Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Laurier House
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: MNDCT, MNSD, FFL

Introduction

In this dispute, the tenants seek the return (and doubling) of their security deposit, pursuant to section 38 of the *Residential Tenancy Act* (the "Act"). They also seek compensation and recovery of the filing fee under sections 67 and 72 of the Act.

The tenants applied for dispute resolution on February 29, 2020 and a dispute resolution hearing was held on July 7, 2020, by way of teleconference. The tenants and the landlord's building manager (the "landlord") attended the hearing, and they were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses. No issues of service were raised by the parties.

I have only reviewed and considered oral and documentary evidence submitted meeting the requirements of the *Rules of Procedure,* to which I was referred, and which was relevant to determining the issues of this application.

Issues

1. Are the tenants entitled to the return (and doubling) of their security deposit?
2. Are the tenants entitled to compensation as claimed?
3. Are the tenants entitled to recovery of the filing fee?

Background and Evidence

The tenancy began on June 1, 2019, and it was a fixed-term tenancy that was to end on May 31, 2020. Monthly rent was $2,000.00 and the tenants paid a security deposit of $1,000.00. A copy of the written tenancy agreement was submitted into evidence.

On December 24, 2019, the tenants gave notice to the landlord that they would be ending the tenancy effective January 31, 2020. The tenants testified that they served the notice by slipping it under the landlord's office door. A copy of an email exchange was also tendered into evidence, and which shows the tenants' intention to end the tenancy effective January 31, 2020.

The tenants vacated the rental unit on January 30, 2020, and on February 10, 2020 the parties completed a Condition Inspection Report (the "Report"), which was also submitted into evidence. On one page of the Report there is a box with the heading "Security Deposit Statement," and within that box there is an entry for a "window cover cleaning" amount of $200.00 and an entry for a "liquidated damages" amount of $350.00. At the bottom of the box there is the statement "I agree with the amounts noted above and authorized deduction of the Balance Due Landlord from my Security Deposit and/or Pet Damage Deposits." I note that there is no amount written in the line that reads "BALANCE DUE LANDLORD". One of the tenant's signatures appears on the signature line, and it is dated to have been signed on February 10, 2020. Below that is the tenants' forwarding address.

At the beginning of the hearing the tenants testified that they are seeking the full return of their security deposit along with the doubled amount. During the tenants' rebuttal and final submission, the tenant testified that she did not agree with some additional amounts that the landlord seemed to have added into the Security Deposit Statement after the Report was completed and signed, and merely expected to be deducted the $550.00 from their security deposit. She expected to be refunded $450.00.

The second aspect of the tenants' application is a claim for $2,000.00. This amount represents rent that they agreed to pay the landlord for February 2020. They testified that they did their best to help the landlord find a new tenant, including advertising.

While the tenants understood that they were liable for rent if the landlord was unable to rent the rental unit for February 1, 2020, they argued that the landlord did not take all reasonable steps in finding new tenants, and that as such they should not have been required to pay for February's rent. They submitted that a month was more than sufficient to have found a new tenant, that they provided full access to the rental unit for showings, and that they simply "don't understand why [the landlord] couldn't rent it in one month." As it turns out, the landlord was able to secure a new tenant on March 14 for occupancy on April 15, 2020.

In her testimony, the landlord referred me to a Breach of One Year Lease document, dated December 24, 2019, and which includes the following language (reproduced as written, but formatted for clarity):

> BREACH OF ONE YEAR LEASE
>
> Date: December ~~31~~ 24, 2029
>
> Resident: [Tenants' names] from unit # [rental unit] decide to move out and clearly understanding for 1year breach of lease term.
>
> [Landlord] staff will be try to re-renting your unit, but Resident 's are still responsible to pay the rent payments in full until the unit # [rental unit] will be re-rented to new residents.
>
> The rental payments for unit # [rental unit] should be done on time only by money order or cash.
>
> When the unit # [rental unit] will be re-rent to the new residents, we will inform you on time to stop with your payments at [Landlord] for unit # [rental unit]

The landlord reiterated that the tenants "clearly understood" what a breach would mean and that they remained responsible for the rent until a new tenant was secured. She referred me to the emails in which the tenants acknowledge the breach.

As to the showings to prospective tenants, the landlord testified that they conducted 39 showings, whereas the tenants disputed this, and argued that the number was "a bit less." Some of the showings where, in fact, of other units in the building. Continuing, the landlord testified that they "did our best to re-rent" the rental unit, they advertised the rental unit for the same rent as what the tenants were paying, and for the same services and utilities included in the tenancy. Ultimately, of all the showings they conducted, they received three applications, one of which bowed out for unknown reasons. As noted, a new tenant signed a tenancy agreement on March 14 for April 15 occupancy.

The tenants argued that the limited office hours and limited showing times (10 AM to 4 PM) would prevent some prospective tenants from viewing the rental unit. The landlord countered this and said that these hours are acceptable and that they also conduct showings (each showing lasts between 20 to 30 minutes) on Saturdays. They are closed on Sundays. She reiterated that they "did our best to re-rent."

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Claim for Return (and Doubling) of Security Deposit

Section 38(1) of the Act states the following regarding what a landlord's obligations are at the end of the tenancy with respect to security and pet damage deposits:

> Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a) the date the tenancy ends, and
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> (b) the date the landlord receives the tenant's forwarding address in writing,
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> 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.

Also important is subsection 38(4)(a) of the Act, which states that

> A landlord may retain an amount from a security deposit or a pet damage deposit if, […] at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant […]

While the "Balance Due Landlord" line was incomplete on the Report, the statement in that Report does, in fact, state "I agree with the amounts noted above." The tenant signed the Report, acknowledging that she accepted this statement. Moreover, the tenant testified that at the time she signed the Report she expected to only receive the balance ($450.00) of the security deposit after $550.00 was deducted.

Based on this evidence and testimony of the tenant, I conclude that the tenants agreed in writing that the landlord could retain the amount of $550.00, in compliance with section 38(4)(a) of the Act. As such, the only amount to be returned was $450.00.

Regarding the forwarding address, the landlord received the tenants' forwarding address in writing on February 10, 2020. There is no evidence that the landlord, by February 25, 2020, either made an application for dispute resolution against the tenants or refunded the security deposit balance of $450.00.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the tenants have proven their claim for the return of $450.00 of their security deposit.

Section 38(6) of the Act states that

> (6) If a landlord does not comply with subsection (1), the landlord
>
> (a) may not make a claim against the security deposit or any pet damage deposit, and
>
> (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

Here, as the landlord did not comply with section 38(6) of the Act, I find that the landlord must pay the tenants double the amount of the balance of the security deposit in the amount of $900.00, pursuant to section 38(6)(b) of the Act.

Claim for Compensation for "Rent"

The tenants claim $2,000.00 for monies that they paid for rent for February 2020 and argue that they should be compensated for this payment because the landlord did not fulfill its obligations in making all reasonable efforts in finding a new tenant.

The tenants gave notice to end the tenancy effective January 31, 2020. The landlords accepted the tenants' notice, notwithstanding that the notice was to end the fixed-term tenancy which was set to end on May 31, 2020. The tenants vacated the rental unit on January 30, 2020. Nevertheless, they paid "rent" for February 2020.

“Rent” is defined in section 1 of the Act as follows:

> “rent” means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following: (a) a security deposit; (b) a pet damage deposit; (c) a fee prescribed under section 97 (2) (k) […]

“Tenancy,” as defined in section 1 of the Act, “means a tenant's right to possession of a rental unit under a tenancy agreement.”

Finally, section 44(1)(d) of the Act states that a tenancy ends when “the tenant vacates or abandons the rental unit.” The tenants testified that they vacated on January 30, 2020, and, importantly, the landlord did not dispute this testimony. Hence, I find as a fact that the tenants vacated the rental unit, and tenancy ended, on January 30, 2020.

Given that the tenancy ended on January 30, 2020, the tenants did not have a right to possession of the rental unit after this date. Thus, as there existed no tenancy after January 30, 2020, the $2,000 paid by the tenants to the landlord cannot be considered “rent” (despite what the parties may have erroneously labeled the payment). Moreover, the “Breach of One Year Lease” document is fundamentally flawed, insofar as this tenancy was concerned: ongoing rent payments cannot be collected by the landlord if no right of possession exists after tenant vacates a rental unit.

This is not to say, however, that a landlord does not have a legal basis for a claim for loss of rent against a tenant who ends their fixed-term tenancy before they are permitted to do so. Though, any such claim must be initiated by making the proper application for dispute resolution under the Act.

Where does this leave the tenants? There is no section of the Act, the regulations, or the tenancy agreement that the landlord breached by which the tenants may seek compensation. However, the common law, including principles of contract law, will apply (section 91 of the Act). Specifically, the principle against unjust enrichment applies in these circumstances. The underlying principle is stated in the following terms: a person who has been unjustly enriched at the expense of another is required to make restitution to the other. The tenants did not argue that this principle applies, but in the absence of any argument by either party, the principle must nevertheless be addressed.

Recovery of money paid under mistake, such as which occurred here, is a type of unjust enrichment. Under traditional law, money paid under mistake of fact — as where a payor mistakenly believes he is indebted to a payee — is considered recoverable.

The leading case on unjust enrichment is *Pettkus v. Becker,* [1980] 2 S.C.R. 834, in which the Supreme Court of Canada established that the following four factors must be proven: (1) enrichment, (2) deprivation, (3) causal connection between enrichment and deprivation, and (4) absence of juristic justification for the enrichment.

First, did the tenants suffer deprivation? Deprivation refers to any loss of money or money's worth that can take the form of a contribution or payment. In this case, a loss of money in the amount of $2,000.00 occurred, and thus I find that the tenants suffered a deprivation. Second and subsequently, I find that the landlord was enriched by the receiving of the $2,000.00 from the tenants.

Third, was there a causal connection between enrichment and deprivation? The court in *Pettkus* (at p. 152) concluded that the connection between deprivation and enrichment must be "substantial and direct." In this case, this is an issue of fact: there was a clear link between the deprivation of $2,000.00 and the landlord's enrichment of that amount.

Fourth, was there an absence of juristic justification for the enrichment? Once an applicant has established enrichment, deprivation and causal connection, a presumptive case of unjust enrichment exists and the burden shifts to the respondent to establish a juristic justification for retention of benefit. While the landlord may have, or may have had, a cause of action against the tenants for a loss of rent after January 30, 2020, there was no legal basis by which they were justified in retaining the $2,000.00 benefit in the absence of making an application for dispute resolution under the Act.

The landlord is, if it is interested in seeking compensation for loss of rent caused by the tenants' early termination of the tenancy, required to make an application and then, in a hearing, prove their case on a balance of probabilities. They would also, in any such hearing, be required to establish that they took reasonable steps in finding a new tenant. In the absence of any such application made by the landlord, however, there is, I must conclude, no juristic justification for the landlord's retention of the $2,000.00.

In summary, I conclude that the tenants are entitled to compensation in the amount of $2,000.00 as the appropriate remedy for the unjust enrichment of these monies.

Claim for Recovery of Filing Fee

Section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee. As the tenants were successful, I grant their claim for reimbursement of the filing fee of $100.00.

In summary, I award the tenants compensation in the amount of $3,000.00.

Conclusion

I hereby grant the tenants a monetary order in the amount of $3,000.00, which must be served on the landlord. Should the landlord fail to pay the tenants the amount owed, the tenants may file, and enforce, the order in the Provincial Court of British Columbia.

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: July 8, 2020

Residential Tenancy Branch