



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT MNSD FFT

Introduction

This hearing was convened as a result of the tenant's Application for Dispute Resolution (application) seeking remedy under the *Residential Tenancy Act* (Act). The tenant applied for a monetary claim of \$5,950.00 for the return of the first month of rent, for their security deposit and for the filing fee.

The tenant, AO (tenant) and the landlord attended the teleconference hearing. All parties were affirmed, and the hearing process was explained to the parties. The parties were provided an opportunity to ask questions. Words utilizing the singular shall also include the plural and vice versa where the context requires.

Neither party raised any concerns regarding the service of documentary evidence. I find the parties were sufficiently served as a result.

Preliminary and Procedural Matters

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Residential Tenancy Branch (RTB) Rules of Procedure (Rules) Rule 6.11. The parties were also informed that if any recording devices were being used, they were directed to immediately cease the recording of the hearing. In addition, the parties were informed that if any recording was surreptitiously made and used for any purpose, they will be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation under the Act. Neither party had any questions about my direction pursuant to RTB Rule 6.11.

In addition, the parties confirmed their respective email addresses at the outset of the hearing and stated that they understood that the decision would be emailed to them.

Issues to be Decided

- Is the tenant entitled to a monetary order under the Act and if so, in what amount?
- What should happen to the tenant's security deposit under the Act?
- Is the tenant entitled to the recovery of the cost of the filing fee under the Act?

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A month to month tenancy began on November 1, 2020. According to the tenancy agreement, the monthly rent was \$3,900.00 per month and was due on the 28th day of each month. The parties confirmed that the tenant paid a security deposit of \$1,950.00 at the start of the tenancy, which the landlord continues to hold.

Tenant's evidence

The tenant referred to an undated ad from Craigslist advertising the rental unit as a Spacious 5 bedroom, 4 bedroom fully furnished home with 12 photos. All photos except the main photo of the front of the home were too small to enlarge as attempting to do so resulted in pixilation of the photos making them too blurry to view. The ad reads as follows:

5-bedroom and 4-bathroom house includes 2 master bedrooms, en-suite and walk in closets with custom cabinets. Brand new kitchen and appliances; stainless steel whirlpool cooktop and kitchenaid fridge and dishwasher, hard wood flooring and granite flooring throughout, bathrooms and interior and exterior paint of the home completed 5 months ago. Furnished or Unfurnished on request. Sought after location near Stride Elementary School, Lord Tweedsmuir Elementary School, Byrne Creek High School, St. Thomas More Collegiate and Douglas College.

Minutes from Douglas College, Willard and Byrne Creek Ravine Park, public and private schools and Skytrains and public transportation.

House exterior and interior renovated, MUST SEE VIRTUALLY OR IN PERSON. Suitable for long term tenants and families. No indoor smokers.

Onsite and street parking + washer and dryer in home!

Available to move in November 1!

For inquiries, more details, scheduling online and/or video, please email.

Disclaimer: The above information, while deemed to be correct, is not guaranteed. Asking rent and availability are subject to change. Property Management provides professional property management services on behalf of the owner of this property. Prospective tenants do not need to pay any fees for renting this property do NOT contact me with unsolicited services or offers

The tenant stated that they operate a flooring company and that they routinely rent homes for their employees and that they search for furnished homes for rent, which is

why this home was chosen because it was furnished and was listed as 5 bedrooms. The tenant stated that from Ontario they found the rental unit online. The tenant signed the tenancy agreement on October 19, 2020 and stated that they first saw the rental unit on November 1, 2020. The tenant claims the rental unit was not as advertised as it was only 4 bedrooms as the 5th bedroom was a walk-in closet with a bed in it.

The tenant referred to 14 colour photos, some of which showed a baseboard apart from the wall, some flooring missing, an area that still had to be painted, a small hole in the wall near the stairs, and a bed missing the mattress with only the boxspring showing.

The tenant writes in their application that "On Sunday, November 1st, I walked into a house to move in that did not match the advertisement pictures and the description! It disappointed us. House is not ready for move-in unlike the description on the internet. The flooring isn't done upstairs, there are broken doors, damaged trimmings, broken furniture, the house is not fully renovated as you put on advertisement fully renovated, it is not 5 bedroom house as you can see in the pictures one "room" is a walk-in closet."

Landlord's evidence

The landlord responded to the tenant's evidence by stating that the photo of the baseboard clearly shows that the nail were still on the baseboard, which supports that the tenant pulled them off the wall solely to make it appear the baseboards were not installed, when in fact the baseboards were installed correctly.

The landlord also stated that the tenant was permitted early access to the rental unit at 8:00 a.m. instead of the normal 1:00 p.m. timeframe as a favour to the tenant, and that the remainder of the flooring was still being installed and was going to be completed in time for the formal possession of the rental unit by the tenant. The landlord explained that the tenant requested early access just to store some items for their work, so the landlord stated they agreed to be kind. The landlord stated that the rental unit had a PIN code access, so the landlord did not need to be present to provide a key to the rental unit.

The landlord stated that the tenant had another rental unit to go to, which is why the tenant tried to claim the rental unit was not as advertised and renege on the signed tenancy agreement. The landlord also presented 4 video files, which show 4 bedrooms, all with beds, and does not show any of the beds missing a mattress and that the tenant removed a mattress for a photo. The landlord stated the video footage was taken on November 4, 2020 and that the landlord advised the tenant that they were taking video

footage due to the tenant claiming that the landlord had misrepresented the rental unit. The landlord also stated that cleaners were scheduled to arrive at 10:00 a.m. to thoroughly clean the rental unit on November 1, 2020 and that it had not been cleaned by 8:00 a.m. when the tenant entered the rental unit using the PIN code.

The landlord presented a November 5, 2020 document from the tenant advising that the tenant was not moving into the rental unit after personally attending and seeing a discrepancy between the advertisement pictures and description and the actual state of the house. The tenant wrote in part "...The whole house was cracked and damaged...", which I will address further below. The tenant wrote their forwarding address at the bottom of that November 5, 2020 document, which the landlord stated they received on November 5, 2020.

The landlord did not file their own application claiming towards the tenant's security deposit and instead, filed evidence in the tenant's claim, which the landlord was advised they could not make a claim by filing evidence in the tenant's application, which I will address further below.

The landlord stated that the ad indicated that viewing was possible virtually or in person and that the tenant did not request a virtual tour as the ad provided for and says in capital letters in the ad the following, "MUST SEE VIRTUALLY OR IN PERSON." The landlord stated that tenant did not send any agent or employees to view the property either before arriving on November 1, 2020.

Analysis

Based on the documentary evidence presented and the testimony provided during the hearing, and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,

4. That the party making the application did what was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the tenant to prove the existence of the damage/loss and that it stemmed directly from a violation of the Act, regulation, or tenancy agreement on the part of the landlord. Once that has been established, the tenant must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the tenant did what is reasonable to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Firstly, section 16 of the Act applies and states:

Start of rights and obligations under tenancy agreement

16 The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

[Emphasis added]

Given the above, I find the tenancy began on November 1, 2020 based on the signed tenancy agreement dated October 19, 2020. I also find that the tenant failed to exercise reasonable due diligence by failing to view the property virtually from Ontario as indicated in the ad. In addition, I find the tenant failed to provide photos of broken doors and of broken furniture and the rental ad does not state “fully renovated” as claimed by the tenant. I also find the tenant’s claim that “The whole house was cracked and damaged” to be false and is inconsistent with the photo and video evidence before me. In addition, I find the photo evidence supports the landlord’s testimony that the tenant pulled off the baseboards, as I can see the straight nails or staples in the baseboards, which I find supports that it is more likely than not that the tenant pulled off the baseboards to give the appearance of the baseboards not being installed. I have reached this finding as it makes no logical sense to have a baseboard a few inches away from a wall with straight nails or staples going through the baseboards.

In addition, I find there is evidence of 5 bedrooms in the video footage and that none of the tenant’s evidence supports that the rental unit was uninhabitable. As a result, I find the tenancy began on November 1, 2020 and that the tenant had no right to end the

tenancy on November 5, 2020 by the letter submitted to the landlord. Therefore, I find the tenant has failed to meet the burden of proof for the return of their November 2020 rent of \$3,900.00. As a result, that portion of the tenant's claim is **dismissed without leave to reapply due to insufficient evidence.**

I will now deal with the tenant's security deposit. Sections 38(1) and 38(6) of the Act apply and state:

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.

(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.

[Emphasis added]

Based on the above, I find that the landlord received the tenant's written forwarding address on November 5, 2020, as the landlord confirmed that during the hearing. I also find that the landlord did not have written permission to retain any portion of the security deposit and that the landlord did not file an application claiming against the security deposit and did not return any portion of the \$1,950.00 security deposit.

In addition, the landlord may not make a claim by submitting evidence in response to the tenant's application. Therefore, as the landlord failed to make a claim against the security deposit and did not return it within 15 days of November 5, 2020, and did not have permission to retain the security deposit, I find the tenant is entitled to the return of **double** the security deposit of \$1,950.00 for a total of **\$3,900.00**. I note that the tenant's security deposit has accrued \$0.00 in interest since the start of the tenancy. I find the

landlord had no right under the Act to retain the security deposit once served with the tenant's written forwarding address.

Due to the tenant's application being only partially successful, I grant the tenant **\$50.00** of their \$100.00 filing fee pursuant to section 72 of the Act.

Monetary Order – I find that the tenant has established a total monetary claim in the amount of **\$3,950.00**, as described above. I grant the tenant a monetary order pursuant to section 67 of the Act in that amount.

The landlord is cautioned to comply with section 38 of the Act in the future.

Conclusion

The tenant's application is partially successful and as they have not waived their rights under the Act, I find the tenant have established a total monetary claim of \$3,950.00 as indicated above.

The decision will be emailed to both parties. The monetary order will be emailed to the tenant only for service on the landlord. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court. The landlord may be held liable for the costs associated with enforcing the monetary order.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: July 21, 2021

Residential Tenancy Branch