



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT MNDCT MNSD

Introduction

This hearing was convened by way of conference call concerning an application made by the tenant seeking a monetary order for return of all or part of the pet damage deposit or security deposit; a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; and to recover the filing fee from the landlord for the cost of the application.

The tenant and an agent for the landlord attended the hearing and each gave affirmed testimony. The parties were given the opportunity to question each other and give submissions.

No issues respecting service or delivery of documents or evidence were raised, and all evidence provided has been reviewed and is considered in this Decision.

Issue(s) to be Decided

- Has the tenant established a monetary claim as against the landlord for return of all or part or double the amount of the pet damage deposit or security deposit?
- Has the tenant established a monetary claim as against the landlord for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for moving expenses and pain and suffering?

Background and Evidence

The tenant testified that this fixed term tenancy began on January 13, 2018 and was to expire on January 31, 2019 thereafter reverting to a month-to-month tenancy. However the tenant vacated the rental unit on June 30, 2018.

Rent in the amount of \$1,500.00 per month was payable on the 1st day of each month, and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenant in the amount of \$750.00 as well as a pet damage deposit in the amount of \$750.00, both of which are still held in trust by the landlord.

The rental unit is an apartment on the 3rd floor of an apartment complex and a copy of the tenancy agreement has been provided as evidence for this hearing.

The tenant further testified that the landlord received the tenant's forwarding address in an email on August 11, 2018, and the landlord has sent documents to the tenant at that address. The landlord has not returned the security deposit or pet damage deposit and has not served the tenant with an Application for Dispute Resolution claiming against the deposits. The parties went through the rental unit with a checklist at move-out, but not at move-in, and the tenant did not agree that the landlord should keep any portion of either of the deposits.

The tenant was forced to move out and testified that her enjoyment of the rental unit was compromised by constant second-hand smoke. The tenant was under the impression that the rental building is a non-smoking building. The tenancy agreement says that smoking is permitted on balconies, but the Addendum states that tenants will consider others. The tenant made a complaint on January 17, 2018 to the landlord, who replied saying that those tenants would be sent an email about it.

On April 17, 2018 the tenant received an email from the landlord, which was sent to all tenants, asking that people smoke away from entrances, but no reference to smoking on balconies; the tenant's complaint was not addressed. The tenant again sent a message to the landlord on April 24, 2018 about people continuing to smoke on balconies and asking that it be addressed, by keeping 7.5 meters from doors and windows. The tenant waited 2 days for a reply and smoke continued to enter the tenant's apartment. The tenant hunted down the smoking tenants and talked to them.

On May 25, 2018 the tenant sent another message to the landlord; smoking on balconies continued. On June 12, 2018 the tenant sent an email to the landlord stating that the tenant could not stay in the rental unit because the landlord did not enforce the lease. The landlord's reply was that she had sent caution notices to tenants, removed ashtrays and spoke to some. However, Item 17 of the tenancy agreement specifies that the landlord can evict a tenant, so the landlord's reply stating that she did what she could is not true.

The rental unit was re-rented well before the end of June. The landlord sent a text message stating that the tenant didn't need to show it any longer to prospective tenants.

The tenant has provided a Monetary Order Worksheet setting out the following claims:

- \$681.08 for moving services;
- \$1,500.00 for the damage and pet deposits; and
- \$500.00 for pain and suffering; for a total claim of \$2,681.08.

The landlord's agent testified that the tenancy agreement provides for liquidated damages if the tenant ends the tenancy earlier than the end of the fixed term. The tenant refused to sign the move-out condition inspection report about liquidated damages.

The landlord has also provided a "Written Evidence Package" for this hearing, including written submissions of the landlord, which states that the tenant did not provide the landlord with a forwarding address in writing.

Addendum 19 of the tenancy agreement is initialled by the landlord and by the tenant, which states: "19. Smoking: a. Tenant agrees that there shall at all times during the tenancy be no smoke originating from any smoke-producing source, whether tobacco or other source, in the suite, or in any part of the common property of the building; b. Tenant agrees that, if he wishes to consume smoke-producing products, he will fully consider his neighbours' peace of mind and ability to enjoy their premises – he will consider their risk of inhaling second-hand smoke as their principal concern."

The landlord's agent testified that when the landlord received complaints, she followed up with emails and text messages to the tenant and other offending tenants, and some have been provided for this hearing.

The rental unit was re-rented immediately at the end of this tenancy, and the landlord's agent is not aware of the landlord having made any Application for Dispute Resolution respecting the security deposit or pet damage deposit.

Analysis

Firstly, the *Residential Tenancy Act* states that a landlord has 15 days from the later of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to return all of a security deposit and/or pet damage deposit to the tenant or to make an Application for Dispute Resolution claiming against the deposit(s)

within that 15 day period, unless the tenant otherwise agrees in writing. If the landlord fails to do either, the landlord must repay the tenant double the amount.

In this case, I find that the tenancy ended on June 30, 2018. The tenant testified that her forwarding address was provided to the landlord by email on August 11, 2018 and the landlord has sent documents to the tenant at that address, and the landlord's agent did not dispute that. The landlord's written submission indicates that the tenant did not provide a forwarding address in writing, and the landlord's agent knows nothing about that. The written submissions also contain the forwarding address of the tenant. There are emails exchanged between the parties, and I prefer the affirmed testimony of the tenant over unsigned and undated written submissions of the landlord. I accept the testimony of the tenant that the forwarding address was provided in an email on August 11, 2018. I find that the landlord had until August 26, 2018 to return the deposits or make an Application for Dispute Resolution.

The tenant testified that she did not agree that the landlord retain any portion and the tenant has not been served with an Application for Dispute Resolution, and I have no such application before me. Therefore, I find that the landlord must repay the tenant double the amount, or \$3,000.00 ($\$750.00 + \$750.00 = \$1,500.00 \times 2 = \$3,000.00$).

Where a party makes a monetary claim for damage or loss as against another party, the onus is on the claiming party to satisfy the 4-part test:

1. that the party suffered damages or a loss;
2. that the damage or loss exists as a result of the other party's failure to comply with the *Residential Tenancy Act* or the tenancy agreement;
3. the amount of such damage or loss; and
4. what efforts the claiming party made to mitigate any damage or loss suffered.

I have reviewed all of the evidentiary material, and there is no question that the tenant attempted to convince the landlord to take a more serious view, or to insist that other tenants take a more serious view of the term in the tenancy agreement respecting consideration of other tenants while smoking outside the rental complex. I also accept that the landlord issued notices and sent text messages and emails to offending tenants. I also accept that the tenant was under the impression that it was a non-smoking building, and it is, and I find that was a material term of the tenancy agreement.

I also accept that the tenant moved out as a result of the breach, and is entitled to moving expenses of \$681.08. However, the tenant did not lead any evidence of suffering any medical or other issues, only that the tenant didn't want her rental unit to

smell of cigarette smoke, and I am not satisfied that the tenant has established a claim for pain and suffering.

Since the tenant has been partially successful with the application the tenant is also entitled to recovery of the \$100.00 filing fee, and I grant a monetary order in favour of the tenant in the amount of \$3,701.08 ($\$3,000.00 + \$681.08 + \$100.00 = \$3,781.08$).

Conclusion

For the reasons set out above, I hereby grant a monetary order in favour of the tenant as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$3,781.08.

This order is final and binding and may be enforced.

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 23, 2018

Residential Tenancy Branch