Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDL-S, FFL

Introduction

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for a monetary Order for damage to the rental unit; to keep all or part of the security deposit, and to recover the fee for filing this Application for Dispute Resolution.

The Agent for the Landlord stated that on September 20, 2019 the Dispute Resolution Package and the evidence the Landlord submitted to the Residential Tenancy Branch in September of 2019 were sent to the Tenant, via registered mail. The Tenant acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

On December 30, 2019 the Landlord submitted evidence to the Residential Tenancy Branch. The Agent for the Landlord stated that this evidence was served to the Tenant, via registered mail, on December 26, 2019. The Tenant acknowledged receiving this evidence; she stated she has had sufficient time to consider the evidence; and it was, therefore, accepted as evidence for these proceedings.

On January 05, 2020 the Tenant submitted evidence to the Residential Tenancy Branch. The Tenant stated that this evidence was delivered to the Landlord's business address on January 06, 2020. The Agent for the Landlord acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each party affirmed that they would provide the truth, the whole truth, and nothing but the truth at these proceedings.

Preliminary Matter

The Agent for the Landlord argued that the *Residential Tenancy Act (Act)* does not apply to this rental unit, as it was provided to the Tenant as travel accommodation. In support of this submission the Agent for the Landlord stated that:

- The Tenant did not live in the rental unit on a permanent basis;
- The Tenant vacated the rental unit approximately one year prior to the end of the fixed term of the tenancy; and
- The agreement signed by the parties is a "Travel Accommodation Agreement".

The Tenant stated that:

- She lived in the rental unit on a full-time basis;
- She had no other home for the period between September 01, 2017 and July 31, 2019;
- During the last month of the tenancy she had another home, which she moved into slowly during the month of August of 2019;
- She paid monthly rent of $3,050.00;
- She paid a security deposit of $1,500.00; and
- She paid a pet damage deposit of $1,500.00

Section 4(e) of the *Act* stipulates that the *Act* does not apply to living accommodation occupied as vacation or travel accommodation. I find that there is insufficient evidence to establish that the Tenant was occupying the rental unit as vacation or travel accommodation.

In determining that there is insufficient evidence to establish that the Tenant was occupying the rental unit as vacation or travel accommodation, I find that the Landlord submitted no evidence to support the submission that the Tenant did not live in the rental unit on a permanent basis or to refute the Tenant's testimony that she did live in the unit on a full-time basis for 23 months.

Residential Tenancy Branch Policy Guideline #27 reads, in part:

> The RTA does not apply to vacation or travel accommodation <u>being used for vacation or travel purposes</u>. (My emphasis added)

On the basis of the testimony of the Tenant and the absence of any documentary evidence to the contrary, I find that the Tenant was using the rental unit as a permanent home and not for the purposes of travel or vacation. I therefore find that the *Act* applies to this tenancy.

Residential Tenancy Branch Policy Guideline #27 reads, in part:

> Whether a tenancy agreement exists depends on the agreement. Some factors that may determine if there is a tenancy agreement are:
> •Whether the agreement to rent the accommodation is for a term;
> •Whether the occupant has exclusive possession of the hotel room;
> •Whether the hotel room is the primary and permanent residence of the occupant.
> •The length of occupancy.

As the written agreement that was signed by the parties gave the Tenant exclusive possession of the rental unit for the 24 months between September 01, 2017 and August 31, 2019, I find it unlikely that the parties truly intended that this rental unit would be used for vacation or travel.

While I accept that the agreement that was signed by the parties refers to the agreement as a "Travel Accommodation Agreement"; the agreement specifies the rental unit will be occupied for the sole purpose of being utilized for vacation or travel accommodations; and the agreement declares that the *Act* does not apply, I find that the *Act* does apply.

Section 5 of the *Act* stipulates that landlords and tenants may not avoid or contract out of this *Act* or the regulations and that an attempt to do so is of no effect. In my view the title of the agreement the parties signed and the reference to the *Act* not applying is a clear attempt to contract out of the *Act* and is, therefore, of no effect.

As the *Act* applies to this tenancy, I have jurisdiction in the matter.

Issue(s) to be Decided

Is the Landlord entitled to compensation for damage to the rental unit and to keep all or part of the security deposit?

Background and Evidence

The Agent for the Landlord and the Tenant agree that:

- the tenancy began on September 01, 2017;
- the tenancy ended on August 30, 2019;
- the Tenant agreed to pay monthly rent of $3,050.00 by the first day of each month;
- the Tenant paid a security deposit of $1,500.00;
- the Tenant paid a pet damage deposit of $1,500.00;
- the Tenant provided the Landlord with a forwarding address, in writing, on August 30, 2019;
- the Tenant did not give the Landlord authority to retain any portion of the pet damage/security deposits; and
- the Landlord did not return any portion of the pet damage/security deposits.

The Landlord is seeking compensation, in the amount of $3,000.00, for damage the rental unit.

The Landlord did not submit a Monetary Order Worksheet or an itemized list in which the Landlord provided a list of damages and the amount of compensation being sought for each alleged damaged item.

When the Agent for the Landlord was asked how the Tenant would know what damages the Landlord is alleging, the Agent stated that the Tenant would need to rely on the list of damages

noted on the condition inspection report which was completed at the end of the tenancy. She acknowledged that the actual costs of repairs are not listed on that report.

The Tenant stated that she did not clearly understand the details of the Landlord's claims, as she was not provided with an itemized list of damage with associated costs for repairs.

The Agent **for the Landlord stated that:**

- **the rental unit was inspected on September 01, 2017 by a different representative for the Landlord;**
- **the Tenant** did not attend the inspection that was scheduled for September 01, 2017 and the rental unit was inspected in her absence;
- as the Tenant did not attend the inspection on September 01, 2017, she did not sign the inspection report;
- the Tenant was offered a second opportunity to participate in an inspection of the rental unit at the start of the tenancy, although she does not recall the time/date of that proposed second inspection; and
- she does not know if the opportunity for the second inspection was served to the Tenant in writing.

The Tenant stated that:

- she and a different representative for the Landlord met briefly at the rental unit on September 01, 2017;
- they did not inspect the rental unit at that time, although the representative told her areas of the rental unit required additional cleaning;
- the representative for the Landlord did not complete a condition inspection report in her presence on September 01, 2017;
- she did not sign a condition inspection report on September 01, 2017, as one was not completed or provided to her for a signature;
- she was not offered a second opportunity to participate in an inspection of the rental unit at the start of the tenancy, either orally or in writing; and
- shortly after the tenancy began, she took photographs of deficiencies with the rental unit, which she sent to the Agent for the Landlord.

The Tenant submitted an email sent to the Agent for the Landlord, dated September 05, 2017, which outlines various deficiencies. In the email the Tenant declares, in part, that the deficiencies are being noted "in lieu of a thorough walk through" and because she wants them "on record for such a time if and when" she vacates the unit.

Analysis

Section 59(2)(b) of the *Act* stipulates that an Application for Dispute Resolution must include full particulars of the dispute that is to be the subject of the dispute resolution proceedings.

I find that the Landlord's Application for Dispute Resolution does not provide full details of the Landlord's dispute. In reaching this conclusion I was heavily influenced by the fact the Landlord provided very limited details of the monetary claim in the Application for Dispute Resolution.

The Landlord did not provide a clear list of the items that are allegedly damaged. Although the Landlord noted some damages on a condition inspection report that was completed at the end of the tenancy, I find that this information does not replace the need to clearly identify the claims being made by the Landlord. The Tenant should not have to search through the Landlord's evidence and guess about the claims being made by the Landlord.

The Landlord did not declare the amount of compensation being sought for each allegedly damaged item. Although the Landlord submitted some receipts, I find that the receipts do not replace the need to declare the amount the Landlord is seeking for each allegedly damaged item. The Tenant should not have to search through the Landlord's evidence and guess how much compensation the Landlord is seeking for each allegedly damaged item.

In light of the absence of detailed information regarding the Landlord's claim for damages, I find that it would be prejudicial to the Tenant to proceed with the Landlord's claim for damages, as the absence of detail makes it difficult, if not impossible, for the Tenant to prepare a response to the claims.

As the Landlord did not provide full particulars of the claim for compensation, as is required by section 59(2)(b) of the *Act,* I refuse to consider the Landlord's application for compensation for damages. The Landlord retains the right to file another Application for Dispute Resolution seeking compensation for the alleged damages.

Section 23(1) of the *Act* stipulates that the landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day. On the basis of the undisputed evidence, I find that the Landlord and the Tenant did not jointly inspect the condition of the rental unit on September 01, 2017.

Section 23(3) of the *Act* stipulates that a landlord must offer a tenant at least 2 opportunities, as prescribed, for the aforementioned inspection. Section 17(2)(b) of the *Residential Tenancy Regulation* stipulates, in part, that a landlord must propose a second time for an inspection, in the approved form. Section 10(1) of the *Act* stipulates that the director may approve forms for the purposes of this *Act.* RTB-22 (Notice of Final Opportunity to Schedule a Condition Inspection) is the form the director has created for the purposes of scheduling a final inspection.

I find that the Landlord did not provide the Tenant with a second opportunity to inspect the rental unit at the start of the tenancy, in accordance with section 23(3) of the *Act*.In concluding that the Tenant did not receive a second opportunity to inspect the rental unit at the start of the tenancy, I was influenced by the Tenant's testimony that a second opportunity for an inspection was not offered to her. Given that the Agent for the Landlord does not recall the time or date of the alleged second opportunity for an inspection, I find her testimony that a second opportunity to inspect was offered lacks credibility.

Even if I accepted the Agent for the Landlord's testimony that a second opportunity for an inspection was offered to the Tenant, I find that there is insufficient evidence to establish that it was provided to the Tenant on a RTB-22. In reaching this conclusion I was heavily influenced by the Agent for the Landlord's testimony that she does not know if the second opportunity was provided in writing and by the fact a copy of an RTB-22 was not submitted in evidence. As there is no evidence the opportunity was provided on an RTB-22, I find that it was not served in accordance with section 17(2)(b) of the *Residential Tenancy Regulation* or section 23(3) of the *Act*.

In adjudicating this matter, I have considered section 10(2) of the *Act,* which stipulates that deviations from an approved form that does not affect its substance and is not intended to mislead does not invalidate the form used. In these circumstances, where there is no evidence the second opportunity was provided in writing, I find that the Tenant was not provided with important information that is contained on the RTB-22.

Section 24(2) of the *Act* stipulates that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord:
(a) does not comply with section 23 (3) *[2 opportunities for inspection]*,
(b) having complied with section 23 (3), does not participate on either occasion, or
(c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

As I have concluded that the Landlord did not comply with section 23(3) of the *Act*, I find that the Landlord's right to claim against the security/pet damage deposit for damage is extinguished, pursuant to section 24(2) of the *Act*.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit plus interest or make an application for dispute resolution claiming against the deposits. In circumstances such as these, where the Landlord's right to claim against the security deposit has been extinguished, pursuant to section 36(2) of the *Act,* the Landlord does not have the right to file an Application for Dispute Resolution claiming against the deposit <u>for damage to the rental unit</u> and the only option

remaining open to the Landlord is to return the security deposit and/or pet damage deposit within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing. I find that the Landlord did not comply with section 38(1) of the *Act*, as the Landlord has not yet returned the deposits.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the Landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord did not comply with section 38(1) of the *Act*, I find that the Landlord must pay double the pet damage deposit and security deposit to the Tenant, which is $6,000.00.

I find that the Landlord has failed to establish the merit of this Application for Dispute Resolution and I dismiss the application to recover the fee for filing this Application for Dispute Resolution.

Conclusion

I refuse the Landlord's claim for compensation for damages to the rental unit, pursuant to section 59(5)(a) of the *Act,* because the Application for Dispute Resolution does not provide sufficient particulars of the claim, as is required by section 59(2)(b) of the *Act.*

The Landlord's application to retain any portion of the Tenant's security and pet damage deposit is dismissed.

I grant the Tenant a monetary Order for $6,000.00, which is double the pet damage/security deposit. In the event the Landlord does not voluntarily comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia 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 *Act*.

Dated: January 15, 2020

Residential Tenancy Branch