Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

The tenants apply to recover a $1225.00 security deposit and a $1225.00 pet damage deposit.

All three parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Does the landlord have a lawful reason for retaining any of the deposit money? If not, do the doubling provisions of s. 38 of the *Residential Tenancy Act* (the "*Act*") apply?

Background and Evidence

The rental unit is the four bedroom upper portion of a house. The landlord lives in a suite in the lower level. There is a second, one bedroom rental unit in the lower level.

There is a written tenancy agreement. The tenancy started in March 2019 for a one year term at a monthly rent of $2600.00. The tenants paid and the landlord still holds a $1225.00 security deposit and a $1225.00 pet damage deposit.

The parties appear to have had a dispute about whether the tenants' teenage daughter could be added as a tenant to the tenancy agreement. As a result, the tenants purported to end the fixed term tenancy at the end of July 2019.

The tenants vacated the rental unit by July 31, 2019. They mailed by registered mail their forwarding address in writing to the landlord along with this application on July 29 and the landlord received it on July 31.

The landlord has filed material in this matter in opposition to the tenants' claim and she has filed material in an effort to show that the tenants owe her money for items taken or damaged and for rental loss after July 31 until she could find replacement tenants. The *Act* and Rules of Procedure do not allow for what might be termed a "counterclaim" that is common in the courts of law. In order for an arbitrator to be clothed with the power to award a party for claims such as this, the claimant must bring her own application. It should be noted that the landlord was firm in her testimony that a man at the Residential Tenancy Office whom she had contacted for assistance informed she could make a monetary claim against the tenants without bringing her own application. Unfortunately, the tenant has either misunderstood him, he has misunderstood her or he was incorrect.

The tenant is free to make her own application for a monetary award against the tenants, subject to the two year time limitation imposed by s. 60 of the *Act*.

The parties met at the rental unit on July 31, 2019 to conduct a move-out inspection. No report appears to have been prepared. The tenant Mr. H. says they agreed all was OK but for a frayed corner of carpet. The landlord disagreed, wanting her lost rent from August.

Analysis

The tenants' claim, made before they vacated the property, appears to seek permission to end the fixed term tenancy before its expiry. They have chosen to do so without permission and so the determination of the question would serve no practical purpose at this time. It may well become a central issue if the landlord brings her anticipated claim following this hearing.

The Deposit

Section 38 of the *Act* provides that once a tenancy has ended and once the tenant has provided the landlord with a forwarding address in writing, the landlord has a fifteen day window to either repay the deposit money to the tenant or to make an application claiming against the deposit. Following that period, if no application is made to claim against the deposit money the landlord loses any ground to continue to hold the deposit money, though the landlord's right to claim for damage or loss against a tenant is not abridged.

Section 38 further provides that if a landlord fails to either repay the deposit money or make a claim against it within that fifteen day period, she must account to the tenant for double the amount of the deposit.

Has the Tenants' Right to the Deposit Money Been Extinguished?

In this case, the landlord argues that the tenants failed to attend for the move-out inspection and so have lost their right to return of the deposit money.

Section 35 and 36 of the *Act* provide that a tenant's right to return of deposit money can be lost if, in certain circumstances, they fail to attend a move out inspection. Below are the relevant provisions of the *Act*"

> **Condition inspection: end of tenancy**
> **35** (1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit
>
> (a) on or after the day the tenant ceases to occupy the rental unit, or
>
> (b) on another mutually agreed day.
>
> (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
>
> (3) The landlord must complete a condition inspection report in accordance with the regulations.
>
> (4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.
>
> (5) The landlord may make the inspection and complete and sign the report without the tenant if
>
> (a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or
>
> (b) the tenant has abandoned the rental unit.

Consequences for tenant and landlord if report requirements not met

36 (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if

(a) the landlord complied with section 35 (2) *[2 opportunities for inspection]*, and

(b) the tenant has not participated on either occasion.

As can be seen in s. 36, in order for a tenant's right to deposit money to be extinguished a landlord must comply with s. 35(2). Section 35(2) required the landlord to offer the tenant at least two opportunities, as prescribed, for the inspection.

In this case, there is no evidence that the landlord offered the tenants any opportunities to inspect. Rather, it appears that when the tenants were moved out on July 31, they called the landlord and it was agreed that she would come over between 3:00 and 4:00 p.m. that day to conduct the move-out inspection. The parties met on the stairs and agreed they all knew what the rental unit looked like, foregoing an actual mutual inspection.

In these circumstances s. 35 does not apply and the tenants' right to their deposit money has not been extinguished.

As the fifteen day window in s. 38 has passed, and as the landlord does not have a lawful right to continue to hold the deposit money (though she may make her own application right away) the tenants are, at this point, entitled to recover their $2450.00 of deposit money.

Double the Deposit

The landlord has breached s. 38 of the *Act* by failing to repay the deposit money or make a claim against it within 15 days after the end of the tenancy and receipt of the tenants' forwarding address in writing. Thus the landlord is subject to the doubling penalty. However, the tenants have not claimed the doubling penalty in their application.

Residential Tenancy Policy Guideline 17, "Security Deposit and Set off [*sic*]" provides that an arbitrator is to award the doubling penalty even if not claimed in the application unless the tenants specifically declines it either in the application or at the hearing. The question was put to the tenant Mr. H. and he chose to accept the doubling penalty.

Conclusion

The tenants are entitled to recover their full deposit money of $2450.00 doubled to $4900.00. They are entitled to recover the $100.00 filing fee for this application.

In result, the tenants will have a monetary order against the landlord in the amount of $5000.00.

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: September 24, 2019

Residential Tenancy Branch