Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes LANDLORD: MNDCL MNRL FFL
TENANT: MNDCT MNSD FFT

Introduction

This hearing dealt with applications from both the landlord and the tenants pursuant to the *Residential Tenancy Act* (the *Act*).

The landlord applied for:

- a Monetary Order for unpaid rent and utilities, and compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67 of the *Act*; and
- recovery of the filing fee for this application from the tenants pursuant to section 72 of the *Act*.

The tenants applied for:

- the return of the security deposit pursuant to section 38 of the *Act*; and
- a Monetary Order for compensation for damage or loss under the *Act*, regulation or tenancy agreement; and
- recovery of the filing fee for this application from the landlord pursuant to section 72 of the *Act*.

The tenants appeared at the date and time set for the hearing of this matter and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. Tenant K.P. testified that he had personally served his notice of dispute resolution and first package of evidence to the landlord's legal counsel who was acting as the landlord's agent on March 8, 2019. He provided the address of the legal counsel's law office and the name of the legal counsel served. Tenant K.P. testified that he served the same landlord's agent/legal counsel in person with his second package of evidence on July 14, 2019.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 2:32 p.m. in order to enable the landlord to call into this teleconference hearing scheduled for 1:30 p.m. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the tenants and I were the only ones who had called into this teleconference.

I further note that the landlord had previously requested the hearing to be rescheduled from its earlier date of April 5, 2019 and that the landlord was provided with the rescheduled hearing date and time directly from the Residential Tenancy Branch.

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 reapply.

Accordingly, in the absence of the landlord's attendance at the hearing to present their claim, I order the landlord's application for dispute resolution dismissed without liberty to reapply.

I proceeded to hear the tenants' application for dispute resolution.

Issue(s) to be Decided

Are the tenants entitled to the return of the security deposit? If so, are the tenants entitled to a monetary award equivalent to the value of the security deposit because of the landlord's failure to comply with section 38 of the *Act*?

Are the tenants entitled to monetary for the landlord's failure to comply with the *Act*, regulations or tenancy agreement?

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

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

The tenants testified that there was a written tenancy agreement and confirmed the details of the tenancy as follows:

- This fixed-term tenancy began on October 31, 2015, with a scheduled end date of October 31, 2016, at which time the tenancy continued on a month-to-month basis.
- Monthly rent of $3,100.00 was payable on the first day of the month.
- The tenants paid a security deposit of $1,550.00 and a pet damage deposit of $1,550.00 at the beginning of the tenancy, which the landlord continues to hold.

The tenants gave verbal notice to the landlord's agent to end their tenancy on November 10, 2018 and moved out the same day. The tenants testified that they failed to provide one month's notice to end tenancy as they had concerns for their safety.

The tenants testified that they provided their forwarding address verbally to the landlord's agent on November 10, 2018 when they gave notice to end their tenancy. The tenants stated that there is evidence the landlord received their forwarding address as the landlord used the forwarding address provided by the tenants to serve the tenants with the landlord's Notice of Dispute Resolution Proceeding package.

The tenants confirmed that they did not provide written authorization to the landlord for any specified deductions from the security deposit or pet damage deposits.

The landlord did not file an application for dispute resolution to retain the security deposit or pet damage deposit. The landlord did file an application for dispute resolution on December 14, 2018 for a claim pertaining to unpaid rent. As noted in the "Introduction" section of this Decision, the landlord's application was dismissed without leave to reapply as the landlord failed to attend this hearing, which was scheduled to address both the landlord's and the tenants' cross-applications for dispute resolution.

As the tenants failed to complete a Monetary Order Worksheet, I refer to the tenants Application for Dispute Resolution to determine the particulars of the tenants' claim. The tenants' Application for Dispute Resolution set out the tenants' claim in two parts. The first part of the claim requested $26,467.16 for loss of quiet enjoyment and aggravated damages. The second part of the claim requested $6,200.00 for the return of double their security and pet damage deposits.

The tenants submitted written submission claimed that they were "subject to harassment, threats, yelling, swearing, police emergencies, arrests, gun possession, drug overdoses, illicit drug transactions, violently thrown objects, second hand smoke from cigarettes and marijuana, neglected garbage and countless other disturbances and traumatic experiences, occurring towards us or on the property from the actions of the landlord's other tenants…who occupied one of the two, rented basement suites below the main unit that our family rented."

The tenants testified that July 28, 2017, they notified the landlord's agent by email of the issues they were experiencing with the lower rental unit occupants and sought the landlord's assistance. The tenants followed up with another email to the landlord's agent on August 11, 2017 again requesting the issues be addressed. The tenants followed up with a third email to the landlord's agent almost a year later on July 3, 2018 with concerns pertaining to the yard maintenance and also regarding the lower rental unit occupants, as follows, in part:

> *Also, you never did address the family living under us. They are smoking on the property still!!!!!!! They have also helped themselves to OUR PARKING SPACE IN THE DRIVEWAY!! When asked them to remove their car from our area I was yelled at and sworn at. This has gone too far. I would hope that you will deal with this in a professional manner by giving them a warning or request they move out.*

The tenants claimed there was no response from the landlord to their emails. As such, the tenants decided to withhold payment of monthly rent for the months of August, September, October and November 2018, and moved out November 10, 2018.

Analysis

Section 67 of the *Act* provides that an arbitrator may determine the amount of the damage or loss and order compensation to the claimant, if an arbitrator has found that damages or loss results from a party not complying with the *Act*, regulations, or tenancy agreement, and the claimant has done whatever is reasonable to minimize the damage or loss, as required by section 7 of the *Act*.

The burden of proof is on the claimant to prove the existence of the damage or loss and that it stemmed directly from a violation of the tenancy agreement or contravention of the *Act* on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or

damage. Finally, it must be proven that the claimant did what was reasonably possible to address the situation in order to mitigate the damage or losses that were incurred.

I have addressed the tenants' claims separately below.

1) Claim for Loss of Quiet Enjoyment and Aggravated Damages

The tenants are seeking monetary compensation for damages which they claim were caused by the landlord's failure to comply with section 28(b) of the *Act*.

Section 28(b) of the *Act* provides that a tenant is entitled to quiet enjoyment, including the right to freedom from unreasonable disturbance.

Residential Tenancy Policy Guideline #6. Entitlement to Quiet Enjoyment provides further explanation of the criteria to determine a breach of quiet enjoyment, as follows, in part:

> *A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.*
>
> *Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.*

Based on the testimony and evidence presented to me, on a balance of probabilities, I have made the following findings in this matter.

I find that the tenants have failed to submit any documentary evidence such as a police report to support their testimony regarding allegations pertaining to illegal activity taking place in the lower rental unit requiring police involvement.

The tenants have also failed to submit into evidence a copy of their residential tenancy agreement to support their testimony that there were enforceable clauses in the tenancy agreement prohibiting smoking in or on the residential rental property, and granting them exclusive use of the parking space.

However, I find sufficient evidence presented through the tenants' unopposed testimony and witness statements submitted into documentary evidence that there was a mutually acrimonious relationship between the tenants and the lower rental unit occupants.

I find that the tenants sought the landlord's assistance to intervene in some way between them and the lower rental unit occupants through an email sent to the landlord on July 28, 2017. Having failed to receive a response, the tenants sent another email to the landlord on August 11, 2017 once again seeking assistance.

However, I find the fact that from August 11, 2017 to July 3, 2018 the tenants did not submit any evidence of further written contact with the landlord regarding continuing issues with the lower rental unit occupants, and the fact that the tenants never filed an Application for Dispute Resolution with the Residential Tenancy Branch at any point during their tenancy, weighs against a finding that the tenants experienced a "substantial interference with the ordinary and lawful enjoyment of the premises" and that there was "frequent and ongoing" interference or unreasonable disturbances during that period of time. Otherwise, I find it is reasonable to expect that the tenants would have filed an Application for Dispute Resolution to address their claims that the landlord failed to act upon their complaints of breach of quiet enjoyment.

I find that on July 3, 2018 the tenants once again reached out to the landlord by email to request assistance to address the issues between them and the lower rental unit occupants. However, instead of filing an Application for Dispute Resolution when they failed to receive a response from the landlord, the tenants decided to withhold payment of rent for the months of August, September, October and November 2018.

In summary, although all the issues referenced by the tenants demonstrated incidences of temporary discomfort or inconvenience to the tenants, I find that there was insufficient evidence presented by the tenants to support a claim for breach of quiet enjoyment on the basis of "frequent and ongoing interference or unreasonable disturbances". Further, I find insufficient evidence presented that the tenants took reasonable actions, such as filing an Application for Dispute Resolution, to mitigate their claimed damage or losses. As such, the tenants claim for compensation on this issue is dismissed.

2) Return of the Security Deposit

The *Act* contains comprehensive provisions on dealing with security deposits. Under section 38 of the *Act*, the landlord is required to handle the security deposit as follows:

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.

…

(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.

…

(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.

At no time does the landlord have the ability to simply keep all or a portion of the security deposit because they feel they are entitled to it due to damages caused by the tenant. If the landlord and the tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

In this matter, the tenancy ended on November 10, 2018, and the tenants testified that they provided the landlord's agent with their forwarding verbally on that day. Although the tenants did not provide their forwarding address "in writing", the tenants testified that

the landlord used the forwarding address provided by the tenants to serve the tenants with the landlord's Notice of Dispute Resolution Proceeding. As such, pursuant to section 71(2)(b) of the *Act*, I find that the landlord was sufficiently served with the tenants' forwarding address on November 10, 2018 as the landlord demonstrated they were in receipt of the forwarding address by serving the tenants with a Notice of Dispute Resolution Proceeding.

Although the landlord filed an Application for Dispute Resolution on December 14, 2018, the tenants pointed out that the landlord's application did not include a claim against the security or pet damage deposit as the landlord's application only sought compensation for unpaid rent. Further, I note that the landlord's application was filed over a month after the tenancy ended.

Based on the above legislative provisions and the testimony and evidence of the tenants, on a balance of probabilities, I find that the landlord failed to address the security deposit in compliance with the *Act*. As such, in accordance with section 38(6) of the *Act*, I find that the tenants are entitled to a monetary award equivalent to the value of double the amount of the security deposit withheld by the landlord, with any interest calculated on the original amount only. No interest is payable for this period.

Therefore, the tenants are entitled to a monetary award of $6,200.00 as compensation for the landlord's failure to address the security deposit in accordance with section 38 of the *Act*.

As the tenants were successful in obtaining a monetary award through their dispute, I find that the tenants are entitled to recover the $100.00 filing fee paid for this application.

In summary, I order that the landlord pay the tenants the sum of $6,300.00 in full satisfaction of the return of the security and pet damage deposits and recovery of the filing fee paid by the tenants for this application.

Conclusion

I issue a Monetary Order in the tenants' favour in the amount of $6,300.00 pursuant to sections 38, 67 and 72 of the *Act*.

The tenants are provided with this 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: August 6, 2019

Residential Tenancy Branch