



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, FFL

Introduction

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

- a monetary order for unpaid rent pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the tenant confirmed that on August 3, 2018, they received a copy of the landlords' dispute resolution hearing package and written evidence package sent by the landlords by registered mail on August 1, 2018, I find that the tenant was duly served with these packages in accordance with sections 88 and 89 of the *Act*. The tenant did not enter any written evidence for consideration at this hearing.

Issues(s) to be Decided

Are the landlords entitled to a monetary award for unpaid rent? Are the landlords entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the tenant entitled to a monetary award equivalent to double the value of the security deposit as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*? Are the landlords entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This one-year fixed term tenancy for the lower level of a two-unit dwelling commenced on May 14, 2018, when the parties signed a Residential Tenancy Agreement that was to cover the period from June 1, 2018 until May 31, 2019. Monthly rent was set at \$1,700.00, payable in advance on the first of each month, plus 35% of the utilities for this property. The landlords continue to hold the tenant's \$850.00 security deposit paid on May 20, 2018.

Landlord IM (the landlord) testified that the parties conducted a joint move-in condition inspection, but the landlords did not create a report of that condition inspection. The tenant denied the landlords' assertion that a joint move-in condition inspection was undertaken at the beginning of this tenancy.

The tenant gave undisputed sworn testimony that the landlord spoke with him after receiving a June 25, 2018 letter from the municipality, in which the municipality asked the landlord to take action to remove an unauthorized secondary suite in this property. The landlord showed the tenant the letter in which the municipality identified three options. The landlord could either take action to:

- remove the six people living in the rental unit above the tenant,
- remove the tenant and his child from their lower level rental unit; or
- combine the two living units such that the tenant would have to share kitchen facilities with the tenants living upstairs.

From the tenant's perspective, the only viable option of the three presented in the letter from the municipality was for the tenant to find alternate rental accommodation elsewhere, at considerable disruption and cost to the tenant.

The tenant admitted fully that they did not pay any rent for July 2018. The landlord testified that on July 4, 2018, the parties met in a local park to discuss options for addressing the letter the landlord had received from the municipality. The landlord gave undisputed sworn testimony that they asked the tenant to pay the monthly rent. The tenant maintained that the landlord agreed to return the tenant's security deposit if the tenant vacated the rental unit by the middle of the month. The landlord said that this agreement was contingent upon the tenant paying the monthly rent then owed to the landlords.

The landlord sent a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) to the tenant by regular mail on July 7, 2018. This 10 Day Notice was deemed received by the tenant on July 12, 2018, the fifth day after its mailing.

The tenant said that they sent the landlord a text message on July 16, 2018, that they would be vacating the rental unit shortly.

On July 19, 2018, the landlord submitted an application for dispute resolution to obtain \$1,700.00 in unpaid rent owing for July 2018, to recover the \$100.00 filing fee and to retain the tenant's security deposit in partial satisfaction of the landlord's claim.

The landlord testified that they received another text message from the tenant on July 20, 2018, advising the landlord that the tenant had vacated the rental unit. This text message also requested the return of the tenant's security deposit. The landlord asked the tenant to provide a forwarding address where the landlord could return the security deposit.

The landlord testified that they received the tenant's forwarding address on July 28, 2018.

Analysis

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. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Section 26(1) of the *Act* establishes that "a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent."

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

There is undisputed evidence that the tenant did not pay any rent for July 2018, for a fixed term tenancy that was not scheduled to end until May 31, 2019. While a different type of notice to end tenancy might have been issued by the landlords in order to

comply with the June 25, 2018 letter from the municipality, I find that this tenancy ended on July 20, 2018, when the tenant complied with the landlords' 10 Day Notice.

Section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss. In this case, the landlord testified that the landlords have made no attempt to re-rent these premises following the tenant's surrender of vacant possession of the rental unit to the landlords on July 20, 2018. This was apparently because the municipality had sent the landlord(s) a letter shared with the tenant advising that the lower rental unit was a secondary suite and the landlords had no authorization to rent out a second suite in this property to tenants. Under these circumstances, I find that the landlords were in no position to advertise the premises to new tenants, as the suite itself had been identified as an illegal occupation of the rental unit. As the tenant bears no responsibility in the landlords' inability to try to re-rent the premises to someone else, I find that the landlords have not mitigated the tenant's exposure to the landlords' loss of rental from July 21, 2018 until the end of this scheduled tenancy on May 31, 2019.

As rent was owing on July 1, 2018, and the tenant failed to pay any rent for the 20 days that the tenant had possession of the rental unit during July, I allow the landlords a monetary award of 20/31 of the \$1,700.00 in monthly rent that became due on July 1, 2018. This results in a monetary award in the landlords' favour in the amount of \$1,096.77 for unpaid rent owed by the tenant for the first twenty days of July 2018 ($\$1,700.00 \times 20/31 = \$1,096.77$).

As the landlords have been successful in this part of their application, I allow the landlords to recover the \$100.00 filing fee for this application.

The landlords' application also sought authorization to retain the tenant's security deposit in partial satisfaction of the monetary award the landlords requested.

Sections 23 and 24 of the *Act* establish the rules whereby joint move-in condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy.

Section 23 of the *Act* reads in part as follows:

23 (1) *The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.*

- (3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.*
- (4) The landlord must complete a condition inspection report in accordance with the regulations.*
- (5) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.*
- (6) The landlord must make the inspection and complete and sign the report without the tenant if
 - (a) the landlord has complied with subsection (3), and*
 - (b) the tenant does not participate on either occasion...**

Section 24(2) of the Act reads in part as follows:

Consequences for tenant and landlord if report requirements not met

- 24** *(2) The right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord*
- (a) does not comply with section 23 (3) [2 opportunities for inspection],*
 - (b) having complied with section 23 (3), does not participate on either occasion, or*
 - (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...*

Sections 36 and 37 of the Act establish similar provisions regarding a joint move-out condition inspection and the report to be produced by the landlord(s) regarding that inspection.

In this case, the landlord testified that they did not prepare a report of their joint move-in condition inspection with the tenant when this tenancy began. The tenant also denies that any such joint move-in condition inspection occurred when the tenant took possession of the rental unit. On the basis of the landlord's admission that they did not create a joint move-in condition inspection report and provide it to the tenant and in accordance with paragraph 24(2)(c) of the Act as outlined above, I find that the

landlords' right to apply to retain the tenant's security deposit was extinguished at the beginning of this tenancy.

Section 38 of the *Act* requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing as long as the landlord's right to apply to retain the deposit had not been extinguished. If that does not occur or if the landlord applies to retain the deposits within the 15 day time period but the landlord's right to apply to retain the tenant's deposit had already been extinguished, the landlord is required to pay a monetary award pursuant to section 38(6) of the *Act* that is double the value of the deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the deposits to offset damages or losses arising out of the tenancy.

In this case, while the landlords filed the application to retain the deposit even before the 15 day period began and certainly within 15 days of receiving the tenant's forwarding address, the landlords' right to retain the deposit was extinguished at the beginning of this tenancy pursuant to section 24(2) of the *Act*.

In this case, the landlords had 15 days after July 28, 2018, to take action to return the tenant's security deposit. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security deposit if "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." As there is no evidence that the tenant has given the landlords written authorization at the end of this tenancy to retain any portion of his security deposit, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit. There is also no evidence that the tenant ever waived their right to obtain monies owed to the tenant arising out of their payment of the security deposit to the landlords.

The following provisions of Policy Guideline 17 of the Residential Tenancy Branch's Policy Guidelines would seem to be of relevance to the consideration of this application:

Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

- *If the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;*

- *If the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*
- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process;*
- *If the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;*
- *whether or not the landlord may have a valid monetary claim.*

Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the value of their security deposit with interest calculated on the original amount only. No interest is payable.

Conclusion

I allow the landlords' application for a monetary award of \$1,096.77 for unpaid rent and the recovery of the landlords' \$100.00 filing fee for this application. As the tenant is entitled to a monetary award totaling \$1,700.00 for the landlords' failure to abide by the provisions of section 38 of the *Act*, I issue a monetary Order in the **tenant's** favour under the following terms:

Item	Amount
Landlord's Entitlement to Unpaid Rent Owing for July 2018 ($\$1,700.00 \times 20/31$ = $\$1,096.77$)	\$1,096.77
Return of Double Security Deposit as per section 38 of the Act ($\$850.00 \times 2 =$ \$1,700.00)	-2,600.00
Recovery of Landlord's Filing Fee for this Application	100.00
Total of Tenant's Monetary Order	-\$503.33

The tenant is provided with these Orders in the above terms and the landlord(s) must be served with this Order as soon as possible. Should the landlord(s) fail to comply with these Orders, these Orders 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 19, 2018

Residential Tenancy Branch