Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDCT, FFT

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenants on November 28, 2020 (the "Application"). The Tenants applied as follows:

- For return of double the security deposit
- For compensation for monetary loss or other money owed
- For reimbursement for the filing fee

The Tenant appeared at the hearing. The Landlord appeared at the hearing with J.S. I explained the hearing process to the parties. I told the parties they were not allowed to record the hearing pursuant to the Rules of Procedure (the "Rules"). The parties provided affirmed testimony.

J.S. was originally named in the Application; however, the parties agreed J.S. was not a co-landlord and should be removed from the Application.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the relevant documentary evidence and all oral testimony of the parties. I have only referred to the evidence I find relevant in this decision.

Issues to be Decided

1. Are the Tenants entitled to return of double the security deposit?
2. Are the Tenants entitled to compensation for monetary loss or other money owed?
3. Are the Tenants entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted, and the parties agreed it is accurate. The tenancy started November 01, 2018 and was for a fixed term ending October 31, 2019. The tenancy then became a month-to-month tenancy. Rent was $2,000.00 per month due on the first day of each month. The Tenants paid a $1,000.00 security deposit.

The parties agreed the tenancy ended February 01, 2020.

The parties agreed the Tenants provided the Landlord a forwarding address by text message January 31, 2020.

The parties agreed the Landlord did not have an outstanding monetary order against the Tenants at the end of the tenancy.

The Landlord testified that the Tenants agreed in an email that the Landlord could keep the security deposit. The email is in evidence.

The Tenant testified that there were further text messages exchanged between the parties in which the Tenants did not agree to the Landlord keeping the security deposit.

The parties agreed that the email from the Tenants about the Landlord keeping the security deposit was in relation to floor damage.

The Landlord testified that he did not apply to the RTB to keep the security deposit because he had the Tenant's agreement to keep the security deposit.

The parties agreed there was no move-in inspection done and the Landlord did not provide the Tenants with two opportunities, one on the RTB form, to do a move-in inspection.

The parties agreed they did a move-out inspection.

In relation to compensation, the Tenants sought $317.62 for gas bills paid during the tenancy. The Tenant testified that the Tenants were paying for the gas for the upper and lower suite without knowing this and that the lower suite was occupied by other tenants. The Tenant testified that the amount sought is one third of the total amount of the gas bills.

The Landlord testified as follows. The rental unit is a home with a legal suite. There is only one gas meter. The lower suite is 900 square feet, has a single tenant and only uses gas for in-floor heating. The upper suite had four occupants, a gas fire, gas BBQ and in-floor heating. He listed the upper suite for $100.00 less in rent to cover the amount which would be paid to cover gas for the lower suite. This was less expensive for the Tenants.

Analysis

Security Deposit

Section 38 of the *Residential Tenancy Act* (the "*Act*") sets out the obligations of a landlord in relation to a security deposit held at the end of a tenancy.

Section 38(1) requires a landlord to return the security deposit in full or file a claim with the RTB against it within 15 days of the later of the end of the tenancy or the date the landlord receives the tenant's forwarding address in writing. There are exceptions to this outlined in sections 38(2) to 38(4) of the *Act*.

Given the testimony of the parties, I accept the tenancy ended February 01, 2020.

Given the testimony of the parties, I accept the Tenants provided the Landlord a forwarding address by text message January 31, 2020.

February 01, 2020 is the relevant date for the purposes of section 38(1) of the *Act*. The Landlord had 15 days from February 01, 2020 to repay the security deposit in full or file a claim with the RTB against it.

There is no issue that the Landlord did not return the security deposit in full within 15 days of February 01, 2020 as the Landlord still held the security deposit at the hearing on March 19, 2021.

The Landlord acknowledged he did not apply to the RTB to keep the security deposit.

Sections 38(2) to 38(5) of the *Act* state:

> (2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) [tenant fails to participate in start of tenancy inspection] or 36 (1) [tenant fails to participate in end of tenancy inspection].
>
> (3) A landlord may retain from a security deposit or a pet damage deposit an amount that
>
> > (a) the director has previously ordered the tenant to pay to the landlord, and
> >
> > (b) at the end of the tenancy remains unpaid.
>
> (4) A landlord may retain an amount from a security deposit or a pet damage deposit if,
>
> > (a) 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…
>
> (5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) [landlord failure to meet start of tenancy condition report requirements] or 36 (2) [landlord failure to meet end of tenancy condition report requirements].

Section 24 of the *Act* states:

> 24 (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if
>
> > (a) the landlord has complied with section 23 (3) [2 opportunities for inspection], and
> >
> > (b) the tenant has not participated on either occasion.
>
> (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.

The parties agreed there was no move-in inspection done and the Landlord did not provide the Tenants with two opportunities, one on the RTB form, to do a move-in inspection. Therefore, the Landlord extinguished his right to claim against the security deposit for damage pursuant to section 24(2) of the *Act*. Further, the Tenants could not have extinguished their right to return of the security deposit as the Landlord did not comply with section 23(3) of the *Act*.

Given the parties agreed they did a move-out inspection, the Tenants did not extinguish their right to return of the security deposit pursuant to section 36 of the *Act*.

Given the above, section 38(2) of the *Act* does not apply.

The parties agreed the Landlord did not have an outstanding monetary order against the Tenants at the end of the tenancy and therefore section 38(3) of the *Act* does not apply.

The Landlord submitted that the Tenants agreed to the Landlord keeping the security deposit for floor damage. Section 38(4)(a) of the *Act* addresses an agreement by tenants to keep a security deposit. However, section 38(5) of the *Act* states that subsection (4)(a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit has been extinguished under section 24(2) or 36(2). Here, the Landlord's right to claim against the security deposit had been extinguished pursuant to section 24(2) of the *Act* and the agreement the Landlord seeks to rely on is in relation to damage. Therefore, pursuant to section 38(5) of the *Act*, section 38(4)(a) of the *Act* does not apply.

Given the above, I find the Landlord failed to comply with section 38(1) of the *Act* in relation to the security deposit and that none of the exceptions outlined in sections 38(2) to 38(4) of the *Act* apply. Therefore, the Landlord is not permitted to claim against the security deposit and must return double the security deposit to the Tenants pursuant to section 38(6) of the *Act*.

The Landlord must return $2,000.00 to the Tenants. There is no interest owed on the security deposit as the amount of interest owed has been 0% since 2009.

Compensation

Section 7 of the *Act* states:

> 7 (1) If a landlord…does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord…must compensate the [tenant] for damage or loss that results.
>
> (2) A…tenant who claims compensation for damage or loss that results from the [landlord's] non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

> It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
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> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Policy Guideline 1 states at page 8:

> SHARED UTILITY SERVICE
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> 1. A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable5 as defined in the Regulations.
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> 2. If the tenancy agreement requires one of the tenants to have utilities (such as

> electricity, gas, water etc.) in his or her name, and if the other tenants under a different tenancy agreement do not pay their share, the tenant whose name is on the bill, or his or her agent, may claim against the landlord for the other tenants' share of the unpaid utility bills.

Similar to the situation described above, I find it is unfair or unconscionable to have required the Tenants to pay for the gas of the lower suite which was occupied by a different tenant. This is particularly so when the Tenants were not aware that they were paying for the gas of the lower suite from the outset of the tenancy and where the parties did not come to a specific agreement about this. Although the Landlord states that rent was reduced to cover the gas charges, it is my understanding that the Landlord simply chose to list the rental unit for less knowing that the Tenants would pay for the gas for the lower suite. I do not consider this a rent reduction when both parties were not aware of the circumstances.

I accept that the Tenants should not have been responsible for paying for the gas for the lower suite. I accept that the Tenants did pay for the gas for the lower suite. I accept that, in effect, the Tenants overpaid for utilities and therefore are entitled to a portion of what was paid back. The Tenants seek one third of the amount paid and I accept that this is reasonable and award the Tenants this amount.

Filing Fee

As the Tenants were successful in the Application, I award them reimbursement for the $100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, the Tenants are entitled to $2,417.62. I issue the Tenants a Monetary Order for this amount.

Conclusion

The Tenants are entitled to $2,417.62 and I issue the Tenants a Monetary Order in this amount. This Order must be served on the Landlord as soon as possible. If the Landlord fails to comply with the Order, the 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 Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: April 16, 2021

Residential Tenancy Branch