Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL MNDCT DRI FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "*Act*") for:

- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) pursuant to section 49;
- a monetary award for damages and loss pursuant to section 67;
- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord was assisted by a family member who acted as agent and interpreter (the "Landlord").

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

At the outset of the hearing the parties confirmed that this tenancy has ended and the tenants withdrew the portion of their application disputing the 2 Month Notice.

Preliminary Issue – Service of Documents

The Landlord confirmed receipt of the tenants' application and materials. Based on the testimony I find the landlord duly served in accordance with sections 88 and 89 of the *Act*.

The tenants disputed that they were served with the landlord's evidentiary materials in accordance with the Residential Tenancy Rules of Procedure or at all. The Landlord testified that the evidence was served on the tenants by posting on the door of the address for service provided by the tenants on May 23, 2021 and subsequently again on June 14, 2021. The landlord submitted photographs showing the evidentiary materials served on the tenants by posting on the rental unit door.

Section 88(g) of the *Act* provides that a document, including evidence for a dispute resolution hearing, may be served on a person by attaching a copy to a door or other conspicuous place at the address at which the person resides.

Section 90 (c) provides that a document served in accordance with section 88 is deemed to be received, if given by attaching a copy to a door, on the third day after it is attached.

In this case I accept the evidence that the landlord attached their evidentiary materials on the door at the service address provided by the tenants on May 23, 2021. Accordingly, the tenants are deemed served on May 26, 2021 three days after attaching.

While the tenants submit that they were temporarily not residing at the service address, I find this does not negate the deemed service provisions of the *Act*. If there was a change to the service address the onus was with the tenants to advise the other party of the new address for service. There is no record that the tenants changed the address for service or that they advised the other party of any change. I find that it would be a breach of the principles of procedural fairness if I were to find that the tenants were not deemed served due to their absence from the service address and failure to pick up the items.

Under the circumstances, I am satisfied with the evidence that the landlord served the tenants by posting their evidence package on the service address door on May 23, 2021 and find that the tenants are deemed served on May 26, 2021 in accordance with sections 88 and 90 of the Act.

Issue(s) to be Decided

Should there be a determination on the issue of the disputed rent increase?
Are the tenants entitled to a monetary award as claimed?
Are the tenants entitled to recover their filing fee from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This periodic tenancy began in 2016 when Tenant HS first moved into the rental unit. There was no written tenancy agreement between the parties. No move-in condition inspection report was prepared. The parties agreed to a monthly rent of $700.00 payable on the first of each month. A security deposit of $350.00 was paid at the start of the tenancy and is still held by the landlord.

Tenant KS married Tenant HS and began residing in the rental unit during the tenancy. The parties agree that over the course of the tenancy the amount paid for the monthly rent was amended at various times. The landlord characterizes the changes as mutual agreements between the parties to set a new rate for the monthly rent. The tenants characterize them as rent increases imposed unilaterally and in contravention of the *Act* and regulations.

There was a previous hearing under the file number on the first page of this decision pertaining to an application by the tenants disputing rent increases for this tenancy. In that earlier decision dated February 18, 2021 the presiding arbitrator writes:

> Based on a balance of probabilities, I find that the correct monthly rent for this tenancy remains at $700.00, the amount originally cited in the Agreement between the landlord and Tenant HS.
> …
> The tenants remain at liberty to apply for amounts that they believe they are entitled to receive based on my final and binding decision that the correct monthly rent for this tenancy since it began is and remains $700.00.

The landlord now submits that despite the final and binding nature of the earlier decision pertaining to the disputed rent increases the matter should now be reconsidered. The landlord submits that they did not have an opportunity to prepare documentary evidence

in support of their position that the rent increases throughout the tenancy were agreed to by the parties at the earlier hearing and that they have now submitted evidence in support of their position.

The parties agree that based on a monthly rent of $700.00 the tenants have overpaid a total amount of $3,850 for this tenancy from December 1, 2016 to January 1, 2021. The tenants seek a monetary award for recovery of this overpaid amount.

The parties agree that the landlord issued a 2 Month Notice to End Tenancy for Landlord's Use dated February 18, 2021 with an effective date of April 30, 2021. The tenants paid the full rent through April 2021. The tenants gave written notice to the landlord to end the tenancy on May 7, 2021 and vacated the rental unit on May 9, 2021. The tenants now seek compensation in the amount of $496.77 which they calculate to be the equivalent of one month's rent under the tenancy agreement, $700.00 less the proportion of the rent for the month of May during which they occupied the rental unit.

The landlord submits that as the tenants stayed in the rental unit beyond the effective date of the 2 Month Notice and did not provide written notice to end the tenancy until May 7, 2021 they would be obligated to pay full rent for the month of May 2021. The landlord submits that as the tenants have not paid rent for May that is sufficient monetary compensation pursuant to section 51 of the *Act* and no further amount is payable or owing.

The landlord submits that they are entitled to retain the security deposit for this tenancy for the cost of carpet cleaning, cleaning and replacement of items removed from the rental unit by the tenants. The tenants testified that they have not provided written authorization that the landlord may retain any portion of the security deposit for this tenancy and seek a return of double the security deposit paid pursuant to section 38 of the *Act*.

The tenants also seek the cost of fuel and travel to the post office which they say was incurred in pursuit of the present application.

Analysis

The legal principle of *res judicata* prevents an applicant from pursuing a claim that has already been conclusively decided. A final and binding decision is not an invitation for parties to submit additional documentary evidence to bolster their arguments and position or to reargue matters that have been conclusively decided.

In the present case I find that the issue of the rent increases during this tenancy have been conclusively determined by another arbitrator in the earlier hearing. While the landlord argues that they ought to be allowed to make submissions and that I should reconsider the issue, I find no ambiguity in the earlier decision which states “my final and binding decision that the correct monthly rent for this tenancy since it began is and remains $700.00”. As it is not open for me to reconsider a matter that has been considered and determined by another Arbitrator I find that I have no jurisdiction to reconsider this issue and find it is *res judicata*. Accordingly, I dismiss this portion of the application.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Section 43(5) provides that a tenant may recover the amount of a rent increase paid that does not comply with the *Act*. I accept the undisputed evidence of the parties that the tenants paid a total amount of $3,850.00 above the monthly rent of $700.00. I find that the submission of the tenants that this amount represents rent payments over the course of this tenancy to be consistent with the documentary evidence and reasonable. I do not find the landlord’s submissions that the amount paid about the $700.00 was agreed upon by the parties and therefore not subject to the provisions of section 43 of the Act to be persuasive. Both parties referenced the amounts paid as rent and it is clear in the documentary correspondence that the parties understood the amounts to be rent increases.

In accordance with the earlier decision the monthly rent for this tenancy was $700.00 and any amount paid above that was rent increases which did not comply with the *Act*. As such, I find that the tenants are entitled to recover the overpayments made throughout the tenancy and issue a monetary award in the amount of $3,850.00 accordingly.

Section 51(1) of the Act sets out that:

> **51** (1)A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the

> landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

Accordingly, I find that the tenants are entitled to a monetary award in the amount of $700.00, the equivalent of one month's rent payable under the tenancy agreement.

Section 57 of the Act provides, in relevant parts, as follows:

> **57** (1)In this section:
>
> "overholding tenant" means a tenant who continues to occupy a rental unit after the tenant's tenancy is ended.
>
> (3)A landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended.

As the effective date of the 2 Month Notice was April 30, 2021, I find that the tenant overheld by remaining in the rental unit during the month of May 2021. It is evident in the portions of the correspondence submitted by the parties that the landlord did not withdraw or cancel the 2 Month Notice and were seeking an end of the tenancy. I accept the undisputed evidence of the parties that the tenants vacated and provided vacant possession of the rental unit to the landlord on May 9, 2021. Accordingly, the tenants were obligated to pay the proportion of the rent for the period of 9 days in May.

I accept the calculation of the tenants that the proportion of the rent payable is $203.23. Accordingly, I find that the tenants are entitled to a monetary award in the amount of $496.77, the amount equivalent to one month's rent under the tenancy agreement less the proportion of the rent payable to the landlord for overholding.

Section 24 of the *Act* provides that the right of a landlord to claim against a security deposit is extinguished if they do not comply with the requirements of section 23 in completing a condition inspection report at the start of the tenancy.

Section 38 of the *Act* requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to section 38(6) of the *Act* equivalent to the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy.

I accept the undisputed evidence of the parties that no condition inspection report was prepared at the start of the tenancy. Accordingly, I find that the landlord has extinguished their right to claim against the deposit for this tenancy.

I further accept the evidence of the parties that the tenants have not provided written authorization that the landlord may retain any portion of the deposit for this tenancy. The parties gave evidence that the tenants provided a forwarding address in writing to the landlord on May 7, 2021 and the tenancy ended on May 9, 2021. I accept the evidence that the landlord has neither returned the full amount of the security deposit nor have they filed an application for authorization to retain the deposit within 15 days of the tenancy ending on May 9, 2021 or at all.

I find the landlord's submissions regarding the state of the rental unit or their losses incurred due to the condition of the suite to be irrelevant to the matter at hand. If the landlord believed they had incurred damages or loss it was incumbent upon them to file an application in accordance with the *Act* rather than unilaterally withhold the deposit without authorization.

Based on the undisputed evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant's security deposit in full within the required 15 days of the tenancy ending. I accept the tenant's evidence that they have not waived their right to obtain a payment pursuant to section 38 of the *Act* as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is entitled to an $700.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

I find that the cost of travel to the post office and fuel costs are not direct losses incurred by the tenants due to any breach of the Act, regulations or tenancy agreement on the part of the landlord but simply the expected costs of pursuing an application for dispute resolution and serving materials prior to a hearing. As such, I find these are not costs recoverable and dismiss this portion of the tenants' claim.

As the tenants were primarily successful in their application they are also entitled to recover their filing fee from the landlord.

Conclusion

I issue a monetary order in the tenants' favour in the amount of $3,708.00 on the following terms:

Item	**Amount**
Recovery of Overpaid Rent	$3,850.00
Section 51 compensation of 1 Month Rent	$700.00
Double Security Deposit (2 x $350.00)	$700.00
Filing Fees	$100.00
Less Rent for Overholding	$203.23
TOTAL	**$5,146.77**

The landlord must be served with this Order as soon as possible. Should the tenant 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.

The portion of the tenants' application seeking cancellation of the 2 Month Notice is withdrawn.

The portion of the tenants' application seeking a determination of a disputed rent increase is *res judicata* and I decline jurisdiction.

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