Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("the *Act*") for:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application pursuant to section 72.

The landlord and the tenant attended the hearing and were given a full opportunity to be heard, to present their sworn testimony and to make submissions.

While I have turned my mind to all the documentary evidence, including witness statements and the testimony of the parties, only the relevant portions of the respective submissions and/or arguments are reproduced here.

The tenant testified that the Application for Dispute Resolution (the Application) and an evidentiary package were sent by way of Canada Post Registered mail on April 27, 2018. The landlord provided a copy of the Canada Post Customer Receipt containing the Tracking Number to confirm this mailing, which shows the package as unclaimed.

The landlord disputed receiving this mailing and stated that they only found out about this hearing due to the e-mail notification sent from the Residential Tenancy Branch (RTB). The landlord confirmed that the address on the registered mail receipt was correct.

I find that the tenant has provided sufficient evidence of their registered mailing and, based on a balance of probabilities, I accept the tenant's testimony that they mailed the Application and evidence as stated. I find that the failure of the landlord to claim the registered mailing does not negate service. In accordance with sections 88, 89 and 90

of the *Act*, I find that the landlord was deemed served with the Application and an evidentiary package on May 02, 2018.

The landlord stated that they did not submit any evidence to the RTB or to the tenant.

The landlord confirmed that they received the tenant's forwarding address on February 27, 2018, which was sent to him by registered mailing and of which the landlord provided a Canada Post Tracking Number to confirm the mailing. In accordance with section 88 of the Act, I find that the landlord was duly served with the tenant's forwarding address.

Issue(s) to be Decided

Is the tenant entitled to a monetary award for the return of all or a portion of their security deposit?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

The tenant provided a copy of the tenancy agreement and addendum which shows that this tenancy began on December 01, 2015, with a monthly rent in the amount of $2,900.00, due on the first day of each month. The tenancy agreement indicates a security deposit in the amount of $1,450.00, which the landlord confirmed that they currently retain. The addendum indicates that the tenant will pay the balance of monthly electric bills beyond $50.00 each month.

The tenant also provided in evidence:

- A copy of a bank statement showing the tenant paying an amount of $98.89 on November 07, 2018, for a utility payment; and
- A copy of a Monetary Order Worksheet showing the tenant's monetary claim consisting of a security deposit in the amount of $1,450.00, refund of fees for two access devices provided totalling $150.00 and the extra charge for a utility bill in the amount of $98.89:

The tenant testified that the landlord has not returned their security deposit or their fees paid for two access devices that were returned to the landlord undamaged. The tenant also submitted that the landlord charged too much for the utilities and did not provide the tenant with copies of the bills to prove what the tenant owed.

The landlord stated that there were various damages to the rental unit, which the landlord had sent the tenant a detailed accounting of, exceeding the amount of the security deposit. The landlord confirmed that they received both access devices but submitted that one of the access devices was damaged and the other refundable fee was applied to the loss that the landlord incurred due to damage from the tenancy. The landlord admitted that there was one utility bill that was overcharged by a small amount and that it had already been refunded to the tenant.

Analysis

Pursuant to section 67 of the Act, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. In this case, to prove a loss, the tenants must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the landlord in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the tenants followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Having reviewed the evidence and testimony, I find that the tenant has not sufficiently proven the actual amount required to compensate them for the overpayment of a utility bill. I find that there is no correspondence submitted regarding this overpayment which would provide information as to the amount of the overpayment or a copy of the bill for that specific month which would prove the overpayment. I further find that the tenant did not mitigate this damage by requiring a copy of the utility bill before paying the requested amount.

For the above reasons, the tenant's claim of $98.89 for the overpayment of a utility bill is dismissed, without leave to reapply.

Section 6 (1) of the *Residential Tenancy Regulations (Regulations)* allows for a landlord to charge a fee when providing an access device that is refundable upon the return of the device.

I find that it is undisputed that the tenant returned two access devices to the landlord and that the tenant paid $75.00 for each device. Therefore I find that the tenant is

entitled to a refund of the fees paid for the access devices in the amount of $150.00 ($75.00 X 2) pursuant to section 6 of the *Regulations*.

If the landlord has actually incurred a loss due to one of the access devices being damaged, they are at liberty to make their own application in order to claim for the loss and prove that the loss exists.

Section 38 (4) allows a landlord to retain from a security deposit if, at the end of the tenancy, the tenant agrees in writing the landlord may retain an amount to pay a liability or obligation of the tenant.

If the landlord does not have the tenant's agreement in writing, section 38 (1) of the *Act* stipulates that within 15 days of either the tenancy ending or the date the landlord receives the tenant's forwarding address in writing, whichever is later, the landlord must either repay any security or pet damage deposit or make an application for dispute resolution claiming against the security deposit or the pet damage deposit.

Since I have found that the landlord was duly served with the tenant's forwarding address on February 27, 2018, I find that the landlord was obligated to obtain the tenant's written consent to keep the security deposit or to make an Application on or before March 14, 2018, 15 days after receiving the tenant's forwarding address.

I find that there is no evidence or testimony provided to show that the landlord had the tenant's agreement in writing to keep the security deposit or that the landlord applied for dispute resolution within 15 days of receiving the tenant's forwarding address to retain a portion of the security deposit as required under section 38 (1).

Section 38 (6) of the *Act* stipulates that a landlord who does not comply with section 38 (1) of the *Act* may not make a claim against the security deposit or any pet damage deposit and must pay double the amount of the security deposit, pet damage deposit or both, as applicable.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. Pursuant to sections 38 (6) and 67 of the Act, I find that the landlord must pay the tenant double the security deposit as they have not complied with section 38 (1) of the *Act*.

Therefore, I find that the tenant is entitled to a monetary award of $2,900.00, which is comprised of double the security deposit ($1,450.00 X 2) plus applicable interest. There is no interest payable over this period.

As the tenant has been successful in their application, I allow the tenant's request to recover their filing fee.

The landlord may still file an application for lost revenue and damages; however, the issue of the security deposit has now been conclusively dealt with in this hearing.

Conclusion

Pursuant to section 67 of the *Act*, I grant a Monetary Order in the tenants' favour in the amount of $3,150.00 for double the security deposit, the refund of fees for the access devices and to recover the $100.00 filing fee from the landlord.

The tenants are provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: November 07, 2018

Residential Tenancy Branch