Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, FFL, MNDCL-S

Introduction

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

- A monetary award for damages and loss pursuant to section 67;
- Authorization to retain the security deposit for this tenancy pursuant to section 38; and
- Authorization to recover the filing fee from the tenants pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The tenants were assisted by an advocate.

As both parties were present service was confirmed. The parties each testified that they were in receipt of the materials. Based on the testimonies I find that each party was served with the respective materials in accordance with sections 88 and 89 of the *Act*.

At the outset of the hearing the respondents corrected the spelling of their names and the style of cause was amended to reflect the correct spelling.

Issue(s) to be Decided

Is the landlord entitled to a monetary award as claimed?
Is the landlord entitled to retain the security deposit for this tenancy?
Is the landlord entitled to recover their filing fee from the tenants?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

There was a previous hearing under the file number on the first page of this decision where the landlord's application was dismissed with leave to reapply. That decision did not change or extend any statutory timelines.

The parties agree on the following facts. This tenancy began on September 1, 2017. Monthly rent was $1,500.00 payable on the first of each month. The written tenancy agreement provides that included in rent are utilities including water, electricity and heat. A security deposit of $750.00 was paid and is still held by the landlord. No condition inspection report was prepared at anytime for this tenancy.

Each party submitted a copy of the written tenancy agreement into evidence. The two copies contain some differences. The copy of the agreement submitted by the landlord provides the address for service of the landlord as the rental address. The landlord's version of the agreement includes a handwritten clause which states "if the utility fee of the utility fee of one year is less than $1200, refund make up the balance balance" [reproduced as written]

The landlord submits that the handwritten clause allows the landlord to charge utility fees in excess of $1,200.00 for a calendar year. The landlord submits that the utility usage during the tenancy exceeded $1,200.00 per year and now seeks a monetary award for the difference.

The landlord testified that the tenants provided notice to end the tenancy in writing on May 29, 2019 by leaving a letter at the address for service of the landlord. The landlord says that the tenant did not provide their notice in any other manner nor did they phone the landlord to inform them of their intentions. The landlord testified that in any event they were out of the country and did not receive the notice until sometime in June 2019. The landlord says that the effective date of the notice would therefore be July 31, 2019 and that the tenants are liable for an additional month's rent.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay

compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

The parties agree that the tenants gave written notice to end the tenancy dated May 29, 2019. The landlord submits that the tenants gave notice in writing by leaving it at the address for service provided on their version of the tenancy agreement. The landlord submits that the tenants did not follow up on their notice or attempt to call or email the landlord. I find the landlord's expectations to be unreasonable. The landlord's own documentary evidence shows that the tenancy agreement contained an address for service on the landlord, the rental address. In the absence of any evidence that the landlord subsequently informed the tenants of a change in service address I find that the tenants acted reasonably and in accordance with the Act by provided the landlord with their notice at the service address. I find that the landlord was served with the notice to end tenancy in accordance with section 88 of the *Act* and sufficiently served in accordance with section 71 of the *Act*.

Section 45 of the Act provides that a tenant may end a tenancy by giving the landlord notice effective on a date one month after the date of the notice and the day before the date when rent is payable under the tenancy agreement.

As such, I find that the effective date of the tenants' notice was June 30, 2019 and there was no obligation on the tenants to pay the rent for July 2019. Consequently, I dismiss this portion of the landlord's application.

The landlord submits that the tenancy agreement provides that the tenants are obligated to pay additional amounts for utilities when their usage exceeds $1,200.00 for a calendar year. I do not find that the evidence supports the landlord's interpretation. A plain reading of the handwritten clause found in the landlord's copy of the tenancy agreement is that the tenants are entitled to a refund if usage is under $1,200.00. I find that there is no clear clause that obligates the tenants to pay additional utilities annually. I do not find the term "make up the balance balance" to be clear that there is an obligation on the tenants for utilities. I further note that this is a clause found solely in the copy of the tenancy agreement submitted by the landlord, the tenant's copy of the agreement is silent on this point.

I found much of the landlord's testimony to be without evidentiary support, an air of reality or merit. The landlord claimed that this agreement was made with the tenants' parents and that the tenants did not dispute the existence of the clause throughout the tenancy. I do not find the landlord's submissions to be convincing or logically consistent. If this was an agreement made in the absence of the tenants, it would not be enforceable in any event. There is no indication that the tenants' parents are a party to this agreement or have any authority to enter into a binding agreement on the tenants' behalf. I find the landlord's insistence that the tenants' failure to dispute the clause as evidence of its existence to be logically inconsistent. If the subject clause is found solely in the landlord's version of the tenancy agreement then the tenants would be unaware of its existence to dispute it. I find the landlord's evidence including their documentary materials and testimony has not met their evidentiary burden and consequently dismiss this portion of the application.

Section 38 of the *Act* requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to section 38(6) of the *Act* equivalent to the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy.

I accept the evidence of the parties that this tenancy ended June 30, 2019 and the tenants had provided a forwarding address prior to the end of the tenancy. I accept the evidence of the parties that the tenants have not given written authorization that the landlord may retain any portion of the security deposit.

The landlord made the present application for authorization to retain the security deposit on November 27, 2019 well past the 15 days from June 30, 2019 provided under the Act. The earlier decision of October 24, 2019 clearly states "This decision does not change or extend any statutory timelines under the Act."

Furthermore, the parties gave evidence that no condition inspection report was prepared at any time during the tenancy. Section 36 of the *Act* provides that the right of a landlord to claim against a security deposit is extinguished if they do not comply with the requirements of section 35 in offering the tenant 2 opportunities for an inspection and completing a condition inspection report.

I do not find the landlord's evidence that they attempted to contact the tenants to schedule a move-out inspection to be believable or supported in the documentary materials. In any event the landlord did not prepare an inspection report at any time for this tenancy whether together with the tenant or on their own. As such I find that the landlord has extinguished their right to claim against the security deposit for this tenancy.

Based on the undisputed evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the tenants' security deposit in full within the required 15 days. I accept the tenants' evidence that they have not waived their right to obtain a payment pursuant to section 38 of the *Act* as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenants are entitled to an $1,500.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

As the landlord was unsuccessful in their application they are not entitled to recover their filing fee.

Conclusion

The landlord's application is dismissed in its entirety without leave to reapply.

I issue a monetary order in the tenants' favour in the amount of $1,500.00. 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 27, 2020

Residential Tenancy Branch