Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

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

- The return of their security deposit;
- Compensation for monetary loss or other money owed; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant C.R. (the Tenant), the Landlord, and a witness for the Landlord (the Witness), all of whom provided affirmed testimony. Although neither the Landlord nor an Tenant could recall exactly when the registered mail package containing the Notice of Dispute Resolution Proceeding was sent or received, the Tenant stated that it was sent by registered mail and the Landlord acknowledged receipt by registered mail and raised no concerns regarding service methods or timelines. As a result, the hearing proceeded as scheduled. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although the Tenant also had difficulty articulating how and when their documentary evidence was served, and the registered mail tracking number provided by the Landlord during the hearing did not yield tracking information for the registered mail on Canada Post's website, I went through the documentary evidence before me with the parties, who confirmed that had received this evidence. As a result, and as neither party raised concerns regarding service methods or timelines or requested that any documentary evidence before me be excluded from consideration, I therefore accepted the documentary evidence for consideration.

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

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses provided for them in the Application.

Preliminary Matters

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 Residential Tenancy Branch (the Branch) under Section 9.1(1) of the Act.

Issue(s) to be Decided

Are the Tenants entitled to the return of their security deposit?

Are the Tenants entitled to compensation for monetary loss or other money owed?

Are the Tenants entitled to recovery of the filing fee?

Background and Evidence

The written tenancy agreement (the tenancy agreement) in the documentary evidence before me, submitted by the Landlord, has conflicting information regarding the start date for the tenancy. In black ink the following start date was written: 15 JAN 2019. However, in blue ink the 5 and the year 2019 are scratched out, “Sept” is written beside the word “JAN” and the initials J.R. and C.R. are written in beside the year 2019. At the hearing the parties agreed that the tenancy commenced on September 1, 2019, not January 15, 2019.

Although the tenancy agreement states that the fixed term of the tenancy was 10 months, with an end date of June 30, 2020, the Tenant stated that they believe the length of the fixed term was only 8 months. However, the Tenants did not submit any documentary evidence in support of this position. In any event, the parties agreed that

after the end of the fixed term, whatever the duration was, the tenancy continued on a month to month (periodic) basis.

The tenancy agreement states that rent in the amount of $1,250.00 is due on the first day of each month and that a security deposit in the amount of $625.00 was required. At the hearing the parties confirmed that this was correct, that rent was not increase during the tenancy, that the $625.00 security deposit was paid in full, and that the deposit was retained by the Landlord in full at the end of the tenancy.

The parties agreed that a move-in condition inspection and report were properly completed at the start of the tenancy and that the Tenants were provided with a copy of the report as required. Although the parties agreed that the Tenants gave written notice in May of 2020 to end the tenancy effective June 30, 2020, they disputed how and when this notice was provided. The Tenant stated that it was sent by email mid-May, but the Landlord denied receipt of any email, stating instead that the Tenants gave them notice by text on May 24, 2020.

The Tenant stated that they and the other Tenant, B.R., moved out of the rental unit on the evening of June 30, 2020, but returned for several days thereafter to do some cleaning. The Landlord disagreed, stating that B.R. remained living in the rental unit for several days after June 30, 2020, and that the tenancy ended on either July 4, 2020, or July 5, 2020, as a result. The Landlord also stated that the Tenants had abandoned many items, such as boxes and couches, in the rental unit, and that they had suffered losses as a result of the Tenants not vacating on time.

The Landlord stated that there was mutual agreement with the Tenants by text to complete the move-out condition inspection on July 1, 2020, at 8:30 A.M., and that the Tenants failed to attend. The Landlord stated that the Tenants were subsequently deemed by them to have abandoned the rental unit. The Tenant disagreed, stating that they never abandoned the rental unit and that there was never a mutual agreement on a date and time for the inspection.

The Tenant stated that they provided their forwarding address in writing to the Landlord on July 7, 2020, by registered mail, and provided a copy of the letter containing their forwarding address dated July 7, 2020, and a photograph of an envelope addressed to the Landlord with a registered mail tracking number affixed to it. Although the Landlord initially denied receipt of the registered mail, after I advised them of the tracking information on the Canada Post tracking website linked to the tracking number shown on the envelope, the Landlord reversed their testimony, acknowledging that they had

received it on approximately July 21, 2020, but denied that it contained anything but several set of keys not previously returned. Despite the Landlord's denial of receipt of the forwarding address by registered mail, the Tenant argued that the Landlord still had their forwarding address, as it was contained on the registered mail envelope and in the Notice of Dispute Resolution Proceeding, and therefore the Landlord could still have either returned their security deposit or filed a claim against it, which they did not do.

The Tenant stated that as the Landlord had neither returned their security deposit nor filed a claim against it within 15 days after the later of the date the tenancy ended or the date the Landlord received their forwarding address in writing, as required by the Act, they are therefore entitled to double the amount of their security deposit. They also sought recovery of the $100.00 filing fee.

Although the Landlord acknowledged retaining the security deposit, they argued that there was written agreement, in the form of text messages, for them to retain it for damage done to the rental unit by the Tenants. The Tenant disagreed, stating that although they engaged in some conversations about some damage, there was not agreement between them on what damage they were responsible for or the costs of any such damage. As a result, the Tenant argued that the text messages exchanged do not amount to a written agreement that the Landlord could retain any portion of the deposit.

The Landlord specifically referenced text 6 on page 14, text 6 on page 15, and text 1 on page 16 of their documentary evidence in relation to their claims that the Tenants had agreed that the Landlord could retain a portion of their security deposit for damage,

Both parties submitted documentary evidence in support of their positions and testimony. The Tenants submitted a receipt for the payment of the security deposit and first months rent, a copy of their forwarding address letter dated July 7, 2020, a photograph of the registered mail package sent on July 7, 2020, and a monetary order worksheet. The Landlord submitted a summary of damages, two emails from witnesses and several photographs regarding the state of the rental unit at the end of the tenancy, 18 pages containing copies of text messages between the Landlord and the Tenant, a copy of the tenancy agreement and a registered mail receipt.

Analysis

Based on the documentary evidence before me and the affirmed testimony of the parties at the hearing, I am satisfied that a tenancy to which the Act applies existed, for

which the Landlord collected a $625.00 security deposit in compliance with the Act, and that no amount of this deposit has been returned to the Tenants.

Although the parties disputed how and when the Tenants provided their notice to end tenancy in writing to the Landlord, there was agreement between them that the Tenants gave at least 30 days written notice in May of 2020, by text message and/or email, that they were ending their tenancy effective June 30, 2021, and that the Landlord accepted this notice to end tenancy.

As the Tenants gave notice to end their tenancy on June 30, 2020, and there is no evidence before me that the parties agreed that the Tenants could remain in the rental unit under their tenancy agreement after the end date for the tenancy given by the Tenants in their notice to end tenancy, I therefore find that they were required, pursuant to section 37(1) of the Act, to vacate the rental unit by 1:00 P.M. on June 30, 2020, and that the tenancy therefore ended at that date and time. Although the Landlord argued that the Tenants overheld the rental unit, which the Tenant denied, and that they suffered losses as a result, there was no Application for Dispute Resolution before me from the Landlord in relation to the alleged overholding of the rental unit or any loss suffered as a result. Rule 6.2 of the Residential Tenancy Branch Rules of Procedures (the Rules of Procedure) states that the hearing will be limited to the matters claimed in the Application. As a result, I have not made any findings of fact in relation to whether the Tenants overheld the rental unit, and if so, whether the Landlord suffered any losses as a result. The Landlord remains at liberty to file an Application for Dispute Resolution with the Branch, seeking compensation for damage to the rental unit, or other monetary loss, should they wish to do so.

The Tenants stated that they sent the Landlord their forwarding address by registered mail on July 7, 2020, and provided me with a picture of the registered mail envelope, which shows their address, the Landlord’s address, and the registered mail tracking number. The Tenants also provided a copy of the letter containing their forwarding address, dated July 7, 2020. At the hearing the Landlord provided contradictory testimony with regards to receipt of the envelope, first testifying that it was not received, and then reversing that testimony when presented with tracking information showing that it was delivered. The Landlord also denied that the envelope contained anything but keys that the Tenants had failed to previously return. The Canada Post tracking website indicates that the registered mail was sent as descried above and delivered to a community mailbox on July 8, 2020. The July 7, 2020, letter containing the Tenants’ forwarding address also contains information regarding the keys returned to the Landlord in the registered mail package.

Given the Landlord's contradictory statements at the hearing regarding when and if they received the registered mail package and what was contained within it, I have concerns about the reliability of their testimony in this regard. As the July 7, 2020, letter expressly states that the keys the Landlord acknowledged receiving from the envelope, were included in the registered mail package, and as the Tenant provided consistent and affirmed testimony with regards to what was contained in the envelope and when it was sent, I find it more likely than not that this letter was included in the registered mail package sent on July 7, 2020. Based on the above, and as the mailing address used for the registered mail matches the Landlord's address in the tenancy agreement before me, I am satisfied on a balance of probabilities that the Tenants mailed the Landlord their forwarding address in writing on July 7, 2020, and I deem the Landlord to have received it on July 13, 2020, pursuant to section 90(a) of the Act.

Section 38 (1) of the Act states that except as provided in subsection (3) or (4) (a), of the Act, within 15 days after the later of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations, or make an Application for Dispute Resolution claiming against the security deposit or pet damage deposit. At the hearing the Landlord acknowledged that they had not filed an Application for Dispute Resolution with the Branch seeking retention of the Tenant's security deposit, but argued that they were entitled to retain it without filing an Application for Dispute Resolution as there had been agreement between the parties in writing that the Landlord could retain it for damage. The Tenant disagreed.

Section 38(4)(a) of the Act 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. At the hearing the Landlord argued that text messages between themselves and the Tenant amount to written agreement that the Landlord could keep the security deposit, however, I disagree.

The Landlord specifically referenced text 6 on page 14, text 6 on page 15, and text 1 on page 16 of their documentary evidence in relation to their claims that the Tenants had agreed that the Landlord could retain a portion of their security deposit for damage. However, the texts themselves were not numbered and the layout of the text messages on the numbered pages is such that I cannot, with any degree of certainty, know which texts the Landlord is referring to on each of the above noted numbered pages of their

evidence. Although there is some evidence that the parties engaged in discussions about the Tenants' responsibility for some damage to the rental unit, there is no evidence in the documents before me that a specific amount of compensation was agreed to as compensation for any damage or that the Tenants agreed that the Landlord was entitled to simply retain the Tenants' security deposit, either in part or in full, as compensation for damage. As a result, I find that section 38(4)(a) of the Act does not apply.

As there is no evidence before me that the Landlord had the right to retain the security deposit, either in full or in part, pursuant to any other section of the Act, I therefore find that the Landlord was required to return the Tenants' security deposit or file a claim against it with the Branch, by July 28, 2020, 15 days after the Landlord was deemed to have been served with the Tenants' forwarding address in writing as set out above, unless the Tenants had extinguished their rights in relation to the return of the security deposit pursuant to sections 24(1) or 36(1) of the Act.

For the following reasons, I am not satisfied that the Tenants extinguished their right to the return of the security deposit under either section 24(1) or 36(1) of the Act. As the parties agreed that a move-in condition inspection and report were properly completed at the start of the tenancy, I find that the Tenants did not extinguish their right to the return of their deposit under section 24(1) of the Act.

Section 36(1) of the Act states that the right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if the landlord complied with section 35(2), and the tenant has not participated on either occasion. Although there was general agreement that a move-out condition inspection and report were not completed, the parties disputed why and who should bear responsibility for any loss incurred as a result.

Although the Landlord stated that there was a mutual agreement by text to meet on July 1, 2020, at 8:30 A.M. for the move out condition inspection, and that the Tenants failed to attend this inspection as scheduled, I do not agree. The Landlord pointed me to text 1 on page 20 of their documentary evidence, which they stated was in the upper left hand corner of the page, in support of this position; however, the text in the upper left hand corner of page 20 is unrelated to the move-out condition inspection and none of the text messages are individually numbered.

Although there is a text from the Tenant on another section of this page, reportedly sent to the Landlord at 7:10 P.M., asking when the Landlord is free for the move-out

condition inspection, neither this text, nor the Landlord's reply at 7:13 P.M., contain the date on which these text messages were exchanged, and other text messages contained on the same page are dated July 2, 2020 – July 4, 2020. As a result, I have concerns that the texts in relation to the move-out condition inspection were exchanged between July 2, 2020 – July 4, 2020, as indicated by the date stamps for other text messages on the same page, and not on or before July 1, 2020, as stated by the Landlord at the hearing. The Landlord's replay that they are available "Anytime after 8:30" also does not specify whether this is 8:30 A.M. or 8:30 P.M. or the date of this availability. Further to this, there is no evidence from the text messages on this page that the Tenants ever agreed to this proposed meeting time. Finally, it appears from the Landlord's own documentary evidence that many text messages between the parties were subsequently exchanged over a series of days, wherein the Tenant repeatedly requested information on when the inspection was to be completed, to which the Landlord either vaguely responded, or responded without directly answering that question.

As a result of the above, I am not satisfied that there was ever a mutually agreed upon date and time for the move out condition inspection to be completed. Having made this finding, I will now turn to whether or not the Landlord offered two opportunities for a move-out condition inspection as required under section 35(2) of the Act.

Section 35(2) of the Act requires Landlords to offer two opportunities, as prescribed, for a move-out condition inspection. Section 17 of the regulations prescribes how landlords are to comply with section 35(2) of the Act. Specifically, section 17(2)(b) of the regulations states that if the tenant is not available at the date and time initially offered for the condition inspection under subsection (1), and the tenant either does not propose an alternative date and time as allowable under 17(2)(a), or the date and time proposed by the tenant is deemed to be unsuitable by the landlord after due consideration, the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

At the hearing, the Landlord acknowledged that they neither used nor were aware of the Notice of Final Opportunity to Schedule a Condition Inspection, form #RTB-22, which is the approved Branch form for the purpose of compliance with section 35(2) of the Act and section 17 of the regulations . As a result, I find that the Landlord failed to comply with section 35(2) of the Act when they did not provide the Tenant with a second opportunity for the condition inspection using the approved form. Residential Tenancy Policy Guideline (Policy Guideline) #17 states that the party who extinguishes their

rights in relation to the security deposit first, will bear the loss. As the Landlord did not comply with section 35(2) of the Act, I find that they therefore extinguished their rights in relation to the security deposit pursuant to 35(2) of the Act, first, and that the Tenant's therefore did not subsequently extinguish their right to the return of their security deposit under section 36(1) of the Act when they did not attend a move-out condition inspection.

Although the Landlord argued that the Tenants abandoned the rental unit, and therefore they were not required to provide a second opportunity for the condition inspection, I disagree. First, I find that the Landlord was required to make arrangements for the move out condition inspection in accordance with section 35(2) of the Act, and in advance of 1:00 P.M. on June 30, 2020, the date and time that he tenancy ended in accordance with the Tenants' written notice to end tenancy. As set out above, I am not satisfied that this was done. Second, it is clear to me from the Landlord's own evidence that the Tenant made repeated attempts to schedule a move-out condition inspection with the Landlord, even after the end of the tenancy on June 30, 2020, and I therefore find that it would be unreasonable to conclude that the Tenants had abandoned the rental unit or their obligations with regards to completion of a move-out condition inspection.

Based on the above, I find that the Landlord failed to comply with section 38(1) of the Act when they did not either return the Tenants' security deposit, in full, or file a claim against it with the Branch, by July 28, 2020. Section 38(6) of the Act states that if a landlord does not comply with subsection (1), the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As a result, I grant the Tenants' $1,250.00, double the amount of their security deposit, pursuant to section 3896) of the Act. As the Tenants were successful in their Application, I also grant them recovery of the $100.00 filing fee pursuant to section 72(1) of the Act.

Pursuant to section 67 of the Act, I therefore grant the Tenants a Monetary Order in the amount of $1,350.00.

Conclusion

Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order in the amount of $1,350.00. The Tenants are provided with this Order in the above terms and the Landlord must be served with this Order as soon as possible. Should the Landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Branch under Section 9.1(1) of the Act.

Dated: March 25, 2021

Residential Tenancy Branch