Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The applicant applied for:

- a monetary order for loss under the Act, the Residential Tenancy Regulation or the tenancy agreement, pursuant to section 67; and
- an authorization to retain the security deposit (the deposit), under section 38.

I left the teleconference connection open until 2:15 P.M. to enable the respondent to call into this teleconference hearing scheduled for 1:30 P.M. The respondent did not attend the hearing. The applicant attended the hearing and was 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 applicant and I were the only ones who had called into this teleconference.

At the outset of the hearing the attending party affirmed she understands the parties are not allowed 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 $5,000.00.”

The applicant confirmed receipt of the respondent’s forwarding address via text message on September 16, 2021 at 1:57 PM.

The applicant testified she mailed the notice of hearing and the evidence (the materials) to the respondent’s forwarding address by registered mail on September 27, 2021. The forwarding address and the tracking number are recorded on the cover of this decision.

Based on the applicant's convincing testimony and the tracking number, I find the applicant served the 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 respondent is deemed to have received the materials on October 02, 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.

Issues to be Decided

Is the applicant entitled to:

1. a monetary order for loss?
2. an authorization to retain the deposit?

Background and Evidence

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

The applicant said she rented the rental unit from Veda Living (the landlord) on August 27, 2020. The applicant sublet the rental unit to the respondent on December 01, 2020 and the respondent was the only occupant until the end of the tenancy. The respondent moved out on or around August 27, 2021. Monthly rent was $850.00, due on the first day of the month. The landlord collected from the applicant a deposit in the amount of $500.00. The applicant collected from the respondent a deposit in the amount of $425.00 and currently holds it in trust. The December 01, 2021 agreement was submitted into evidence:

> CONDITIONS:
> […]
> -If you are terminating your lease, your sublet must move out & return your keys on the last day of your lease (i.e. August 27th by 2:00 PM – please make this clear, no late move-outs)
> HOW IT WORKS:

> -You remain our tenant and act as the landlord to your sublet (also know as a sub-tenant).
> -You continue to pay rent & your sublet pays rent to you
> […]
> Sublet lease contract
> Agreement between: [the applicant] (original tenant) and [the respondent] (sub-tenant)
> […]
> The sub-tenant will rent the rented premises beginning the 1 day of December 2020 and ending this August, day of 27th 2021.
> […]
> 5. JOINT AND SEVERAL RESPONSIBLITIES: In consideration of the Lessor renting the Rented Premises to the Lessees, and if more than one of them, jointly and severally, as does each Guarantor for their respective son/daughter's portions only, its successors and assigns, guarantees to the Lessor the payment by the Lessees of rent and all other sums of money in accordance with the provisions of this Lease and that the Lessees will perform and observe all their covenants, agreements and obligations under this Lease.
> […]
> j) The lessee shall not keep any pets on the property

The applicant affirmed the rental unit is a self-contained suite rented by the landlord to students from any university. The landlord is a private company.

The applicant stated the rental unit was in good condition when she sublet it to the respondent. The parties did not conduct an inspection. There were minor wall scratches on August 27 and December 01, 2020.

The respondent had a cat in the rental unit and the cat damaged the couch and the windows coverings. The applicant was not aware the respondent had a cat.

The applicant submitted a move out inspection:

> Tenant name: the applicant
> Attendance: only landlord's agent is present
> Missing/damaged: couch badly broken ($700)
> Suggestion: Suggested Loss of Deposit's, windows screen damaged by cat, heavy wall damage, cat hair on curtains, dirty
> Missing entrance fob, mail key, laundry card.
> Chargeback: $885

On August 30, 2021 the landlord emailed the applicant and the respondent:

> As you are a sublet, this is an issue you would discuss with the tenant you sublet from, who I have cc'ed here.
> As per our Move-Out inspection and report, the couch was damaged by a cat. On Nov 30, 2020 when we approved you as a sublet, we informed you and the applicant of this via email. The email mentions "No pets." Therefore, we do have a chargeback against out tenant [the applicant] due to couch damage (pet scratches), window screen damage (from cat), heavy wall damage, and cat hair on curtains.
> [applicant], if you have any questions, please let us know.

The applicant submitted two photographs taken on August 30, 2021 by the landlord showing a damaged couch.

On September 10, 2021 the applicant emailed the landlord:

> [applicant] Yes I did take a security deposit from her [the respondent]. I give you confirmation to keep the deposit and apply it to the outstanding chargeback then.
>
> [landlord] We will apply your deposit on file to your chargeback. As an act of goodwill as you have been quick to respond and understanding, we will waive the additional $385 and cover this cost.

The applicant affirmed the landlord retained the $500.00 deposit collected from the applicant because of the damages caused by the respondent and because the respondent did not return the keys.

The applicant is claiming for an authorization to retain the $425.00 deposit that she collected from the respondent and for a monetary order in the amount of $75.00, as the respondent is responsible for damages to the couch and windows coverings and the keys replacement expenses in the total amount of $500.00.

The respondent did not authorize the applicant to retain the deposit.

The applicant submitted this application on September 16, 2021. The applicant submitted a monetary order worksheet indicating a total claim in the amount of $500.00.

Analysis

Section 7 of the Act states:

> Liability for not complying with this Act or a tenancy agreement
> (1)If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
> (2)A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

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 the case is on the person making the claim.

December 01, 2021 agreement

Residential Tenancy Branch Policy Guideline 19 states:

> B. Assignment

> Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.
>
> When either a manufactured home park tenancy or a residential tenancy is assigned, the new tenant takes on the obligations of the original tenancy agreement, and is usually not responsible for actions or failure of the original tenant to act prior to the assignment. It is possible that the original tenant may be liable to the landlord under the original agreement. For example:
>
> □ the assignment to the new tenant was made without the landlord's consent; or
>
> □ the assignment agreement doesn't expressly address the assignment of the original tenant's obligations to the new tenant in order to ensure the original tenant does not remain liable under the original tenancy agreement.
> […]
> An assignment may take place in various circumstances, such as a tenant leaving town, but still having a period of time left on a fixed-term tenancy agreement. The original tenant may wish to assign the tenancy agreement to a new tenant who takes over the tenancy agreement for the remainder of the term.
>
> C. Subletting
> […]
> Unlike assignment, a sublet is temporary. In order for a sublease to exist, the original tenant must retain an interest in the tenancy. While the sublease can be very similar to the original tenancy agreement, the sublease must be for a shorter period of time than the original fixed-term tenancy agreement – even just one day shorter. The situation with month-to-month (periodic) tenancy agreements is not as clear as the Act does not specifically refer to periodic tenancies, nor does it specifically exclude them. In the case of a periodic tenancy, there would need to be an agreement that the sublet continues on a month-to-month basis, less one day, in order to preserve the original tenant's interest in the tenancy.

In the March 12, 2014 decision from the British Columbia Court of Appeal, Rhebergen v. Creston Veterinary Clinic Ltd., 2014 BCCA 97, Justice Lowry writes:

> [54] Generally a court must endeavour to resolve ambiguity in order to determine the mutual intention of the parties to a contract by interpreting the wording of any given clause in the context of the whole of the agreement as well as the factual matrix that gave rise to the agreement and against which it is intended to operate: Jacobsen v. Bergman, 2002 BCCA 102, paras. 3-6.

I find the December 01, 2021 agreement named 'Sublet lease contract' is an ambiguous document, as it contains clauses of a sublet and assignment agreement.

Based on the applicant's testimony, the December 01, 2021 agreement and the August 30, 2021 email, interpreting the December 01, 2021 agreement in light of the situation

presented, I find it is reasonable to conclude that the December 01, 2021 agreement is an assignment agreement between the applicant and the respondent approved by the landlord, as the respondent had possession of the rental unit until the end of the tenancy.

Section 1 of the Act states:

> "landlord", in relation to a rental unit, includes any of the following:
> (a)the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
> (i)permits occupation of the rental unit under a tenancy agreement, or
> (ii)exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
> (b)the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
> (c)a person, other than a tenant occupying the rental unit, who
> (i)is entitled to possession of the rental unit, and
> (ii)exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;

Residential Tenancy Branch Policy Guideline 17 states: “The obligations of a landlord with respect to a security deposit run with the land or reversion. Thus, if the landlord changes, the new landlord retains these obligations.”

Based on the applicant’s testimony and the December 01, 2021 agreement, I find the applicant acted as a co-landlord, as the applicant received rent from the respondent and paid rent to the landlord.

Damages

Section 32(3) of the Act states: “A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.”

Based on the applicant's convincing testimony, the photographs and the August 30, 2021 email, I find, on a balance of probabilities, the respondent breached section 32(3) of the Act by damaging the couch and the windows coverings and the applicant suffered losses because of the respondent's breach.

Section 37(2)(b) of the Act states:

> When a tenant vacates a rental unit, the tenant must
> (b)give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

Based on the applicant's convincing testimony, I find, on a balance of probabilities, that the respondent breached section 37(2)(b) of the Act by not returning the keys when the tenancy ended and the applicant suffered losses because of the respondent's breach.

Based on the inspection and the September 10, 2021 email, I find the applicant proved, on a balance of probabilities, a loss in the amount of $500.00 for the damages claimed.

Thus, per section 7 of the Act, I order the respondent to pay the applicant $500.00.

Deposit

Section 23 of the Act states:

> (1)The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.
> […]
> (4)The landlord must complete a condition inspection report in accordance with the regulations.

I accept the applicant's uncontested testimony that the parties did not inspect the rental unit.

Section 24 of the Act states:

> (2)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
> […]

> (c)does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

I find the applicant extinguished her right to claim against the deposit, per section 24(c) of the Act, as the applicant did not inspect the rental unit when the applicant assigned the rental unit to the respondent.

Section 38(1) of the Act requires the landlord to either return the tenant's security 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.

The forwarding address was provided in writing on September 16, 2021 and the tenancy ended on August 27, 2021. The applicant retained the deposit in the amount of $425.00.

In accordance with section 38(6)(b) of the Act, as the applicant extinguished her right to claim against the deposit and did not return the deposit within the timeframe of section 38(1) of the Act, the applicant must pay the respondent double the amount of the deposit they retained.

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:

> The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.
> […]
> 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 Act.

Under these circumstances and in accordance with section 38(6)(b) of the Act, I find the respondent is entitled to $850.00 (double the deposit of $425.00).

Set-off

The applicant is awarded $500.00. The respondent is awarded $850.00.

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.
2. The Residential Tenancy Act provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord and the monetary amount or cost awarded to a tenant may be deducted from any rent due to the landlord.

In summary, the respondent is awarded $350.00.

Conclusion

Pursuant to section 38 of the Act, I grant the respondent a monetary order in the amount of $350.00.

The respondent is provided with this order in the above terms and the applicant must be served with this order. Should the applicant 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: May 10, 2022

Residential Tenancy Branch