landlord sent a text message to the tenants asking if they wanted to stay as the landlord had decided to move elsewhere. The tenants declined this request. The tenants refused to pay September 2016 rent as they felt that they were entitled to one month free rent. The landlord issued a 10 Day Notice to End Tenancy ('10 Day Notice') on September 21, 2016 for the unpaid September 2016 rent as she felt the tenants were not entitled to one month free rent as a 2 Month Notice was never issued. The tenants moved out on the effective date of the 10 Day Notice, September 30, 2016.

The landlord testified that the tenants left holes in the walls which required six hours of painting and patching. The landlord also testified that the kitchen required cleaning. The landlord conducted a move-out inspection with the tenants on September 30, 2016, but did not complete the Condition Inspection Report.

The tenants testified that the landlord notified them in July that she wanted the rental suite back for her own personal use by the end of September 2016. The tenants did not dispute that they requested at least three months to move out, but felt that the landlord was still bound by the *Act* to give proper notice and compensation. The tenants provided their forwarding address upon move-out, and expected the return of their deposit as they did not give permission for the landlord to retain any portion of it. The tenants dispute the fact that the landlord did a proper move-out inspection with them, and the landlord did not fill out a report.

Analysis

Section 38(1) of the *Act* requires that a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenants' forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenants' security deposit plus applicable interest and must pay the tenants a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the

triggering event is the latter of the end of the tenancy or the tenants' provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "at the end of a tenancy, the tenants agree in writing the landlord may retain the amount to pay a liability or obligation of the tenant."

In this case, the landlord did apply for dispute resolution to obtain authorization to retain the tenants' security deposit within the time period allowed. The tenants gave sworn testimony that the landlord had not obtained their written authorization at the end of the tenancy to retain any portion of their security deposit. I therefore must make a determination whether the landlord is entitled to retain a portion of the security deposit.

I note that the landlord had failed to comply with section 35 of the *Act* which requires the landlord to both perform a move-out inspection and fill out a condition inspection report. The consequence of not abiding by this section of the *Act* is that "the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished", as noted in sections 24(2) and 36(2) of the *Act*. As there is undisputed evidence that the landlord did not complete a move-out condition inspection report and in accordance with section 38(6) of the *Act*, I issue a monetary award of double the value of the tenants' security deposit.

The landlord testified that the tenants had damaged the walls, and failed to properly clean the rental unit at the end of the tenancy. Without a completed move-out inspection report, I find that there is no way to determine which damages occurred during this tenancy, and what the pre-existing condition of the home was. Although I acknowledge that there was damage to the home as depicted in the photos the landlord submitted in evidence, I find that there is insufficient information to make any finding that the tenants are responsible. In the absence of documentation or witness testimony to support whether the damage was caused by the tenants, I am dismissing the landlord's application for monetary compensation for the damage.

The landlord also submitted a $240.00 monetary claim for cleaning (8 hours x $30/hour). The landlord testified that she did the cleaning herself, and provided photos to support her claim that the tenants did not properly clean the residence. I note that the photos submitted in support of the cleaning required are labelled "back of the stove", "behind fridge", "fridge top", "inside of fridge", and "top of cabinets". With the exception of inside the stove and refrigerator, I find these photos do not provide a clear representation of the cleanliness of the suite. The majority of the photos are dark and unclear. Accordingly, I dismiss this portion of the landlord's monetary claim.

Subsection 49(3) of the *Act* sets out that a landlord may end a tenancy in respect of a rental unit where the landlord or a close family member of the landlord intends in good faith to occupy the rental unit. The landlord provided undisputed evidence in this hearing that she had intended to occupy the suite herself, and notified the tenants of her intentions.

Section 52 of the *Act* provides the following requirements requiring the form and content of notices to end tenancy:

> ***52*** *In order to be effective, a notice to end a tenancy must be in writing and must*
>
> *(a) be signed and dated by the landlord or tenant giving the notice,*
>
> *(b) give the address of the rental unit,*
>
> *(c) state the effective date of the notice,*
>
> *(d) except for a notice under section 45 (1) or (2)* [tenant's notice]*, state the grounds for ending the tenancy, and*
>
> *(e) when given by a landlord, be in the approved form...*

The typed letter the landlord issued to the tenants does not comply with section 52 of the *Act*. Although the parties agreed that the landlord intended to occupy the rental unit for her own use, she did not issue any formal notice using the approved Residential Tenancy Branch form to do so. Additionally the landlord stated in her own testimony that on August 5, 2017, she had decided not to occupy the suite after giving notice to the tenants. Since no official notice to end tenancy for landlord's use was provided to the tenants and, in fact, the tenants issued their own notice to end tenancy by text message to the landlord, I find that the tenants were not entitled to withhold any portion of the rent.

Section 26(1) of the *Act* states that a "tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent." As the tenants did not have permission from the landlord, nor did they have an order from an Arbitrator to withhold any rent, I find that the landlord is entitled to recover the $1,050.00 that was withheld for the September 2016 rent.

As I find the landlord was only partially successful in her application, I dismiss her application for recovery of the filing fee.

Conclusion

In this case, both parties are entitled to monetary awards totalling $1,050.00. Since these amounts are offsetting, I issue no monetary Orders regarding this matter.

The remainder of the landlord's monetary claim is dismissed.

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: May 16, 2017

Residential Tenancy Branch