Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC

Introduction

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the "Act") filed February 22, 2017. The tenant seeks return of the security deposit and compensation for damage or loss under the Act, regulation, or tenancy agreement.

The tenant attended the hearing with an advocate. He had an opportunity to provide affirmed testimony and to present his evidence orally and in written and documentary form. An advocate made submissions on his behalf.

As the landlord did not attend, service of the tenant's application and notice of hearing was considered. The advocate advised that the landlord named on the tenancy agreement sold the building in question to the current landlords several years ago. A property search from April of 2017 was in evidence. It established that the numbered company named in this application owns the building in which the rental unit is located. A corporate search also in evidence records RK as the sole director of that corporate landlord. A Residential Tenancy Branch ("RTB") decision dated August 14, 2012 arising from a prior application by this tenant, and naming the numbered company as landlord, was also in evidence. In that decision, the arbitrator notes that the individual landlord did not attend at the reconvened hearing but had attended at an early hearing of the matter. Based on these materials I am convinced that the landlords named in the application before me were the tenant's landlords.

The advocate advised that she sent the application and notice of hearing by registered mail to the individual landlord, RK, on February 23, 2017, and to the corporate landlord on March 31, 2017. Both mailings were sent to the registered and records office address shown on the corporate search, which is also the landlord's address on the tenancy agreement. Both were unclaimed and returned to sender. Copies of the registered mail receipts and the tracking information for both mailings were in evidence. The tracking information for the February 23, 2017 mailing shows that the recipient did not claim the mail. The tracking information for the March 31, 2017 registered mail

indicates the landlord was “not located at address provided.” The tenant’s evidence in support of his application was also sent by registered mail to the address recorded on the corporate search and set out in the tenancy agreement.

The advocate further stated that her organization has historically had difficulty serving these particular landlords. The advocate argued that the landlords have failed in their duty to keep the tenant apprised of their contact information and appear to be deliberately evading service.

Based on the advocate’s submissions and the materials in evidence, I deem the landlords to have been served with the application and notice of hearing under sections 89 and 90 of the Act. Materials sent by registered mail are deemed served five days after mailing. Refusal to accept service does not override this provision. Nor is refusal to accept service grounds for review under the Act.

Section 13(2)(e) of the Act makes the landlord responsible for the tenancy agreement, which must include the address for service and telephone number of the landlord or the landlord’s agent. These landlords have not amended the tenancy agreement to include their contact information. Nor do they appear to have provided any contact information via their agents since the fire. The tenant has been forced to resort to land title and corporate searches in his attempts to serve the landlords. There is not much more than can be required of the tenant in his attempt to effect service. Accordingly, I also find that the landlords have been adequately served under s. 71(2) of the Act.

Issue(s) to be Decided

Has there been a breach of s. 38 of the Act by the landlords?

Is the tenant entitled to compensation for damage or loss under the Act?

Background and Evidence

A copy of the written tenancy agreement was in evidence. It records a month to month tenancy beginning in January of 2007 with monthly rent payable on the 30th of the month. The tenant testified that rent has been reduced by $75.00 monthly since the 2012 RTB decision mentioned above, in which an arbitrator allowed the tenant to reduce the rent by this amount until the landlords made certain repairs, including addressing a rodent infestation and providing a working dryer and telephone service.

These repairs had not been made when the tenancy ended, with the result that the monthly rent at that time was $525.00.

A security deposit of $400.00 was paid at the beginning of the tenancy and remains with the landlords.

The tenant stated that the building was rendered uninhabitable as the result of two fires in the building on March 21, 2016. One of the landlords' agents advised the tenant that his tenancy agreement had been frustrated as a result of the fires. The tenant had no choice but to find alternative accommodation. Although he paid rent for the period between March 21 and 31 of 2016, he was not able to reside in the rental unit. The tenant seeks a partial refund of rent for these days.

Both the tenant and his advocate advised that, after the fire, there were meetings between the tenants and the landlords' agents. In those meetings, the tenants were assured that their security deposits would be returned to them in a timely way. However, the tenant before me has not yet received his security deposit from the landlords. He said that he understands that the landlords have not refunded any of the tenants their security deposits.

The tenant's advocate sent the landlords written notice of the tenant's forwarding address on January 16, 2017, also by registered mail. A copy of that letter and the registered mail receipt were in evidence. It was also returned to sender because it was not claimed. The tenant is seeking return of his security deposit.

Analysis

The Act contains comprehensive provisions dealing with security 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
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> > (a) the date the tenancy ends, and
> >
> > (b) the date the landlord receives the tenant's forwarding address in writing,
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> 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 upon the undisputed evidence, testimony, and submissions, I find that the landlords are in breach of the Act. Section 44(1)(e) of the Act provides that a tenancy ends when a tenancy agreement is frustrated, and I find that this tenancy ended on March 21, 2016. I further find that the tenant provided the landlord with his forwarding address in writing on January 16, 2017 through the organization advocating on his behalf.

The tenant has not authorized the landlords to retain any portion of the security deposit. The landlords have not applied within 15 days of the end of the tenancy or receipt of the tenant's forwarding address to retain a portion of the security deposit. Instead the landlords have through their agents assured the tenant that his security deposit will be refunded, and then failed to refund it.

The security deposit is held in trust for the tenant by the landlord, who may not keep it without establishing the right to do so or obtaining the tenant's agreement. If the landlord and the tenant are unable to agree to the repayment of the security deposit or to deductions to be made to 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.

Having made the above findings, I must order, pursuant to sections 38 and 67 of the Act, that the landlords pay the tenant double the security deposit (2 x $400.00). Over

the period of this tenancy, $11.52 in interest in payable on the deposit. Accordingly, the landlords owe the tenant **$811.52** for the security deposit.

Additionally, I accept that the landlords owe the tenant the **$169.40** claimed as prorated rent for the period between March 21-31, 2016, when the unit was not available to him.

Section 92 of the Act provides that the *Frustrated Contract Act* and the doctrine of frustration apply to tenancy agreements. Section 5(2) of the *Frustrated Contract Act* provides that where a contract is frustrated, a party is entitled to restitution from the other party for benefits created by the first party's performance of the contract. This means that the tenant is entitled to refund of the monies paid, or restitution, for the period of time that he contracted for accommodation, as his payment of rent to the end of the month represents his performance of the contract.

Conclusion

The tenant is given a formal order for $**980.92** (representing double the security deposit, interest, and a refund of prorated rent). 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.

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 *Residential Tenancy Act*.

Dated: July 27, 2017

Residential Tenancy Branch