



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BONNIEHON MANAGMENT INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

MNDCT, FFT

Introduction

On November 19, 2019, the Tenant submitted an Application for Dispute Resolution under the *Residential Tenancy Act* ("the Act") to request the return of the security deposit, and to recover the cost of the filing fee. The matter was set for a conference call.

Both the Tenant and Landlord attended the hearing and were each affirmed to be truthful in their testimony. The Tenant and Landlord were provided with the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. The Tenant and the Landlord testified that they received each others documentary evidence that I have before me.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Has there been a breach of Section 38 of the *Act* by the Landlord?
- Is the Tenant entitled to the return of his security deposit, pursuant to section 38 of the *Act*?
- Is the Tenant entitled to recover the cost of the filing fee?

Background and Evidence

The testimony of both parties that this tenancy was to start on Nov 15, 2019, that rent was to be \$1,700.00 per month, plus \$70.00 a month in parking was to be due by the

first day of each month. The parties agreed that the Tenant paid a \$850.00 security deposit, and prepaid \$885.00 in rent and parking for November 2019. The Tenant submitted a copy of the tenancy agreement into documentary evidence.

Both the Landlord and the Tenant agree that the Tenant did not move into the rental unit, and that the tenant advised the Landlord that they no longer required the tenancy on November 3, 2019, the day after signing the tenancy agreement.

The Tenant testified that the Landlord told them they would be keeping the security deposit and the prepaid November rent and parking as a liquidated damages. The Tenant testified that he felt that the \$1,735.00 liquidated damages charge was excessive and offered the Landlord \$500.00. The Tenant submitted the email exchange between the Landlord and themselves into documentary evidence.

The Landlord testified they were still holding the security deposit and prepaid November rent and parking fees for this tenancy. The Landlord also testified that as of the date of this hearing, they had not filed an application to make a claim against the security deposit or prepaid rent for this tenancy.

The Landlord testified that the \$500.00 offer from the Tenant was not acceptable to the Landlord. The Landlord testified that they had made an offer to the Tenant to end the fixed term tenancy early for the payment of one month's rent, and that is why they kept the Tenant's prepaid rent, parking and security deposit.

The Tenant testified that they did not accept the Landlord's offer of one month's rent to end the fixed term tenancy early, as they had ended the tenancy within 24 hours of signing the tenancy agreement and that they believe that the Landlord had sufficient time to secure a new renter for the rental unit before the November 15, 2019 start date of this tenancy.

The Landlord testified that they did not attempt to locate a new renter to take over this tenancy, as they were renovating on the rental unit, as they had originally planned before entering in to this tenancy agreement. The Landlord confirmed that they did not obtain written approval from the Tenant to keep the prepaid rent, parking and security deposit that they collected for this tenancy.

Analysis

Based on the testimony, the documentary evidence before me, and on a balance of probabilities, I find as follows:

I have reviewed the tenancy agreement signed by these parties on November 2, 2019, and I find that the parties entered into a one-year and two-week fixed term tenancy, beginning on November 15, 2019, and ending December 1, 2020, in accordance with the *Act*. I also accept the agreed upon testimony that the Tenant paid a \$850.00 security deposit and prepaid the November rent and parking for this tenancy, in the amount of \$885.00.

The parties also agreed that the Tenant gave Notice to the Landlord to ending this tenancy early on November 3, 2019, one day after signing the tenancy agreement. Section 45(2) how a tenant can end a fixed term tenancy, stating the following:

Tenant's notice

45 (2) *A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Section 45(2b) of the *Act* states that a tenant cannot end a tenancy agreement earlier than the date specified in the tenancy agreement. Therefore, this tenancy could not have ended in accordance with the *Act* until December 1, 2020. I find that the Tenant failed to comply with the *Act* when they issued notice to the Landlord to end the tenancy as of November 3, 2019.

In this case, the Tenant is requesting the recovery of their prepaid rent, parking and their security deposit, in the amount of \$1,735.00, consisting of \$850.00 in rent for the period of November 15 to November 30, 2019, \$35.00 in parking fees for the same period and the security deposit in the amount of \$850.00.

When considering a request for a monetary award for compensation due to a loss, I must consider sections 7 and 67 of the *Act*. Which states that a party that makes an application for monetary compensation against another party has the burden to prove their claim. The Residential Tenancy Policy Guideline #16 Compensation for Damage or Loss provides guidance on how an applicant must prove their claim. The policy guide states the following:

“The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To determine whether compensation is due, the arbitrator may determine whether:

- A party to the tenancy agreement has failed to comply with the *Act*, regulation or tenancy agreement;
- Loss or damage has resulted from this non-compliance;
- The party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- The party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

In determining if the requested compensation is due, I must first determine if there has been a breach of the *Act* during this tenancy. While it has already been determined that the Tenant breached the *Act*, I find that the Tenant's breach alone did not presume the automatic forfeiture of the prepaid rent, parking and security deposit to the Landlord, for this tenancy. Section 7(2) of the *Act* states the following:

Liability for not complying with this Act or a tenancy agreement

7 (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Although I acknowledge that it is not the Landlord who is making the claim for compensating in this case, I find that the Landlord still holds a burden to prove that they were in compliance with the *Act's* requirement to minimize their losses due to the Tenant's breach, and that they were legally justified in retaining the Tenant's prepaid rent, parking and security deposit for this tenancy.

I accept the testimony of the Landlord, provided during these proceedings, that they did not attempt to locate a new renter for this rental unit after the Tenant provided them with their notice to end this tenancy. I also accept that the Landlord has not applied for dispute resolution, to claim against the security deposit or the prepaid rent for this tenancy.

I have reviewed the testimony and documentary evidence submitted to these proceedings, and I find that the Landlord breached section 7(2) of the *Act*, when they did not take reasonable steps to mitigate their losses, due to the Tenant's breach, by attempting to secure a new renter for the rental unit.

I acknowledged the Landlord's argument that they had planned to renovate the rental unit before entering into this tenancy agreement, and that they decided to go ahead with the previously planned renovations, after the Tenant backout on this tenancy. However, I find that there could be no loss of rental revenue, for which the Landlord could claim entitlement to for this tenancy, as they had decided not to re-rent the unit at the end of this tenancy. There can be no loss of rental income when there was no intention to rent.

I also acknowledge the tenants claim that the Landlord had told them that they would keep the prepaid rent, parking and the security deposit for this tenancy, as liquidated damages. I note that there is a liquidated damages clause included on this tenancy agreement; however, the existence of that clause does not negate the requirement of the Landlord to acquire permission, from either the Tenant or through an order of the Residential Tenancy Branch to retaining prepaid amounts for this tenancy, in this case, the Landlord has neither.

Accordingly, I find that due to the Landlord's breach of section 7(2) of the *Act* combined with the fact that they did not obtain permission from the Tenant or the Residential Tenancy Branch, to retain these funds, that the Landlord is not entitled to retain the prepaid rent for this tenancy.

Consequently, I find that the Tenant has established an entitlement to the recovery of their prepaid rent for this tenancy, and I grant the Tenant a monetary award in the amount of \$885.00 for the recovery of their prepaid rent and parking fees for this tenancy.

The Tenant is also claiming for the return of their \$850.00 security deposit paid for this tenancy. Section 38(1) of the *Act* gives the landlord 15 days from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing

to file an Application for Dispute Resolution claiming against the deposit or repay the security deposit to the tenant.

Return of security deposit and pet damage deposit

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.

I have reviewed all of the evidence before me, and I find that there is no documentary evidence to show that the Tenant provided the Landlord with their forwarding address, in writing, as required by the Act, before filing this application.

I acknowledge that the Tenant's premature application, for the return of their security deposit, was not discussed during these proceedings. However, upon subsequent review of the documentary evidence following these proceedings, this Arbitrator noted the Tenant's early application. Consequently, I find that the Tenant prematurely submitted their application for these proceedings, in regard to the return of their security deposit, and did not wait the required 15 days before making their application. Therefore, I must dismiss the Tenant's application with leave to reapply.

However, I find that the Tenant has provided their forwarding address to the Landlord, on their application for these proceedings. Accordingly, I find that the Landlord is in receipt of the Tenant's forwarding address as of the date of these proceedings, May 28, 2020.

Consequently, I find that the Landlord has until June 12, 2019, to comply with section 38(1) of the *Act* by either repaying the deposit in full to the Tenant or submitting an Application for Dispute resolution to claim against the deposit.

If the Landlord fails to return the security deposit to the Tenant or file a claim pursuant to section 38(1) of the *Act*, the Tenant will be within their rights to apply for the return of

their security deposit as of June 13, 2020. The Tenant is also granted leave to apply for the doubling provision pursuant to Section 38(6b) of the *Act* if an application to recover their security deposit is required.

Section 72 of the Act gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Tenant has been successful in this application, I find that the Tenant is entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

I dismiss the Tenant's claim for the recovery of their security deposit with leave to reapply.

I grant the Tenant a **Monetary Order** in the amount of **\$985.00**. 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: May 29, 2020

Residential Tenancy Branch