Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, MND, MNSD, MNR, FF

Introduction

This hearing was convened in response to an application by the Tenant and an application by the Landlord pursuant to the *Residential Tenancy Act* (the "Act").

The Tenant applied on October 26, 2017 for:

1. An Order for the return of the security deposit - Section 38; and
2. An Order to recover the filing fee for this application - Section 72.

The Landlord applied on November 7, 2017 for:

1. A Monetary Order for compensation - Section 687;
2. A Monetary Order for damage to the unit - Section 67;
3. A Monetary Order for unpaid rent or utilities - Section 67; re
4. An Order to retain the security deposit - Section 38; and
5. An Order to recover the filing fee for this application - Section 72.

The Tenant and Landlord were each given full opportunity to be heard, to present evidence and to make submissions.

Preliminary Matters

At the onset of the hearing the Tenant stated that they did not receive any evidence from the Landlord. The Landlord stated that a 50 page evidence package was sent to the Tenant at its Calgary address on either February 12 or 13, 2018 by registered mail. The Landlord provided a tracking # that was the same as the tracking # that the Landlord provided for the registered mail service of the application. The Landlord then

provided a different tracking# for the evidence package. This second tracking # is noted on the front cover of this Decision and I note that this evidence indicates that no such tracking # exists in the online postal tracking system.

The Landlord was asked to check the postal receipts for the registered mail to obtain the dates of the service of either the application or the evidence package. The Landlord then stated that the application was mailed on November 2, 2018. When the Landlord was informed that this date was prior to the date the Landlord made its application the Landlord stated that he had taken a photo of the tracking # and was reading off his notes. The Tenant confirmed that the application had been received by the Tenant. The Tenant states that nothing came in the mail to the Tenant after February 2018. The Tenant's legal counsel states that they are prepared to proceed without the Landlord's evidence.

It was noted that no evidence was uploaded from the Landlord to the Residential Tenancy Branch (the "RTB") other than a copy of the tenancy agreement that was uploaded on the same day as the application was made. The Landlord states that he has receipts for the evidence uploads to the RTB but cannot find them. The Landlord seeks an adjournment in order to provide its evidence to the Tenant and the RTB. The Tenant's Legal counsel argues that the Landlord has had ample time to provide its evidence package and that the Landlord has given confusing and contradictory evidence in relation to the registered mail and tracking #'s. The Tenant's legal counsel indicates that the evidence would be of little assistance any way.

The Landlord states that it received no evidence from the Tenant. The Tenant states that on May 11, 2018 its evidence was couriered to the Landlord at the dispute address and that the delivery of the package was signed for at the address with a woman's name. The Tenant states that he also texted the Landlord on May 8 and 9, 2018 asking the Landlord to confirm the service to that address. The Tenant states that the Landlord never replied.

The Landlord states that its correct address for service is set out on the tenancy agreement. It is noted that there is no address for service to the Landlord on the tenancy agreement provided by each party. The Landlord states that at the time of the application, November 7, 2017 repairs were being made to the unit. The Landlord states that the repairs were being made over October and November 2017. The Landlord states that for this reason the invoices for the repair costs were not available at the time of the application. The Landlord states that the invoice was not received by the Landlord until January 7, 2018 and that this evidence was then sent February 12, 2018 as just one item was still being repaired and that there was some delay because of the vacation season.

Rule 3.3 of the RTB Rules of Procedure provides that evidence supporting a cross application must be submitted at the same time as the application is submitted or within three days of submitting the application online and must be received by the other party not less than 14 days before the hearing. Rule 3.19 provides that no additional evidence may be submitted after the hearing starts except as directed by the Arbitrator. Given the Landlord's unsupported, confusing and contradictory evidence in relation to service of its evidence and application packages to the Tenant, considering the Tenant's evidence that no evidence from the Landlord was received and considering that no evidence was received by the RTB from the Landlord I find on a balance of probabilities that the Landlord did not provide any evidence to the Tenant other than the tenancy agreement. As the Landlord had a significant amount of time to ensure its evidence was provided I decline to consider an adjournment.

Given the direct and forthright evidence from the Tenant that the evidence sent to the Landlord at the dispute address was received and signed for and that the Landlord was informed of that delivery by text I find on a balance of probabilities that the Tenant did serve the Landlord with its evidence and I also find on a balance of probabilities that the

Landlord was informed of this delivery. As a result I find that I may consider this evidence.

Issue(s) to be Decided

Is the Landlord entitled to the monetary amounts claimed?

Is the Tenant entitled to return of double the security deposit and recovery of the filing fee?

Background and Evidence

The following are undisputed facts: The tenancy, under written agreement, started on May 1, 2017 for a fixed term to end October 31, 2018. Rent of $7,400.00 was payable on the first day of each month. At the outset of the tenancy the Landlord collected $3,700.00 as a security deposit. The Tenant provided its forwarding address to the Landlord on October 26, 2017.

The Landlord states that the Parties mutually conducted both a move-in and move-out condition inspection with completed reports provided to the Tenant. The Landlord states that it is not sure when the Tenant moved out of the unit but that the move-out inspection was conducted with the Tenant on October 10, 2017 and that the Landlord took possession of the unit on this date.

The Tenant states that at move-in only a walkthrough of the unit was conducted with the Landlord and that no report was completed or provided to the Tenant. The Tenant states that it moved out of the unit on October 10, 2017 and that while the Parties had agreed to complete an inspection on October 10, 2017 the Landlord texted the Tenant that he was unable to attend the inspection. The Tenant states that the Landlord did not offer a second opportunity and that the Landlord informed the Tenant that the Landlord would complete the inspection alone. The Tenant provides text communications of the move-out inspection discussions.

The Landlord states that he was at the move-in inspection with the Tenant, that the Tenant signed the move-in report and that the Tenant was given a copy of that report. The Landlord states that there was an issue with meeting at the move-out, that the originally agreed daytime inspection for October 10, 0217 was cancelled, that the cleaners were still cleaning on October 11, 2017, and that a second opportunity for the inspection was verbally offered for October 12, 2017 but that the Tenant could not attend any other opportunity. The Landlord states that the Landlord conducted the move-out inspection several weeks later and filled out the form but does not know when it was sent to the Tenant. The Tenant states that no second opportunity was provided.

The Landlord states that the Tenant left the unit unclean and with damages. The Landlord claims $1,188.00 as follows:

- $300.00 for paint damage to the walls;
- $588.00 for the cost to remove and return the unit furnishings. The Landlord states that the unit was furnished but that the Tenant wanted its own furniture so the Tenant agreed in the tenancy agreement to pay for the removal at the outset of the tenancy and the return of the furnishings at the end of the tenancy;
- $100.00 for the cost to remove furniture left behind by the Tenant;
- $100.00 for the cost of a queen size bed frame that was removed by the Tenant; and
- $222.00 for the cost of cleaning the unit.

The Tenant states that the walls only had picture hanging nail marks and that this is normal wear and tear. The Tenant states that some paint was marked around the thermostat that the Tenant repaired at the Tenant's own expense and that the Landlord had informed the Tenant that the Landlord would take care of the painting of that area.

The Tenant does not dispute the claim for **$588.00** and the **$100.00** for furniture that was left. The Tenant states that the bedframe was to have been removed with the other furnishings but was left behind. The Tenant states that the Landlord refused to remove

it and agreed that the Tenant could remove it at the Tenant's expense as the bedframe was broken. The Tenant states that professional cleaners were hired for the move-out clean and that the left the unit spotless. The Tenant states that the Landlord took photos of the unit while the cleaners were still cleaning and sent those photos to the Tenant at the time.

The Landlord claims $3,700.00 as the cost to find another tenant. The Landlord states that while the Landlord tried to find a tenant itself it also hired a company to find a tenant and that the amount paid to the company is a standard leasing fee. The Tenant sates that the Landlord attempted to extort money from the Tenant for this cost and threatened the Tenant that if the Tenant did not pay this amount immediately the Landlord would not be available to show the unit. The Tenant states that the Landlord informed the Tenant that another tenant was lined up for November 1, 2018 and that if the Tenant refused to pay the fee the Landlord would not enter into a tenancy with this new tenant and would leave for vacation. The Landlord states that the Tenant is making a serious allegation of extortion and that there was no request for the Tenant to pay for a greater cost than $1,000.00 for the placement of the prospective tenant for November 1, 2017. The Tenant's legal counsel argues that nothing in the tenancy agreement provides for the Tenant to pay any re-rental costs and that these costs are otherwise not allowed or claimable under the Act.

The Landlord states that on September 20, 2018 the Tenant informed the Landlord that it would be ending the tenancy at the end of October 2017. The Landlord states that the Tenant paid the full rent for October 2017. The Landlord states that on September 22, 2017 it advertised the unit online for an October 15 or November 1, 2017 start date. The Landlord states that the unit was variously advertised for rent at $6,900.00 unfurnished, $7,400.00 with the current furnishings and $8,889.00 with updated furnishings. The Landlord states that a new tenant was in place as of April 2018 at a rental rate of $6,800.00 for a 6 month fixed term. The Landlord states that it was unable to rent the unit sooner dues to the late season when the market was low and that it was

difficult to find a tenant in the fall of 2017. The Landlord states that there was only one showing in November and no showings in December 2017. The Landlord states that the rent was reduced by $500.00 across the board as of November 1, 2017. The Landlord claims one month of lost rental income of $7,400.00.

The Tenant state that only one online advertisement was found on September 20, 2017 to rent the unit unfurnished for $7,200.00. The Tenant states that the Landlord informed the Tenant that the tenant lined up for November 1, 2017 would be paying $7,200.00. The Tenant states that it gave the Landlord 6 weeks' notice of ending the tenancy and that the unit was available to occupy as early as October 15, 2017. The Tenant states that the Parties had also agreed to a mutual agreement to end the tenancy and that following negotiations to settle all disputes the Tenant signed and returned this agreement to the Landlord on October 15, 2017. The Landlord states that they send the Tenant a draft of the mutual agreement but does not know if the Tenant returned it to the Landlord.

The Tenant states that at move-in the unit required a large number of repairs that the Landlord never addressed. The Tenant states that the Tenant addressed the deficiencies at his own cost. The Tenant provides a list of the required repairs and deficiencies as evidence. The Tenant's counsel argues that none of the Landlord's claims, other than those not disputed by the Tenant, are supported and that there is no evidence to support any expenses were incurred. Legal Counsel argues that they have provided a screen shot of the ad seeking the greater amount of rent than paid by the Tenant. Legal Counsel requests that all the Landlord's claims be dismissed and that under the circumstances the Tenant is entitled to the return of double the security deposit.

Analysis

Section 23 of the Act requires that upon the start of a tenancy, a landlord and tenant must together inspect the condition of a rental unit. Section 24(2) of the Act further

provides that where a Landlord does not complete and give the tenant a copy of a condition inspection report, the right to claim against that deposit for damage to the residential property is extinguished. Section 36(2) provides 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 if the landlord does not offer 2 opportunities for an inspection.

The Landlord made quite startling contradictions to its own oral evidence on more than one occasion during the hearing. While it may be that the Landlord was very confused in the provision of its oral evidence because of the contradictions I cannot find the Landlord's oral evidence to carry much credibility. The Tenant overall gave clear, direct, unconfused and supported oral evidence. As a result I prefer the Tenant's evidence and find on a balance of probabilities that the Landlord did not complete and provide a move-in inspection report to the Tenant and did not make at least two offers to conduct a move-out report. As a result I find that the Landlord's right to claim against the security deposit for damage to the unit was extinguished. The Landlord's right to claim against the security deposit for other losses, such as rental income, continued however.

Section 7 of the Act provides that where a tenant does not comply with the Act, regulation or tenancy agreement, the tenant must compensate the landlord for damage or loss that results. This section further provides that where a landlord or tenant claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement the claiming party must do whatever is reasonable to minimize the damage or loss.

Given the over lack of credibility with the Landlord's oral evidence, the overall preference for the Tenant's oral evidence, and the lack of supporting evidence for the Landlord's claims, I find that the Landlord has not provided sufficient evidence of the Tenant causing any damage to the unit or of the Landlord incurring any costs from such damage to the unit. I dismiss the Landlord claims for damages to the walls, bedframe

and cleaning. Based on the Tenant's evidence of not disputing the damages or costs claimed for the original furnishings and the Tenant's own left behind furnishings, I find that the Landlord is entitled to **$588.00** and **$100.00.**

As there is nothing in the Act that requires a tenant to pay any leasing costs and I note that this is the usual cost of doing business for a landlord, and as there is nothing in the tenancy agreement that requires the Tenant to pay any re-leasing costs where there is a breach of the fixed term I find that the Landlord has not substantiated any entitlement to re-leasing costs claimed and I dismiss this claim.

Again based on the overall lack of the Landlord's credibility and given the Tenant's evidence of the unit being advertised for a significantly larger rental amount than was to be paid by the Tenant I find that the Landlord did not take any reasonable steps to mitigate its rental losses and I dismiss the claim for one month's loss of rental income. As the Landlord's claims have been primarily without merit beyond the costs that were originally agreed to by the Tenant, I decline to award the Landlord with recovery of the filing fee.

Section 38 of the Act provides that within 15 days after the later of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit or make an application for dispute resolution claiming against the security deposit. Where a landlord fails to comply with this section, the landlord must pay the tenant double the amount of the security deposit. Based on the undisputed evidence that the Landlord received the forwarding address on October 26, 2017 and as the Landlord made its application on November 7, 2017 I find that the Landlord applied to retain the security deposit within the time allowed and that the Tenant is therefore not entitled to return of double the security deposit. While the Landlord has not been successful with a majority of its claims and while the Landlord's apparent confusion gives rise to a lack of credibility there is no evidence provided in

advance or at the hearing that the Landlord made frivolous claims or any claims that could be seen as an abuse of the process.

Deducting the Landlord's undisputed entitlement of **$688.00** from the security deposits plus zero interest of **$3,700.00** leaves **$3,012.00** to be returned to the Tenant. As the Tenant's claim for return of the security deposit has been mostly met I find that the Tenant is entitled to recovery of the **$100.00** filing fee for a total entailment of **$3,112.00**.

Conclusion

I Order the Landlord to retain **$688.00** from the security deposit plus interest of $3,700.00 in full satisfaction of the claim.

I grant the Tenant an order under Section 67 of the Act for **$3,112.00**. If necessary, this order may be filed in the Small Claims 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 15, 20198

Residential Tenancy Branch