Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNSD MNDC FF

Introduction

Both parties attended the hearing and the tenant provided evidence that she had served the landlord with the Application for Dispute Resolution and evidence by registered mail and by email with her forwarding address on August 17, 2017. The landlord agreed he had received the application as stated but was unsure about the forwarding address. However, the tenant provided evidence he responded to the email and acknowledged it. While email is not an authorized method of service under section 88 of the Act, I find he was sufficiently served with the tenant's forwarding address on August 17, 2017 pursuant to section 71(b) of the Act for the purposes of this hearing. I find the documents were served pursuant to sections 88 and 89 of the Act for the purposes of this hearing. The tenant applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

a) An Order to return double the security deposit pursuant to Section 38; and
b) To recover the filing fee for this application.

Issue(s) to be Decided:

Has the tenant proved on the balance of probabilities that she is entitled to the return of double the security deposit according to section 38 of the Act?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to present evidence and make submissions. The tenant said she had paid a security and pet damage deposit of $1500 and agreed to rent the unit for $1500 a month commencing April 1, 2016. The tenant vacated the unit on July 28, 2017 and provided her forwarding address in writing on August 17, 2017. The landlord agreed these facts were correct. The landlord returned $1200 of the tenant's deposits (and retained $300) but she says she gave no permission to retain any of it.

The landlord said he retained $300 of the deposit after extensive negotiation with the tenant over damages allegedly caused. She admitted to some of them in her texts included in evidence. The landlord had not filed an Application to claim against the deposit as he relied on the agreement he had made with the tenant. In evidence are numerous text messages, two of which state:
Landlord: "Tell you what. How about $300 then? I know it will cost me more but you were a great tenant…If you want you can look at it as payment for those other things. Sound good?
Tenant: (landlord's name), I'll accept $1200 back. Are you sending an e-transfer?

The text messages were not dated but the landlord testified they were done on August 8, 2017 after a lot or previous negotiation by text. The e transfer was completed but the tenant said she just took it because she was nervous she would not get it. She wasn't really agreeing.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.
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Analysis:

The *Residential Tenancy Act* provides:

Return of security deposit and pet damage deposit
38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
(a) the date the tenancy ends, and
(b) the date the landlord receives the tenant's forwarding address in writing,
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.
(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,
(a) at the end of a tenancy, ***the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant****, or* [emphasis mine]
(b) after the end of the tenancy, the director orders that the landlord may retain the amount.
(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.

In most situations, section 38(1) of the Act requires a landlord, within 15 days of the later of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an application 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 pay the tenant double the amount of the security deposit (section 38(6)).

I find the weight of the evidence is that the parties entered into negotiations and the tenant agreed the landlord could retain $300 of the deposit within the 15 days allowed by section 38 of the Act. I find her text message does not note any limitations to her agreement such as she retains the right to claim all of the deposit back. I find whatever the tenant's motivation, the landlord was entitled to rely on her agreement. By relying on her agreement, he did not find it necessary to make an application to claim against her deposit within the 15 days. I find the landlord complied with section 38 of the Act and refunded all of the deposit except for the agreed retained amount within the 15 days allowed by section 38. Of course, by making this agreement, the tenant can also rely on it if the landlord makes further claims for damages against her.

Conclusion:

I dismiss the tenant's application in its entirety and find her not entitled to recover the filing fee for this application due to lack of success.

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 15, 2018

Residential Tenancy Branch