Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL, MNDCL, FFL, MNRL, OL

Introduction

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

- Compensation for damage caused by the Tenants, their pets, or their guests to the unit, site or property;
- Compensation for monetary loss or other money owed;
- Recovery of unpaid rent; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by three former tenants of the rental unit, only two of whom were named as respondents in the Application (M.A. and K.B.), and the Landlord. As only M.A. and K.B. are named as tenants and respondents in the Application and only they provided evidence and testimony on behalf of the respondents, I will refer to M.A. and K.B. collectively as the Tenants in this decision. I will refer to the other tenant not named as a respondent in the Application by their initials, S.T. All testimony provided was affirmed. During the course of the 127 minute hearing I determined that an administrative error on the part of the Residential Tenancy Branch (the Branch) had occurred, whereby the Landlord was never provided with a copy of the Notice of Dispute Resolution Proceeding for the original hearing. As a result, the Tenants were never served with the Notice of Dispute Resolution Proceeding, including a copy of the Application and the Notice of Hearing, by the Landlord. All parties attended the hearing only as a result of calls to the Branch prompted by auto-generated email reminders. As a result, I found it necessary to adjourn the proceeding at 3:37 P.M. after 127 minutes of hearing time. An interim decision was made on January 28, 2021, and the reconvened hearing was set for April 26, 2021, at 11:00 AM.

A copy of the interim decision and the Notice of Hearing for the April 26, 2021, hearing date was sent to each party by the Branch via on January 29, 2021, as requested by them at the original hearing. The Landlord was also provided with a copy of the Notice of Dispute Resolution Proceeding, for service on the Tenants in the manner set out in the substituted service decision dated October 16, 2020. In the interim decision I made orders relating to the service of the original Notice of Dispute Resolution Proceeding by the Landlord on the Tenants, and the service or reservice of documentary evidence for consideration at the reconvened hearing. For the sake of brevity, I will not repeat here all of the matters covered by the interim decision, or the orders made therein, and as a result, the interim decision dated January 28, 2021, should be read in conjunction with this decision.

The hearing was reconvened by telephone conference call on April 26, 2021, at 11:00 AM and was attended by the Tenants and the Landlord, although the Landlord attended several minutes late, after the hearing had already begun. All testimony provided was affirmed. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Section 59(3) of the Act states that except for an application referred to in subsection (6), a person who makes an application for dispute resolution must give a copy of the application to the other party within 3 days of making it, or within a different period specified by the director. Rule 3.1 of the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure) states that the applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Branch, serve each respondent with copies of all of the following:

a) the Notice of Dispute Resolution Proceeding provided to the applicant by the Branch, which includes the Application for Dispute Resolution;
b) the Respondent Instructions for Dispute Resolution;
c) the dispute resolution process fact sheet (RTB-114) or direct request process fact sheet (RTB-130) provided by the Branch; and
d) any other evidence submitted to the Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [Documents that must be submitted with an Application for Dispute Resolution].

Further to the above, in the interim decision dated January 28, 2021, I ordered the Landlord to send to the Tenants, within three days of receiving it from the Branch, and at the email addresses approved for service in the substituted service Decision from the

Branch dated October 16, 2020, a copy of the Notice of Dispute Resolution Proceeding Package for the hearing on January 21, 2021.

At the reconvened hearing the Tenants stated that the Landlord had not complied with section 59(3) of the Act, rule 3.1 of the Rules of Procedure, or my above noted order with regards to service of the Notice of Dispute Resolution Proceeding. When I asked the Landlord whether they had complied, the Landlord acknowledged that they had not complied with the sections of the Act, and the Rules of Procedure set out above, or the order made by me in the interim decision regarding service of the Notice of Dispute Resolution Proceeding on the Tenants, as they had misunderstood my order in the interim decision.

In reading section 59(3) of the Act, I note that the word "must" is used in relation to service of the Application for Dispute Resolution on the respondent(s) by the Applicant(s). The word "must" denotes that service within the three day period, or within a different period specified by the director, is mandatory. As rule 3.1 of the Rules of Procedure specifies that a copy of the Application must be served on the respondent(s) by the Applicant(s) within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Branch, I therefore find that the Landlord was required by the Legislation to serve the Application on the Tenants within three days of January 29, 2021, the date the Branch provided the Landlord with a copy of the Notice of Dispute Resolution Proceeding and the date the Landlord confirmed at the hearing that the email containing the Notice of Dispute Resolution Proceeding was received by them.

At the hearing the Tenants took issue with the fact that the Landlord failed to comply with section 59(3) of the Act, rule 3.1 of the Rules of Procedure, and my order in the interim decision with regards to service of the Notice of Dispute Resolution Proceeding, including a copy of the Application. As a result, I am satisfied that the Tenants did not waive the mandatory three day requirement. Residential Tenancy Policy Guideline (Policy Guideline) #12 states that failure to serve documents in accordance with the Legislation may result in the application being adjourned, dismissed with leave to reapply, or dismissed without leave to reapply. As a result of the Landlord's failure to serve the Notice of Dispute Resolution Proceeding, including the Application, on the Tenants as required by section 59(3) of the Act, I therefore dismiss the Landlord's Application seeking compensation for damage caused by the Tenants, their pets, or their guests to the unit, site or property; compensation for monetary loss or other money owed; and recovery of unpaid rent, with leave to reapply. The Landlord's Application

seeking recovery of the filing fee for the Application is dismissed without leave to reapply.

Despite the above, the parties agreed at the original hearing on January 21, 2021, that the security deposit should be dealt with as part of the Application and the Application was amended accordingly, as the Landlord wished to withhold it towards any amounts owed by the Tenants and the Tenants wished for its return, or double its amount, as applicable. As the Landlord still holds the full deposit amount of $1,550.00, and the tenancy ended almost 8 months prior to the hearing date, I find that it would be significantly prejudicial to the Tenant's to dismiss the Landlord's Application, even with leave to reapply, without having first dealt with the matter of the security deposit. As a result, the hearing proceeded only on the matter of the security deposit.

As the parties acknowledged receipt of each other's documentary evidence in accordance with the Act, the Rules of Procedure and the orders set out by me in the interim decision dated January 28, 2021, I therefore accepted the documentary evidence before me from all parties for consideration.

Although I have reviewed all evidence and testimony before me that met the requirements of the Rules of Procedure, I refer only to the relevant and determinative facts, evidence, submissions, 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 by the Branch at the email addresses confirmed at the hearing.

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 the matter of the security deposit under the authority delegated to me by the Director of the Branch under Section 9.1(1) of the Act.

Issue(s) to be Decided

Is the Landlord entitled to hold all or some of the security deposit?

If not, are the Tenant's entitled to the return of all, some, or double its amount?

Background and Evidence

The tenancy agreement in the documentary evidence before me, signed on November 14, 2019, states that the month to month tenancy commenced on December 1, 2019, and that rent in the amount of $3,100.00 is due on the first day of each month. The tenancy agreement also states that a security deposit in the amount of $1,550.00 is required.

At the hearing the parties confirmed that the terms of the tenancy set out above are correct and that the $1,550.00 security deposit was paid, the entirety of which is still held by the Landlord. Although the tenancy agreement also mentions a pet damage deposit, the parties agreed at the hearing that no pet damage deposit was paid.

The parties agreed that a move-in condition inspection was completed at the start of the tenancy, but that no move-in condition inspection report was completed by the Landlord or served on the Tenants. The parties agreed that the tenancy ended on August 31, 2020, and that a move-out condition inspection was scheduled for September 1, 2020. The parties agreed that a move-out condition inspection was completed, but that no move-out condition inspection report was present or completed at the time of the inspection or signed by the Tenants. The Landlord stated that the move-out condition inspection report was completed by their agent sometime after the inspection, although the exact date and time of its completion was not given, and that a copy was sent to the Tenants. Again, the Landlord could not be sure of the date and time this was provided to the Tenants, or the method of service, as they stated that it was done by their agent. The Tenants denied receipt of the move-out condition inspection report until they received the Landlord's documentary evidence in relation to the Application and took issue with the agent's involvement in and presence at the move-out condition inspection as they stated that they did not know who the agent was and that the agent had never been involved in their tenancy prior to the move-out condition inspection. They also stated that the agent was not following reasonable COVID-19 safety protocol, such as social distancing and wearing a mask.

The parties agreed that the Tenants provided the Landlord with their forwarding address, by email, on September 3, 2020.

The Landlord stated that at the time the tenancy ended, they did not have an outstanding monetary order naming the Tenants or an order from the Branch authorizing them to retain any portion of the security deposit. Although the Landlord argued that they have a text message dated May 19, 2020, wherein the Tenant M.A.

agrees that utilities are owed and to pay them, the Tenants disputed whether utilities were in fact owed. They also argued that the Landlord has mischaracterized the text message exchange and that the matter of utilities was unrelated to the matter of the security deposit. In any event, all parties agreed that the text message referred to by the Landlord, a copy of which was not submitted by the Landlord for review or consideration by the Tenants or I, does not state that the Landlord may retain any amount of the security deposit. There was also agreement between the parties that no other written agreement exists wherein the Tenants agreed that the Landlord could retain any amount of the security deposit.

Analysis

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, or the date the landlord receives the tenant's forwarding address in writing, whichever is later, 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.

Based on the affirmed testimony of the parties at the hearing, I am satisfied that the tenancy ended on August 31, 2020, and that the Tenants provided their forwarding address in writing to the Landlord on September 3, 2020. Although the Landlord argued that a text message dated May 19, 2020, wherein the Tenant M.A. allegedly agreed that outstanding utilities were owed and to pay them, should constitute written agreement that they could keep this amount from the security deposit, I disagree. First, a copy of the text message was not provided by the Landlord for my review and consideration and the Tenants argued that the Landlord’s characterization of the matter discussed in the text message is inaccurate. They also disagreed that utilities were owed as alleged by the Landlord. Second, section 38(4) of the Act is clear that any agreement for the Landlord to retain an amount from the security deposit at the end of the tenancy is to be in writing, and all parties agreed that the text message referred to by the Landlord contained no such written agreement. As a result, I find that the Landlord was not entitled to retain any portion of the security deposit at the end of the tenancy as a result of the May 19, 2020, text message regarding utilities.

As the parties agreed that there were no previous outstanding monetary orders in relation to this tenancy at the time the tenancy ended, no order from the Branch allowing the Landlord to retain any portion of the security deposit, and no written

agreements wherein the Tenants explicitly agreed that the Landlord could retain an amount from the security deposit, I therefore find that the Landlord was not entitled to retain any portion of the security deposit under sections 38(3) or 38(4) of the Act.

As the parties agreed that the Landlord did not complete a move-in condition inspection report at the start of the tenancy, as required by section 23(4) of the Act, I find that the Landlord therefore extinguished their right to claim against the security deposit for damage pursuant to section 24(2)(c) of the Act. Policy Guideline #17 states that the party who breached their obligation in relation to the security deposit first, will bear the loss. As a result, I find that section 38(2) of the Act does not apply, regardless of whether or not the Tenants subsequently extinguished their rights in relation to the security deposit, as the Landlord extinguished their right in relation to the security deposit, first, at the start of the tenancy.

Based on the above, I find that the Landlord was therefore required to return the security deposit to the Tenants, in full, or file a claim against it with the Branch, by September 18, 2020, 15 days after the date the Landlord received the Tenants' forwarding address in writing by email. Although the Landlord filed their Application on September 4, 2020, the Landlord did not seek retention of the security deposit as part of the Application and the Application was only amended byway of mutual agreement of the parties, to include the security deposit, at the January 21, 2021, hearing. As a result, I find that the Landlord did not file a claim against the security deposit within the 15 day period set out under section 38(1) of the Act. As the parties agreed that the Landlord also did not return the security deposit, or any portion thereof, within the 15 day period, I therefore find that the Landlord breached section 38(1) of the Act.

Pursuant to section 38(6) of the Act, I therefore find that the Tenants are entitled to $3,100.00, double the amount of the $1,550.00 security deposit improperly retained by the Landlord at the end of the tenancy, and I order the Landlord to pay this amount to the Tenants. No interest is owed in accordance with the regulations. I also grant the Tenants a Monetary Order, pursuant to section 67 of the Act, in the amount of $3,100.00, for recovery of this amount from the Landlord.

Conclusion

Pursuant to section 67 of the Act, I grant the Tenants a Monetary Order in the amount of **$3,100.00**. The Tenants are provided with this Order in the above terms and should the Landlord fail to comply with this decision, the Monetary Order may be served on the

Landlord in accordance with the Act and filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The Landlord's claims for compensation for damage caused by the Tenants, their pets, or their guests to the unit, site or property; compensation for monetary loss or other money owed; and recovery of unpaid rent, are dismissed with leave to reapply. The Landlord's claim for recovery of the filing fee for this Application is dismissed without leave to reapply.

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

Dated: April 27, 2021

Residential Tenancy Branch