Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

File No. 310049915: MNSDS-DR, FFT
File No. 910062859: MNRL, MNDCL, FFL

Introduction

The Tenants apply for the return of their security deposit pursuant to s. 38 of the *Residential Tenancy Act* (the "*Act*") and for the return of their filing fee pursuant to s. 72.

The Tenants' application was originally filed as a direct request application but was adjourned to a participatory hearing following an interim decision of November 4, 2021.

The Landlord files a cross-application seeking compensation for unpaid rent and monetary loss pursuant to s. 67 of the *Act*. The Landlord also seeks the return of her filing fee under s. 72.

C.C. appeared as Tenant. The co-tenant applicant did not attend. J.B. appeared as Landlord.

Pursuant to Rule 7.1 of the Rules of Procedure, the hearing began as scheduled in the Notice of Dispute Resolution. As the co-tenant applicant did not attend, the hearing was conducted in their absence as permitted by Rule 7.3 of the Rules of Procedure.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing.

The Tenant advised that the Landlord was served with the Notice of Dispute Resolution for the participatory hearing and their evidence by way of registered mail sent on

November 6, 2021. The Landlord acknowledges receipt of the Tenants' application materials. I find that the Tenants' application materials were served in accordance with s. 89 of the *Act* and were acknowledged received by the Landlord.

Preliminary Issue – Service of the Landlord's Application Materials

The Landlord advised that she served the tenants with the Notice of Dispute Resolution for her application and her evidence by way of registered mail send on February 12, 2022. The Landlord provides two tracking receipts, one for each tenant. The tracking receipts do not indicate the address in which they were sent, however, the Landlord indicates that they were mailed to the forwarding address for each tenant.

The Tenant denies receiving the Landlord's application materials and denies receiving a slip to go to the post office to retrieve a package. At the hearing, I confirmed with the parties that I would review the tracking information provided by the Landlord for the relevant packages. The tracking information indicated that the Tenant's package was not retrieved and had been returned to the sender. The co-tenant's package had been retrieved by the recipient on February 17, 2022.

Rule 3.5 of the Rules of Procedure requires an applicant to demonstrate that each of the respondents named in the application were served as required by the *Act* and the Rules of Procedure.

Policy Guideline #12 states the following with respect to service of all parties in a dispute:

> All parties named on an application for dispute resolution must be served notice of proceedings, including any supporting documents submitted with the application. Where more than one party is named on an application for dispute resolution, each party must be served separately. Failure to serve documents in a way recognized by the Legislation may result in the application being adjourned, dismissed with leave to reapply, or dismissed without leave to reapply.

I accept that the Landlord sent two registered mail packages in an attempt to serve both tenants. However, the Tenant denies receiving the registered mail package and it was returned to the sender as it was not retrieved by the recipient. The registered mail tracking information provided by the Landlord does not include the addresses in which

they were sent. In the face of the Tenant's denial, the fact that the registered mail was returned to the sender, and, most importantly, the lack of information on the addresses where the registered mail packages were sent, I find that the Landlord has failed to demonstrate service of her application materials on all the parties named as respondents.

As the Landlord has failed to demonstrate service of her application materials on all the parties named in her dispute, I dismiss her application with leave to reapply. However, I dismiss the Landlord's claim for the return of her filing fee without leave to reapply. The Landlord shall bear her own expense for the application as it was not heard due to her failure to demonstrate service.

As the tenants' application was served, the hearing that was conducted is limited to the tenants' claim. As the Landlord failed to demonstrate service of her application materials, which included her evidence, I do not include the documentary evidence she provided to the Residential Tenancy Branch into the record for the tenants' application. Only the Landlord's oral submissions are considered for the purposes of the tenants' application.

Issue(s) to be Decided

1) Are the Tenants entitled to the return of their security deposit?
2) Are the Tenants entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The tenants took possession of the rental unit on September 1, 2019.
- The tenants gave vacant possession of the rental unit to the Landlord on August 31, 2021.
- Rent of $1,450.00 was due on the first day of each month.
- The Landlord held a security deposit of $725.00 in trust for the tenants.

The Tenant provided a copy of the tenancy agreement. The Tenant indicated that she was the named co-tenant within the tenancy agreement and that the tenancy agreement used her nickname, rather than her legal name as listed in the application. The Landlord did not contradict the Tenant with respect to this point and referred to the Tenant by her nickname.

There appears to have been a dispute with respect to the cleanliness of the rental unit when the tenants vacated. The Tenant indicated that there was no written move-in or move-out inspection. The Landlord confirmed that no written move-in or move-out inspection was conducted.

The Landlord indicated in her submissions that the rental unit was unclean and that she needed to hire a cleaner. She says that a cleaner came on September 1, 2021 and cost $257.30. The Landlord indicated at the hearing that the current occupants of the rental unit, who presumably took occupancy on September 1, 2021, attested to the uncleanly state of the rental unit.

The Tenant submitted a series of text messages between her and the Landlord. The Tenant highlighted two that were sent on September 1, 2021 as being relevant to this dispute. In the first, she consented to the Landlord retaining $150.00 to pay for the cleaner. In the second, the Tenant provided the Landlord with her forwarding address. Other messages within the exchange indicate that the security deposit was to be returned to the Tenant alone instead of being divided between her and the co-tenant.

The Landlord argued that text message is not an approved form of service though also indicated that she received the text message as she attempted to serve her application materials to the Tenant’s forwarding address provided in the text message.

The Tenants evidence includes two emails dated September 14, 2021 between her and the Landlord. The first was sent by the Tenant looking to confirm that the Landlord received her text message of September 1, 2021 with a screenshot of the message with her forwarding address. The Landlord replied later that day at 7:04 PM indicating that she had not had a chance to sit down to figure out how much she owed to the tenants and that she would do this to return what was owed by the next day.

The Tenant advised that she received $202.00 from the Landlord on September 17, 2021, including a copy of the email for the e-transfer which was undated. The Landlord denies this and indicates that it was sent on September 14, 2021.

The Tenant provided a copy of a text message she says she received from the Landlord which provided a breakdown on how amount of $202.00 was arrived at. The Landlord confirmed that this included the amount paid for the cleaner and some outstanding utility charges that were to be paid by the tenants.

The Tenant does not deny that she and her co-tenant owed utility payments to the Landlord. However, she expected that to be treated separately from the security deposit, which would be returned and the utilities paid later. She further advised that the Landlord provided her copies of the relevant utility invoices except for a statement from BC Hydro and confirmed that the numbers provided by the Landlord in her text message correspond with the invoices she received.

The Landlord advised that the billing period for BC Hydro statement that was not received by the Tenant ended on September 15, 2021. She stated that she estimated the cost to the tenants as being $202.20 as she did not have the information. At the hearing, she advised that the actual amount owed based on the invoice is $220.23.

Analysis

The tenants apply for the return of their security deposit.

I have reviewed the interim reasons of November 4, 2021 and accept the Tenant's evidence that the tenancy agreement has her nickname listed rather than her legal name listed within her application. This issue is not relevant as I am satisfied that the Tenant C.C. is the same tenant as listed in the tenancy agreement.

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the Residential Tenancy Branch. A landlord may not claim against the security deposit if the application is made outside of the 15-day window established by s. 38.

Under s. 38(6) of the *Act*, when a landlord fails to either repay or claim against the security deposit within the 15-day window, the landlord may not claim against the security deposit and must pay the tenant double their deposit.

Presently, the Landlord raises the technical argument that the Tenant's text message of September 1, 2021, which included her forwarding address, does not comply with the general service provisions set out under s. 88 of the *Act*.

I am not persuaded by the Landlord's argument that the Tenant failed to provide the Landlord, in writing, with her forwarding address by sending a text message on September 1, 2021. It is clear that the parties in this matter acted in an informal fashion. There was no written move-in or move-out inspection. They appear to have communicated by way of text message, which included the Landlord sending the Tenant a message with the breakdown of the deductions she took from the security deposit. The Landlord herself acknowledges receiving the Tenant's text message with her forwarding address. Indeed, she stated that she sent the registered mail package for her application to that very address.

I find that the Tenant provided the Landlord with her forwarding address in writing by way of text message sent on September 1, 2021 as contemplated by s. 38(1) of the *Act*. I further find that pursuant to s. 71(2) of the *Act* that the Landlord was sufficiently served with the Tenant's forwarding address. I make these findings due to the conduct of the parties, the Landlord's acknowledged receipt of the Tenant's forwarding address, and the fact that the Landlord confirmed that she attempted to serve the Tenant at her forwarding address that was provided by way of text message.

This means that the Landlord had 15-days to either return the security deposit or file a claim against it with the Residential Tenancy Branch, making the deadline September 16, 2021. The Landlord's application, which was dismissed with leave to reapply on the grounds explained above, was filed on February 2, 2022, which is well after the deadline imposed by s. 38(1).

Further, s. 38(5) provides that the right of a landlord to retain all or part of a security deposit with the written consent of the tenant is extinguished if the landlord's right to claim against security deposit for damages is extinguished by either ss. 24(2) or 36(2). Both of these sections are in relation to the move-in and move-out inspection process.

The parties agree that no written move-in or move-out inspection was conducted. Sections 23(4) and 35(3) require a landlord to complete a move-in and move-out condition inspection report in accordance with the regulations. I find that the Landlord has failed to complete a move-in condition inspections reports under s. 23(4) as no written condition inspection report was ever completed. Pursuant to s. 24(2) of the *Act*,

where a landlord fails to comply with their obligations under s. 23, their right to claim against the security deposit is extinguished. As no move-in condition inspection report was ever conducted, I find that the Landlord's right to claim against the security deposit for damages is extinguished pursuant to s. 24(2) of the *Act*.

Given this and pursuant to s. 38(5), the Tenant's purported consent to the withholding of $150.00 does not apply as the Landlord's right to claim for damages against the security deposit was extinguished. The practical effect of this is that the Landlord could either have returned the security deposit in full or filed a claim against the security deposit for something other than damages by September 16, 2021. In this case, the Landlord only returned $202.00 and did not file their claim until February 2, 2022.

I find that the Landlord failed to comply with s. 38(1) of the *Act* by not returning the security deposit and not filing a claim within the 15-days permitted. Accordingly, I find that s. 38(6) is engaged and the Tenant is entitled to the doubling of her security deposit, which in this case is $1,450.00 ($725.00 x 2). Less the $202.00 that was returned, the Tenant has established they are entitled to $1,248.00.

Conclusion

The Landlord failed to demonstrate that her application materials were served on the named respondents. Accordingly, her application is dismissed with leave to reapply. The Landlord's claim for the return of her filing fee under s. 72 is, however, dismissed without leave to reapply.

I am satisfied that s. 38(6) of the *Act* applies and the tenants are entitled to double of the security deposit. The Landlord's right to claim against the security deposit was extinguished under s. 24(2) of the *Act*, the practical effect of which was that she could either return the security deposit in full or file an application claiming against the security deposit for something other than damages. The Landlord only provided partial return of the security deposit. The tenants are entitled to $1,450.00 ($725.00 x 2) under s. 38(6) of the *Act* as the purported consent of withholding $150.00 does not apply as provided by s. 38(5) of the *Act*. Less the $202.00 that was returned, the total amount to be paid under s. 38(6) is $1,248.00

As the application was successful, I find that the tenants are entitled to the return of their filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay the tenants $100.00 for their filing fee.

Pursuant to ss. 38, 67, and 72 of the *Act*, I order that the Landlord pay **$1,348.00** to the tenants, which represents the total monetary order by combining the amounts listed above.

It is the tenants' obligation to serve the monetary on the Landlord. If the Landlord does not comply with the monetary order, it may be filed with 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: March 23, 2022

Residential Tenancy Branch