Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

This hearing dealt with the Application filed by the Tenant under the *Residential Tenancy Act* (the "*Act*"). The Tenant applied for the return of their security deposit, for a monetary order for compensation due to monetary loss or other money owed, and to recover their filing fee. The matter was set for a conference call.

The Tenant, the Tenant's Advocate (the "Tenant") and the Landlord attended the hearing and were each affirmed to be truthful in their testimony. The Landlord and the Tenant were provided with the opportunity to present their evidence orally and in written and documentary form and to make submissions at the hearing. Both parties were advised of section 6.11 of the Residential Tenancy Branches Rules of Procedure, prohibiting the recording of these proceedings.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matter - *Jurisdiction*

The Landlord testified that this tenancy did not fall under the *Residential Tenancy Act* as he ran a boarding house for students, where they rented bedrooms rooms, that included the sharded used of common areas, like then kitchen and bathroom, and as these are not a fully self-contained suite, they due not fall under this *Act*.

When asked by this Arbitrator, the Landlord testified that the owner of this property does not reside in the rental unit with their tenants, nor is the owner of this property a registered educational institution.

Section 2 of the Act states the following regarding what this *Act* applies to:

What this Act applies to

2 *(1) Despite any other enactment but subject to section 4 [what this Act does not apply to], this Act applies to tenancy agreements, rental units and other residential property.*

(2) Except as otherwise provided in this Act, this Act applies to a tenancy agreement entered into before or after the date this Act comes into force.

Section 4 of the *Act* states the following:

What this Act does not apply to

4 *This Act does not apply to*

(a) living accommodation rented by a not for profit housing cooperative to a member of the cooperative,

(b) living accommodation owned or operated by an educational institution and provided by that institution to its students or employees,

(c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,

(d) living accommodation included with premises that

(i) are primarily occupied for business purposes, and

(ii) are rented under a single agreement,

(e) living accommodation occupied as vacation or travel accommodation,

(f) living accommodation provided for emergency shelter or transitional housing,

(g) living accommodation

(i)in a community care facility under the Community Care and Assisted Living Act,

(ii)in a continuing care facility under the Continuing Care Act,

(iii) in a public or private hospital under the Hospital Act,

(iv) if designated under the Mental Health Act, in a Provincial mental health facility, an observation unit or a psychiatric unit,

(v) in a housing based health facility that provides hospitality support services and personal health care, or

(vi) that is made available in the course of providing rehabilitative or therapeutic treatment or services,

(h) living accommodation in a correctional institution,

> *(i) living accommodation rented under a tenancy agreement that has a term longer than 20 years,*
> *(j) tenancy agreements to which the Manufactured Home Park Tenancy Act applies, or*
> *(k) prescribed tenancy agreements, rental units or residential property.*

I accept the Landlord's testimony that the owner of the property does not reside on this rental property, nor is the owner an educational institution. Accordingly, based on the Landlord's testimony, I find that there is nothing under section 4 of the *Act* that would exclude this boarding house from being considered a rental unit under this *Act*.

I have read the rental agreement entered into between these parties, and I find that these parties entered into a legally binding tenancy agreement that falls under the jurisdiction of the *Residential Tenancy Act*. Therefore, I accept jurisdiction over this matter.

Issues to be Decided

- Has there been a breach of Section 38 of the *Act* by the Landlord?
- Is the Tenant entitled to the return of their security deposit?
- Is the Tenant entitled to monetary compensation for losses under the *Act*?
- Is the Tenant entitled to the return of their filing fee for this application?

Background and Evidence

While I have considered all of the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here.

The parties testified that the tenancy began on February 1, 2020, as a four-month fixed term tenancy that rolled into a month-to-month tenancy. Rent in the amount of $350.00 was to be paid by the first day of each month, and that the Landlord collected a $200.00 security deposit for this tenancy. The parties agreed that the Tenant moved out of the rental unit on December 31, 2020. The Tenant submitted a copy of their Tenancy agreement into documentary evidence.

The Tenants testified that they provided the Landlord with their forwarding address on January 1, 2021. The Tenant testified that on January 12, 2021, they received $150.00

of their $200.00 security deposit back from the Landlord. The Tenants also testified that at no time had the Landlord been given written permission to keep any portion of their security deposit for this tenancy.

The Landlord testified that they received the Tenant's forwarding address and returned $150.00 of the $200.00 security deposit they were holding for this tenancy. The Landlord testified that they had not obtained written permission to keep $50.00 of the security deposit.

The Tenant testified that they are claiming for $400.00 in compensation due to a breach of privacy and the restriction/removal of a contracted service during the tenancy. The Tenant testified that the Landlord monitored their data use of the Wi-Fi service included in their tenancy agreement, as well as what applications they were using and at what times of the day. The Tenant testified that they feel this was a breach of their privacy.

The Landlord testified that use of the Wi-Fi was included in the tenancy agreement but that this Wi-Fi is the personal account of the Landlord and not the Tenant and therefore they had every right to monitor that account, as to who was using the account, when it was being used and how it was being used. The Landlord testified that they ran a boarding house, with several renters having access to the same Wi-Fi account that they provided and that the Tenant cannot expect or demand privacy when they are using someone else's account.

The Tenant testified that in April 2020, the Landlord restricted their Wi-Fi access to seven hours a day and that in November 2020, the Landlord removed their access to the Wi-Fi altogether, with no notice or rent reduction. The Tenant testified that they had to use extra data on the cell phone due to this and that it cost them an extra $60.00 per month.

The Landlord testified that they did restrict each person in the house to only seven hours of Wi-Fi usage per day and that this was done due to people spending too much time on the Wi-Fi, which resulted in slow to no service of others who were on the same system. The Landlord agreed that the Tenant's access to the Wi-Fi was removed in November 2020.

Analysis

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

I accept the agreed-upon testimony of these parties, supported by the documentary evidence, that they had entered into a four-month fixed term tenancy agreement that rolled into a month-to-month tenancy at the end of the initial fixed term. I also accept that this tenancy started February 1, 2020, for a monthly rent of $350.00 due on the first day of each month and that the Landlord collected a $200.00 security deposit for this tenancy. Section 19 of the *Act* states the following regarding security deposit for a tenancy:

> ***Limits on amount of deposits***
>
> ***19*** *(1)A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.*
>
> *(2) If a landlord accepts a security deposit or a 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.*

Pursuant to section 19 of the *Act*, the maximum-security deposit the Landlord may have accepted for this tenancy was $175.00. However, in this case, the Landlord required and accepted a $200.00 security deposit. I find that the Landlord breached section 19 of the *Act* when they collected a $200.00 security deposit for this tenancy. The Landlord was cautioned during these proceedings regarding their breach of the *Act.*

Additionally, it was noted during the review of the tenancy agreement that the Landlord had included an escalating late fee provision in this tenancy agreement. Section 12 of the tenancy agreement states the following:

> “12. Where rent is late on more than one occasion the tenant will pay an extra $50.00 on part of his or her rent during the first thee days rent is late. If rent is a full week late, the fee will be $150.00. Where rent is late two weeks the fee will increase to $200.00”
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> [Reproduced as written]

Section 7 of the *Residential Tenancy Regulation* (the “*Regulation*”) states the following regarding fees charged by a landlord during a tenancy:

> ***Non-refundable fees charged by landlord***
>
> ***7*** *(1) A landlord may charge any of the following non-refundable fees:*
>
> *(a) direct cost of replacing keys or other access devices;*

(b) direct cost of additional keys or other access devices requested by the tenant;
(c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;
(d) subject to subsection (2), an administration fee of not more than $25 for the return of a tenant's cheque by a financial institution or for late payment of rent;
(e) subject to subsection (2), a fee that does not exceed the greater of $15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;
(f) a move-in or move-out fee charged by a strata corporation to the landlord;
(g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.

(2)A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

Pursuant to section 7(1d) of the *Regulation*, a late fee charge can not exceed $25.00; in this case, I find that the Landlord has written a tenancy agreement that allows for a late fee in excess of the maximum allowable amount.

I find that the Landlord has breached the *Regulation* by writing a tenancy agreement term that would allow for a late fee to exceed the maximum allowable amount. Section 5 of the *Act* states the following regarding attempts to contract contrary to the *Act* or the *Regulation*:

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find that the Landlord has attempted to contract out of the maximum allowable late fee as set out by *Regulation*. Consequently, I find that the term in this tenancy agreement regarding the payment of late fees to be of no effect. The Landlord was cautioned during these proceedings regarding their breach of the *Act* and the *Regulation;* the

Tenant was also advised that they may have a monetary claim against this Landlord if they had paid a late fee in excess of $25.00 during this tenancy.

Section 38(1) of the *Act* gives a landlord 15 days from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to file an Application for Dispute Resolution claiming against the deposits or repay the security deposit and pet damage deposit to the tenant.

> ***Return of security deposit and pet damage deposit***
>
> ***38*** *(1) Except as provided in subsection (3) or (4) (a), 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, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;*
>
> *(d)make an application for dispute resolution claiming against the security deposit or pet damage deposit.*

I accept the agreed-upon testimony of these parties and find that this tenancy ended on December 31, 2020, the date the Tenant moved out of the rental unit and that they provided their forward address to the Landlord on January 1, 2021. Accordingly, the Landlord had until January 16, 2021, to comply with section 38(1) of the *Act* by either repaying the deposits in full to the Tenant or submitting an Application for Dispute resolution to claim against the deposits. The Landlord, in this case, did neither.

At no time does a landlord have the right to simply keep the security deposit because they feel they are entitled to it or are justified to keep it. If the landlord and the tenant are unable to agree, in writing, to the repayment of the security deposit or that deductions be made, the landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later. It is not enough that the landlord thinks they are entitled to keep even a small portion of the deposit based on unproven claims.

I find that the Landlord breached section 38 (1) of the *Act* by not returning the Tenant's full deposit or filing a claim against the portion of the deposit they wished to keep within the statutory timeline.

Section 38 (6) of the *Act* goes on to state that if the landlord does not comply with the requirement to return or apply to retain the deposit within the 15 days, the landlord must pay the tenant double the security deposit.

> ***Return of security deposit and pet damage deposit***
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> ***38*** *(6) If a landlord does not comply with subsection (1), the landlord*
>
> *(a)may not make a claim against the security deposit or any pet damage deposit, and*
>
> *(b)must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.*

Therefore, I find that pursuant to section 38(6) of the *Act,* the Tenant has successfully proven that they are entitled to the return of double their security deposit. I find for the Tenant, in the amount of $250.00, consisting of $400.00 in the doubled value of the security deposit for this tenancy, less the $150.00 the Landlord returned to the Tenant on January 12, 2021.

As for the Tenant's claim for $400.00 in compensation due to a breach of privacy and the restriction and then removal of a contracted service, awards for compensation due to damage are provided for under sections 7 and 67 of the *Act.* A party that makes an application for monetary compensation against another party has the burden to prove their claim. The Residential Tenancy Policy Guideline #16 Compensation for Damage or Loss provides guidance on how an applicant must prove their claim. The policy guide states the following:

> "The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. 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.

In considering the validity of the Tenant's claim for $400.00 in compensation, I must first determine if the Landlord breached *Act* under sections 27 [*Terminating or restricting services or facilities]* and/or 28 [*Protection of tenant's right to quiet enjoyment]*.

I will address the Tenant's claims under section 28 first; on this portion of the Tenant's maintains that the Landlord infringed on their right to privacy when the Landlord monitored their internet data and app usage during their tenancy. Section 28 of the Act states the following:

> ***Protection of tenant's right to quiet enjoyment***
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> ***28*** *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*
>
> *(a) reasonable privacy;*
>
> *(b) freedom from unreasonable disturbance;*
>
> *(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
>
> *(d) use of common areas for reasonable and lawful purposes, free from significant interference.*

I accept the agreed-upon testimony of these parties that the Landlord did monitor the data and app usage report provided to them by their internet provider for the Wi-Fi service for this rental property. I also accept the agreed-upon testimony of these parties that the Wi-Fi account for this tenancy was in the name of the Landlord throughout this tenancy.

I find that It is reasonable to expect that an account holder would monitor the usage of an account in which they had the legal obligation to pay. As the Wi-Fi account for this tenancy was in the name of the Landlord, I find that there could be no reasonable expectation of privacy by the Tenant when they use the Landlord's account. Consequently, I find that the Landlord did not breach section 28 of the *Act* when they monitored the data usage on their own internet services account.

As for the Tenant's claim of a breach of section 27 of the *Act*, on this portion of the Tenant claims that the Landlord first restricted and then terminated their access to Wi-Fi service without notice. Section 27 of the *Act* states the following:

Terminating or restricting services or facilities

27 *(1) A landlord must not terminate or restrict a service or facility if*

(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or

(b) providing the service or facility is a material term of the tenancy agreement.

(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord

(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and

(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

I accept the agreed-upon testimony of these parties that Wi-Fi had been included in this tenancy agreement. I also accept the agreed-upon testimony of these parties that as of April 2020, the Landlord had restricted the Tenant's Wi-Fi access to seven hours a day and that as of November 2020, the Landlord had terminated the Tenant's Wi-Fi access.

I have also reviewed the tenancy agreement signed between these parties and note that this agreement does include a handwritten notation stating the following:

"WiFi included"

[Reproduced as written]

As there are no conditions for the Wi-Fi included in this tenancy agreement, I find that this tenancy agreement did included unlimited access to the W-Fi for no additional charge; however, due to the nature of how this service was added to this agreement, and the lack of conditions for that service, I also find that that this service was not a essential service, or a material term of this tenancy.

Pursuant to section 27(2) of the Act, a landlord has the right to restrict and even terminate a non-essential service included in a tenancy agreement. Although that restriction or termination of the service must be done in accordance with the requirements set out in this section, which include a minimum of 30 days written notice, issued on the approved form, #RTB-24 Notice Terminating or Restricting a Service or Facility, and that the notice is accompanied by a suitable rent reduction.

I accept the Landlord's testimony that they did not issue form #RTB-24 to the Tenant, that they did not provide 30 days notice before the service was restricted, and that they did not issue a rent reduction when they restricted the contact service of Wi-Fi in April 2020. Therefore, I find that the Landlord was in breach of section 27 of the *Act* when they restricted the Tenant's access to the Wi-Fi to only seven hours per day, without 30 days written notice, and without a rent reduction.

Additionally, I accept the Landlord's testimony that they did not issue form #RTB-24 to the Tenant, that they did not provide 30 days notice or a rent reduction before they terminated the Tenant's access to the contact service of Wi-Fi in November 2020. Therefore, I find that the Landlord again breached section 27 of the *Act* when they terminated the Tenant's access to the Wi-Fi without 30 days written notice and without a rent reduction.

Overall, I find that the Landlord breached section 27 of the *Act* twice during this tenancy; first in April 2020 when they restricted access and for a second time in November when they terminated the Tenant's access to the contracted service of Wi-Fi for this tenancy. I accept the Tenant's testimony that due to the Landlord's restriction, and then termination of their access to Wi-Fi, they were forced to use extra data on the personal cell phone, which resulted in a financial loss to the Tenant. However, I find that the Tenant has not submitted any documentary evidence to establish the amount of loss they suffered due to the Landlord's breach of the *Act*. However, an arbitrator may also award compensation in situations where establishing the value of the damage or loss is not straightforward.

In this case, I find that the Landlord's breach of the *Act* did result in a financial loss to the Tenant. Therefore, I find that the Tenant has established an entitlement to a nominal award in the amount of $200.00, consisting of $140.00 for the restriction of their access to the contracted service between April to October 2020, and $60.00 for the termination of their access to the contracted service between November and December 2020.

Additionally, section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Tenant has been successful in their application, I find that the Tenant is entitled to recover the $100.00 filing fee paid for this application.

I grant the Tenant a monetary order of $550.00, consisting of $200.00 in compensation $400.00 in the recovery of the doubled value of the security deposit, $100.00 in the

recovery of the filing fee for this hearing, less $150.00 in the amount of security deposit that had been returned to the Tenant before these proceedings.

Conclusion

I find that the Landlord breached section 19 of the Act when they collected a security deposit in excess of the maximum amount permitted under the *Act* for this tenancy.

I find that the Landlord breached section 7 of the *Regulation* and section 5 of the *Act* by writing a tenancy agreement term that would allow for a late fee to exceed the maximum allowable amount.

I find that the Landlord breached section 27 of the *Act* when they failed to provide the required 30 day written notice and rent reduction when they restricted and then terminated a service that had been included in the tenancy agreement.

I find that the value of the security deposit paid for this tenancy has doubled in value due to the Landlord's breach of section 38 of the *Act*.

I find for the Tenant pursuant to sections 38, 67 and 72 of the *Act*. I grant the Tenant a **Monetary Order** in the amount of **$550.00**. 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: June 15, 2021

Residential Tenancy Branch