Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Code MNR, MNSD, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord filed under the Residential Tenancy Act (the "Act"), for a monetary order for unpaid rent, for an order to retain the security deposit in partial satisfaction of the claim and to recover the cost of the filing fee.

Both the landlord and the tenant's advocate appeared, gave testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions at the hearing.

The advocate for the tenant submitted they received no evidence from the landlord. The landlord stated that they gave the Residential Tenancy Branch (the "RTB") their evidence and thought they would make a copy for the tenant.

In this case the landlord did not serve their evidence on the tenant. It is not the responsibility of the RTB to serve parties with evidence. That is the responsibility of the parties. As the tenant was not served with the landlord's evidence, I find that evidence must be excluded.

The landlord submitted they received no evidence from the tenant. The advocate stated their evidence was sent to the landlord's service address by registered mail. Filed in evidence is a copy of the Canada post tracking number and history, which shows the documents were sent on January 15, 2021, and that the Canada post left a Notice card for the landlord to pick up the documents on January 18, 2021.

The landlord submits they do not check their mail daily and it has been about 10 days since it was last checked.

Based on the above, I find the landlord was deemed to have receive the tenant's evidence five days after it was mailed. It was the landlords own neglect when they failed to check their mail. Therefore, I allow the tenant's evidence to be considered.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure. I refer only to the relevant facts and issues in this decision.

Issues to be Decided

Is the landlord entitled to a monetary order for unpaid rent?
Is the landlord entitled to retain the security deposit in partial satisfaction of the claim?

Background and Evidence

The tenancy agreement shows that the parties entered into a fixed term tenancy which began on March 23, 2020 and was to expire on September 30, 2020. Rent in the amount of $3,500.00 was payable on the 23rd of each month. The tenant paid a security deposit of $1,750.00 and a move in and move out fee of $500.00. The tenancy ended on or about September 14, 2020.

The landlord submitted although this was a fixed term, the agreement allows the tenant to end the tenancy with at least 30 days' notice.

The landlord submits that the tenant failed to pay the following rent:

a.	Rent for April and May 2020 was short by $400.00 each month	$800.00
b.	Rent for June and July was short by $250.00 each month	$500.00
c.	Rent for August 2020 was not paid	$1,750.00
	Total claimed	$3,050.00

The advocate submitted that the tenant had negotiated a lower rent with the landlord and was required to pay the amount of $3,100.00 for May and June 2020, and at the end of the two months they would revisit the matter. Filed in evidence are text messages, which support there was an agreement to lower the rent.

The advocate submitted that the tenant and the landlord revisited the issue of rent on June 16, 2020, and there was an agreement that the tenant would pay the amount of

$3,250.00 to remain in the unit. The advocate stated that the tenant paid this amount for July, August and September 2020,and there was no issues at that time.

The advocate submits that the tenant gave their 30 day notice to end tenancy on August 15, 2020, and as rent is payable on the 23rd day of each month, the tenancy would end on September 22, 2020; however, the tenant moved out on September 14, 2020 although the rent was paid to the 22nd of that month.

The advocate submits that the landlord was not entitled to charge the tenant a move-in fee or move-out fee as the tenant did not sign a form k, and not all strata's charge this fee.

The advocate submits that the landlord did not file their application within the statutory time limit. The advocate stated that the tenant first gave the landlord their written forwarding address on September 15, 2020, by posting a letter on the door of the rental unit and again on September 22, 2020, by email and there were other request after that date.

The landlord responded that they did not remember agreeing to the lower the rent for May and June 2020. The landlord stated that they remember a conversation with the tenant about subsequent and the tenant was hostile and the just accepted to receive the lower rent of $3,250.00 and thought they would deal with this issue after the tenancy ended.

The landlord submits they did not receive any forwarding address on September 15, 2020; however, they acknowledge they received the tenant's forwarding address on September 22, 2020.

The landlord responded that if they were not allowed to charge a move-in fee and move-out fee they have no issue with this being returned to the tenant.

Analysis

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

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard,

that is, a balance of probabilities. In this case, the landlord has the burden of proof to prove their claim.

Section 7(1) of the Act states that if a landlord or tenant does not comply with the Act, regulation or tenancy agreement, the non-comply landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the Act provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

In this case, I accept the submission of the tenant's advocate that the parties agreed that the rent for May and June 2020, would be lowered to $3,100.00. This is supported by the text messages submitted in evidence. The tenant paid the agreed upon amount. Therefore, I find the landlord has failed to prove the tenant breached section 26 of the Act.

I am also satisfied there was a subsequent agreement that rent would continue at the rate of $3,250.00. While I accept this was not done in writing; however, the original text message indicates rent would be renegotiated. Which appears there was an agreement over the telephone, and the tenant sent three payments of $3,250.00 for July, August and September 2020, rent. The landlord never raised this issue, in any further communication that this was not acceptable or that there was no agreement, which would have been reasonable if no such agreement was made. I find the tenant paid rent for July, August and September 2020. Therefore, I find the landlord has failed to prove the tenant breached section 26 of the Act.

As the landlord has failed to establish the tenant breach the Act, I find I must dismiss the landlord's application without leave to reapply. As the landlord was not successful, I decline to award the cost of the filing fee.

As the landlord has no further right to retain the security deposit, I find the security deposit must be returned. As the tenant's advocate raised the issue that the landlord did not make their application within the statutory time limit, I must consider whether the doubling provision of section 38(6) of the Act apply.

The advocate submitted that the landlord received the forwarding address of the tenant, as it was posted to the door of the rental unit on September 15, 2020. While I accept section 88 of the Act allows such a document to be posted by this method; however, this is not where the landlord resided, or where the landlord carries on business, such

as their local office or service address. This was the tenant's rental unit. I find the forwarding address provided on September 15, 2020, is not in compliance with the Act.

I do accept the landlord had the tenant's forwarding address on September 22, 2020, that was acknowledged by the landlord. I find the landlord had 15 days after they received the tenant forwarding address to either return the security deposit or make an application claiming against the security deposit, which the last day to make that application was October 7, 2020. The landlord's application for dispute resolution was filed on October 6, 2020. I find the landlord did file their application within the statutory time limit and the doubling provision of section 38(6) of the Act do not apply. Therefore, I find the tenant is entitled to the return of their security deposit in the original amount paid of **$1,750.00.**

I am also satisfied that the landlord was not entitled to charge the tenant a move-in or move-out fee as there was no form K completed and this does not appear to be a strata fee. Therefore, I find the tenant is entitled to the return of this fee in the amount of **$500.00.**

Therefore, I find the landlord must return to the tenant the total amount of $2,250.00. I grant the tenant a monetary order, pursuant to section 67 of the Act, should the landlord fail to comply with my order.

This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court. The **landlord is cautioned** that costs of such enforcement are recoverable from the landlord.

Conclusion

The landlord's application is dismissed. The tenant is granted a monetary order for the return of their security deposit and move-in and move-out 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: January 29, 2021

Residential Tenancy Branch