Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: MNDC MNSD FF
Tenant: MNSD FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties. The participatory hearing was held, via teleconference, on November 2, 2020, and January 22, 2021. Both parties applied for multiple remedies under the *Residential Tenancy Act* (the "*Act*").

At the hearing on November 2, 2020, the Arbitrator at that time adjourned the proceeding to allow the parties to re-serve their evidence. The parties were both given instructions regarding the service of their evidence in preparation for the hearing which was set for January 22, 2021.

At the hearing on January 22, 2021, the Tenants confirmed that they received the Landlord's Notice of Hearing. As per the interim decision from November 2, 2020, the Landlord was granted permission to serve her evidence by email for this proceeding. The Tenants confirmed that they received the Landlord's evidence, including the photos provided. However, the copies of these photos she uploaded to the dispute access site were not sufficiently labelled or easily identifiable. The Landlord was unable to point out relevant photos or documents in her evidence, since she failed to name them in a manner which would allow them to be referenced.

The Landlord could not point out where her monetary worksheet was, nor could she explain which photos pertained to which part of her application. The only breakdown of the amounts the Landlord could locate during the hearing was the amount listed on the actual application itself, which explained that she was seeking $1,600.00 for cleanup which was comprised of 2 people working for 16 hours each at $25.00 per hour. The Tenants expressed confusion about what amounts were being sought because the

above calculation only totals $800.00 and because they were never given a worksheet explaining the amounts.

During the hearing, the Landlord did a poor job explaining what amounts she was seeking, and why, and was unable to provide clarity to myself or the Tenants at the outset of the hearing. I note the following Rule of Procedure:

> *3.7 Evidence must be organized, clear and legible*
>
> *All documents to be relied on as evidence must be clear and legible.*
>
> *To ensure a fair, efficient and effective process, identical documents and photographs, identified in the same manner, must be served on each respondent and uploaded to the Online Application for Dispute Resolution or submitted to the Residential Tenancy Branch directly or through a Service BC Office.*
>
> ***For example, photographs must be described in the same way, in the same order, such as: "Living room photo 1 and Living room photo 2". To ensure fairness and efficiency, the arbitrator has the discretion to not consider evidence if the arbitrator determines it is not readily identifiable, organized, clear and legible.***
>
> *3.10.1 Description and labelling of digital evidence*
>
> *To ensure a fair, efficient and effective process, where a party submits digital evidence, identical digital evidence and an accompanying description must be submitted through the Online Application for Dispute Resolution or Dispute Access Site, directly to the Residential Tenancy Branch or through a Service BC Office, and be served on each respondent.*
>
> *A party submitting digital evidence must:*
> *• include with the digital evidence:*
> *- a description of the evidence;*
> ***-identification of photographs, such as a logical number system and description;***
> *-a description of the contents of each digital file;*
> *-a time code for the key point in each audio or video recording; and*
> *-a statement as to the significance of each digital file;*

[my emphasis added]

The Landlord was under the impression her files were named in a manner which made them readily identifiable and easy to access. However, after explaining the challenges we were having with understanding her claim, and her evidence, the Landlord requested to withdraw her application for monetary compensation, rather than proceed today and risk not having the evidence be admissible.

The Tenants did not present any compelling reason why this should not be done, or why it would be prejudicial to them. After considering the totality of the situation, I accept that the Landlord filed this application in good faith, but was unaware how the files would be displayed on my end, and how hard to would be for both the Tenants to follow along with her claim. Given all of the above, I allowed the Landlord to withdraw her application, and I grant her leave to reapply for the monetary compensation she is seeking.

I encourage the Landlord to consult the Rules of Procedure and the Act with respect to the organization, and labelling of her evidence as well as the service of that evidence. Any orders allowing email service for this proceeding will not be extended into future proceedings. I encourage the Landlord to put the (properly labelled and organized) digital files on a USB stick, and to mail that by registered mail to the Tenants. I also encourage the Landlord to provide a full breakdown of the amounts sought on a worksheet, one which can be referred to in the hearing.

In summary, the Landlord's application is hereby withdrawn, and she is granted leave to reapply for the amounts sought. The Tenants wished to proceed with their application, and the remainder of the hearing focused on these matters.

The Landlord confirmed service of the Tenants' application, and evidence package and did not take issue with the service of that package. I find the Tenants sufficiently served the Landlord with their application, Notice of Hearing and evidence for the purposes of this hearing.

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.

Issue(s) to be Decided

1. Are the Tenants entitled to recover double the security and pet deposit, for the Landlord's breach of section 38 of the Act?

Background and Evidence

The parties agreed that monthly rent was set at $1,800.00 per month and was due on the first of the month. The Landlord still holds a security deposit of $900.00, and a pet deposit of $900.00. The parties also confirmed that the Tenants moved into the rental unit around June 15, 2019, and moved out at the end of June 2020, after their one-year lease expired.

The Tenants stated that they used Facebook messenger to provide the Landlord with their notice that they would be moving out. The Tenants stated they sent this email to the Landlord around the end of May. The Landlord confirmed getting this message. The Landlord stated that she accepted this Notice as the Tenant's formal written notice, and proceeded relist and re-rent the property after the Tenants were set to leave at the end of June 2020.

The Tenants stated that when they moved into the rental unit, they only ever walked through the unit once with the Landlord to view the property to determine if they wanted to take it. The Landlord explained that since the rental unit is out of town, she didn't meet the Tenants again to do a walk-through condition inspection with them, and she also confirmed that she did not complete a move-in condition inspection report. The Tenants stated that, instead, the Landlord met them, prior to moving in, and got them to sign a few photographs in an attempt to document the condition of the unit at the time they moved in.

The Tenants also stated that despite giving the Landlord notice that they were moving out over a month in advance, the Landlord failed to schedule a move-out inspection/walk through at the end of the tenancy. The Tenants stated that they moved out on June 28, 2020, and left the keys at that time. The Landlord entered the unit in the days following this, and the Tenants stated that when one of them returned to give back the mail key, the Landlord had already started cleaning and moving things around. The Tenants stated that the Landlord asked one of them to walk through the unit at the time they dropped off the mail key on June 30, 2020, but the Tenant stated she wanted to be given a heads up so that this was going to happen, so that both Tenants could attend the inspection.

The Landlord confirmed that she never attempted to give the Tenant advance notice to schedule the condition inspection report. The Landlord also did not provide a second opportunity for inspection, following the failed attempt at doing a move-out inspection on June 30, 2020, when the mail keys were dropped off.

The Tenants opined that both Tenants should be there for the inspection. The Tenants stated that given how the Landlord managed both the move-in, and move-out inspections, as well as the condition inspection report, she extinguished her right to claim against the security deposit. As such, the Tenants are applying for the return of double their security deposit, given nothing has been returned to them.

The Tenants stated that they sent the Landlord their forwarding address in writing by way of an email on June 30, 2020. The Landlord confirmed getting this email that same day.

Analysis

Based on the documentary evidence and oral testimony provided during the hearing, and on a balance of probabilities, I find:

Section 38(1) of the *Act* requires a landlord to repay the security deposit or make an application for dispute resolution within 15 days after receipt of a tenant's forwarding address in writing or the end of the tenancy, whichever is later. When a landlord fails to do one of these two things, section 38(6) of the *Act* confirms the tenant is entitled to the return of double the security deposit.

Tenant's Notice to End Tenancy

I note the Tenants provided their Notice to End tenancy via Facebook messenger email service. Although this is not an approved method of service under the Act, I note the Landlord accepted this as formal notice, and did not take issue with the form and content of that notice, via messenger. I find the Landlord received this Notice to End Tenancy in late May 2020, effective June 30, 2020.

In determining that the Landlord received the Tenant's written notice to end tenancy "in writing" when it was sent by electronic message, I was guided, in part, by the definition provided by the Black's Law Dictionary Sixth Edition, which defines "writing" as "handwriting, typewriting, printing, photostating, and every other means of recording any tangible thing in any form of communication or representation, including letters, words,

pictures, sounds, or symbols, or combinations thereof". I find that a Facebook message meets the definition of written as defined by Black's Law Dictionary.

I was further guided by section 6 of the *Electronics Transactions Act,* which stipulates that a requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides the information or record in electronic form and the information or record is accessible by the other person in a manner usable for subsequent reference, and capable of being retained by the other person in a manner usable for subsequent reference. As electronic messages are capable of being retained and used for further reference, I find that the Facebook message can be used by a tenant to provide a landlord with a notice to end tenancy pursuant to section 6 of the *Electronics Transactions Act.*

Section 88 of the *Act* specifies a variety of ways that documents, other than documents referred to in section 89 of the *Act,* must be served. Service by electronic message is not one of methods of serving documents included in section 88 of the *Act*.

Section 71(2)(c) of the *Act* authorizes me to conclude that a document not given or served in accordance with section 88 or 89 of the *Act* is sufficiently given or served for purposes of this *Act*. As the Landlord acknowledged receiving the message in which the Tenants provided their notice, I find that the Landlord was sufficiently served with the Tenants' notice that they would be moving out.

Although the Tenants largely vacated the unit on June 28, 2020, I note they did not return all keys to the unit and the mailbox until June 30, 2020. I find June 30, 2020, reflects the end of the tenancy, given this is when the keys were returned, and when their notice to end tenancy took effect.

Extinguishment

Having reviewed the totality of the situation, I note the Landlord failed to complete a proper condition inspection report at the start of the tenancy. It appears the only time the Landlord and the Tenant met at the rental unit at the start of the tenancy was when the Tenants viewed the property. I find this does not count as a formal move-in condition inspection. I find the Landlord failed to offer a proper opportunity to do the move-in inspection with the Tenants, and also failed to complete a condition inspection report in accordance with the Act and the Regulations.

Section 23 of the Act states as follows:

Condition inspection: start of tenancy or new pet

23 *(1)The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.*

(2)The landlord and tenant together must inspect the condition of the rental unit on or before the day the tenant starts keeping a pet or on another mutually agreed day, if

(a)the landlord permits the tenant to keep a pet on the residential property after the start of a tenancy, and

(b)a previous inspection was not completed under subsection (1).

(3)The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

(4)The landlord must complete a condition inspection report in accordance with the regulations.

(5)Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

(6)The landlord must make the inspection and complete and sign the report without the tenant if

(a)the landlord has complied with subsection (3), and

(b)the tenant does not participate on either occasion.

Given the Landlord's multiple breaches of section 23 of the Act, I find she extinguished her right to claim against the deposits for damage. This extinguishment is explained in section 24(2) as follows:

24 (2) The right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord

(a) does not comply with section 23 (3) [2 opportunities for inspection]

(b) having complied with section 23 (3), does not participate on either occasion, or

(c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

[Reproduced as written.]

Based on the above, I find the Landlord extinguished her right to file against the security deposit, and she was required to return the security deposit and pet deposit, in full, within 15 days of receiving the Tenants' forwarding address in writing, or the end of the tenancy, whichever is later.

In this case, the Landlord stated she received the Tenant's email containing their forwarding address on June 30, 2020. She did not take issue with service in this manner and confirmed she was able to open and read the email/message. Although serving the other party via electronic message is not an approved method of service under section 88 or 89 of the Act, I find it was sufficiently served to the Landlord on the day she stated she received it, June 30, 2020. I make this finding pursuant to section 71(2)(c).

Pursuant to section 38(1) of the Act, the Landlord had 15 days from receipt of the forwarding address in writing (until July 15, 2020) to repay the security and pet deposits (in full) to the Tenants. However, the Landlord did not do so and I find the Landlord breached section 38(1) of the Act. Policy Guideline #17 – Security Deposit and Set off states that the arbitrator will order the return of double the deposits if the Landlord has claimed against the deposit for damage to the unit and the Landlord's right to make such a claim has been extinguished under the Act.

Pursuant to section 38(6)(b) of the Act, I find the Tenants are entitled to recover double the amount of the security deposit ($1,800.00 x 2). Further, section 72 of the *Act* gives me authority to order the repayment of a fee for an application for dispute resolution. Since the Tenants were successful in this hearing, I also order the Landlord to repay the $100.00 fee the Tenants paid to make the application for dispute resolution.

In summary, I issued the Tenant a monetary order for $3,700.00 based on the Landlord's failure to deal with the security deposit in accordance with section 38 of the *Act*, and for extinguishing her right to claim against the deposits.

Despite all of the above, the Landlord is still at liberty to apply for damage or loss under the Act. However, the merit of that application will be determined at a future hearing, if the Landlord decides to pursue those amounts.

Conclusion

I grant the Tenants a monetary order in the amount of **$3,700.00**. This order must be served on the Landlord. If the Landlord fails to comply with this order the Tenants may file the order in the Provincial Court (Small Claims) and be 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: January 27, 2021

Residential Tenancy Branch