



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

FFT MNDCT MNSD

Introduction

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

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- authorization to recover the filing fee from the landlord 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.

The tenant testified that they served the landlord with their application for dispute resolution dated September 19, 2018 and evidence by registered mail. The landlord testified that they had not been served with the tenants' application for dispute resolution and evidence but said that they were in possession of all materials having obtained them from the Branch. The tenant confirmed they had been served with the landlord's evidence. Based on the testimonies, I find that both parties are in possession of the application and evidentiary materials. While the landlord disputed that they had been served by the tenant they confirmed they have received the application and had an opportunity to review and prepare their own evidence. Accordingly, I find that there is no undue prejudice to either party. In accordance with section 71 of the *Act* and Rule of Procedure 3.17, I find that each party has been sufficiently served with the respective materials.

Issue(s) to be Decided

Are the tenants entitled to a monetary award as claimed?

Are the tenants entitled to a return of double the security deposit ?

Are the tenants entitled to recover the filing fee from the landlord?

Background and Evidence

The parties agreed on the following facts. This periodic tenancy began in 2013 and ended on April 30, 2018 in accordance with a 2 Month Notice to End Tenancy for Landlord's Use. The monthly rent was \$2,200.00 payable on the first of each month. A security deposit of \$1,100.00 was paid at the start of the tenancy and is still held by the landlord. The rental property consists of a detached home and second building located on the property. The tenant rented out the second building to separate occupants for a monthly rent of \$1,000.00.

The parties testified that there was a move-in condition inspection report prepared though neither party submitted a copy into evidence. The parties testified that they participated in a move-out inspection but were unable to agree on an amount that would be deducted from the security deposit. Both parties signed the move-out condition inspection report but the tenant did not give written authorization that the landlord may deduct any amount from the deposit for this tenancy.

The landlord filed their application for dispute resolution under the file number on the first page of this decision on May 8, 2018 seeking authorization to retain the security deposit for this tenancy. The landlord's application was scheduled for a hearing on June 19, 2018. The landlord did not participate in that hearing and the arbitrator who heard the matter dismissed the application with leave to reapply.

The tenant seeks a return of double the value of the security deposit for this tenancy in the amount of \$2,200.00. The tenant disagrees with the landlord's assessment of damage to the rental unit. The landlord testified that the damage to the rental unit went beyond the expected wear and tear and that there were specific repairs required, for which the total costs exceeded the security deposit value.

The tenant testified that the landlord collected the \$1,000.00 rent from the sub-tenant in April, 2018 without the tenant's consent or knowledge. The tenant says that their sub-tenant was obligated to pay the rent of \$1,000.00 to them but the landlord intervened

and collected the amount from the sub-tenants. The parties testified that the landlord and the sub-tenant entered into a new tenancy agreement allowing the sub-tenants to continue residing in the second building on the rental property.

Analysis

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit and pet damage deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit and pet damage deposit. However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the deposits as per section 38(4)(a).

In the present case the tenancy ended on April 30, 2018 and the parties participated in a move-out inspection on May 8, 2018. The tenant's forwarding address was provided on the condition inspection report. The landlord filed their application for dispute resolution to retain the security deposit for this tenancy on May 8, 2018. While the landlord did not attend the hearing for their application and it was dismissed with leave to reapply, I find that the landlord did file an application to retain the security deposit within the 15 days provided under the *Act*.

I accept the tenant's evidence that they did not provide written authorization that the landlord may retain any portion of their security deposit. While the landlord submits that there was damage beyond the expected wear and tear in the rental suite, the landlord's application for compensation for damages was dismissed at the earlier hearing. I find that the evidence now submitted by the landlord is insufficient to find that the rental unit suffered damages and loss beyond those expected from occupancy. In any event, the opportunity for the landlord to claim for damages and loss was at the hearing for their own application. The landlord failed to participate at their scheduled hearing and their application was dismissed. As such I find that the landlord is not authorized to retain the security deposit for this tenancy. Accordingly, I issue a monetary award in the tenants' favour for the amount of \$1,100.00, the value of the security deposit for this tenancy.

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the *Act*, regulations or a tenancy agreement. 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 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. The claimant also has a duty to take reasonable steps to mitigate their loss.

The parties agree that there was another occupant residing on the rental property. The parties characterize the additional occupant as a sub-tenant and the tenant claims damages and loss in the amount of \$1,000.00 for the April 2018 rent collected by the landlord instead of paid to them.

Residential Tenancy Policy Guideline 19 provides the following definition of a sublease agreement:

The use of the word 'sublet' can cause confusion because under the *Act* it refers to the situation where the original tenant moves out of the rental unit, granting exclusive occupancy to a subtenant, pursuant to a sublease agreement. 'Sublet' has also been used to refer to situations where the tenant remains in the rental unit and rents out space within the unit to others. **However, under the Act, this is not considered to be a sublet.** If the original tenant transfers their rights to a subtenant under a sublease agreement and vacates the rental unit, a landlord/tenant relationship is created and the provisions of the *Act* apply to the parties. If there is no landlord/tenant relationship, the *Act* does not apply.

In the present case the tenants remained in the rental property and merely rented out a portion of the total space to an occupant. The tenants were not acting as an agent of the landlord. While the landlord was aware of the additional occupant they were not party to the agreement between the tenants and the occupant.

I find that there was no landlord/tenant relationship between the tenants and the occupant as set out in the *Act*. Whatever agreement that was entered between the tenants and the occupant was not governed by the *Act*. Therefore, the landlord entering into a new tenancy agreement with the occupant is not a violation of the *Act*, regulations or tenancy agreement from which damages arise. I find that there is no basis for this portion of the tenants' claim and dismiss it accordingly.

As the tenants application was partially successful I find it appropriate to order that they be able to recover \$50.00, a portion of the filing fee for their application.

Conclusion

I issue a monetary award in the tenants' favour in the amount of \$1,150.00.

The tenants are provided with a Monetary 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 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 23, 2019

Residential Tenancy Branch