Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the landlord: MNDL-S, FFL
For the tenant: MNSDS-DR, FFL

Introduction

The landlord filed an Application for Dispute Resolution (the "landlord's Application") on December 14, 2020 seeking an order to recover money for damage to the rental unit, and the application filing fee.

The tenant filed an Application for Dispute Resolution (the "tenant's Application") on January 12, 2021. They seek a return of the security deposit they paid at the start of the tenancy. Additionally, they seek reimbursement of the application filing fee.

The tenant's Application here was initially filed as a Direct Request. The matter proceeded by way of a participatory hearing because the Direct Request application cannot be considered by that method when there is a cross-application by the landlord in place.

The matter proceeded to a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*") on April 22, 2021. Both parties attended the conference call hearing. I explained the process and offered both parties the opportunity to ask questions. Both parties presented oral testimony and evidence during the hearing.

Preliminary Matter

At the beginning of the hearing, the tenant provided they forwarded their own tenant's Application plus their prepared evidence to the landlord. They provided a Canada Post receipt and tracking information that shows they sent the registered mail on January 12,

2021 to the landlord's address. In the hearing, the landlord confirmed they received the tenant's package.

In the hearing, the landlord stated they attempted to provide the Notice of Dispute Resolution (the "Notice") from their own landlord's Application to the tenant; however, they were unable to accomplish service. In the hearing they stated they made the effort at providing their Notice and initial evidence to the tenant, in person at the tenant's forwarding address. When they went to the forwarding address to deliver documents, the person at that address was not the tenant and that person refused to accept documents. The landlord mentioned they hired a process server in December 2020.

The landlord provided an Amendment to their Application dated April 12, 2021. They attempted to provide further evidence to the tenant's representative via email. The tenant's representative in the hearing stated they would not accept service in this manner and at that time were only representing the tenant in the court matter. There is no record the landlord filed the Amendment with the Residential Tenancy Branch.

Additionally, the landlord provided that they attempted service of the amendment and updated evidence to the tenant via registered mail. This was to the tenant's forwarding address.

At the outset of the hearing the tenant stated they did not receive the Notice generated from the landlord's Application; nor did they receive evidence packages. The tenant responded to this to say they initially provided the landlord a forwarding address and that information has not changed. They were aware of the landlord's visit to the forwarding address location; however, their version of this was that the landlord would not leave documents because the individual at that address was not the tenant. They reiterated that the address they provided at the end of tenancy was the address for service, and "the landlord elected not to use this service because [they] know [the tenant] does not live there." They also provided that the landlord's need for a process server arises through a separate action requiring service for court registry purposes.

Additionally, they noted the landlord provided the Notice via email on December 20, 2020. The tenant submits this is past the three day time limit specified in the Proceeding Package received when a party files an application.

The Residential Tenancy Branch has the *Residential Tenancy Branch Rules of Procedure* and these are "to ensure a fair, efficient and consistent process for resolving disputes for landlords and tenants" (Rule 1.1). Rule 3.1 provides that an applicant must

serve the party with the Notice and other evidence *within three days* of the Notice being made available by the Residential Tenancy Branch. Rule 3.5 provides that an applicant must demonstrate that they served the respondent with the Notice and all evidence.

The *Act* s. 89(1) stipulates that an application for dispute resolution, when required to be given by one party to another, must be given in one of the following ways:

> (a) by leaving a copy with the person;
> (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
> (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
> (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
> (e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*.

The *Act* s. 71 also refers to substituted service. The Rules define this as "an alternative method of service authorized by an arbitrator where the party has made reasonable efforts to serve but has been unable to serve documents . . ." There is a separate application process available to a party should the need arise.

Here, the landlord stated in the hearing that they attempted hand delivery of the Notice to the tenant; however, they did not find the tenant there at the forwarding address, and in the landlord's version the person at that address would not accept documents. This attempt by the landlord did not result in the tenant receiving the necessary documents.

The landlord also stated they used a process server; however, they did not provide proof this was related to this dispute resolution process. I find the process server hired was for a separate action involving service of court documents.

I conclude the landlord did not complete service of the Notice of Dispute Resolution and other evidence to the tenant within the necessary timeline. The landlord only shows that they used registered mail by mid-April. There is no record that they completed service of the Notice within three days to the tenant. There is no record the landlord utilized registered mail as per s. 89(1)(d) for service of the Notice. Also, there was no Application by the landlord for substituted service.

The only evidence that the landlord attempted to serve information to the tenant via registered mail is from April 2021. This is to send further updated evidence to the tenant. This does not resolve the lack of service of the Notice.

With no Notice served, I find the tenant was only aware of this hearing through the filing of their own Application. This converted that direct request application to a participatory hearing when the Residential Tenancy Branch added the tenant's Application to the same hearing initiated by the landlord.

Because the landlord did not complete service of the Notice and their evidence in a method prescribed by the *Act*, I dismiss the landlord's Application for Dispute Resolution in its entirety, without leave to reapply. The landlord's evidence is excluded from consideration because of this service issue. Because the landlord's Application is dismissed, they are not entitled to recovery of the Application fling fee.

Issue(s) to be Decided

- Is the tenant entitled to an Order granting a refund of the security deposit pursuant to s. 38(1)(c) of the *Act*?

- Is the tenant entitled to recover the filing fee for this Application pursuant to s. 72 of the *Act*?

Background and Evidence

I have reviewed all written submissions and evidence before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this section.

The tenant provided a copy of the tenancy agreement. Both parties signed the agreement on August 1, 2019 for the tenancy beginning on August 1, 2019. The agreement specifies the rent amount of $1,600 was due on the 1st each month. The agreement shows the tenant paid a security deposit of $800 as a "DD Deposit Received."

The agreement specifies the rental unit is the upper level. This is "AS IS and inspected on August 1, 2019." In a written statement, the tenant specified that the rental unit

became the lower unit at the time they moved in, and this was with no initial inspection. This was because of prior damage in the unit. In the hearing, the tenant stated the landlord lowered the amount of rent to $1,300, always with cash payment and no receipts. With the reduced amount of rent, there was no refund of any portion of the paid security deposit of $800, which is more than a one-half-rent-amount allowed by the *Act*.

The landlord advised the tenant of the end of tenancy on October 15, 2020 for the end-date December 15, 2020. This was for "expired lease – month to month rental completed" and "water supply issues." On November 26, 2020 the tenant provided a notice to the landlord that they would be moving out on December 6, 2020 – this is a "10 days Notice to End Tenancy." This gives a forwarding address in the same document. The letter also states: "This gives you 15 days from today's date to return my full damage deposit in its entirety of $800."

The tenant reiterated that there was no move-out inspection on the final day. They provided pictures of what the unit looked like when they moved out. In their written statement, the tenant provides that the landlord stated "let me know when you have items moved out. Send me a few pics and any concerns, I'll check when I get home and can e-transfer your refund." Also, the landlord advised they would not charge for any damages to the suite; however, they advised they would deduct an amount for damages that the tenant's children "did to [the landlord's] belongings in [the landlord's] yard from 2019."

The tenant maintains they did not agree to any deduction from the security deposit. The final day of the tenancy, December 6, passed and there was no further communication about a final inspection. On December 9, the landlord attempted to e-transfer the balance of the security deposit, after deduction, to the tenant and the tenant did not accept it.

In their written statement the tenant provides their account of the discovery of damage to items in the yard which took place in August 2019. They provided that it was questionable whether the damage to the items was pre-existing because there were several items belonging to the landlord all over the property in an unorganized fashion.

The tenant and landlord went through a previous dispute resolution hearing in December 2020. The tenant provides that the Arbitrator instructed the landlord in that hearing to return the security deposit. This was because there was no initial or final walk-through inspections. After the hearing, the landlord attempted to schedule the

meeting on December 17; however, the tenant did not accept because of the significant time gap after the end of the tenancy. Additionally, the tenant noted the requirement for the meeting to occur on the final day.

In the written decision, the Arbitrator provided instruction to the tenant to apply for a return of the security deposit, joining their tenant's Application to that of the landlord in this present dispute.

In the hearing the landlord stated they did not keep any part of the security deposit because there was no damage to the interior of the rental unit. They stated they were not charging the tenant for any damage therefore a walk-through inspection was not necessary.

Regarding the damaged yard items, the landlord stated the tenant was willing to pay, and agreed to do so on one of the four times the landlord mentioned it to them. They pointed to an August 26, 2019 message from the tenant wherein the tenant inquired how much the damage was. The landlord maintained they mentioned they would give the deposit back to the tenant, minus the amount of damaged yard items.

Analysis

To address the tenants' claim for a return of the security deposit, I turn to the *Act.* The relevant portion regarding the return of the security deposit is s. 38:

> (1) . . .within 15 days after the later of
> (a) the date the tenancy ends, and
> (b) the date the landlord receives the tenant's forwarding address in writing;
> The landlord must do one of the following:
> (c) repay. . .any security deposit. . .to the tenant. . .;
> (d) make an application for dispute resolution claiming against the security deposit. . .

Following this, s. 38(4) sets out that the landlord may retain an amount from the security deposit with either the tenant's written agreement, or by a monetary order of this office.

A condition inspection meeting at the start and end of the tenancy is strictly prescribed by the *Act* in s. 23 and s. 35. By s. 24 and s. 36, a landlord's right to claim against the security deposit is extinguished if a meeting does not happen or does not complete a report.

The *Act* s. 19 sets limits on the amounts of deposits:

(1) A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of ½ of one month's rent payable under the tenancy agreement.
(2) If a landlord accepts a security deposit or pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment.

For the amount of the deposit that the landlord is legally responsible for paying to the tenant, I consider the initial amount of security deposit paid here: $800.00. Both parties agreed this was the amount that was paid on August 1, 2019, as shown in the tenancy agreement. This exceeds the one-half month rent permitted for this purpose under s. 19(1) of the *Act*.

While the landlord had no authority to accept this amount for a security deposit, I find that both parties have treated the entire amount as the security deposit for the duration of the tenancy and the landlord continues to hold this amount as of the date of the hearing.

In this hearing, I find the tenant's address was within the landlord's knowledge on November 26, 2020. The tenancy ended on December 6, 2020. Although the landlord's Application is dismissed above, I find they properly applied for dispute resolution within the 15 days set out in the *Act* on December 14, 2020. They thus complied with s.38 (1) set out above.

The landlord's claim for an amount of the security deposit is dismissed above; therefore, they are not entitled to reimbursement against the security deposit. The message from the tenant to the landlord on August 26, 2019 does not constitute an agreement from the tenant for the landlord to keep any portion of the deposit. As such, I find the landlord must return the security deposit amount of $800.00 to the tenant as per the *Act*.

Alternatively, the landlord appears to draw a distinction between the interior of the rental unit and damage they claim occurred in the yard – thereby alleviating the need for a walk-through inspection when they assessed no damage in the interior. This distinction does not preclude the need for a walk-through inspection at the end of the tenancy. It is the landlord's responsibility to ensure this meeting occurs and is documented. A set out in s. 38(5), this is a secondary reason by which the landlord is responsible for the return of the full amount of the security deposit.

For the above reasons, the landlord must return the full amount of the security deposit to the tenant. This amount is $800. The *Act* s. 38(8) provides for methods of repayment available to the landlord.

As the tenant is successful in this application, I find that the tenant is entitled to recover the $100.00 filing fee paid for this application.

Conclusion

Pursuant to sections 67 and 72 of the *Act*, I grant the tenant a Monetary Order in the amount of $900 as outlined above. The tenant is 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 Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: April 26, 2021

Residential Tenancy Branch