Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the Tenant: MNSD, FFT
For the Landlords: MNDL-S, MNDCL-S, FFL

Introduction

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

- authorization to obtain a return of all or a portion of their security deposit and pet damage deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

This hearing also dealt with the landlord's application pursuant to the Act for:

- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to sections 37 and 67; and
- authorization to recover their filing fee for this application from the tenants pursuant to section 72 of the Act.

Preliminary Issue – Landlord's Application

The hearing was conducted by conference call. The landlord did not attend this hearing, although I waited until 1:40 p.m. in order to enable the landlord to connect with this teleconference hearing scheduled for 1:30 p.m. Both tenants called into this teleconference hearing at the date and time set for the hearing of this matter.

I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. During the hearing, I also confirmed from the online teleconference system that the tenants and I were the only persons who had called into this teleconference.

Rule 7.1 of the Rules of Procedure provides as follows:

> **7.1 Commencement of the hearing**: The hearing must commence at the scheduled time unless otherwise decided by the arbitrator.

Rule 7.3 of the Rules of Procedure provides as follows:

> **7.3 Consequences of not attending the hearing**
>
> If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply.

Accordingly, **in the absence of any evidence or submissions from the applicant landlord, I order the landlord's application dismissed without leave to reapply**. I make no findings on the merits of the matter.

Preliminary Issue – Service of Tenant's Dispute Resolution Hearing Package

The tenants appeared at the hearing. The tenants present were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenants testified that they served the Tenants' Application for Dispute Resolution hearing package ("dispute resolution hearing package") to the landlord by way of registered mail on November 30, 2018. The tenants testified that a duplicate copy of their dispute resolution hearing package was served to the landlord on November 30, 2018 by way of leaving a copy in the mailbox for the building manager of the building in which the rental unit is located. The tenants did not provide a copy of a Canada Post Registered Mail receipt or registered mail ticket/tracking slip which may have contained a tracking number associated with the registered mailing.

Section 89 of the Act establishes special rules for service of certain documents, which includes an application for dispute resolution. I find that section 89 of the Act does not

permit an application for dispute resolution to be served by way of leaving it in a mailbox. Therefore, I decline to find that the landlord was served with the tenants' dispute resolution hearing package in this fashion.

The tenants testified that after they vacated the rental unit, they were not able to communicate with the landlord and did not provide a forwarding address. The tenants testified that the landlord was provided with their forwarding address on the tenant's application for dispute resolution which was provided to the landlord when the tenants served their dispute resolution hearing package to the landlord.

The tenants asserted that although they did not provide proof that the dispute resolution hearing package was served by way of registered mail, they argued that the landlord came to learn of their application and was able to file its own application in response. The tenants further asserted that the landlord was in possession of their forwarding address, as the landlord was able to serve its own application and evidence to the tenants by way of registered mail. The tenants confirmed receipt of the landlord's application and evidence on March 04, 2019, and stated that it was mailed to their forwarding address.

Based on the foregoing, and the uncontested evidence provided by the tenants, I find that on balance, it is more likely than not that the landlord received the tenant's dispute resolution hearing package by way of registered mail which the tenants testified to having mailed on November 30, 2018, and therefore, I find that the landlord has been served with the tenant's dispute resolution hearing package in accordance with section 89 of the Act. Section 90 of the Act determines that a document served by registered mail is deemed to have been received five days after service. As such, in accordance with sections 89 and 90 of the Act, I find that the landlord has been deemed served with the tenants' dispute resolution hearing package on December 05, 2018, the fifth day after its registered mailing.

I further find that the tenants' application and landlord's application were scheduled to be heard during the same hearing (which, of course, listed the same date, time, and teleconference phone numbers and participant conference codes). Therefore, it would not be prejudicial to proceed with the tenant's application, as the landlord had knowledge that both the tenants' and landlord's application would be heard during the same proceeding.

Issue(s) to be Decided

Are the tenants entitled to a monetary award for the return of all or a portion of their security deposit and pet damage deposit? If so, should they be doubled?

Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

I have reviewed all evidence before me that met the requirements of the Rules of Procedure. While I have considered documentary evidence submitted and all oral testimony of the tenants, I will only refer to the evidence and facts which I find relevant in this decision. Not all details of the respective submissions and / or arguments of the tenants are reproduced here. The principal aspects of the tenants' claim and my findings around it are set out below.

The tenants testified that the tenancy began on September 25, 2017, and that a security deposit of $450.00 was provided to the landlord which continues to be held by the landlord. The tenants testified that a pet damage deposit in the amount of $450.00 was also provided to the landlord which continues to be held by the landlord. The monthly rent was set at $900.00, and was payable on the last day of each month preceding the month for which it is due. A copy of a written tenancy agreement which confirms the details provided orally by the tenants was submitted as evidence by the landlord to the landlord's file.

The tenants testified that a condition inspection was not conducted at the start of the tenancy, as they were not given an opportunity to walk-through the unit with the building manager (the "BM"). The tenants stated that they had a good relationship with the BM, as they were residing in a different unit within the same building. The tenants provided that they had to move from the unit they were occupying to a different unit in the same building (which is the unit defined as the "rental unit" in this application) due to noise created by another occupant, and that the BM did not adhere to the formal condition inspection process before the tenants moved-in to the new unit within the same building.

The tenants testified that the landlord was in the process of completing repairs and renovations to their new unit, such as painting, making repairs to fans and light fixtures, and repairing tiles in the kitchen. The tenants stated that the repairs were not complete when they moved-in, and some of the items were not completed during the course of

their tenancy. The tenants stated that some of the unit had blue paint, while other parts had grey paint, and that the tile work in the kitchen was not completed, nor were the repairs to the fan and all light fixtures completed. The tenants testified that the unit was not cleaned prior to them moving-in.

The tenants testified that although a condition inspection was not completed, they signed a condition inspection report at the start of the tenancy at the request of the BM, since they were on good terms. At the time, the BM conveyed to them that the unit was still in the process of being repaired, and that the items in the unit that were not "up to par" or presented with damage would not be an issue since the landlord was in the process of completing repairs.

The tenants testified that shortly after moving-in to the new unit, they discovered that the unit had bed bugs. They testified that they advised the landlord of the bed bug issue, and that on two occasions, they prepared their unit for bed bug treatment, which they described as an extensive process. The tenants stated that the first treatment was promised by the landlord in October 2017, but that the treatment was never actually done to the unit. The tenants testified that a second treatment was scheduled in February 2018, which also resulted in their unit not being treated.

The tenants testified that the tenant "JS" was pregnant and they determined that due to the bed bug issue, and the landlord's failure to treat the issue, they wished to end the tenancy as the unit was unfit and not safe as a result of the bed bugs. The tenants stated that in March 2018, they notified the BM of their wish to end the tenancy and move. The tenants testified that the BM accepted their notification to end the tenancy and began to undertake efforts to find a new tenant immediately. The tenants provided that the BM conveyed to them that she had procured a new tenant who would occupy the unit as of April 01, 2018, and that the tenants were to vacate the unit by that date.

The tenants testified that the tenancy ended on April 01, 2018, and that they vacated the unit on that date. The tenants provided that a condition inspection was not conducted at the end of the tenancy after the tenants had vacated the rental unit. The tenants testified that they attempted to contact the BM and were not successful, and that they left the keys to the unit in the BM's office. The tenants provided that the BM did not contact them to conduct a condition inspection.

The tenants testified that the BM completed an end of tenancy condition inspection report on her own, in the absence of having conducted a condition inspection with the tenants, and without having given them an opportunity to attend.

The tenants testified that after the tenancy ended, neither the BM nor any other representative of the landlord contacted them. The tenants provided that they did not provide their forwarding address to the landlord until such time that the forwarding address was included on their application for dispute resolution, which they filed on November 28, 2018 and subsequently served to the landlord by registered mail on November 30, 2018.

The tenants testified that they did not either expressly or tacitly, nor either verbally or in writing, grant consent to the landlord to retain any portion of the security deposit or pet damage deposit. The tenants testified that the landlord does not have the right to retain either the security deposit or pet damage deposit, as there is no unpaid sum owed by the tenants with respect to the tenancy, and no previous decision of an RTB Arbitrator which granted leave for the landlord to retain the deposits.

Therefore, the tenants seek to recover their security deposit and pet damage deposit, both in the amount of $450.00 for a total claim of $900.00.

Analysis

Section 38(1) of the Act requires the landlord to either return a tenant's security deposit and/or pet damage deposit in full or file for dispute resolution for authorization to retain the deposit(s) 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 is required to pay a monetary award, pursuant to section 38(6)(b) of the Act*,* equivalent to double the value of the security deposit and/or the pet damage deposit. There are exceptions to this outlined in sections 38(2) to 38(4) of the Act. A landlord may also under sections 38(3) and 38(4) retain a tenant's security or pet deposit if an order to do so has been issued by an arbitrator or if the tenant agrees in writing that the landlord may retain the amount to pay a liability or obligation of the tenant.

No evidence was produced at the hearing that established that the landlord received the tenants' written authorization to retain all, or a portion of the security deposit or pet damage deposit, to offset damages or losses arising out of the tenancy as per section 38(4)(a) of the Act, nor did the landlord receive an order from an Arbitrator enabling it to do so.

I find that a move-in condition inspection report was not completed in accordance with section 23 of the Act. I also find that a condition inspection was not completed at the end of the tenancy in accordance with section 35 of the Act. Therefore, I find the landlord extinguished its rights in relation to the security deposit under sections 24 and 36 of the Act. I find that the rights of the tenants' to seek return of their deposit has not been extinguished pursuant to the provisions of Residential Tenancy Policy Guideline 17, which states, in part, the following:

> *In cases where both the landlord's right to retain and the tenant's right to the return of the deposit have been extinguished, the party who breached their obligation first will bear the loss. For example, if the landlord failed to give the tenant a copy of the inspection done at the beginning of the tenancy, then even though the tenant may not have taken part in the move out inspection, the landlord will be precluded from claiming against the deposit because the landlord's breach occurred first.*

Although the tenants did not participate in a condition inspection at the end of the tenancy, I find that the landlord breached its obligation first by not completing a condition inspection report at the start of the tenancy in accordance with section 23 of the Act. Additionally, the landlord did not offer the tenants an opportunity to attend a condition inspection at the end of the tenancy in accordance with section 35 of the Act. Therefore, I find the tenants did not extinguish their rights in relation to the security deposit under sections 24 and 36 of the Act.

I find that the tenancy ended on April 01, 2018, after the tenants vacated the rental unit. Based on the uncontested testimony provided by the tenants, I find that it is likely, and reasonable to determine, that the landlord received the tenants' forwarding address after receiving a copy of the tenants' dispute resolution hearing package, which the landlord was deemed to have received on December 05, 2018, in accordance with sections 89 and 90 of the Act. Therefore, I find that the landlord received the tenants' forwarding address on December 05, 2018.

I find that the landlord did file an application for dispute resolution claiming against the security deposit and pet damage deposit. However, the landlord's application was filed on March 01, 2019, and was therefore not filed within 15 days of receiving the tenants' forwarding address, as required under the provisions of section 38(1) of the Act.

Additionally, the landlord's application has been dismissed without liberty to reapply and no findings on the merits of the landlord's application were made.

Therefore, in considering only the tenants' application and the uncontested testimony of the tenants, I find that the tenants are entitled to recover their security deposit and pet damage deposit, as they have filed an application pursuant to section 38 to recover the deposits.

Pursuant to section 38(6)(b) of the Act, a landlord is required to pay a monetary award equivalent to double the value of the security deposit if a landlord does not comply with the provisions of section 38(1) of the Act. Section 38(1) of the Act provides the following:

> ***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.*

I find that the landlord failed to adhere to section 38(1) of the Act. The tenants are therefore entitled to a monetary award in the amount of $1,800.00, representing a doubling of the tenants' unreturned security deposit ($450.00 x 2) and a doubling of the tenants' unreturned pet damage deposit ($450.00 x 2).

As the tenants were successful in this application, I find that the tenants are entitled to recover the $100.00 filing fee paid for this application.

Conclusion

I issue a Monetary Order in the tenants' favour in the amount of $1,900.00 against the landlord, calculated as follows:

Item	Amount
Doubling of unreturned Security Deposit ($450.00 x 2)	$900.00
Doubling of unreturned Pet Damage Deposit ($450.00 x 2)	900.00
Recovery of Filing Fee	100.00
Total Monetary Award to Tenants	**$1,900.00**

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: April 12, 2019

Residential Tenancy Branch