



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the landlord: MNRL-S, FFL
For the tenant: MNSDB-DR, FFT

Introduction

This hearing dealt with a cross application. The landlord's application pursuant to the Residential Tenancy Act (the Act) is for:

- a monetary order for unpaid rent, pursuant to section 26;
- an authorization to retain a portion of the security and pet damage deposits (the deposits), under section 38; and
- an authorization to recover the filing fee for this application, under section 72.

The tenant's application pursuant to the Act is for:

- an order for the landlord to return the deposits, under section 38; and
- an authorization to recover the filing fee for this application, under section 72.

I left the teleconference connection open until 2:34 P.M. to enable tenant VC to call into this teleconference hearing scheduled for 1:30 P.M. Tenant VC did not attend the hearing. Landlord WH, advocate JH (the landlord) and tenant ES attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord WH, the landlord, tenant ES and I were the only ones who had called into this teleconference.

At the outset of the hearing the attending parties affirmed they understand it is prohibited to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

I note the landlord's application lists landlord WH and respondents tenants ES and JH. The tenant's application lists tenant ES and respondent landlord WH.

Preliminary Issue – Service of the landlord’s application

The landlord affirmed she served the notice of hearing and the evidence (the landlord’s materials) by registered mail to tenants VC and ES on September 17, 2021. The tracking numbers and addresses are recorded on the cover page of this decision.

The landlord stated tenant VC provided her forwarding address by text message on September 06, 2021 at 5:30 P.M. and that VC texted the landlord on September 20, 2021 confirming receipt of the landlord’s materials. Tenant ES testified he does not know the forwarding address of tenant VC. Tenant ES confirmed receipt of the landlord’s materials and that he had enough time to review them.

Residential Tenancy Branch Policy Guideline 12 states: “The respondent’s address may be found on the tenancy agreement, in a notice of forwarding address, in any change of address document or in an application for dispute resolution.”

Based on the testimony offered by the landlord and tenant ES, I find the landlord served tenant ES the landlord’s materials in accordance with section 89(1)(c) of the Act.

Based on the credible testimony offered by the landlord, I find tenant VC served her forwarding address via text message on September 06, 2021. I find the landlord served tenant VC the landlord’s materials in accordance with section 89(1)(c) of the Act.

Section 90 of the Act provides that a document served in accordance with Section 89 of the Act is deemed to be received if given or served by mail, on the 5th day after it is mailed. Given the evidence of registered mail the tenant VC deemed to have received the materials on September 22, 2021, in accordance with section 90 (a) of the Act.

Rule of Procedure 7.3 allows a hearing to continue in the absence of the respondent.

Preliminary Issue – Service of the tenant’s application

The landlord confirmed receipt of the tenant’s notice of hearing and evidence (the tenant’s materials) by registered mail in October 2021.

I find tenant ES served the landlord the tenant’s materials in accordance with section 89(1)(c) of the Act.

Issues to be Decided

Is the landlord entitled to:

1. a monetary order for unpaid rent?
2. an authorization to retain a portion of the deposits?
3. an authorization to recover the filing fee?

Is tenant ES entitled to:

1. an order for the landlord to return the deposits?
2. an authorization to recover the filing fee?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the landlord's and tenant's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the applicants' obligation to present the evidence to substantiate their application.

Both parties agreed the tenancy started on January 21, 2020 and ended on August 31, 2021. Monthly rent was \$2,300.00, due on the first day of the month. The tenancy was fixed-term until January 31, 2021 and continued as a periodic tenancy.

The landlord said at the outset of the tenancy she collected a security deposit of \$1,150.00 and a pet damage deposit of \$1,150.00. The landlord currently holds in trust the deposits in the total amount of \$2,300.00.

The landlord affirmed she received on January 21, 2020: \$575.00 for January 2020 *pro rata* rent, \$2,300.00 advance rent payment for the month of January 2021, \$2,300.00 February 2020 rent, the security deposit of \$1,150.00 and the pet deposit of \$1,150.00. The total amount the landlord received on January 21, 2020 was \$7,475.00.

Tenant ES stated the landlord collected a security deposit of \$2,300.00 and a pet damage deposit of \$1,150.00. Later tenant ES testified the landlord received \$7,475.00 on January 21, 2020.

The tenancy agreement dated January 21, 2020 was submitted into evidence. It indicates the tenant is VC, the tenant paid a security deposit of \$1,150.00 and a pet damage deposit of \$1,150.00. It also states: "The landlord received on January 21, 2020: \$575 pro rated rent from January 25 to January 31st 2020, \$2,300.00 advance

rent payment apply to last month rent and \$2,300.00 February 2020 rent. Security deposit \$1,150.00 Pet deposit \$1,150.00. Total: \$7,475.00.”

Tenant ES said he moved to Canada in December 2019 and he was not aware that his name should also be in the tenancy agreement as a tenant. Tenant ES affirmed he was a tenant with tenant VC and they both paid the deposits and the rent.

The landlord stated she was aware that tenant ES was a tenant. The tenancy agreement only lists tenant VC because she asked to be the only named tenant.

Both parties agreed that tenant VC moved out on May 31, 2021 and the landlord started a new tenancy agreement with tenant ES only. The May 21, 2021 tenancy agreement, signed by VC, ES and the landlord, states:

- 1-One year lease end and lease continues on to month to month tenancy
 - 2- VA has given notice of end of tenancy to the end of May 31st 2021
 - 3-ES will continue the month to month tenancy to the end of August 31, 2021 at monthly rent of \$1300 inclusive all the utilities, and agrees to take care of and watering the plants at least once a week, or twice a week as needed.
 - 4-The Landlord will retain all the deposit until the tenancy end on August 31, 2021 and plus 15 days as allowed by RTA. Until then we will arrangement a walk through inspection to the end of tenancy.
- Signed by the landlord, tenant VC and tenant ES

Both parties testified that VC agreed to transfer the deposits from the tenancy agreement dated January 21, 2020 to the tenancy agreement dated May 21, 2021. Tenant ES continued to occupy the rental unit and monthly rent was \$1,300.00 from June 01, 2021.

The tenant submitted into evidence a report (the tenant's report) indicating possession date of April 21, 2021, not signed on the move-in and not indicating the rental unit's condition at the outset of the tenancy. The landlord submitted a report (the landlord's report) signed by tenant VC on January 21, 2020 and by the landlord on January 21, 2020 and August 31, 2021.

The landlord is claiming \$1,300.00 for August 2021 rent, as the tenant did not pay this amount. Tenant ES said he did not pay rent because the landlord verbally asked him to move out and tenants are entitled to one free month of rent when a landlord asks the tenant to move out.

Tenant ES provided his forwarding address in writing to the landlord on August 31, 2021. The landlord affirmed that maybe she received the forwarding address in writing on August 31, 2021.

Tenant ES stated he did not authorize the landlord to retain the deposits.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

The Act defines tenancy agreement: “an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit”

I accept the uncontested testimony offered by the landlord and tenant ES, the May 21, 2021 tenancy agreement and the reports provided by tenant es and the landlord that a new tenancy started on May 31, 2021 between the landlord and tenant ES only.

Unpaid rent

Section 26(1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act.

I accept the uncontested testimony offered by both parties that monthly rent of \$1,300.00 for August 2021 was not paid.

Per section 26(1) of the Act, I award the landlord August 2021 rent in the amount of \$1,300.00. This award is against tenant ES.

I note the tenant is entitled to receive from the landlord compensation in the amount of one month's rent when the tenant receives a two month notice to end tenancy under section 49, not when the landlord asks the tenant to move out.

Deposits

Based on the landlord's convincing testimony and the tenancy agreements dated January 21, 2020 and May 21, 2021, I find the landlord collected a security deposit in the amount of \$1,150.00.

I accept the uncontested testimony offered by both parties that the landlord collected a pet damage deposit of \$1,150.00 and the landlord currently holds the total amount of \$2,300.00 for the deposits.

Section 23(4) of the Act requires the landlord to complete a condition inspection report in accordance with the regulation at the start of the tenancy.

Based on the tenant's report, I find the landlord and tenant ES did not complete a condition inspection report at the start of the May 31, 2021 tenancy agreement.

I find the landlord did not comply with section 23(4) of the Act. Thus, the landlord extinguished her right to claim against the deposits, per section 24(2)(c) of the Act:

The right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord
(a) does not comply with section 23 (3) [2 opportunities for inspection],
(b) having complied with section 23 (3), does not participate on either occasion, or
(c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

(emphasis added)

Section 38(1) of the Act requires the landlord to either return the tenant's deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing.

Based on the convincing testimony offered by tenant ES, I find ES provided his forwarding address in writing on August 31, 2021. The landlord retained the deposits and submitted an application claiming against the deposits.

In accordance with section 38(6)(b) of the Act, as the landlord extinguished her right to claim against the deposits and did not return the full amount of the deposits within the timeframe of section 38(1) of the Act, the landlord must pay tenant ES double the amount of the deposits.

Residential Tenancy Branch Policy Guideline 17 is clear that the arbitrator will double the value of the deposit when the landlord has not complied with the 15 day deadline; it states:

Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act¹;

Under these circumstances and in accordance with section 38(6)(b) of the Act, I find tenant ES is entitled to \$4,600.00 (double the \$2,300.00 deposits).

Filing fee and set-off

As both parties were successful with their applications, each party will bear their own filing fee.

Tenant ES is awarded \$4,600.00. The landlord is awarded \$1,300.00.

Residential Tenancy Branch Policy Guideline 17 sets guidance for a set-off when there are two monetary awards:

1. Where a landlord applies for a monetary order and a tenant applies for a monetary order and both matters are heard together, and where the parties are the same in both applications, the arbitrator will set-off the awards and make a single order for the balance owing to one of the parties. The arbitrator will issue one written decision indicating the amount(s) awarded separately to each party on each claim, and then will indicate the amount of set-off which will appear in the order.

Thus, tenant ES is awarded \$3,300.00.

Conclusion

Per sections 38 of the Act, I award tenant ES \$3,300.00. Tenant ES is provided with this order in the above terms and the landlord must be served with this order. 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: March 23, 2022

Residential Tenancy Branch