



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FFT

Introduction

On June 19, 2018, the Tenant applied for a Dispute Resolution proceeding seeking a return of the security deposit pursuant to Section 38 of the *Residential Tenancy Act* (the “Act”) and seeking recovery of the filing fee pursuant to Section 72 of the *Act*.

S.N. attended the hearing on behalf of the Tenant and M.R. attended the hearing as an agent for the Landlord. All in attendance provided a solemn affirmation.

S.N. confirmed that the Landlord was served the Notice of Hearing package by registered mail on June 20, 2018 and M.R. confirmed receipt of this. In accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was served with the Notice of Hearing package.

The Tenant’s counsel advised that their evidence was served to the Landlord by registered mail on August 24, 2018 and the Landlord confirmed receipt of this. As this complied with Rule 3.14 of the Rules of Procedure, the Tenant’s evidence was considered in this hearing.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to a return of double the security deposit?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

All parties agreed that the tenancy started on October 1, 2017 as a fixed term tenancy for a period of one year, ending on September 30, 2018 and that the tenancy ended on May 30, 2018. Rent was established at \$1,150.00 per month due on the first day of each month. A security deposit of \$575.00 was paid and the tenancy agreement included a liquidated damages clause of \$300.00.

A letter was submitted into evidence from the Tenant's mother (E.Y.) stating that she contacted M.R. on April 26, 2018 as her daughter had passed away on April 10, 2018. M.R. advised her to put this in writing so she mailed a letter to the Landlord on April 26, 2018 providing written notice to end the tenancy effective on May 31, 2018. However, she did not hear back from the Landlord and she was not made aware that this was a fixed term tenancy. She paid the rent for May 2018 in full and over the course of the next month, the apartment was emptied and cleaned. M.R. was on site occasionally but did not speak to her. On May 15, 2018, she contacted M.R. to advise him that the rental unit was ready for a move-out inspection; however, she did not hear from him.

On May 30, 2018, she had an agent attend the move-out inspection for her and at the end of the inspection, M.R. brought up the issue of a "breach" of the fixed term tenancy. While E.Y.'s agent did not have the authority to accept the "breach" term, she signed the move-out inspection report under duress, agreeing to the deduction of the liquidated damages. She also advised M.R. that this action was underhanded, given the circumstances. She provided a forwarding address in writing on the move-out inspection report.

E.Y. contacted M.R. the next day, disagreeing with the purported "breach"; however, it was the Landlord's opinion that this situation constituted a breach whereby the liquidated damages is applicable. She received the security deposit back less \$300.00, and it is her opinion that this deduction for liquidated damages is not applicable as the tenancy was frustrated due to the Tenant's passing. In the alternative, it is her opinion that the Landlord was obligated to inform her of the fixed term tenancy and that assigning or subletting the rental unit was an option instead.

During the hearing, S.K. advised that he contacted M.R. and stated that charging for liquidated damages in this situation is abhorrent and that the tenancy was frustrated, which allows for a breach of contract. He referenced Sections 91 and 92 of the *Act* with respect to the applicability of common law and the *Frustrated Contracts Act* and he submitted that the law states that the doctrine of frustration applies to end a contract in the event of a death. He indicated that the only way the Landlord could justify a charge in this instance is if there was a provision in the tenancy agreement specifically allowing the Landlord to pursue damages for this particular circumstance. He emphasized that a breach occurs when an obligation is not met; however, the passing of a Tenant does not constitute a breach. S.K. cited the Landlord's action as a "cash grab", he suggested that the Landlord himself breached Section 38 of the *Act* by retaining the amount for liquidated damages wrongly, and as such, the amount of the deposit should be doubled pursuant to the *Act*.

S.K. also submitted that the Landlord is obligated to inform of the lease conditions and as this was never done, the Tenant's mother was never afforded the opportunity to assign or sublet the rental unit, which is a Tenant's right.

M.R. confirmed that E.Y. contacted him at the end of April and he advised that he did not contact her out of respect. He stated that he was not sure if E.Y. was aware that this was a fixed term tenancy or not, but he did not make any attempts to show the rental unit to prospective tenants in May 2018 out of respect for her situation. He advised that E.Y. did not approach him about assigning the rental unit and regardless, the idea of re-renting the rental unit to another relative did not make sense to him. He advised that he was simply following the owner's orders to recoup the \$300.00 for liquidated damages and that the balance of the security deposit was returned within 15 days of the forwarding address being provided during the move-out inspection.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this decision are below.

The definition of "tenant" under Section 1 of the *Act* includes the estate of a deceased tenant, which demonstrates that the *Act* contemplates these instances. As such, the end of a tenancy is not simply based on the death of a tenant as the circumstances of each case must be considered. Policy guideline number 34 outlines the doctrine of frustration as "a contract [that] becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible." However, the undisputed evidence is that E.Y. assumed the tenancy as contemplated by the *Act*. As such, I am not satisfied that the tenancy was incapable of being performed and that the tenancy was frustrated, as suggested.

With respect to the security deposit, Section 38(4) of the *Act* allows for the Landlord to retain an amount from the deposit with the Tenant's written consent. While E.Y. advised that her agent did not have the "authority to accept the breach term", the undisputed evidence is that this person was designated as a representative on behalf of E.Y. and she signed the move-out inspection report agreeing to the \$300.00 deduction. As such, I am not satisfied that the Landlord breached the requirements of Section 38 of the *Act* by withholding this money.

Regarding S.K.'s argument that E.Y.'s right to assign or sublet the rental unit was unreasonably withheld, there is no provision in the *Act* which requires the Landlord to inform E.Y. of their rights to do so. Furthermore, the onus is on E.Y. to make this request. As such, I do not find that this argument carries any merit.

Based on the totality of the evidence before me, the evidence is that there was a liquidated damages clause noted in the tenancy agreement that justifies the circumstances when a fixed term tenancy is ended early and the amount withheld. Furthermore, as this charge was agreed to in writing at the end of the tenancy, I do not find that the Landlord has contravened the *Act* in any respect. Consequently, I dismiss this Application in its entirety.

As the Applicant was unsuccessful in their claims, I find that the Applicant is not entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

I dismiss this Application for Dispute Resolution without leave to reapply.

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: October 11, 2018

Residential Tenancy Branch