Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNRL-S, 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; and
- Authorization to retain the security deposit for this tenancy pursuant to section 38.

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.

As both parties were present service was confirmed. The tenant testified that they received the landlord's materials and had not served any evidence. Based on their testimonies I find the tenant duly served in accordance with sections 88 and 89 of the *Act*.

Preliminary Issue-Adjournment Request

At the outset of the hearing the tenant requested an adjournment. The tenant gave some testimony stating that "it has been a stressful few months" and have not had an opportunity to prepare for the hearing. The tenant cited school and work responsibilities as well as moving. The tenant provided no documentary evidence in support of their submissions and was unable to give a cogent response to why increased stressors over the past few months prevented them from preparing for a hearing of which they were notified in August 2020.

The landlord did not consent to the hearing being adjourned and rescheduled.

Rule 7.8 of the Residential Tenancy Branch Rules of Procedure grants me the authority to determine whether the circumstances warrant an adjournment of the hearing.

Rule 7.9 lists some of the criteria to consider:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

I find that the tenant has provided little evidence in support of their request for an adjournment. The tenant's submission consists of vague complaints that they feel they are unprepared. The tenant claims that they have faced increased stressors preventing them from adequately preparing but have provided no documentary evidence in support of their claims and gave vague testimony without details or explanation.

Under the circumstances I find that the tenant has not met the criteria established for granting an adjournment. I find little evidence that an adjournment is necessary to provide a fair opportunity for the tenant and that any failure to prepare is borne out of their own actions. I find that the desire for an adjournment and any possible prejudice to the tenant arises as direct result of the tenant's failure to take reasonable steps. As such, the tenant has not met the criteria established for granting an adjournment.

Issue(s) to be Decided

Is the landlord entitled to any of the relief sought?

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.

This tenancy began in March 2019, when the landlord assumed the tenancy from the previous owner of the property and ended on April 30, 2020. The monthly rent was $4,375.00 payable on the first of each month. The parties agree that a security deposit of $2,150.00 was paid at the start of the tenancy. A copy of the tenancy agreement was submitted into evidence.

There was an earlier hearing under the file number on the first page of this decision. The earlier hearing resulted in a monetary order in the tenant's favour in the amount of $4,300.00 for the return of double the security deposit.

Despite the earlier order the landlord testified that they still retain the security deposit of $2,150.00. The landlord's present application includes a claim for authorization to retain the deposit for the tenancy.

The parties say that the landlord issued a Notice to End Tenancy for Landlord's Use on or about March 24, 2020 providing an end of tenancy date of April 30, 2020. Neither party submitted a copy of the notice issued into evidence. The tenant submits that while the notice provided an effective date earlier than allowed under the *Act*, they chose not to dispute the notice and vacated the rental unit by April 30, 2020. The tenant withheld the rent for the month of April 2020 in accordance with their right to do so under section 51 of the *Act*. The landlord now seeks a monetary award in the amount of $4,375.00 for unpaid rent for the month of April 2020.

The landlord also seeks unpaid utilities in the amount of $2,077.00. The landlord submits that utilities are not included in the rent. The landlord submitted into evidence copies of utility statements that were received by the landlord from the municipality. Some of the utility invoices submitted are for periods after the tenancy ended and all include items which are expressly covered under the tenancy agreement such as garbage collection and recycling. The parties testified that the landlord did not give written demand for the payment of these utilities prior to the application.

Analysis

The principle of *res judicata* prevents an applicant from pursuing a claim that has already been conclusively decided. The security deposit for this tenancy was the subject of the earlier hearing of July 16, 2020 where the tenant was issued a monetary order to recover the value of double the security deposit.

I find that I have no jurisdiction to consider a matter that has already been the subject of a final and binding decision by another arbitrator appointed under the *Act*. I find that the landlord's claim for the deposit is not a new issue but the same matter already determined. Accordingly, I dismiss this portion of the landlord's claim seeking authorization to retain the security deposit for this tenancy.

I find the present application of the landlord seeking authorization to retain the deposit, filed on August 12, 2020 after the original decision was issued and affirmed in a review consideration decision, and their providing false testimony under oath that there have been no previous hearings and that they still hold the deposit to be an abuse of process.

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 landlord gave testimony that they issued a Notice to End Tenancy for Landlord's Use and that they are seeking a monetary award for the last month's rent which was withheld by the tenant. While the parties failed to provide a copy of the notice into documentary evidence, I accept the testimonies that both parties understood there to be a valid notice to end tenancy pursuant to section 49 of the *Act*. The tenant withheld the last month's rent as they were entitled to do pursuant to section 51(1.1) of the *Act*. The landlord now seeks a monetary award for the withheld rent payment but this was an amount that the tenant was entitled to withhold under the *Act* and one which the landlord has no statutory basis to demand. Accordingly, I dismiss this portion of the landlord's claim as the landlord has not incurred a loss, there has been no violation of the Act, regulations or tenancy agreement on the part of the tenant and there is no basis for a monetary award.

I find that the landlord has not provided sufficient evidence in support of the portion of their claim seeking a monetary award for unpaid utilities. Many of the invoices submitted are for periods after the tenancy has concluded, include charges which are expressly included in the rent payment such as garbage collection, or are items for which the tenant would not be accountable such as property transfer tax. While there are some items included in the invoice which may give rise to a monetary claim, the evidence of the parties is that the landlord has not previously given written notice to the tenant that any utilities are payable. A tenant can not be expected to make payments for utilities of which they are not informed. I find the failure of the landlord to make demand of utility payments or to provide these municipal bills to the tenant during the tenancy is not consistent with the landlord's position that utilities were the responsibility of the tenant.

If these municipal utilities were payable, either to the landlord or directly to the municipality, then it would be reasonable to expect that the tenant would be informed of the charges or allowed to receive the bills directly from the municipality. The landlord did not inform the tenant of the charges nor did they allow the tenant to receive the bills from the municipality. Based on the conduct of the parties I do not find there to be sufficient evidence that the tenant was responsible for paying the municipal utility bills as the landlord now claims. I find that it would be contrary to the principles of fairness to allow a landlord to claim for monetary amounts that the tenant is neither informed of nor given an opportunity to pay during the tenancy. I find that any monetary amount paid by the landlord to the municipality for utilities is not a loss incurred due to a breach on the part of the tenant and does not give rise to a monetary award.

I find the landlord's present application, including a claim for an issue previously determined and an attempt to claim rent which they are not entitled to under the statute demonstrates either a profound ignorance of the *Act* and regulations or a callous disregard for them that is troubling. I find the landlord's testimony under oath that there have been no previous decisions made by the Branch when there was a decision and order issued against them to be an outright falsehood and attempt to mislead that cannot be characterized as a misunderstanding or misstatement. I find the landlord's conduct to be worthy of censure and rebuke.

Conclusion

I dismiss the landlord's application in its entirety without leave to reapply.

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 25, 2021

Residential Tenancy Branch