Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution (the "Application") that was filed by the Landlord under the *Residential Tenancy Act* (the "*Act*"), seeking:

- Unpaid Rent,
- Compensation for monetary loss or other money owed,
- Recovery of the filing fee; and
- Authorization to withhold all or a part of the Tenant's security deposit for money owed.

The hearing was originally convened by telephone conference call at 1:30 P.M. on April 30, 2020, and was attended by the Landlord, the Landlord's Advocate, the Tenant and the Tenant's Advocate, all of whom provided affirmed testimony. The hearing was subsequently adjourned, and an Interim Decision was rendered on May 21, 2020, in which I made several orders. For the sake of brevity, I will not repeat here the matters covered or the orders made in the Interim Decision, and as a result, the Interim Decision should be read in conjunction with this Decision. A copy of the Interim Decision was sent to the parties by the Residential Tenancy Branch (the "Branch") and the reconvened hearing was set for 11:00 A.M. on June 18, 2020.

The hearing was reconvened by telephone conference call on June 18, 2020, at 11:00 AM and was again attended by the Landlord, the Landlord's Advocate, the Tenant and the Tenant's Advocate, 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.

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

Preliminary Matters

Preliminary Matter #1

At the original hearing the Tenant and their Advocate denied receipt of any photographs or videos from the Landlord but acknowledged receipt of 96 pages of other documentary evidence. The Landlord stated that a USB containing this documentary evidence was personally served on a former advocate for the Tenant on December 6, 2020, as that advocate had assisted the Tenant in a previous matter between the parties with the Branch. The Landlord pointed to copies of email correspondence before me as proof that this advocate was served and stated that it was their understanding that this evidence was given to the Tenant by their former advocate.

The Tenant denied receipt of this documentary evidence stating that they no longer work with that advocate. The Tenant's Advocate stated that in any event, the Tenant does not have a computer and therefore would not have been able to view this evidence. Having reviewed the email correspondence referred to by the Landlord in the hearing, I am not satisfied that it demonstrates that the documentary evidence in question was in fact ever given to the Tenant. In an email dated December 17, 2019, from the Tenant's former advocate to the Landlord, the former advocate states that they are not sure that serving this documentary evidence on them at their office qualifies as valid service. In a subsequent email dated December 19, 2019, the former advocate states that they are not sure if the Tenant has seen the videos and photographs and asks if the Landlord has sent them to the Tenant. In that email the former advocate also provides the name and contact information for the Advocate currently working with the Tenant.

The ability to know the case against you and to provide evidence and testimony in your defense is fundamental to the dispute resolution process. I do not accept the Landlord's position that serving a former advocate of the Tenant constitutes valid service under the *Act*. Simply because someone was retained to act as an advocate for a party with regards to a former matter with the Branch, does not mean that this person is by default, considered to be assisting or acting on behalf of that party in future matters. I think that a finding to that effect would be illogical, contrary to common sense, and in conflict with both the service provisions of the *Act*, as well as the Rules of Procedure.

As the Landlord has no other proof that the USB containing their video and photographic evidence was ever given to the Tenant by the former advocate and

acknowledged in the hearing that it was not otherwise given to or served on the Tenant by them, I therefore find that it would be a breach of the Rules of Procedure and the principles of natural justice to accept this evidence for consideration as the Tenant did not have the opportunity to review it or respond to it. As a result, I therefore excluded this evidence from consideration.

Preliminary Matter #2

In the hearing I identified that additional documentary evidence was received by the Branch from the Landlord on April 29, 2020, only one day before the hearing, and inquired with the Landlord regarding how and when this documentary evidence was served on the Tenant. The Landlord stated that they had sent this documentary evidence to the Tenant by registered mail at the rental unit address on April 25, 2020, and provided me with the registered mail receipt and the registered mail tracking number. The Canada Post tracking website shows that this registered mail was received by the Tenant on April 29, 2020, and the Tenant confirmed receipt. However, the Tenant and their Advocate raised concerns about the late service of this evidence as it was received only one day before the hearing and the Tenant and their Advocate stated that they therefore did not have time to review, consider, and formulate a response to it prior to the hearing.

Rules 2.5 and 3.14 of the Rules of Procedure state that all evidence the Applicant wishes to rely on in the hearing should be submitted with the Application at the time it is filed, and that in any event, all evidence must be received by the Respondent not later than 14 days before the hearing. As stated above, the ability to know the case against you and to provide evidence and testimony in your defense is fundamental to the dispute resolution process. The above noted documentary evidence was sent far outside of the acceptable timeframes set out in the Rules of Procedure. Further to this, I find that one day is a woefully insufficient amount of time for the Tenant and their Advocate to have reviewed and considered this documentary evidence in preparation for the hearing.

Although rule 3.17 allows for the submission and consideration of late evidence in particular circumstances, provided the acceptance and consideration of the late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice, I find that it would be a breach of both the Rules of Procedure and the principles of natural justice to accept this evidence for consideration as the Tenant did not have the opportunity to review or respond to it and therefore the

acceptance of this documentary evidence would result in an unreasonable prejudice to the Tenant. I therefore excluded this evidence from consideration.

Preliminary Matter #3

The Tenant's Advocate stated that the Tenant's documentary evidence was emailed to the Landlord by them at 11::29 A.M. on April 14, 2020, at the email address listed for the Landlord on the Application. The Landlord stated that they have been "tied up" and were not aware of this email. The Landlord asked the Tenant's Advocate to re-send it during the hearing, which the advocate did, and the Landlord and their Advocate confirmed receipt.

Although the *Act* does not list email as an acceptable method of service, the Director's Order dated March 30, 2020, explicitly authorised email service as a result of the state of emergency between March 30, 2020 – June 24, 2020, the date it was repealed. Sections 71 (2)(b) and 71 (2)(c) of the *Act* also state that I may find that a document has been sufficiently served for the purposes of the *Act* on a date that I specify and that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of the *Act*.

Given that the Landlord listed their email address on the Application, and was clearly regularly checking their email in relation to the Application based on the copies of email correspondence with the Tenant's former advocate provided to me for consideration by the Landlord in relation to the service of their own documentary evidence on the Tenant, I therefore find that it was not only reasonable for the Tenant's Advocate to serve the Tenant's documentary evidence on the Landlord by email at this address but that it was also reasonable to expect that the Landlord received this email from the Tenant's Advocate. As a result, I find it deemed served on the Landlord three days after it was sent, on April 17, 2020. As this is within the timelines set out under rule 3.15 of the Rules of Procedure, I therefore accepted this documentary evidence for consideration.

Preliminary Matter #4

In the Interim Decision I allowed the parties to serve on one another, any additional documentary evidence that they wished to be considered at the reconvened hearing in relation to the payment of rent, or the lack thereof. During the original hearing the Landlord and their Advocate indicated that they wished to receive the Interim Decision by email and I confirmed the email addresses to be used in the hearing. The Tenant

also requested that they receive a copy of the Interim Decision via their Advocates email address, which was confirmed in the hearing.

At the reconvened hearing the Landlord stated that their additional documentary evidence was sent to the Tenant's Advocate by email on June 4, 2020, and the Advocate confirmed receipt on the Tenant's behalf. As a result, I accepted this documentary evidence for consideration.

The Tenant's Advocate stated that they sent the Tenant's additional documentary evidence to both the Landlord and the Landlord's Advocate by email at their respective email addresses on June 10, 2020, and although the Landlord's Advocate confirmed receipt, the Landlord could not recall having received it or read it.

I have already made a finding in this decision that it was acceptable for the Landlord to be served by email on an earlier occasion and I find no reason to decide differently now; especially as the Landlord served their additional documentary evidence on the Tenant by email and the Landlord's Advocate confirmed receipt at their own email address. While I appreciate the Landlord's lack of recollection with regards to the receipt of this email and the Tenant's additional documentary evidence, I find that it was incumbent upon them to be diligent in checking for the receipt of additional documentary evidence from the Tenant in advance of the reconvened hearing, based on the Interim Decision and the service of their own additional documentary evidence on the Tenant, and I find that the Landlord lacked diligence in doing so, either willfully or unintentionally. As a result, I also accepted the Tenant's additional documentary evidence for consideration.

Preliminary Matter #5

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 Branch under Section 9.1(1) of the *Act*.

Preliminary Matter #6

In their Application the Landlord sought multiple remedies under multiple unrelated sections of the *Act*. Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

I find that the priority claim relates to unpaid rent and as the other claim made by the Landlord is not sufficiently related to unpaid rent, I exercised my discretion to dismiss the Landlord's claim for compensation for monetary loss or other money owed with leave to reapply.

As a result, the hearing proceeded based only on the Landlord's Application seeking the recovery of unpaid rent, authorization to withhold all or a portion of the Tenant's security deposit for unpaid rent, and recovery of the filing fee.

Issue(s) to be Decided

- Is the Landlord entitled to recover unpaid rent?
- Is the Landlord entitled to withhold all or a portion of the Tenant's security deposit for unpaid rent?
- Is the Landlord entitled to recovery of the filing fee?

Background and Evidence

Although the Landlord submitted copies of three different tenancy agreements for my review, during the hearing they stated that none of them accurately reflect the correct terms of the tenancy agreement and that the Tenant harassed and coerced them into reducing the rent and including additional services and facilities, such as utilities (water, sewer, garbage, electricity, and heat), basic cable and internet, and access to free laundry facilities. The Tenant disagreed stating that they had entered into negotiations with the Landlord and different terms for the tenancy agreement were subsequently agreed upon than those advertised in the Landlord's listing. Although one of the tenancy agreements in the documentary evidence before me appears to have been signed by both parties, the Landlord denied that this is the correct tenancy agreement and the Tenant alleged that the Landlord fraudulently signed it on their behalf.

In any event, the parties ultimately agreed in the hearing that the tenancy began on March 1, 2017, that rent in the amount of $950.00 has been paid by the Tenant since the start of the tenancy, that rent is payable on the last day of each month, for the following month, and that a $475.00 security deposit was paid, which the Landlord still holds.

Although the parties initially disagreed about what utilities, services, and facilities were included in rent and why as outlined above, ultimately, they agreed that the above noted utilities, use of the Landlord's basic cable and internet and access to free laundry

facilities was included in rent. They also agreed that the Tenant was to pay extra for access to the fight channel. Despite the above, both parties agreed that the Tenant's access to laundry facilities has been discontinued or significantly restricted, however, they disputed why and whether the Landlord was entitled to discontinue this access under the *Act*.

In their Application and the hearing, the Landlord sought $7,391.25 in outstanding rent, however, the Tenant and their Advocate stated that this rent has been paid in full, except for $70.00 which the Tenant was entitled to deduct under the *Act* for repairs completed and paid for by them. The Tenant and their Advocate also acknowledged that $100.00 had been withheld from rent on several occasions due to the Landlord's removal of laundry access, however, the Tenant and their Advocate stated that these amounts have since been repaid as the Tenant now understands that they need either an order from the Branch or the Landlord's consent to reduce rent for this purpose. Both parties submitted documentary evidence for my review in support of their positions, such as bank statements, self-authored submissions, copies of cashed cheques and copies of previous 10 Day Notice's to End Tenancy for Unpaid Rent or Utilities.

The parties disputed the amount of rent currently payable under the tenancy agreement and whether rent had been properly increased during the tenancy in accordance with the *Act*. The Landlord stated that they served two Notices of Rent Increase on the Tenant in accordance with the *Act* and as a result, rent is currently $1,012.70. The Landlord submitted two Notice's of Rent Increase for my review in support of this testimony. The Tenant denied having ever received these from the Landlord prior to receipt of the Landlord's documentary evidence for the hearing and as a result, the Tenant and their Advocate stated that rent remains at $950.00. Additionally, the Tenant and their Advocate questioned the validity, authenticity, and reliability of the Notice's of Rent Increase submitted by the Landlord, as well as the Landlord's testimony regarding the service of these Notice's of Rent Increase, as one of the forms indicates that it was signed and dated by the Landlord on December 1, 2017, almost two years prior to the creation date for the form.

Although I requested that the Landlord provide an explanation for this discrepancy during the hearing, the Landlord was either unwilling or unable of providing me with an explanation and appeared to be avoiding answering my direct questions with regards to the creation of this form.

The Tenant and their Advocate acknowledged that the Tenant deducted $70.00 from rent but stated that this was deducted as a result of repairs to the rental unit completed

and paid for by the Tenant with the Landlord's approval. The Tenant and their Advocate stated the Tenant had no option but to deduct this amount from rent as the Landlord had failed to reimburse them for these repairs after being provided with a written request to do so. The Landlord and their Advocate denied that the Tenant was either authorized to complete repairs or to deduct any amount from rent for the cost of repairs.

Analysis

As the parties agreed in the hearing that rent in the amount of $950.00 has always been paid by the Tenant since the start of the tenancy, I find that rent in that amount was due under the tenancy agreement. As the parties agreed that rent is payable on the last day of each month and that the Tenant paid a $475.00 security deposit which the Landlord still holds, I also find these as fact. Although the Landlord denied willingly agreeing to provide the Tenant with access to laundry, utilities, basic cable and internet as part of the tenancy agreement, both their documentary evidence and their testimony in the hearing indicates that these were in fact provided to the Tenant by the Landlord from the start of the tenancy.

The Landlord's arguments that these were not included as part of the tenancy agreement were focused on their belief that the Tenant harassed and coerced them into providing these services and therefore their provision should not be included as a condition of the tenancy agreement. I disagree. The *Act* requires that Landlord's set out the terms of the tenancy agreement in writing so that they are clear to all parties. However, the Landlord acknowledged that no written tenancy agreement was ever signed by both parties, despite both parties each drafting their own versions. As a result, I find that the Landlord failed to meet their obligations under section 13 (1) of the *Act,* something which has undoubtably contributed to the confusion between the parties regarding what is, and is not, included in the payment of rent.

However, I do not accept the Landlord's argument that utilities, basic cable and internet, and access to free laundry facilities are not included in rent simply because they were coerced into providing these services and facilities as part of rent by the Tenant. The parties agreed in the hearing that these were provided to the Tenant at the start of the tenancy, which is corroborated by the Landlord's own documentary evidence, and I find that it was ultimately the Landlord's choice to provide these services and facilities, regardless of the reason for this choice. The Landlord's regret at having provided them as part of the tenancy agreement does not change the terms of the tenancy agreement as entered into by the parties or their obligations to provide these services and facilities to the Tenant for the duration of the tenancy. As a result, I find that the Tenant's rent

includes utilities (heat, electricity, water, sewer, and garbage, unless otherwise agreed to), basic cable and internet, and reasonable access to free laundry facilities. I also find that the Tenant is entitled to access to the fight channel on television, provided they pay the Landlord for this service.

Neither party provided testimony in the hearing regarding whether or not the tenancy agreement is periodic in nature (month to month) or for a fixed term. I note that only the tenancy agreement signed by the Tenant (and not the Landlord) has a fixed term, whereas both tenancy agreements signed by the Landlord are periodic in nature (month to month). As there is no clear evidence regarding whether or not a fixed term exists or the duration of any fixed term, I therefore find that the tenancy is periodic in nature.

Although the Landlord stated that they had properly served several notices of rent increase on the Tenant in accordance with the *Act,* the Tenant denied receipt and the Landlord submitted no documentary evidence of this service. Further to this, one of the Notice of Rent Increase forms submitted for my consideration by the Landlord, which is signed and dated December 1, 2017, has a form creation date of November 2019. This means that the Landlord could not have filled out and signed this form on December 1, 2017, as indicated on the form, as this form did not exist at that time.

Although the Landlord's Advocate argued that this does not constitute fraud as the Landlord likely innocently re-created this form for the purpose of the hearing as they did not have a copy, I disagree. Despite my repeated attempts during the hearing to have the Landlord explain how this form came to be created, they were either unwilling or unable to do so. As a result, I find that the only reasonable conclusion to be made is that the Landlord knowingly and falsely completed this form without the intention of disclosing that it was re-created to either myself or the Tenant, and that they knowingly submitted this falsely re-created form for my consideration in the hearing with the intention of relying on it in order to obtain a decision from the Branch in their favour. In my opinion, this clearly and unequivocally constitutes fraud and I find that there was nothing either accidental or innocent about this decision on the part of the Landlord.

As I am satisfied that the Landlord engaged in fraud with regards to the creation of one of the Notice of Rent Increase documents submitted by them for my consideration, I find that I therefore cannot be satisfied that the other Notice of Rent Increase document submitted by them is either accurate or reliable and I therefore give no weight to either form.

Based on the above I am therefore not satisfied that the Landlord ever served the Tenant with a Notice of Rent Increase as required by the *Act* and I find that the Tenant's rent therefore remains at $950.00 per month, the amount agreed upon at the start of the tenancy. Should the Landlord wish to increase the rent, they must comply with the *Act* and the regulation with regards to rent increases. The Landlord should also be aware that failure to comply with the *Act* or this decision with regards to the amount of rent payable under the tenancy agreement, the services and facilities included in rent, or rent increases, may result in administrative penalties of up to $5,000.00 per day.

The Tenant submitted documentary evidence in the form of bank statements and copies of the fronts and backs of cashed cheques from their bank, in support of their testimony that rent has been paid in full, except for the $70.00 withheld for repairs. I note that most of the cheques are in the Landlord's name only and that none of the cheques contain any endorsements, meaning they have not been signed over by the Landlord to be cashed by another person. The cheques that are not in the name of the Landlord only, are in both the name of the Landlord and another person, who I understand from the hearing to be a family member of the Landlord, their agent, or both. Although the Landlord denied receiving these cheques from the Tenant or cashing them, their own bank statements show most of these payments. When asked to explain the discrepancies between their testimony and their bank statements, the Landlord continually responded by saying that rent had not been paid and referencing matters unrelated to the payment of rent.

I find the Landlord's testimony contradictory to both their own documentary evidence as well as the documentary evidence submitted by the Tenant. As the Tenant's bank statements, the copies of the cashed cheques submitted by the Tenant, and the bank statements submitted by the Landlord all show similar things, I find these documents to be accurate and reliable reflections of the amounts of rent paid by the Tenant. Although the Landlord's bank statements do not show all of the cashed cheques, the Tenant and their Advocate stated that deposits for higher amounts on the dates these cheques were cashed can be seen on the Landlord's bank statements, and argued that this is evidence that the Landlord deposited the Tenant's rent cheques, along with other cheques or cash.

Based on the above, I am satisfied on a balance of probabilities that the outstanding rent allegedly owed by the Tenant, except for the $70.00 withheld for repairs, was in fact paid. I find that most of the payments shown on the Tenant's bank statements exactly match deposit amounts in the Landlord's bank statements as well as the copies of the cashed cheques from the Tenant's bank. As the copies of the cashed cheques show

that the cheques were unendorsed at the time that they were cashed, I am also satisfied that they could only have been cashed by the Landlord, or the other named person, as applicable. Further to this, I find the Tenant's argument that the remaining payments not shown on the Landlord's bank statements in the exact amounts of the cheques can be accounted for by way of the larger deposits shown in the Landlord's bank statements on those dates, persuasive. I also am not satisfied that the Landlord provided for my consideration bank statements from every bank account and all financial institutions and I therefore find that it is reasonable to conclude that the Landlord, or the family member/agent also named on several cheques, may have cashed the Tenant's rent cheques using other bank accounts.

Based on the above, I therefore dismiss the Landlord's claim for recovery of unpaid rent, except for the $70.00 withheld by the Tenant for repairs, without leave to reapply.

Although the Tenant stated that they were authorized under the *Act* to deduct $70.00 from rent for authorized repairs, the Landlord disagreed and the only documentary evidence before me in relation to this deduction is a hand written note authored by the Tenant requesting that the Landlord reimburse them and advising them that if reimbursement is not received, they will deduct this amount from rent.

Section 26 (1) of the *Act* states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the *Act*, the regulations or the tenancy agreement, unless the tenant has a right under the *Act* to deduct all or a portion of the rent. Based on the above, I am not satisfied that that the Tenant was entitled to deduct this amount form rent under the *Act* without the Landlord's consent or an order from the Branch, and I therefore find that the Landlord is entitled to the recovery of this unpaid rent. As this was not the Tenant's Application, I have made no findings of fact or law in relation to whether the Tenant may be entitled to recover the cost of any repairs completed from the Landlord under the *Act* and the Tenant therefore remains at liberty to seek reimbursement of this amount from the Landlord or to file an Application for Dispute Resolution with the Branch seeking its recovery, should they wish to do so.

Based on the above, I find that the Landlord is only entitled to the recovery of $70.00 in unpaid rent. As they were at least partially successful in their Application, I also grant the Landlord recovery of the $100.00 filing fee pursuant to section 72 of the *Act*.

Pursuant to section 72 (2)(b) of the *Act*, I therefore authorize the Landlord to withhold $170.00 from the Tenant's security deposit for recovery of the above noted amount owed.

Conclusion

Pursuant to section 72 (2)(b) of the *Act*, I authorize the Landlord to withhold $170.00 from the Tenant's security deposit for unpaid rent and recovery of the filing fee.

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: July 14, 2020

Residential Tenancy Branch