Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNSD RR MNDCT FFT

Introduction

Both parties and witnesses attended the hearing and gave sworn or affirmed testimony. The tenant provided evidence that they had served the landlord with the Application for Dispute Resolution by registered mail and with their forwarding address by posting it on the door. The landlord agreed they received the Notice of Hearing and evidence but not the forwarding address on their door. I find the documents were served pursuant to sections 88 and 89 of the Act for the purposes of this hearing although the landlord claimed they never received the forwarding address until they saw the tenants' application. 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;
b) An Order for 12 months of rent as compensation pursuant to section 49.3 of the Act as the landlord did not use the property for the stated purpose on the section 49 Notice to End Tenancy; and
c) To recover the filing fee for this application.

Issue(s) to be Decided:

Has the tenant proved on the balance of probabilities that they are entitled to compensation as claimed?

Background and Evidence

Both parties and witnesses attended the hearing and were given opportunity to be heard, to present evidence and make submissions. It is undisputed that the tenancy commenced March 15, 2017 on a fixed term to March 15, 2018, rent was $2650 a month and a security deposit and pet damage deposit, each in the amount of $1325 were paid. On January 14, 2018, the landlords served a Notice to End Tenancy for landlord's use of the property to be effective March 16, 2018 and the tenants vacated in accordance with the Notice.

It is undisputed that the landlord returned their security deposit less $325 which was withheld for alleged deck damage. The tenants said they did not consent to this and did not damage the deck. It is undisputed that their pet damage deposit was returned in full. The tenants claim double their security deposit back. The parties were not interested in negotiating a settlement although I pointed out that the landlord has up to two years to claim damages arising from the tenancy. The landlords confirmed again that they never received the tenants' forwarding address in writing and only saw it on this application made by them. The realtor confirmed that he had not seen it posted on the door as they claimed or in the mailbox. The tenants put a copy of the letter with the forwarding address dated March 13, 2018 into evidence but did not provide evidence of service.

The tenants also claim a refund of 12 months of rent pursuant to section 49.3 of the Act as they state the landlord did not occupy the property as stated. The landlord said they have other homes but this home was bought for their principal residence. They said the male landlord had a job opportunity in the city and had to spend some time there; however, they said they moved into the house, all their belongings are there and they continue to occupy it. A friend and a realtor both testified that the landlords are living in the house and have their belongings, including furniture and clothes there. They have visited there for dinner. The tenant queried why the house was listed for sale with the notation that it was vacant. The realtor said the landlords listed it in July 2018 but they listed other property as well and they took this house off the market. He noted it as vacant to inform other realtors that it was easy to show as the owners (landlords) had consented for them to come in without notice when they were in the city on business. He confirmed the landlords moved into the house and have continued to occupy it as their home. They have another home on the street which is rented by their daughter.

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:

Section 49:

(3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

Section 51:

1) *A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.*

Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if

(a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or

(b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

As pointed out to the parties in the hearing, section 51 of the Act was amended and came into force on May 17, 2018. The older section 51 applies to a Notice to End Tenancy served prior to that date. It states in section 51(2) that an amount equal to double the monthly rent payable may be claimed by the tenant if sections 51(2) and a) and b) are not fulfilled. This Notice was served on January 14, 2018. Therefore, if any amount, the tenants would be entitled to twice the monthly rent if they prove on a balance of probabilities that the landlord or a close family member did not use the house for the stated purpose on the section 49 Notice.

I find the evidence of the landlord credible that they renovated the home to an extent and then moved in. Their credibility is well supported by the testimony of their friend and also a realtor who has visited them in the home and observed their furniture, their clothing and that their entertainment is conducted there. While they may have listed the home for sale for a time, I find the home was not sold but was used for their stated purpose since March 2018 and it is the actual use that is stressed in section 51. I dismiss the claim of the tenant for double the monthly rental.

Regarding the return of the security deposit and pet damage deposit, I find section 38 states:
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
(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)).

However, I find insufficient evidence in this case that the tenant served the landlord with their forwarding address in writing. While their letter is in evidence, I find insufficient evidence of service. I note that neither the landlord nor the realtor saw their letter. I find seeing their address on the Application does not meet the requirements of section 38. I find the remainder of their deposit is $325 according to the weight of the evidence.

Conclusion:
I dismiss the tenant's claim under sections 49 and 51 for double the monthly rental without leave to reapply. Since I find insufficient evidence of service of a forwarding address, I dismiss the portion of the application for the security deposit with leave to reapply. I find the tenant not entitled to recover the filing fee due to lack of success.

PURSUANT TO SECTION 38 OF THE ACT, I HEREBY ORDER THE TENANT TO SERVE THE LANDLORD WITH THEIR FORWARDING ADDRESS IN WRITING AND RETAIN PROOF OF SERVICE. THE LANDLORD WILL HAVE 15 DAYS FROM SERVICE PURSUANT TO SECTION 38 OF THE ACT TO RETURN THE BALANCE OF THE SECURITY DEPOSIT TO THE TENANT ($325) OR TO FILE AN

APPLICATION TO CLAIM AGAINST IT. IF NOT, THE DOUBLING PROVISIONS OF SECTION 38 WILL APPLY.

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: September 11, 2018

Residential Tenancy Branch