Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT, MNSD
FFL, MNRL, MNDCL-s

Introduction

This hearing dealt with an Application for Dispute Resolution (the Tenant's Application) filed by the Tenant under the *Residential Tenancy Act* (the *Act*) on August 4, 2021, seeking:

- The return of double the amount of their security deposit and/or pet damage deposit; and
- Recovery of the filing fee.

This hearing also dealt with a cross-application filed by the Landlord under the *Act* (the Landlord's Application) on January 11, 2022, seeking:

- Recovery of unpaid rent;
- Compensation for monetary loss of other money owed;
- Retention of the security deposit and/or pet damage deposit; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call on February 17, 2022, at 1:30 P.M. and was attended by the Tenant and the Landlord, both of whom provided affirmed testimony. As the parties acknowledged that they were served with each other's respective Notice of Dispute Resolution Proceeding (NODRP) packages, and raised no concerns with regards to dates or methods of service, I accepted that they were served in accordance with the *Act* and the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure). The hearing therefore proceeded as scheduled. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

The parties were advised that pursuant to rule 6.10 of the Rules of Procedure, interruptions and inappropriate behavior would not be permitted and could result in limitations on participation, such as being muted, or exclusion from the proceedings. The parties were asked to refrain from speaking over me and one another and to hold their questions and responses until it was their opportunity to speak. The Parties were also advised that personal recordings of the proceeding were prohibited under the Rules of Procedure and confirmed that they were not recording the proceedings.

I have reviewed all evidence and testimony before me that that was accepted for consideration. However, I refer only to the relevant and determinative facts, evidence, and issues in this decision. At the request of the parties, a copy of the decision and any orders issued in their favor will be emailed to them at the email addresses listed in the Applications and confirmed at the hearing.

Preliminary Matters

Although the parties engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them on anything other than the $40.00 required for deck cleaning, which the Tenant agreed to pay for. As a result, I proceeded with the hearing and rendered a decision in relation to the remaining matters under the authority delegated to me by the Director of the Branch under Section 9.1(1) of the *Act*.

Issue(s) to be Decided

Is the Landlord entitled to the recovery of unpaid rent or loss of rent?

Is the Landlord entitled to compensation for monetary loss or other money owed?

Is either party entitled to retention or return of the security deposit, or if applicable, double its amount?

Is either party entitled to recovery of the filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me states that the periodic (month-to-month) tenancy commenced on November 15, 2019, that rent in the amount

of $3,200.00 was due on the first day of each month, and that a $1,600.00 security deposit was required. The parties agreed that the Tenant rented most of a freestanding home but that there was a separate rental unit in the property rented by the Landlord to another tenant under a separate tenancy agreement, which does not have separate utility meters. At the hearing the parties agreed that the following things were included in the cost of rent: garbage collection, recycling services, sewage disposal, access to a no cost washer/dryer, a refrigerator, a dishwasher, a stove and oven, window coverings, parking for two vehicles on the street, two keys for the front door, and one key for the three other doors. The parties agreed that although water was not included in the cost of rent, it was charged by the municipality on the same bill as garbage, recycling services and sewage disposal. The parties agreed that $560.00 of the $1,600.00 security deposit was returned to the Tenant by a cheque dated June 26, 2021. The parties agreed that the tenancy ended on June 1, 2021, as a result of service of a Two Month Notice to End Tenancy for Landlord's Use of Property (Two Month Notice) on the Tenant.

The Tenant stated that they are seeking $2,639.65, which represents twice the amount of their initial security deposit, less the amount already returned, pursuant to section 38(6) of the *Act*, plus recover of the $100.00 filing fee. The Landlord stated that they are seeking $681.47 for unpaid utilities, $445.74 for cleaning and damage repair, as the Tenant did not leave the rental unit in the state required by section 37 of the *Act* at the end of the tenancy, $100.00 for recovery of the filing fee, and authorization to retain the remaining portion of the Tenant's security deposit towards the amounts owed.

Although the parties agree that the Tenant's forwarding address was received by the Landlord via text message prior to the end of the tenancy, they disputed whether this constituted a proper written forwarding address under the *Act*. The Landlord argued that a text message does not constitute a proper written forwarding address as they were advised of such by information officers at the Residential Tenancy Branch (the Branch). In contrast the Tenant argued that as a text message is a written form of communication, it meets the requirements that the forwarding address be in writing.

There was a disagreement between the parties with regards to how the water and sewer bill was to be billed and paid under the tenancy agreement. The Landlord stated that even though this is not noted in the tenancy agreement, there was always an agreement between the parties that the entirety of the water and sewer bill charged by the municipality was the responsibility of the Tenant, less 20% for the cost of utilities used by the Landlord's other tenant at the property. The Tenant disagreed, stating that

the portion of the bill to be paid by them versus the Landlord was not discussed or agreed to prior to the start of the tenancy, and that there was never an agreement on the amount that was to be their responsibility. Instead, the Tenant argued that the Landlord simply advised them of the portion that they would pay towards utility bills to cover the expenses incurred by the occupant of the separate suite, but that there was no agreement or discussion between them about whether this was reasonable, and the Tenant chose not to make waves about it during the tenancy. Again, the Landlord disagreed, reiterating that the amounts were agreed upon and took issue with the fact that the Tenant is only disputing the final bill, which was issued in the Landlord's name after the tenancy ended. The parties did however agree that the utilities for the entire property were in the Tenant's name during the tenancy.

The Landlord argued that at the end of the tenancy the Tenant told them not to worry about anything else after they were granted compensation in the amount of one months rent pursuant to section 51(1) of the *Act*, which they took as a waiver with regards to the return of any remaining portions of the security deposit and any timelines under the *Act*. The Tenant disagreed, stating that they never waived any timelines or rights under the *Act* in relation to their security deposit, as they are not in a financial position to walk away from their own money. The parties agree that at the time the tenancy ended there was no agreement between them in writing for the Landlord to keep any portion of the security deposit, that there was no outstanding monetary order against the Tenant from the Landlord which remained unpaid, and that there was no previous order from the Branch authorizing the Landlord to retain all or some of the security deposit.

The parties agreed that move-in and move-out condition inspections and reports were completed at the start and the end of the tenancy. However, the parties agreed that the Tenant did not stay for the full duration of the move out condition inspection, which was subsequently completed by the Landlord in the Tenants absence. The Tenant stated that moving was very stressful, it was a challenging time for them, that they were feeling stressed, and that they needed to leave the move-out condition inspection for their own mental health, which they feel was justified. The parties agreed that the Tenant received a copy of the move-in condition inspection report at the start of the tenancy and that a copy of the move-out condition inspection report was only provided to the Tenant by the Landlord when the Landlord served their evidence on the Tenant in relation to this hearing. However, the Landlord stated that this was justified as they had previously written the Tenant a letter regarding what was found in the rental unit after the end of the tenancy, what was fixed, and at what cost.

There was no dispute between the parties that the utilities covered under the utility bill submitted by the Landlord relate to the tenancy. The Landlord argued that the Tenant is responsible for $681.47, which represents 80% of the last monthly water charge, the regular water rate, the fixed sewer disposal charge, and the sewer treatment charge, as per their agreement, plus a $100,00 outstanding balance carried forward from a previous billing period. The Tenant again reiterated that there was no formal agreement in place that they were responsible for the cost of those utilities less 20% and argued that they should not be responsible for any costs related to sewage disposal or treatment as those were covered by the cost of rent under the tenancy agreement. The Tenant stated that at most they would be willing to pay $340.73 towards the outstanding utility amount sought by the Landlord.

The parties disputed whether the rental unit was left reasonably clean at the end of the tenancy, as required by section 37 of the *Act*. The Landlord stated that although the rental unit was largely clean, there were some areas lacking, and they sought $60.00 for the cost of cleaning the oven, $20.00 for the cost of cleaning the garage, $80.00 for the cost of mowing the lawn(s), and $23.44 for the cost of supplies purchased, for a total of $183.44. In support of these amounts the Landlord pointed to a letter from their realtor, receipts for the purchase of cleaning supplies, pictures of the rental unit allegedly taken after the Tenant vacated, and emails to the Tenant regarding the state of the rental unit after the end of the tenancy and the cost for cleaning and repairs. The Tenant denied that the rental unit was not left reasonably clean at the end of the tenancy. In support of their testimony, they pointed to an invoice for a move-out-clean completed on May 31, 2021, by a commercial cleaning company in the amount of $262.50.

The Landlord stated that the rental was in pristine condition at the start of the tenancy as they had just completed $300.00-$400.00 in renovations and that the Tenant had caused $100.00 in damage to the rental unit by scratching the ceiling with their poster bed, using large nails in the drywall, leaving sticky-tape hooks on the wall, causing marks on the countertops, and otherwise scratching/gouging/damaging drywall. The Landlord stated that they were being reasonable in seeking only $100.00 for the cost of repairing this damage, as holes and gouges needed to be filled, sanded, and painted, and that they had not charged for much of the damage, choosing instead to consider it reasonable wear and tear. The Landlord pointed to the move-out condition inspection report and receipts for the purchase of supplies in support of their position. The Tenant denied damaging the rental unit. In support of their testimony, they pointed to photographs of the rental taken unit during the tenancy for the purpose of advertising the property for sale.

Analysis

Based on the documentary evidence and testimony before me, I am satisfied that a tendency to which the *Act* applies existed between the parties between November 15, 2019, and June 1, 2021, that rent in the amount of $3,200.00 was due on the first day of each month including the following services and utilities: garbage collection, recycling services, sewage disposal, access to a no cost washer/dryer, and street parking for two vehicles. I am also satisfied that the Tenant paid a security deposit in the amount of $1,600.00, $560.00 of which was returned to the Tenant on June 26, 2021.

Section 5 of the *Act* states that landlords and tenants may not avoid or contract out of the *Act* or the regulations, and that any attempt to do so is of no effect. Policy Guideline #1 states that a term in a tenancy agreement which requires a tenant to put the electricity, gas, or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable. Policy Guideline #8 states that under the *Act* a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party and that terms that are unconscionable are not enforceable.

At the hearing the Tenant testified that utilities for the entire property were in their name during the tenancy and the Landlord did not dispute this testimony. The parties also agreed that the Tenant did not rent the entire property as there was another rental unit on the property where another tenant of the Landlord resided under a separate tenancy agreement, and that the separate rental unit did not have its own utility meters. As a result of the above, and pursuant to Policy Guidelines #1 and #8, I therefore find that the term of the tenancy agreement relating to the payment of utilities, specifically utilities relating to water usage, is unconscionable and therefore unenforceable, as it required the Tenant to put utilities in their own name for portions of the property occupied by another tenant of the Landlord. As a result, I therefore dismiss the Landlords claim for recovery of any outstanding utility amounts, without leave to reapply.

Although the Tenant argued that the rental unit was left reasonably clean at the end of the tenancy, the Tenant by their own admission did not fully participate in the move-out condition inspection and did not sign or add any notations to the move-out condition inspection report. Section 21 of the regulation states that in dispute resolution proceedings, a condition inspection report completed in accordance with this part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary. The documentary evidence submitted by the Landlord,

including photographs and a letter from their realtor, align with the stated condition of the rental unit at the end of the tenancy as set out on in the move-out condition inspection report. Although the Tenant submitted photographs taken during the tenancy for the purpose of advertising the rental unit for sale, no date was given for when these pictures were taken. As a result, I do not find them to be compelling evidence of the state of the rental unit at the end of the tenancy. I also do not find the cleaning invoice submitted by the Tenant constitutes a preponderance of evidence contrary to the move-out condition inspection report, as the Landlord agreed that the rental unit had been cleaned, they simply argued that not all areas had had been cleaned sufficiently. Based on the above, I therefore dismiss the Tenant's argument that the rental unit was left reasonably clean and undamaged except for reasonable wear and tear at the end of the tenancy, and I grant the Landlord the $445.74 sought for cleaning and repair costs.

Having made these findings, I will now turn my mind to the matter of the security deposit. Based on the testimony of the parties, I am satisfied that sections 38(3), and 38(4) of the *Act* do not apply. As I have already set out above, I am satisfied that the tenancy ended on June 1, 2021. Although the Landlord argued that the text message received by the Tenant with the Tenant's forwarding address prior to the end of the tenancy does not meet the requirements under section 38(1)(b) of the *Act*, I disagree. As stated by the Tenant at the hearing, text messages are a form of written communication and I find that the rationale for providing a forwarding address in writing is so that there is a record of the address itself, so that there can be no misunderstanding, and proof it was provided by the tenant to the landlord. As a result, I find that the Tenant provided the Landlord with their forwarding address in writing prior to the end of the tenancy.

Although the Landlord argued that the Tenant waived their right to the return of the balance of their security deposit and the timelines under the *Act* with regards to the security deposit, when they advised the Landlord that they were not concerned with anything other than receipt of the one-month compensation owed to them under section 51(1) of the *Act*, again I disagree. The Tenant denied any such waiver, and the Landlord submitted no documentary or other evidence that any such waiver occurred. Nevertheless, I find that the Tenant's right to the return of the security deposit or any balance thereof, was extinguished pursuant to section 36(1)(b) of the *Act*, when they did not fully participate in the move-out condition inspection or sign the move-out condition inspection report, as required. Although the Tenant stated that they needed to leave for mental health reasons and stress, they provided no corroboratory evidence to support this testimony or suggest that such steps were medically necessary, rather than simply

a personal choice by the Tenant. As a result, I therefore find that the Tenant was not prevented, due to no fault of their own, from fully participating in the move-out condition inspection or from signing the move-out condition inspection report, and that they therefore breached sections 35(1) and 35(4) of the *Act* when they chose to leave the move-out condition inspection prematurely and without having first signed the move-out condition inspection report.

Although the Tenant stated that the Landlord did not give them a copy of the move-out condition inspection report within the timelines set out under the regulation, which the Landlord did not dispute, pursuant to Policy Guideline #17 section B subsection 8, in cases where both the landlord's right to retain and the tenant's rights to the return of deposit have been extinguished, the party who breached their obligation first will bear the loss. As a result, I find that it is the Tenant who breached their obligations with regards to the move-out condition inspection first, and therefore it is the Tenant who will bear the loss, even though the Landlord subsequently also extinguished their right to claim against the security deposit for damage to the rental unit under section 36(2)(c) of the *Act*. Based on the above, I therefore dismiss the Tenant's Application with regards to their security deposit, and recovery of the filing fee, without leave to reapply.

Despite the foregoing, Policy Guideline #17 states under section D subsection 4 that in cases where the tenant's right to the return of a security deposit has been extinguished, and the landlord has made a monetary claim against the tenant, the security deposit and interest, if any, will be set-off against any amount awarded to the landlord notwithstanding that the tenant's right to the return of the deposit has been extinguished. In this situation, while the right to the return of the deposit has been extinguished, the deposit itself remains available for other lawful purposes under the *Act*.

As the Landlord was successful in at least some of their claims, I grant them recovery of the $100.00 filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2)(b) of the *Act,* and Policy Guideline #17, subsection D subsection 4, I authorize the Landlord to retain the following amounts from the Tenant's security deposit:

- $445.74 for cleaning and repair costs; and
- $100.00 for recovery of the filing fee.

The remaining $494.26 balance of the Tenant's security deposit may also be retained by the Landlord, as the Tenant has extinguished their right to its return as set out above.

Conclusion

The Tenant's Application is dismissed in its entirety without leave to reapply.

The Landlords claim for $681.47 in outstanding utilities is dismissed without leave to reapply and the Landlord is granted $545.74 for cleaning and repair costs, and recovery of the $100.00 filing fee, which they are entitled to withhold from the Tenant's security deposit. The remaining balance of the Tenant's security deposit may also be withheld by the Landlord, as the Tenant has extinguished their right to its return.

This decision has been rendered more than 30 days after the close of the proceedings, and I sincerely apologize for the delay. However, section 77(2) of the *Act* states that the director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30-day period in subsection (1)(d). As a result, I find that neither the validity of this decision and the associated order, nor my authority to render them, are affected by the fact that they were issued more than 30 days after the close of the proceedings.

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: June 28, 2022

Residential Tenancy Branch