



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

On August 30, 2018, the Tenant applied for a Dispute Resolution proceeding seeking monetary compensation pursuant to Section 67 of the *Residential Tenancy Act* (the “*Act*”), seeking a return of the security deposit pursuant to Section 38 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*

Both the Tenant and the Landlord attended the hearing. All parties provided a solemn affirmation.

The Tenant advised that she served the Notice of Hearing package to the Landlord by registered mail on September 7, 2018 and the Landlord confirmed that he received this package. Based on this undisputed testimony, in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was served the Notice of Hearing package.

The Tenant advised that she mailed her evidence to the Landlord on December 4, 2018 and the Landlord confirmed receipt of it. Based on the undisputed testimony, I am satisfied that service of the Tenant’s evidence complies with the service requirements of Rule 3.14 of the Rules of Procedure. As such, I have considered the accepted evidence when rendering this decision.

The Landlord advised that he served his evidence to the Tenant by hand on December 25, 2018 and the Tenant confirmed receipt of it. He also advised that he uploaded his evidence to the electronic file with the Residential Tenancy Branch; however, there was no such evidence uploaded. I advised the Landlord that he would be allowed to upload

this evidence or fax it to me by the end of the day on January 4, 2018. As I have not received any evidence from the Landlord, I am not satisfied that he has complied with Rule 3.15 of the Rules of Procedure and provided the Residential Tenancy Branch with the evidence that he wished to rely on. As such, I am not satisfied of service of the Landlord's evidence and this decision will be rendered based on the Landlord's testimony during the hearing.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral 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?
- Was a rent increase implemented contrary to the *Act*?
- Is the Tenant entitled to compensation?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

Both parties agreed that the tenancy started on February 1, 2012 and rent was established at \$1,500.00 per month, due on the first of each month. The tenancy ended on September 1, 2018. A security deposit of \$650.00 was paid.

Both parties agreed that the Landlord served a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice") on July 5, 2017 and the reason the Landlord checked off on the Notice was because "The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse)." The Landlord indicated on the Notice that the effective date of the Notice was September 1, 2017.

The Tenant advised the Landlord that she was entitled to one month's compensation when served with this Notice, but the Landlord stated that she was not entitled to this compensation. The Tenant stated that she did not give written notice to end her tenancy early as the Landlord wanted her out. The Tenant stated that she paid rent for July and August 2017. The Tenant stated that she paid \$1,500.00 for August 2017 rent and she is seeking compensation in the amount of **\$1,500.00** pursuant to the compensation requirements of Section 51 of the *Act*.

In addition, she is seeking compensation in the amount of **\$1,500.00** pursuant to the compensation requirements of Section 51(2) of the *Act* because the Landlord did not use the property for the stated purpose on the Notice after the tenancy ended. She advised that the Landlord told her that he would move in and then eventually sell the property. However, the neighbours informed her that the rental unit sat empty for 11 months after the tenancy ended, contrary to his reason of occupying the rental unit, and that new tenants are in the rental unit. She provided copies of text messages as documentary evidence to support this position.

During the hearing, the Landlord questioned why the Tenant was entitled to one month's compensation and stated that he did not read the compensation requirements of the Notice after he served it. Moreover, with respect to the Tenant's request for additional compensation for not using the property for the stated purpose, he advised that his plan was to move into the property, eventually buy a property in Calgary, and then move there. He stated that he left the rental unit vacant as it was his intention to live in it.

The Tenant advised that the Landlord called her in September 2016 to raise the rent from \$1,300.00 to \$1,550.00 and she disagreed with this increase; however, he stated that he would be forced to sell the house otherwise. Under duress, she verbally agreed to a rent increase to \$1,500.00 starting November 1, 2016 until August 2017. As the maximum allowable rent increase for 2016 was 2.9%, the \$1,500.00 that was paid was an illegal rent increase over the \$1,344.83 that was allowable to be charged by the Landlord. As such, the Tenant is seeking compensation in the amount of \$155.17 per month for 9 months from November 2016 to July 2017, totalling **\$1,396.53**.

The Landlord advised that the rental unit was rented to the Tenant below market value because he felt bad for her situation and asked her what rent amount would be

appropriate. He stated that both parties agreed to \$1,300.00 per month at the start of the tenancy. He then submitted that he raised her rent but to an amount that she stated she could afford, which was \$1,500.00 per month.

The Tenant advised that she completed a move-out inspection report with the Landlord on September 1, 2017, that she provided the Landlord with her forwarding address in writing then, and then she texted her forwarding address to the Landlord on September 12, 2017. Since this time, the Landlord has not returned any communication regarding the return of her security deposit.

The Landlord advised that he was not aware of the requirements of the *Act* with respect to the security deposit and that he did not return the deposit in full, nor did he make an application against the deposit within 15 days of receiving the Tenant's forwarding address in writing. He also stated that he did not have the Tenant's written consent to withhold any amount of the deposit.

The Tenant stated that the tenancy agreement submitted into evidence noted that "snow removal, trash and lawn care are provided by the landlord". She also stated that she had been in an accident and was unable to mow the lawn, that the Landlord only mowed the lawn three times in 2012, and that after repeated requests, the Tenant eventually hired a company to mow the lawn. She stated that the Landlord would constantly argue with her, so she did not bring up this issue anymore with him as this situation was stressful. She provided text messages, as documentary evidence, of the estimated cost of her lawn mowing expenditure as 20 cuts per year at \$40.00 per cut. Thus, the Tenant is seeking **\$4,240.00** on the cost of lawn care from 2012 to 2017. However, she does not know the exact number of times the lawn was mowed, and she does not have receipts for this work.

The Landlord advised that the tenancy agreement that was submitted into evidence was only a portion of the actual agreement and that the Tenant was actually responsible for the lawn. He stated that she requested a lawnmower, that he purchased one for her, and that he did not hear from her again.

Finally, the Tenant is seeking compensation in the amount of **\$1,380.00** as there was a toilet in the downstairs bathroom that had been broken since October 2013 and remained that way for the duration of the tenancy. As well, she stated that she also

noticed black mold in this bathroom, and after advising the Landlord of this, it took him four months to fix it. She submitted that the Landlord brought in three plumbers to estimate the cost to repair the toilet and that the broken toilet sat in the yard for months until she paid to have it removed. Essentially, she had no functioning second bathroom and her niece provided testimony confirming that these issues were not fixed, and that the toilet did not work for four years. She is requesting a rent reduction of \$30.00 per month from October 2013 until the end of tenancy.

The Landlord advised that when the Tenant moved in, the toilet in this second bathroom was broken and not useable; however, the Tenant told him that this was not a problem as long as the shower was functioning. He stated that he was never asked by the Tenant to fix any issues in this bathroom, that he received an email quote from a plumbing company to repair the toilet, and that he did not make these repairs as the cost was too expensive. He advised that if there were any repair issues in the rental unit, the Tenant would pay for them and he would reimburse her. He stated that he was not made aware of any mold issues and that he had not been to the rental unit in five years.

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 first claim I will address is with respect to the security deposit. Section 38(1) of the *Act* requires the Landlord, within 15 days 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 in full or file an Application for Dispute Resolution seeking an Order allowing the Landlord 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 double the deposit to the Tenant, pursuant to Section 38(6) of the *Act*.

Based on the undisputed evidence before me, I am satisfied that the Landlord was served with the Tenant's forwarding address in writing at the end of the tenancy and that she additionally texted her forwarding address to the Landlord on September 12, 2017. As the tenancy ended on September 1, 2017, and as both parties agreed that she

texted her address on September 12, 2017, I find that the date he received the Tenant's text is the date which initiated the 15-day time limit for the Landlord to deal with the deposit. The undisputed evidence before me is that the Landlord did not return the security deposit in full or make an Application to keep the deposit within 15 days of September 12, 2017. Furthermore, there is no provision in the *Act* which allows the Landlord to retain a portion of the deposit without authority under the *Act* or having the Tenant's written consent.

As the Landlord did not return the security deposit in full or make an Application to retain it within 15 days of September 12, 2017, the Landlord in essence illegally withheld the deposit contrary to the *Act*. Thus, I am satisfied that the Landlord breached the requirements of Section 38 and the doubling provisions of the *Act* apply in this circumstance. Consequently, I find that the Tenant has established a claim for a monetary award amounting to double the original security deposit. Under these provisions, I grant the Tenant a monetary award in the amount of **\$1,300.00** in full satisfaction of this claim.

The second claim I will address is with respect to the issue of the alleged illegal rent increase. Section 41 of the *Act* stipulates that the Landlord may only increase rent if he complies with the Sections pertaining to rent increases in the *Act*. Furthermore, Section 42 states that the Landlord cannot impose a rent increase for at least 12 months after the date on which the Tenant's rent was first payable for the rental unit or the effective date of the last rent increase made in accordance with this *Act*. As well, the Landlord must give the Tenant notice of a rent increase at least 3 months before the effective date of the increase, and this notice must be in the approved form. Finally, Section 43 indicates that the Landlord may impose a rent increase only up to the amount: calculated in accordance with the regulations, ordered by the Director of the Residential Tenancy Branch, or agreed to by the Tenants in writing.

In addition, I find it important to note that Policy Guideline # 37 outlines the following with respect to allowable rent increases:

A tenant may agree to, but cannot be required to accept, a rent increase that is greater than the maximum allowable amount unless it is ordered by an arbitrator. If the tenant agrees to an additional rent increase, that agreement must be in writing. The tenant's written agreement must clearly set out the agreed rent increase (for example, the percentage increase and the amount in dollars) and the tenant's signed agreement to that increase.

The landlord must still follow the requirements in the Legislation regarding the timing and notice of rent increases. The landlord must issue to the tenant a Notice of Rent Increase. It is recommended the landlord attach a copy of the agreement to the Notice of Rent Increase given to the tenant. Tenants must be given three full months' notice of the increase.

Payment of a rent increase in an amount more than the allowed annual increase does not constitute a written agreement to a rent increase in that amount.

When reviewing the evidence before me, the undisputed evidence is that the Landlord did not give the Tenant the notice of a rent increase at least 3 months before the effective date of the increase, did not use the approved form, and did not have the Tenant's consent in writing to increase the amount of rent charged over the maximum allowable for 2016. As such, I am satisfied that this attempt to change the total rent owing amounts to an illegal rent increase, contrary to the requirements of the *Act*.

With respect to the amount of overpayment due to this illegal rent increase, the Tenant's rent was \$1,300.00 per month and the maximum allowable rent increase for 2016 was 2.9%. Therefore, the maximum allowable rent that the Landlord could have increased the rent to would have been to \$1,337.70 per month. As the Tenant had paid \$1,500.00 per month from November 2016 to July 2017, I am satisfied that the Tenant has established a monetary award of nine months of overpayment of rent at \$162.30 per month, totaling **\$1,460.70**.

Regarding the Tenant's claims pertaining to the Notice, I have reviewed the Landlord's Notice to ensure that the Landlord has complied with the requirements as to the form and content of Section 52 of the *Act*. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 52 and I find that it is a valid Notice.

With respect to the Tenant's claim for one month's compensation owed to her when she was served the Notice, I find it important to note that Section 51 of the *Act* reads in part as follows:

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.*

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

The undisputed evidence is that the Tenant was entitled to one month's compensation pursuant to this Notice and that she paid \$1,500.00 for August 2017 rent. Consequently, I grant the Tenant a monetary award of one month's rent in the amount of **\$1,500.00**.

Regarding the Tenant's claim for compensation in the amount of double one month's rent as the Landlord did not use the property for the stated purpose on the Notice, Section 49 of the *Act* outlines the Landlord's right to end a tenancy in respect of a rental unit where the Landlord or a close family member of the Landlord intends in good faith to occupy the rental unit.

Furthermore, I find it important to note that Policy Guideline # 2 outlines the good faith requirement when ending a tenancy:

"If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy.

If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate that they do not have an ulterior motive for ending the tenancy."

I understand the Tenant's concerns with respect to her doubts that the Landlord did not use the property for the stated purpose; however, the reason for the Notice was that the Landlord or close family member would occupy the rental unit. I find it important to note that Black's Law defines "occupancy" as "The act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy, esp. of a dwelling or land."

The Landlord submitted that he re-gained possession of the rental unit after the effective date of the Notice and left it vacant for a substantial period of time. I find it important to note that the definition of “occupy” above does not encompass a person residing in a rental unit. Furthermore, the compensation provisions of this Notice are to deter a Landlord from ending a tenancy for an ulterior motive and subsequently benefitting from that act. When reviewing the totality of the evidence before me, I am satisfied that the Landlord occupied the rental unit within the definition of Black’s Law and that he did not gain any benefit from doing so as he did not re-rent it for a period of at least 11 months, as per the Tenant’s evidence. Therefore, I am satisfied that the Landlord used the property for the stated purpose and that the Landlord did not contravene the *Act* in this circumstance. Consequently, I dismiss the Tenant’s claim on this issue in its entirety.

With respect to the Tenant’s claim for compensation regarding the lawn cutting, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that the purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred, and that it is up to the party claiming compensation to provide evidence to establish that compensation is warranted. In essence, to determine whether compensation is due, the following four-part test is applied:

- Did the Landlord fail to comply with the *Act*, regulation or tenancy agreement?
- Did the loss or damage result from this non-compliance?
- Did the Tenant prove the amount of or value of the damage or loss?
- Did the Tenant act reasonably to minimize that damage or loss?

When reviewing the totality of the evidence before me, there is conflicting testimony surrounding this issue. However, the burden of proof is on the Tenant to prove this claim. I find that the Tenant has not provided specific dates that the lawn cutting service was utilized or provided receipts to corroborate these expenses. This lack of compelling evidence causes me to doubt the reliability and the credibility of the Tenant’s claims on this point. Furthermore, there is no evidence before me that the Tenant acted reasonably to minimize this loss and simply allegedly paid for this service since April 2012. Therefore, I am not satisfied that the Tenant has established grounds for this claim and I dismiss the Tenant’s claim on this issue in its entirety.

Finally, with respect to the Tenant's claim for compensation due to an unusable bathroom, the consistent evidence before me is that the Landlord rented the property out with a second bathroom with a non-functioning toilet. I find it important to note that the *Act* requires that the Landlord be responsible for ensuring that rental unit and property meets "health, safety and housing standards" established by law, and is reasonably suitable for occupation. I do not find that providing a rental unit with a non-functioning toilet would comply with this requirement. Furthermore, the Landlord advised that he was provided with a quote to fix this, but simply did not as it was too expensive. Consequently, I am satisfied that the Landlord breached the *Act* in this regard with respect to the toilet.

However, there is conflicting testimony regarding the presence of black mold in this downstairs bathroom and I find it curious that the Tenant does not make mention of this in her written submissions. Additionally, there is no other evidence to support this allegation. As such, I am not persuaded of the credibility of the Tenant's submissions regarding the mold.

In considering the Tenant's claims for having a second bathroom with a non-functioning toilet since October 2013, I am satisfied that the Tenant has established a claim in the amount of \$20.00 per month for the 46 months that she was without this second toilet. As such, I grant the Tenant a monetary award in the amount of **\$920.00** to rectify this issue.

As the Tenant was successful in her claims, I find that the Tenant is entitled to recover the \$100.00 filing fee paid for this application.

Pursuant to Sections 67 and 72 of the *Act*, I grant the Tenant a Monetary Order as follows:

Calculation of Monetary Award Payable by the Landlord to the Tenant

Double the security deposit	\$1,300.00
Rent overpayment	\$1,460.70
One month's compensation based on the Notice	\$1,500.00
Broken toilet	\$920.00
Recovery of filing fee	\$100.00
TOTAL MONETARY AWARD	\$5,280.70

Conclusion

The Tenant is provided with a Monetary Order in the amount of **\$5,280.70** 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 an Order 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: January 16, 2019

Residential Tenancy Branch