



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing was convened in response to an application by the Landlord pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. A Monetary Order for compensation - Section 67;
2. An Order to retain all or part of the security deposit - Section 38; and
3. An Order to recover the filing fee for this application - Section 72.

The Landlord’s Agent (the “Agent L”) and the Tenant’s Agent (the “Agent T”) were each given full opportunity under oath to be heard, to present evidence and to make submissions. The Tenant’s Witness gave evidence under oath.

Preliminary Matter

It is noted that during the hearing the Agent T gave evidence of writing that was present on the back page of the tenancy agreement that was supplied with the Landlord’s evidence package to the Tenant. The Agent L stated that this page was not in his own materials and it was noted that the Residential Tenancy Branch (the “RTB”) also did not have this page. As this evidence appeared to be material to the dispute and in order to avoid an adjournment, the Parties agreed to be given time at the hearing for Agent T to upload a copy of this page to the RTB and to immediately send Agent L a copy of this page by email. Agent L confirmed receipt of this evidence during the hearing and it is noted that the RTB also received a copy of this evidence during the hearing.

Issue(s) to be Decided

Is the Landlord entitled to the monetary amounts claimed?

Background and Evidence

The following are agreed facts: The tenancy was a sublease tenancy under a written sublease agreement (the "Agreement"). The tenancy started on July 27, 2018 and the Tenant moved out on October 27, 2018. Rent was \$1,300.00 per month and the Tenant paid the three month's rent in advance. At the outset of the tenancy the Landlord collected \$500.00 as a security deposit. The Landlord received the Tenant's forwarding address on November 11, 2018.

Agent L states that under section 6 of the Agreement the Tenant was required to pay for utilities. The Landlord provides a copy of the tenancy agreement and section 6 provides as follows: "All charges for utilities connected with premises which are to be paid by the sublessor under the master lease shall be paid by the subtenant." The Landlord did not provide a copy of the master lease. Agent L states that the Landlord is required to pay for all utilities under the master lease except for heat and that the heat is generated from gas. Agent L states that the Tenant was verbally informed of its responsibility for utility costs. The Landlord claims \$61.60 as the costs for hydro and \$80.49 as the costs for internet service. Agent L states that although he was not present at the signing of the lease, he did attend over the phone for some portion of time during the lease signing and that the utilities were mentioned. Agent L states that the Tenant was informed of its responsibility for the cable costs.

Agent T states that no copy of the terms of the master lease was ever provided to the Tenant and that the Tenant was never informed of any responsibility for utilities. Agent T states that the Tenant would not read English so the Landlord called Agent L to help explain the agreement. Agent T states that the Landlord wrote the terms of the tenancy agreement in the Tenant's language on the back page of the written agreement. Agent T states that there is no reference in this writing to any utilities. Agent T states that there was no discussion about utilities and there was no awareness of the utilities provision until the Tenant received the application for dispute. Agent T states that the heat to the unit was provided through hydro and not gas. Agent L confirmed that he could read the language on the back page, that there was only mention of the date of the lease and the security deposit, and that there was no mention of utilities.

Agent L states that the Tenant failed to return the keys at move-out and that as a result the Landlord lost access to the unit on October 28, 2018 as planned. Agent L states that the Landlord did not retain its own copy of the unit keys and did not seek a copy of the keys from the property manager located in the adjoining city. Agent L states that the Landlord stayed with a friend until moving into the unit and that no costs were incurred for that stay. Agent L states that there was no loss of rental income only a loss of use of the unit. Agent L states that since the keys were never returned the lock was changed for security reasons. The Landlord claims \$173.33 as compensation for the loss of access for four days and \$34.50 as the cost of changing the locks.

Agent T states that the Landlord's invoice indicates that the lock was changed on November 7, 2018. Agent T states that the Landlord leased the unit as they were leaving the country and were not back until November 7, 2018. Agent T states that at the outset of the tenancy the Landlord told the Tenant that they would collect the keys from the Tenant at move-out if they were back in the country at the time and that if not back they would make arrangements with the neighbour to take the keys. Agent T states that after failing to reach the Landlord or the neighbour they contact the building manager who have an office in the building and that they were instructed to leave the keys with the office.

The Witness states that she was assisting the Tenant with the move-out and confirms that the Tenant tried to reach the Landlord both on the move-out day and for a couple of days later. The Witness states that after no response from either the neighbour or the Landlord they located the building manager and returned the keys to the office located in the same building on November 2, 2018. The Witness states that they also left a letter of explanation for the Landlord with the keys. Agent L states that they were never informed that the keys were left with the building manager and that they have still not received the keys. Agent L argues that Agent T only provided oral evidence and that there is no documentary evidence to support their oral evidence. Agent T argues that the Landlord has not provided evidence to support that the building manager was never contacted by the Landlord. Agent T argues that the Landlord is not entitled to the compensation claimed as the Landlord did not incur any costs.

Analysis

Section 37(2)(b) of the Act provides that when a tenant vacates a rental unit, the tenant must give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property. Section 7 of the Act provides that where a tenant does not comply with the Act, regulation or tenancy agreement, the tenant must compensate the landlord for damage or loss that results. This section further provides that where a landlord or tenant claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement the claiming party must do whatever is reasonable to minimize the damage or loss. Although I accept that the Tenant did not return the keys to the Landlord at move-out, I accept the Witness supported evidence that the Tenant could not contact the Landlord or the neighbor at move-out and ultimately left the keys with the on-site property management office on November 2, 2018. For this reason I find on a balance of probabilities that the Landlord has not substantiated any negligence of the Tenant in returning the keys or any security concerns that may have been associated with the Tenant having the keys. Further and critically the Landlord did not have its own set of keys and I consider this a failure to reasonably minimize damage or loss associated with an inability to enter the unit. Had the Landlord retained its own key the Landlord would have been unable to access the unit at any time. As the Landlord did not retain any copy of the keys I find that the Landlord may not now claim for losses associated with a loss of access to the unit or the change of the lock and I dismiss these claims.

Section 6(3)(c) of the Act provides that a term of a tenancy agreement is not enforceable if, the term is not expressed in a manner that clearly communicates the rights and obligations under it. It is undisputed that the written tenancy agreement sets out that the Tenant must pay for utilities. There is however no mention of what utilities are to be paid and the master agreement that presumably sets out the obligations for utilities was not provided to the Tenant at any time and was not provided as evidence for this dispute. The Landlord's plausible evidence is that gas heat is included and the Tenant's equally plausible evidence is that the hydro bill included the heat. Given the lack of clarity in the tenancy agreement and the Parties' equally plausible evidence I cannot determine on a balance of probabilities which utilities the Tenant was responsible for. As the term of the tenancy agreement in relation to which utilities are the responsibility of the Tenant is not clearly communicated and as the oral evidence is not helpful I find on a balance of probabilities that this term is unclear and not enforceable. I dismiss the claim for utility costs.

As the Landlord's claims have not met with success I decline to award recovery of the filing fee and in effect the entire application is dismissed. As the Landlord is not therefore entitled to any retention of the security deposit I find that the Landlord must now return the full security deposit of \$500.00 plus zero interest to the Tenant forthwith.

Conclusion

The Landlord's application is dismissed.

I grant the Tenant an order under Section 67 of the Act for **\$500.00**. If necessary, this order may be filed in the Small Claims 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: March 15, 2019

Residential Tenancy Branch