Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDCT, FFT
MNRL-S, MNDCL-S, MNDL-S, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Tenant (the "Tenant's Application") and an Amendment to an Application for Dispute Resolution (the "Tenant's Amendment") filed under the *Residential Tenancy Act* (the "*Act*"). In their Application the Tenant sought:

- The return of their security deposit and pet damage deposit in the amount of $2,650.00; and
- Recovery of the filing fee

In their Amendment the Tenant sought:

- To change their address for service;
- Increase their monetary claim to double the amount of their security deposit and pet damage deposit, plus interest; and
- Recovery of $2,550.00 in rent paid due to a rent increase in excess of the allowable limits.

This hearing also dealt with a Cross-Application for Dispute Resolution that was filed by the Landlord (the "Landlord's Application") under the *Act*, seeking:

- Compensation in the amount of $840.00 for cleaning costs;
- Compensation in the amount of $200.00 for late fees;
- Compensation in the amount of $1,400.00 for lost July 2019 rent;
- Compensation in the amount of $1,400.00 for other monetary loss or other money owed; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant, Legal Counsel for the Tenant, and the Landlord, all of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally

and in written and documentary form, and to make submissions at the hearing. The parties agreed that they had been provided copies of the Applications, the Amendment, the Notice of Hearing, and all of the documentary evidence before me for review and raised no concerns regarding the service or receipt of these documents.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure"); however, I refer only to the relevant facts and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them.

Preliminary Matters

Matter #1

Although the parties engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Residential Tenancy Branch (the "Branch") under Section 9.1(1) of the *Act*.

Issue(s) to be Decided

Is the Tenant entitled to the return of double their security deposit and pet damage deposit, plus any applicable interest?

Is the Tenant entitled to a rent refund of $2,550.00?

Is the Landlord entitled to $840.00 in cleaning costs?

Is the Landlord entitled to recover $200.00 in late fees?

Is the Landlord entitled to $1,400.00 in rent for July 2019?

Is the Landlord entitled to $1,400.00 in compensation for money owed or other monetary loss?

Is the Landlord entitled to withhold all or a portion of the Tenant's security or pet damage deposits towards any amounts owed?

Is either party entitled to recovery of the filing fee?

Background and Evidence

The parties agreed that the fixed-term tenancy originally started on September 5, 2017, and was set to end on June 30, 2018, that rent in the amount of $1,250.00 was due each month, and that a $625.00 security deposit was paid, which the Landlord still holds. However, the parties disagreed about the day the tenancy was supposed to start, and which day rent was due. The Tenant stated that they were supposed to move in on September 1, 2017, but the Landlord was running a Bed and Breakfast out of the rental unit and it was not in fact ready for them to move in until the September 5, 2017. As a result, the Tenant and their Legal Counsel argued that the Tenant was owed a rent credit for this four-day period. The Tenant and their Legal Counsel also argued that rent is due on the 5th of each month, not the 1st, and that the tenancy therefore runs from the 5th day of one month, to the 4th day of the following month.

The Landlord denied that the rental unit was not ready on September 1, 2017, and stated that the Tenant was moving from out of town and could not move-in sooner. The Landlord stated that the keys were provided to the Tenant before September 1, 2017, that rent is due on the 1st of each month as stated in the tenancy agreement and that no rent credit is due to the Tenant as they chose to move-in after the 1st of the month.

The Landlord sought $200.00 in late fees at $50.00 per day for late payment of rent on June 2, 2019, March 2, 2018, May 2, 2018, and September 2, 2018. The Tenant agreed that they paid rent on the above dates, however, they and their Legal Counsel argued that these do not constitute late payments as rent is not due until the 5th. The Landlord pointed to both tenancy agreements in the documentary evidence before me wherein it states that rent is due on the 1st of each month. The Landlord also pointed to the addendums to the tenancy agreements wherein the Tenant agreed to pay $50.00 per day for late rent.

Although the parties disagreed about the reasons for which a second tenancy agreement was signed, they agreed that a second fixed-term tenancy was entered into on February 1, 2018, with an end date of January 30, 2019. The parties agreed that rent in the amount of $1,400.00 was due on the 1st of each month and that a pet deposit in

the amount of $700.00 was paid. The Tenant also submitted confirmation of a $700.00 email money transfer to the Landlord.

The Landlord stated that in January of 2018 the Tenant verbally told them that they needed to find a place closer to work in another town and will be out by February 1, 2018. The Landlord stated that they were frustrated as the Tenant had signed a fixed-term tenancy agreement until June 30, 2018, but started looking for a new occupant. The Landlord stated that they secured a new occupant for February 1, 2018, at a monthly rent amount of $1,400.00. The Landlord stated that when the new occupant went to move in, the Tenant was still in the property and was refusing to move out as they had not found alternate accommodation. As a result, the Landlord stated that they were forced to refund the $1,400.00 paid for February by the new occupant and the Tenant was asked to sign a new tenancy agreement at the increased rent amount as they had given notice to end their previous tenancy and this was the amount the new occupant was going to pay. In support of this testimony the Landlord submitted a copy of a tenancy agreement in another occupant's name, effective February 1, 2018, at a rent amount of $1,400.00.

The Tenant denied having ever given notice to end their tenancy and stated that the Landlord approached them, advised them that they get more money from the unit in the summer as a Bed and Breakfast, and that if they wanted to stay, they would need to sign a new tenancy agreement at a higher rent amount. The Tenant stated that they felt like they had no choice but to sign the new tenancy agreement as the Landlord was calling them constantly and they were unable to find alternate accommodation.

The Tenant and their Legal Counsel argued that the new tenancy agreement is actually an unlawful rent increase disguised as a new tenancy agreement. The Tenant and their Legal Counsel argued that the new tenancy agreement does not constitute a notice of rent increase in accordance with the *Act* and that in any event, even if it did, the earliest rent could have been increased was September 2018. They also argued that the $150.00 increase was in excess of the allowable rent increase amount. The Tenant therefore sought a $2,550.00 rent refund at $150.00 per month, for 17 months (February 1, 2018 – June 30, 2019).

The Landlord agreed that no notice of rent increase was given and reiterated that $1,400.00 was payable under the second tenancy agreement as the Tenant had given notice and their first tenancy had ended. The Landlord stated that they were entitled to charge this rent increase as it was a new agreement and that is what was agreed upon

by the new occupant, who ultimately could not move into the rental unit due to the Tenant's actions.

The Landlord denied threatening to have the Tenant evicted if they did not sign a new tenancy agreement as the legislative changes that came into force in December of 2017 prohibited this practice and that in any event, they weren't interested in doing short-term rentals, as demonstrated by the longer-term tenancy agreements signed by the parties in the documentary evidence before me.

The Tenant stated that the Landlord had no right to rent out his rental unit as he had not given notice, and that the Landlord therefore did so at their own loss. Further to this, the Tenant and their Legal Counsel argued that the Landlord did not submit any documentary or other evidence that the Tenant gave notice, or that the new occupant either paid or was refunded rent in the amount of $1,400.00, and that the Landlord therefore did not suffer a $1,400.00.

The parties agreed that the tenancy ended on June 30, 2019. The Parties also agreed that a move-in condition inspection and report were completed in compliance with the *Act* and regulations at the start of the first tenancy but that no move-out condition inspection or report were completed at the end of either of the tenancies. The Landlord stated that there was a verbal agreement with the Tenant that they would do the move-out condition inspection at 1:00 P.M. on June 30, 2019. The Landlord stated that at approximately 11:00 A.M. on June 30, 2019, the Tenant called them and asked for additional time to move out, and that the Landlord obliged. The Landlord stated that when they arrived at the property between 5:00-6:00 P.M. on June 30, 2019, to complete the inspection, the Tenant was not there, but some of their belongings were still outside in the yard. The Landlord stated that the Tenant had left the unit unlocked and the key inside so that they could begin cleaning and had agreed to return after they took the last load of their belongings to their new address. However, the Landlord stated that after picking up the last load of their belongings, the Tenant never returned, and therefore the inspection was not completed.

The Tenant denied any agreement to complete a condition inspection at 1:00 P.M. on June 30, 2019, or making any subsequent agreements for an inspection. The Tenant stated that the Landlord never mentioned a condition inspection before moving out, or at any point on June 30, 2019, despite having multiple interactions with the Tenant that date. However, the Tenant did agree that they moved their remaining belongings into the yard and left the keys inside the rental unit for the Landlord so that the Landlord could have entry to the rental unit for the purposes of cleaning.

The Landlord stated that after the Tenant moved out, the rental unit required significant cleaning as it was left dirty and the unit and furniture rented to the Tenant as part of the tenancy agreement smelled of pets and pet urine. The Landlord stated that the stove itself was so dirty that it took 2-3 hours to clean. The Landlord stated that $840.00 was paid for cleaning of the rental unit and submitted a receipt for my consideration. In support of their testimony, the Landlord also submitted a condition inspection report signed and dated by both the Tenant and the Landlord on September 4, 2017, indicating the condition of the rental unit as fair at the start of the original tenancy.

The Tenant stated that the rental unit had previously been used as a Bed and Breakfast and that as a result, it was not in very good condition at the start of the tenancy. Additionally, the Tenant stated that they and their partner, who is a professional cleaner, had spent two days cleaning the rental unit prior to moving out. As a result, the Tenant stated that the unit was clean, and the Landlord is not entitled to the cleaning costs sought. Further to this, the Tenant and their Legal Counsel questioned the validity of the cleaning receipt as it does not state that the cleaning was necessary, the extent of the services provided, or the name of the cleaner.

The Tenant stated that they sent the Landlord their forwarding address by regular mail on September 28, 2019. In support of this testimony the Tenant provided a photograph of an envelope addressed to the Landlord at their address for service listed on the tenancy agreement, a photograph of them in from of a mailbox holding the previously mentioned envelope, a photograph of a completed damage/security deposit refund form dated September 21, 2019, requesting the return of $1,325.00 in deposits at the forwarding address provided or by email money transfer, and verification that the photograph in front of the mailbox was taken on September 28, 2019.

The Landlord denied receipt of this envelope containing the Tenant’s forwarding address and their request for the return of their deposits. The Landlord stated that after the tenancy ended, they received no contact from the Tenant until they were served with the Tenant’s Application by registered mail on November 18, 2019. The Landlord stated that they then filed their cross-Application seeking to retain the Tenant’s security and pet damage deposits for cleaning costs and other monetary loss on November 23, 2019.

Analysis

Although the Tenant and their legal counsel argued that the Tenant is entitled to a four-day rent credit for the period of September 1, 2017 – September 4, 2017, the Tenant did not seek this amount in their Application or Amendment. Rule 6.2 of the Rules of Procedure states that the hearing is limited to matters claimed on the application unless the arbitrator allows a party to amend the application. As the Tenant did not seek to amend their Application at the hearing to include this amount, I have not considered the Tenant's claim for this amount in rendering my decision.

Section 90 of the *Act* states that a document given or served by mail is deemed received 5 days after the mailing, unless earlier received. However, Residential Tenancy Policy Guideline 12 also states that the Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that be done, and that a party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received.

I am satisfied by the Tenant's affirmed testimony and documentary evidence that they mailed the Landlord their forwarding address and their request for the return of their security and pet damage deposits on September 28, 2019, in accordance with section 88 (c) of the *Act*. However, rule 3.5 of the Rules of Procedure states that at the hearing, the Applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with all evidence as required by the *Act* and the Rules of Procedure, not just that it was sent. Although I have no reason to believe that the Tenant failed to send the aforementioned documents to the Landlord by regular mail on September 28, 2019, the Landlord denied receipt. As a result, I find that the Tenant has not satisfied me that the document was served on the Landlord as they have provided no evidence that it was actually received.

Although section 88 (c) of the *Act* allows some documents to be sent or served by regular mail, I find it important to note that there are other options for the service of documents that allow for confirmation of service and receipt, such as registered mail or personal service with a witness. By choosing to send their forwarding address by regular mail, I find that the Tenant took on the risk that their mail would not be received and allowed the Landlord the opportunity to rebut the deeming provisions in the hearing by testifying that the mail was never received, which they have done. I therefore find that I am not satisfied that the Landlord was served with the Tenant's forwarding address for the purpose of returning their security and pet damage deposits until

November 18, 2019, the date they acknowledge receipt of the Tenant's Application. As a result, I find that the Tenant's Application dated October 29, 2019, seeking the return of double the amount of their security and pet damage deposit was premature.

Residential Tenancy Policy Guideline 17 states that the arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the *Act*, on a landlord's application to retain all or part of the security deposit or a tenant's application for the return of the deposit. As the Landlord has applied to retain all or a portion of the security and pet damage deposit, I will deal with the security deposit and pet damage deposit in this decision as part of the Landlord's Application. As such, I have dismissed the Tenant's Application seeking the return of double their security and pet damage deposit without leave to reapply.

Although the Landlord sought $200.00 in late fees at $50.00 per day for late payment of rent, section 7 (1) (d) and 7 (2) of the regulation states that a landlord may charge an administration fee of not more than $25.00 for late payment of rent and only if the tenancy agreement provides for the payment of this fee.

Although the addendum to the tenancy agreement allows the Landlord to charge the Tenant a $50.00 per day late fee, this section of the addendum is in contravention of section 7 (1) (d) of the regulation. Section 5 of the *Act* states that landlords and tenants cannot contract outside of the *Act* or regulations and that any attempt to do so will be of no effect. As a result, I find that the portion of the addendum requiring the Tenant to pay a $50.00 per day late fee for the late payment of rent is null and void and I therefore dismiss the Landlord's claim for $200.00 in late fees without leave to reapply.

Although I appreciate the Landlord's position in relation to the increase in rent between tenancy agreements, Residential Tenancy Policy Guideline 30, section H, is clear that a rent increase between fixed term tenancy agreements with the same tenant for the same unit is subject to the rent increase provisions of the Legislation, including requirements for timing and notice. The Policy Guideline clearly states that to raise the rent above the maximum annual allowable amount, the landlord must have either the tenant's written agreement or an order from an arbitrator and that if the tenant agrees to an additional rent increase, the landlord must still issue a Notice of Rent Increase along with a copy of the tenant's signed agreement to the additional amount. It also states that the tenant must be given three full months' notice of the increase.

The Landlord acknowledged in the hearing that no Notice of Rent Increase was given and there is no evidence before me that the Landlord had either an order from an

arbitrator or separate written permission from the Tenant to increase the rent amount above the maximum annual allowable amount. Further to this, rent may only be increased every 12 months, and as a result, I find that the earliest rent could have been increased is September 2018, and then, only upon serving the Tenant with proper notice of the rent increase in accordance with the *Act*. As the second fixed-term tenancy agreement was for the same Tenant residing in the same rental unit, I find that the Landlord was obligated to comply with the rent increase provisions of the Legislation and was therefore not permitted to increase the rent by $150.00 per month when going from one fixed-term tenancy agreement to another. As a result of the above, I find that the Tenant's rent remained at $1,250.00 per month and the Tenant is therefore entitled to a rent refund of $2,550.00 pursuant to section 43 (5) of the *Act*; $150.00 per month for 17 months including February 2018 – June 2019.

The Landlord sought $1,400.00 in compensation for money refunded to the new occupant who was unable to move in on February 1, 2018, in accordance with their tenancy agreement. I am satisfied based on the affirmed testimony of the Landlord and the copy of the tenancy agreement in the documentary evidence before me, that the new occupant was to pay $1,400.00 for February 1, 2018. However, there is no documentary or other evidence before me that the new occupant ever paid this money to the Landlord or that this money was ever refunded. As a result, I find that the Landlord has failed to satisfy me of this loss and I therefore dismiss this claim without leave to reapply.

Although the parties disagreed about why a move-out condition inspection and report were not completed, ultimately there was agreement that a condition inspection was not completed together at the end of the tenancy, and that a condition inspection report was not completed by the Landlord in the absence of the Tenant. However, the Landlord stated that the rental unit, the furniture, and the appliances rented to the Tenant were dirty and that the rental unit smelled of pet urine. In support of their testimony they submitted a receipt in the amount of $840.00 for the cost of cleaning. Although the Tenant stated that the rental unit was already in poor condition at the start of the tenancy and that they left it clean and undamaged at the end of the tenancy, they did not submit any documentary evidence in support of this testimony. The Tenant and their Legal Counsel also questioned the validity of the cleaning receipt stating that it does not state that the cleaning was necessary, the extent of the services provided, or the name of the cleaner.

While I appreciate that the receipt does not state the exact nature or extend of the cleaning provided or that cleaning was “necessary”, I do not find this fatal to the Landlord’s claim. The Tenant did not provide any documentary evidence to support their testimony that cleaning was not required whereas the Landlord provided a receipt showing cleaning services in the amount of $840.00 rendered in respect to the rental unit and a move-in condition inspection report signed by both the Tenant and the Landlord on September 4, 2017, indicating that the condition of the rental unit at the start of the tenancy was fair. Further to this, the parties agreed that the Tenant had not fully moved-out of the rental unit by 1:00 P.M. on June 30, 2019, and that they had to leave belongings in the yard as they had not been able to move-out on time.

As a result, I question the reliability and credibility of the Tenant’s statement that the rental unit was in poor condition at the start of the tenancy and that the rental unit had been fully cleaned. It does not make sense to me that the rental unit could be adequately cleaned while all their possessions remained in the rental unit. Further to this, the Tenant acknowledged giving the Landlord access to the rental unit for the purpose of cleaning, which is inconsistent with their testimony that the rental unit was already clean. On a balance of probabilities, I am therefore satisfied that the Landlord had the rental unit cleaned because it was not left reasonably clean and undamaged as required by section 37 (2) (a) of the *Act* and smelled of pet urine as stated by the Landlord. As a result, I find that the Landlord is entitled to recovery of the $840.00 cleaning costs.

Although the Landlord claimed $1,400.00 for loss of July 2019 rent in their Application, the cleaning receipt is dated July 1, 2019, and they did not provide any testimony or point to any other documentary evidence in the hearing regarding why they would be entitled to loss of rent for the entire month of July 2019, or what efforts were made to minimize this loss. As a result, I am not satisfied that the Landlord suffered any loss of rent for July 2019, that any such loss, should it exist, was a result of a breach of the *Act* or tenancy agreement on the part of the Tenant, or that the Landlord acted reasonably to mitigate any loss that occurred by having the unit cleaned and re-rented as soon as possible. I therefore dismiss this claim without leave to reapply.

As neither party was fully successful in their Applications, I decline to grant either party recovery of the filing fee.

Having render my decision in relation to the monetary claims made by the parties, I will now turn my mind to whether the Landlord is entitled to retain all or a part of the Tenant’s security and pet damage deposits. I have already found above that the

Landlord is entitled to $840.00 in cleaning costs and that the Tenant is entitled to a rent refund in the amount of $2,550.00.

Section 38 (1) of the *Act* states that unless the Landlord has an order from the Branch pursuant to sections (3) or (4) that applies to the deposits, or written agreement from the Tenant to retain all or a portion of the security or pet damage deposits, the Landlord must either return the deposits to the Tenant in full, or file and Application in relation to the deposits with 15 days of the end of the tenancy or the date the forwarding address was received in writing, whichever is later. There is no evidence that the Landlord was entitled to withhold all or a portion of the deposits by the Tenant or the Branch, and as I have already found that the Landlord received the Tenant's forwarding address in writing on November 18, 2019, I therefore find that the Landlord complied with section 38 of the *Act* when they filed their Application seeking to retain all or a portion of the Tenant's security deposit and pet damage deposit in relation to cleaning costs and other money owed on November 23, 2019.

While I am not satisfied that the Landlord complied with section 35 (2) of the *Act* by giving the Tenant two opportunities to complete the move-out condition inspection, or that they completed the inspection in the absence of the Tenant and gave the Tenant a copy of the move-out condition inspection report in compliance with the regulations, I find that the extinguishment provision under section 36 (2) of the *Act* does not apply as the Landlord filed their Application seeking authorization to withhold the security and pet damage deposits for numerous reasons unrelated to damage to the rental unit. As a result, I have applied section 72 (2) (b) of the *Act* and I authorize the Landlord to withhold $840.00 from the $1,325.00 in deposits held, the balance of which is to be returned to the Tenant. The Tenant is not entitled to any interest under the regulations.

Based on the above, and pursuant to section 67 of the *Act*, the Tenant is therefore entitled to a Monetary Order in the amount of $3,035.00; $2,550.00 for a rent refund, plus the $485.00 remaining balance of the security and pet damage deposits owed to them.

Conclusion

Pursuant to section 67 of the *Act*, I grant the Tenant a Monetary Order in the amount of $3,035.00. The Tenant is 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: April 7, 2020

Residential Tenancy Branch