



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDCT, FFT

Introduction

This hearing convened as a Tenant's Application for Dispute Resolution, filed on August 26, 2018, wherein the Tenant requested monetary compensation in the amount \$13,500.00 as well as recovery of the filing fee.

The hearing came before me as a review hearing pursuant to a Review Consideration Decision dated November 16, 2018. The original hearing occurred on October 26, 2018. The Tenant failed to attend the hearing and her application was dismissed. The Tenant applied for and was granted review consideration of the Decision and a new hearing was ordered.

The new hearing was conducted by teleconference before me at 9:30 a.m. on January 7, 2019.

Both parties called into the Review Hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me. The Tenant was represented by her son, A.G. The Landlord was also in attendance with her legal counsel, L.Z., her realtor, A.S., as well as her husband, K.S.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the

evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The parties confirmed their email addresses during the hearing. The parties further confirmed their understanding that this Decision would be emailed to them and that any applicable Orders would be emailed to the appropriate party.

Issues to be Decided

1. Is the Tenant entitled to monetary compensation from the Landlord?
2. What should happen with the Tenant's security deposit?
3. Should the Tenant recover the filing fee?

Background and Evidence

A.G. testified on behalf of the Tenant. He confirmed that he lived in the rental unit with his mother (the Tenant) and as such had personal knowledge of the tenancy and the issues raised in the Application.

The tenancy agreement was also provided in evidence and which confirmed that this tenancy began July 1, 2010. Monthly rent was initially \$3,000.00 per month, and at the time the tenancy ended it was \$3,500.00. The Tenant paid a \$1,500.00 security deposit and a \$1,500.00 pet damage deposit.

A.G. stated that the Tenant provided her forwarding address to the Landlord on July 4, 2018 by posting to the rental unit door. Introduced in evidence was a photo of the letter posted to the door. A.G. confirmed that the door depicted in the photo is the rental unit door.

A.G. confirmed that the Landlord did not return the security deposit, nor did the Landlord make an application to retain the funds within 15 days of the end of the tenancy or receipt of the Tenant's forwarding address.

A.G. stated that the Landlord issued a 2 Month Notice to End Tenancy for Landlord's Use on April 8, 2018 (the "Notice"). The Notice was not in front of me however counsel

for the Landlord confirmed that the Landlord was not taking issue with the fact the Notice was issued. The effective date was June 30, 2018.

A.G. claimed that his mother did not receive her free months' rent as required by section 51 of the *Act*.

A.G. confirmed that the reason for ending the tenancy as noted on the Notice was that the rental unit would be occupied by the Landlord or a close family member.

A.G. submitted that the Landlord did not move into the property, rather it remained vacant. In support he provided letters from neighbours who confirmed that they did not see anyone move into the rental property.

A.G. also stated that the Landlord also tried to rent a portion of the property on Craigslist. He confirmed that his mother rented the entire property, including a basement suite. After the tenancy ended the Landlord attempted to rent out the basement suite for \$1,500.00. A copy of the Craigslist Ad was provided in evidence.

A.G. stated that he was not aware if the property was rented or not.

A.G. stated that to his knowledge and to this date the property remains vacant.

In response to the Tenant's claims, the Landlord testified as follows. She confirmed that she received \$3,000.00 in deposits from the Tenant. The Landlord was not able to provide any testimony with respect to receipt of the Tenant's forwarding address.

The realtor, A.S., also testified on behalf of the Landlord. A.S. confirmed she received a \$3,000.00 security and pet damage deposit from the Tenant.

A.S. stated that she did not receive the forwarding address which was posted to the rental unit door; rather, she received the Tenant's forwarding address by email at the end of July 2018. In any event she confirmed that she did not apply for dispute resolution or return the \$3,000.00 deposits, although she did believe the Landlord should be permitted to retain some amount of the deposits towards cleaning.

A.S. further confirmed that the Tenant received their free month's rent as they did not pay the June 2018 rent.

A.S. further stated that after the tenancy ended the Landlord moved into the rental property. A.S. confirmed that she helped the Landlords sell their condominium on July

16, 2018 after which their items were moved to the rental home. A.S. further stated that the reason the home appeared vacant is because the Landlord L.Z. had breast cancer while she was in another country and was away for a period of time for treatment.

A.S. stated that she advertised the basement suite for rent for the Landlords. She stated that the Landlords are elderly and they wanted someone in the basement to help them around the house as well as with translation. A.S. confirmed that the basement was never in fact rented.

In reply the Tenant's Representative confirmed that the Tenant did not pay rent for June 2018.

He also confirmed that the neighbours did not see anyone move into the rental unit despite the realtor's claim that the Landlord's items were delivered there.

Analysis

After consideration of the evidence and testimony before me and on a balance of probabilities I find as follows.

The Tenant applies for return of double the security deposit paid pursuant to section 38 of the *Residential Tenancy Act* which provides as follows:

Return of security deposit and pet damage deposit

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.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24

(1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(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.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) [*landlord failure to meet start of tenancy condition report requirements*] or 36 (2) [*landlord failure to meet end of tenancy condition report requirements*].

(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.

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows.

I accept the Tenant's evidence that she did not agree to the Landlord retaining any portion of their security deposit.

I find that the Landlords received the Tenant's forwarding address in writing on July 31, 2018.

The Landlord failed to return the Deposits or apply for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenant as required under section 38(1) of the *Act*.

The security deposit is held in trust for the Tenant by the Landlord. The Landlord may only keep all or a portion of the security deposit through the authority of the *Act*, such as the written agreement of the Tenant or an Order from an Arbitrator. If the Landlord believes they are entitled to monetary compensation from the Tenant, they must either obtain the Tenant's consent to such deductions, or obtain an Order from an Arbitrator authorizing them to retain a portion of the Tenant's security deposit. Here the Landlord did not have any such authority.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the *Act*, that the Landlord pay the Tenant the sum of **\$6,000.00**, comprised of double the security and pet damage deposit (2 x \$3,000.00).

I find that the Tenants received June 2018 as their free month of rent pursuant to section 51(1).

The Landlord issued the Notice pursuant to sections 49(3) of the *Residential Tenancy Act* which reads as follows:

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.

Notably, section 49(3) uses the word "occupy" not "reside" or "live in". Meaning must be given to the words actually used in the legislation. "Occupy" and "reside" have different meanings. Since the *Act* does not require the Landlord to "reside" in the rental unit, whether the Landlord actually resided or lived in the rental unit is not relevant.

The *Act* does not define the word "occupy" or "occupied". Black's Law Dictionary defines "occupy" as "to take or enter upon possession of; to hold possession of; to hold or keep for use; to tenant; to do business in; to possess; to take or hold possession."

Based upon the undisputed evidence before me, I find that no other person took possession of the rental unit from the Landlord following the issuance of the Notice. Since no other person took possession of the rental unit I am satisfied that the Landlord *occupied* the rental unit for at least six months following the effective date of the Notice.

I am satisfied the Landlord fulfilled the stated purpose on the 2 Month Notice such that I find the Tenant is not entitled to compensation under section 51(2). Therefore, I dismiss this portion of the claim against the Landlord.

Having been successful in their application the Tenant is entitled to recover the \$100.00 filing fee.

Conclusion

The Decision of October 26, 2018 is hereby set aside.

The Tenant's Application for return of double the security and pet damage deposit paid is granted. The Tenant is entitled to the sum of **\$6,000.00**.

The Tenant's Application for compensation pursuant to section 51 is dismissed. The Tenant received the month of June 2018 free such that she has received compensation pursuant to section 51(1). The Landlord used the rental unit for the stated purpose such that the Tenant is not entitled to further compensation pursuant to section 51(2).

The Tenant is entitled to recover the \$100.00 filing fee.

In furtherance of this Decision, the Tenant is given a formal Monetary Order in the amount of **\$6,100.00**. The Tenant must serve a copy of this Order on the Landlord as soon as possible. Should the Landlord fail to comply with this Order, the 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 8, 2019

Residential Tenancy Branch