Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

Pursuant to section 9.1(1), of the *Residential Tenancy Act* (the *Act*), I was designated to hear this matter. This hearing dealt with the landlord's application for:

- a Monetary Order for unpaid rent and utilities pursuant to section 67 of the *Act*;
- a Monetary Order for damages or compensation pursuant to section 67 of the *Act*;
- an Order allowing the landlord to retain the security deposit pursuant to section 38 of the *Act*; and
- recovery of the filing fee from the tenant pursuant to section 72 of the *Act*.

Both the landlord and the tenant appeared for the scheduled hearing. I find that the notice of hearing was properly served and that evidence was properly served and submitted by all parties.

The hearing process was explained and parties were given an opportunity to ask any questions about the process. The parties were given a full opportunity to present affirmed evidence, make submissions, and to cross-examine the other party on the relevant evidence provided in this hearing.

Issue(s) to be Decided

Is the landlord entitled to:

- a Monetary Order for unpaid rent and utilities pursuant to section 67 of the *Act*;
- a Monetary Order for damages or compensation pursuant to section 67 of the *Act*;

- an Order allowing the landlord to retain the security deposit pursuant to section 38 of the *Act*; and
- recovery of the filing fee from the tenant pursuant to section 72 of the *Act*?

Background and Evidence

This tenancy was the last in a series of fixed term tenancies as between the same two parties and began on June 1, 2017. This tenancy was for the fixed term of 12 months and was to end on May 31, 2018. The tenant gave notice to the landlord of his intention to move out early via email on September 21, 2017. The tenant left the rental unit on October 31, 2017. The landlord did not agree to the early termination of the fixed term tenancy but did agree to try to re-rent the premises as soon as possible.

The amount of rent was $2,020.00 per month, payable on the first day of each month. The tenant was also responsible to pay 50% of the utilities for the house which included hydro, water and oil. A security deposit of $925.00 was received by the landlord on May 3, 2014. There was no evidence that any move-in inspection report was completed at the start of the tenancy. The parties did meet at the premises on November 1, 2017, and completed and signed a move-out inspection report.

A forwarding address was provided by the tenant on the move-out inspection report. The evidence of the tenant is that he provided this to the landlord on November 1, 2017 and he points out that the forwarding address information on the move-out report is in his handwriting. He says at the time he was unsure of his new postal code but wrote down what he thought was correct and subsequently emailed the landlord to confirm this was correct.

The evidence of the landlord is that the forwarding address for the tenant was only given at some point after the move-out inspection report was completed and signed by both parties on November 1, 2017. He was unable to say when or how he got the forwarding address. He did not deal with the fact that this information was in the handwriting of the tenant on the move-out inspection report. As a result, I find the evidence of the tenant to be more reliable and I find that the landlord was given the forwarding address of the tenant in writing on November 1, 2017.

The landlord was able to re-rent the premises as of December 1, 2017.

The landlord brought this Application on December 13, 2017.

The landlord seeks payment of the sum of $2,020.00 for lost rent for the month of November, 2017.

The landlord stated several times in his evidence that the rental property is a beautiful ocean front home and that he has never had any vacancy in the past. He then stated that in order to rent the unit out as of December 1, 2017, he had to agree that the new tenant would not be responsible to pay for 50% of the oil to heat the property. As the respondent was responsible to pay this under the terms of the lease he broke, the landlord seeks payment of $637.22 as damages. He says this sum is an estimate of what the tenant owes based on 50% of the cost of oil to heat the property as paid by the tenant during the winter of 2016-2017. No evidence was presented as to what the actual cost for oil to heat the property for the winter of 2017-2018.

The landlord also seeks the sum of $584.17 which is the tenant's 50% portion of water and hydro owing up to October 31, 2017. The tenant does not dispute that this sum is owing.

Finally, the landlord seeks recovery of the $100.00 filing fee from the tenant.

The tenant's position is that the landlord "violated his rights" and that he had no confidence that the landlord could resolve an ongoing dispute he had with the tenants who lived in the basement suite of the house. He said he felt uncomfortable and unsafe due to the actions of the downstairs tenants and was especially concerned for the safety of his daughter who would stay with him once per week. His daughter has developmental challenges.

There was a large volume of evidence entered regarding the difficulties the tenant perceived with the people downstairs. I have reviewed it and while it may well be that these were unpleasant people I see no conduct that would lead me to conclude that there was any threat to the tenant or his daughter.

The tenant was very concerned that the landlord had given keys to his suite to the people downstairs while the landlord (and the tenant), were both out of the country. Upon further review it was determined that the landlord had given keys to both the suite of this tenant and another tenant in the house to the people downstairs while all were out of the country in case some emergency came up that required access. There was no allegation that the people downstairs had actually entered or done anything improper in the tenant's suite.

There were a number of emails entered into evidence by the landlord that show:

- the landlord being put on notice by the tenant of issues with the people downstairs;
- the landlord responding to the tenant and agreeing to look into the matter;
- the landlord following up to confirm what he had done; and
- the landlord making suggestions as to how to avoid future conflict.

On a number of occasions, the actions of the landlord appear to have prompted the people downstairs to apologize to the tenant and/or change their behaviour.

Analysis

Section 45 (3) of the *Act* states:

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

This section of the *Act* sets out a two-part test that must be met for a tenant to end the tenancy. Policy Guideline 30 confirms that a tenant may end the tenancy if the landlord has breached a material term of the tenancy agreement and fails to correct the breach after being given notice by the tenant **and**, that the tenant must give proper notice under the *Act*.

In the present case the tenant has not shown that there has been a breach of a material term of the tenancy agreement or, that the landlord has not corrected the situation after a reasonable time after the tenant has written notice of the failure. Even if I found that the landlord had breached a material term of the tenancy agreement in terms of the right of the tenant to quiet enjoyment in accordance with section 28 of the *Act*, the "notice" by the tenant via email on September 21, 2017, does not satisfy the second part of the test.

In fact, the evidence is that the September 21, 2017, email was sent by the tenant on the first day when the tenant knew the landlord would be out of the country for 3 weeks. Also, there is no time given to correct the situation rather, the tenant states he is moving out.

As a result, I find that the tenant could not end the tenancy in accordance with section 45 (3) of the *Act* and, has breached the terms of the tenancy agreement.

Either party to a tenancy may bring an application for damages under section 67 of the *Act* which states:

> *Without limiting the general authority in section 62 (3), if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.*

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

With respect for the claim by the landlord for the sum of $2,020.00, being the lost rent for the month of November 2017, I find that the landlord has led evidence sufficient to establish all four points set out above. Accordingly, there will be an order that $2,020.00 is payable to the landlord for damages for lost rent pursuant to section 67 of the *Act*.

With respect for the claim by the landlord for the sum of $637.22, being an estimate of what the tenant owes based on 50% of the cost of oil to heat the property during the winter of 2017-2018, I find that the landlord has not led evidence sufficient to establish all four points above. No evidence was presented as to what the actual value of the loss was – which would be 50% of the actual cost for oil to heat the property for the winter of 2017-2018. No evidence was presented in terms of steps taken to mitigate the loss. Accordingly, this portion of the landlord's claim is dismissed.

With respect to the claim by the landlord for the sum of $584.17 which is the tenant's 50% portion of water and hydro owing up to October 31, 2017, as the tenant does not dispute that this sum is owing, there will be an order that $584.17 is payable to the landlord for unpaid utilities pursuant to section 67 of the *Act*.

The landlord has applied to retain the security deposit of $925.00 in partial satisfaction of this award.

Section 38 of the *Act* requires the landlord to either return a tenant's security or pet deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the *later* of the end of a tenancy and, or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord **is required to pay** a monetary award, pursuant to section 38(6)(b) of the *Act,* **equivalent to double** the value of the security or pet deposit.

I find that the landlord did not apply for permission to keep the security deposit in compliance with section 38 of the *Act*. The landlord was given the tenant's forwarding address in writing on November 1, 2017. The landlord only brought the Application for Dispute Resolution on December 13, 2017.

However, section 38 does not apply if a landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy as per section 38(4)(a). A landlord may also under section 38(3)(b), retain a tenant's security or pet deposit if an order to do so has been issued by an arbitrator.

No evidence was produced at the hearing that the landlord had obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy.

No evidence was produced at the hearing that the landlord had obtained an order under section 38(3)(b), retain the tenant's security deposit.

Pursuant to section 38 of the *Act*, I find that the tenant is entitled to a monetary award of $1,850.00 representing double the amount of the security deposit that was not returned to him.

As the landlord was only partially successful in its claim and has withheld the security deposit of the tenant in contravention of the *Act*, I decline to award him the filing fee under section 72 of the *Act*.

Conclusion

The Order to be issued to the landlord is calculated as follows:

Item	**Amount**
Rent Damages claim	$2,020.00
Utilities damages claim	584.17
Less Double Security Deposit Owing	-1,850.00
Recovery of Filing Fee for this Application	00.00
Total Monetary Order	**$754.17**

I issue a Monetary Order in the landlord's favour in the amount of $754.17 against the tenant. The landlord is provided with a Monetary Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: June 27, 2018

Residential Tenancy Branch