Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT, MNSD, MNDCT

Introduction

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

- monetary order for $2,200 representing two times the amount of the security deposit and pet damage deposit, pursuant to sections 38 and 62 of the Act;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $643.21 pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenant attended the hearing. The landlord was represented at the hearing by its property manager ("**ES**"). The respondent landlord ("**FSR**") is a property management company which no longer manages the residential property in which the rental unit is located. In September 2021 another property management company ("**HPPM**", full name on cover of this decision) was retained by the owner of the residential property (the "**Owner**", full name on cover of this decision) to manage the residential property. HPPM's managing broker ("**TV**") attended the hearing but, beyond providing clarification as the change in property management companies, did not participate in the hearing.

The tenant testified, and ES confirmed, that the tenant served the landlord with the notice of dispute resolution package and supporting documentary evidence. ES testified, and the tenant confirmed, that the landlord served the tenant with their documentary evidence. I find that all parties have been served with the required documents in accordance with the Act.

Preliminary Issue – Identity of Respondent

At the outset of the hearing, I raised the issue of whether FSR was properly named as the landlord in this application. The tenancy agreement submitted into evidence names the parties as the tenant and FSR "as agent for the landlord". However, it does not list the name of the landlord for which it is an agent. ES advised me that FSR was agent for the Owner when it entered into the tenancy agreement. I asked ES and TV if the Owner or HPPM should be named as a landlord to this application, as FSR was not currently the property manager.

TV stated that as FSR was the property manager for the relevant time period, it should be the respondent, and not HPPM. ES stated that she was agreeable to FSR remaining as the respondent, so long as FSR would not have to pay any monetary order I might make in this decision. I advised her that if I made a monetary order, it would be against whomever was named as respondent on the application, and they would be responsible for complying with it.

ES stated that, if this were the case, FSR would be able to recover any amount it was ordered to pay from the Owner. I advised her that I am not privy to the contractual agreement between the Owner and FSR, so I could not say if this would be the case. ES stated that she confident this would be the case and agreed that FSR should remain as the named respondent in this application. As such, I will not order that any party be added as respondent to this application. I will refer to FSR as "the landlord" for the rest of this decision.

Issues to be Decided

Is the tenant entitled to:

1) a monetary order of $2,843.21; and
2) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written, fixed term tenancy agreement starting April 1, 2021 and ending March 31, 2022. Monthly rent is $1,100 and is payable on the first of each month. The tenant paid the landlord a security deposit of $550 and a pet damage deposit of $550. On June 18, 2021, the landlord returned $550 of these deposits to the tenant. The landlord retained the balance.

The tenant moved into the rental unit on April 1, 2021. She conducted a move-in condition inspection with the landlord on March 25, 2021. She vacated the rental unit on April 30, 2021. She conducted a move-out condition inspection with the landlord on April 30, 2021. A copy of both condition inspection reports was entered into evidence.

The tenant testified that within a few days of moving into the rental unit, she discovered that her next-door neighbour was frequently smoking cigarettes inside her unit and on the patio. The building in which the rental unit is located (the "**building**") is smoke-free. The tenancy agreement included a non-smoking clause which indicated that it was a material term of the tenancy agreement. ES did not dispute any part of the tenant's testimony and agreed that the neighbour was smoking in the rental unit.

The tenant advised the landlord's leasing agent of the of the smoking on April 7, 2021, and asked if there was another rental unit that she would be able to move into. She was advised that there was another unit available, but it was on a floor of the building which did not allow pets. The tenant had a pet, so she declined to relocate.

The tenant emailed the landlord's agents several times between April 12 and April 22, 2021 reporting her neighbour's breaches of the no-smoking policy and describing the health impacts the smoke is having on her. She testified that she made repeated phone calls to the landlord's agents about the issue and left voicemails, but that these calls were not answered or returned.

The tenant testified that the smoke coming into her rental unit became so sever that she developed health problems. She testified that she is allergic to cigarette smoke and submitted a note from her doctor confirming this.

On April 20, 2021, the tenant emailed the landlord's agents stating that the night prior she had only had an hour and half sleep due to the smoke and the "coughing and hacking" it caused her. She testified that her "chest is so tight and hurts so bad" as a result. She then advised the landlord that she would be vacating the rental unit on April 30, 2021. She explained:

> I signed up for a smoke free environment and it is not. Living here is not safe for me. I'm also getting doctors note for you too. Unfortunately, I won't be paying you rent for next month either. I'm on disability and need to pay rent somewhere helps. I hope you understand that this is an emergency situation.

The tenant testified that she did not have a new apartment lined up when she made the decision to vacate and that she moved into her van after vacating. She testified that she did not give the landlord any prior notice that she would vacate the rental unit should the issue not be corrected.

The tenant incurred a number of expenses as a result of ending the tenancy early. She had to hired movers to move her belongings into storage at a cost of $204.75. She provided an invoice confirming this amount. She testified that she had to cancel her cable and internet and that the provider charged her an "early cancelation fee" of $220. She submitted an invoice for this amount. She testified that she incurred a $42.06 cancelation fee when she cancelled her home insurance. She submitted an invoice for this amount. She also testified that she had to discard or donate much of the food in her refrigerator. She testified that she ate as much of it as she could in the days leading up to her departure but was unable to finish everything. She estimated that the value of the groceries donated or discarded was $150 (she did not submit any receipts to confirm this amount).

The tenant testified that as she was moving into her van, she was unable to transfer any of the cable, internet, or insurance to another property, and she was unable to bring her perishable food with her when she moved.

In an email sent on April 22, 2021, the tenant requested that the landlord return her security and pet damage deposit and provided her forwarding address (her brother's work address). The email address it was sent to belongs to an agent of the landlord and was regularly used by the parties to communicate about the tenancy.

The tenant vacated the rental unit on April 30, 2021.

On June 15, 2021, the landlord's agent emailed the tenant and wrote:

> I just wanted to reach out to you in regards to your deposit, I have spoken with the client and we have agreed to return your half. Even though the lease was broken and subject to liquidated damages, we feel as it is a kind gesture to return you half of it. We continued to still inspect the unit beside you as well as yours but could not find any evidence of smoking.
>
> I am wondering, where is the best place to send your money to?

The tenant replied that same day providing the same forwarding address as before. The landlord returned $550 to the tenant shortly thereafter.

As stated above, ES did not dispute that the tenant's neighbour was smoking inside, in contravention of the building's non-smoking policy. Instead, she argued that the tenant had not given the landlord sufficient time to address the issue she raised. She noted that less than two weeks elapsed between when the tenant first notified the landlord of the issue and the tenant declaring her intention to vacate the rental unit. She testified that in this two-week period, the landlord delivered two cautions to the neighbour about the complaints (these were not entered into evidence) and arranged to inspect the neighbour's unit. She testified that an agent of the landlord inspected the unit on April 21, 2021. She did not testify as to the result of that inspection, however the June 15, 2021 email reproduced above references the findings.

ES testified that, in her experience, evicting a tenant for repeated breach of a non-smoking policy can take at least three months.

ES argued that the tenant was not entitled to unilaterally terminate the tenancy so soon after advising the landlord of the problem as this would not afford the landlord an opportunity to fix it.

ES agreed that the landlord only returned half of the tenant's deposits. She argued that the tenancy agreement contained a liquidated damages clause which entitled the landlord to $1,100 if the tenant broke the lease, but, in light of the circumstances, the

landlord thought it appropriate to only deduct half that amount. ES stated that, to the best of her knowledge, the landlord had not made an application to the Residential Tenancy Branch to retain any part of the deposits.

Analysis

1. Return of Deposits

Section 38(1) of the Act states:

> **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.

Based on the testimony of the parties, I find that the tenancy ended on April 30, 2021. The tenant emailed her forwarding address to the landlord on April 22, 2021 and again on June 15, 2021. Despite email not being an approved method of service documents under section 88 of the Act, I find it appropriate to exercise my discretion pursuant to section 71(2) of the Act and find that the forwarding address was sufficiently served for the purposes of the Act on June 15, 2021, given that the landlord requested the tenant's forwarding address by email, and given that, after receiving it, the landlord returned a portion of the tenant's deposits to the tenant.

However, I find that the landlord has not returned the full amount of the deposits to the tenant within 15 days of receiving her forwarding address, or at all.

I find that the landlord has not made an application for dispute resolution claiming against the deposits within 15 days of receiving the forwarding address from the tenants.

It is not enough for the landlord to allege that the tenant is obligated to pay liquidated damages. The landlord must actually make an application for dispute resolution at the RTB claiming against the deposits seeking liquidated damages within 15 days from receiving the tenant's forwarding address.

The landlord did not do this. Accordingly, I find that it has failed to comply with its obligations under section 38(1) of the Act.

Section 38(6) of the Act sets out what is to occur in the event that a landlord fails to return or claim against a deposit within the specified timeframe:

> (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.

RTB Policy Guideline 17 provides examples of how this amount is to be calculated in the event a landlord returns a portion of a deposit to the tenant:

> Example A: A tenant paid $400 as a security deposit. At the end of the tenancy, the landlord held back $125 without the tenant's written permission and without an order from the Residential Tenancy Branch. The tenant applied for a monetary order and a hearing was held.
>
> The arbitrator doubles the amount paid as a security deposit ($400 x 2 = $800), then deducts the amount already returned to the tenant, to determine the amount of the monetary order. In this example, the amount of the monetary order is $525.00 ($800 - $275 = $525).

As such, as the landlord failed to comply with section 38(1) of the Act, I find that the landlord must pay the tenant $1,650 ($1,100 x 2 = $2,200; $2,200 - $550 = $1,650).

2. <u>Compensation for losses caused by move</u>

The tenancy was for a fixed term of one year, starting April 1, 2021 and ending March 31, 2022. It is not disputed that the tenant vacated the rental unit prior to the end of the fixed term. The tenant argued that she was required to move out of the rental unit prior due to her health condition and the landlord's failure to adequate address her complaints about the smoke coming from her neighbour's unit.

Sections 45(2) and (3) of the Act set out haw a tenant may terminate a fixed-term tenancy:

> **Tenant's notice**
> 45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
> (a) is not earlier than one month after the date the landlord receives the notice,

> (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
> (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
> (3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

As the term of the tenancy extended to March 2022, I find that the tenant was not able to end the tenancy on April 30, 2021 pursuant to section 45(2) of the Act.

RTB Policy Guideline 8 discusses how a tenant may end a fixed-term tenancy pursuant to section 45(3) of the Act:

> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
> - that there is a problem;
> - that they believe the problem is a breach of a material term of the tenancy agreement;
> - that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
> - that if the problem is not fixed by the deadline, the party will end the tenancy.

Prior to her April 20, 2021 email in which she notified the landlord of her intention to vacate the rental unit on April 30, 2021, the tenant never advised the landlord of her intention to move out should the issue of cigarette smoke not be resolved. Additionally, while I understand that the tenant was severely inconvenienced by the cigarette smoke, and unhappy with her perceived lack of action on the part of the landlord to address her complaints, I do not find that the landlord was ignoring the tenant's complaints or taking an unreasonable amount of time to address the issue. With two weeks of first being notified of the issue, the landlord had sent two warning letters and had scheduled an inspection of the neighbour's unit. While this may not be as fast as the tenant would have liked, this is not an unreasonable time frame for a landlord to take such steps.

I cannot say how the situation might have been resolved should the tenant have allowed the landlord a reasonable amount of time to address the issue. Indeed, she notified the landlord of her intention to move before the inspection of the neighbour's unit even occurred.

I do not find that the tenant gave the landlord a reasonable amount of time to address the breach of a material term of the tenancy and I find that she failed to provide a reasonable deadline within which the landlord must fix the issue. Instead, the tenant unilaterally and without warning ended the tenancy when she was unsatisfied with the

landlord's progress in addressing her complaints. As such, I find that she failed to end her fixed-term tenancy in accordance with section 45(3) of the Act.

Accordingly, I do not find that the tenant is entitled to compensation arising her ending the tenancy before the end of the fixed term. These costs were not incurred as a result of the landlord's breach of the Act, but rather a result of her own breach. I dismiss this portion of the tenant's application, without leave to reapply.

Pursuant to section 72(1) of the Act, as the tenant has been partially successful in the application, she may recover the filing fee from the landlord.

Conclusion

Pursuant to sections 65 and 72 of the Act, I order that the landlord pay the tenant $1,750, representing the repayment of the filing fee and the return of double the deposits less the amount already returned.

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: January 18, 2022

Residential Tenancy Branch