Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Bramblebush Farm Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, FFT, MNDCT

Introduction

This hearing dealt with a tenant's claim for return of the security deposit and monetary compensation for lack of heat for the period of October 19, 2020 through February 28, 2021, as amended.

The hearing was held over three dates and two Interim Decisions were issued. The Interim Decisions should be read in conjunction with this final decision.

As seen in the second Interim Decision, I had issued orders with respect to re-service of the tenant's materials to the landlord. At the commencement of the third hearing session, I confirmed with the parties that the materials were given to the landlord as ordered.

Issue(s) to be Decided

1. Is the tenant entitled to return of the security deposit and should the deposit be doubled?
2. Has the tenant established an entitlement to the compensation she claims for lack of heat?

Background and Evidence

In January 2018 an oral tenancy agreement formed between the landlord and the tenant and the tenant's husband. The landlord collected a security deposit of $900.00. The tenant's husband moved out of the rental unit in early 2020, leaving the tenant to continue to reside in the rental unit along with the couple's child.

According to the landlord, the landlord asked the tenant's husband if he wanted the security deposit back when he moved out and the tenant's husband responded that he did not want it back since the tenant continued to live in the rental unit. As such, the landlord continued to hold the $900.00 security deposit in trust.

According to the landlord, after the tenant's husband moved out of the rental unit, the rent was paid by the tenant some months and by the tenant's husband other months, until November 2020. No rent was paid for December 2020 through February 2021 despite the tenant residing in the rental unit.

In December 2020, the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent to the tenant for unpaid rent of $1850.00 for the month of December 2020. The landlord then filed an Application for Dispute Resolution against the tenant seeking an Order of Possession and Monetary Order for unpaid rent. A hearing was held on February 19, 2021 and the Arbitrator concluded the tenancy ended as of December 20, 2020 since the tenant did not pay the outstanding rent or file to dispute the 10 Day Notice. An Order of Possession and Monetary Order for unpaid and/or loss of rent was granted to the landlord that same day. The landlord was awarded unpaid and/or loss of rent for the three months of December 2020, January 2021 and February 2021, at the monthly rate of $1850.00, to reflect the tenant's non-payment of rent and her continued occupation of the rental unit through to the date of the hearing.

The tenant vacated the rental unit on February 28, 2021. The tenant's husband asked the landlord if he could move back into the rental unit and the landlord agreed to rent the unit to the tenant's husband. On March 1, 2021 the tenant's husband moved back into the rental unit, without the tenant.

Return of security deposit

The tenant submitted that on March 3, 2021 she obtained a postal box and then sent her forwarding address to the landlord in the mail. The tenant's testimony as to the date she sent the forwarding address to the landlord uncertain. The tenant's testimony as to whether she received any response from the landlord after sending her forwarding address was also inconsistent.

The landlord acknowledged that he did receive the tenant's written forwarding address in March 2021 or April 2021. The landlord acknowledged he is still holding the security deposit and that he has not received authorization to retain it from the tenant or an Arbitrator.

The landlord suggested that he may not have returned the security deposit to the tenant because the tenant's husband moved back into the rental unit and he continues to occupy the rental unit. Also, the tenant owes him rent for three months.

Compensation for lack of heat

The tenant is seeking compensation equivalent to the rent paid and/or payable for the period of October 19, 2020 through to February 28, 2021. The tenant explained that the date of October 19, 2020 is the date the tenant filed an Application for Dispute Resolution seeking repair orders.

The rental unit was described as being a double wide manufactured home, approximately 1730 – 1850 sq. ft., with three bedrooms and equipped with a gas furnace and gas fireplace.

Both parties stated that the area where the manufactured home is located is windy. Both parties also stated that the pilot light for the furnace would blow out from time to time in 2018 and 2019 and that it could be re-started by manually re-lighting the pilot light.

The tenant testified that in January 2020 the furnace completely stopped working due to its age as it was 27 years old. The landlord denied that the furnace stopped working entirely and that the pilot light would need to be re-lit if the wind blew it out, and that this became an issue for the tenant after the tenant's husband moved out. The landlord stated that there was only one time during the tenancy that the furnace stopped working completely and when that happened, he had a furnace technician attend the unit and replace the necessary part.

The tenant also stated that the gas fireplace was also not working until December 2020 when it was repaired but even after it was repaired it only provided partial heat since it was located at one end of the manufactured home. The landlord denied that the gas fireplace was not operational and denied it had to be repaired. Rather, the landlord described the gas fireplace as having been serviced.

The tenant testified that she had space heaters in the rental unit to provide heat after the furnace stopped working. The landlord acknowledged that he saw a couple of space heaters in the rental unit but he did not know why since the furnace was operational and when he entered the rental unit during the relevant period, he noticed

the unit was warm. The landlord pointed out that the rent included electricity and gas so there would be no benefit to the landlord if the tenant was using space heaters instead of the furnace or fireplace.

The tenant submitted that the furnace technician attended the rental unit a number of times to re-light the pilot light on the furnace. The landlord acknowledged that to be accurate but pointed out that the tenant took it upon herself to call the furnace technician to re-light the pilot light.

The tenant testified that in December 2020 the landlord had a “China cap” installed on the chimney of the furnace in an effort to stop the wind from coming down the chimney but it did not sufficiently address the issue that the furnace was 27 years old and electrical breakers were popping. The landlord acknowledged he had a “storm cap” installed on the top of the chimney to alleviate the strong winds from blowing out the furnace pilot light.

As for the electrical breakers popping, the landlord described how the tenant complained of the electrical panel “blowing up” but upon inspection the electrical panel was found to be fine. The landlord is of the belief the tenant suffers from mental health issues and is prone to severe exaggeration, including allegations that the landlord killed her cat and vandalized her car.

During the hearing, I twice suggested to the tenant that seeking a rent abatement equal to 100% of the rent for insufficient heat may not be reasonable considering the tenant still had daily use of the rental unit for sleeping, bathing, eating and other living activities. The tenant maintained that her claim was reasonable, that she should not have to pay rent for the period of time she did not have sufficient heat, and she was not prepared to reduce her request since the rental unit was cold.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons with respect to the two parts to the tenant’s claim against the landlord.

Return of security deposit

Section 38(1) of the Act provides that the landlord has 15 days, from the date the tenancy ends or the tenant provides a forwarding address in writing, whichever date is later, to either refund the security deposit, get the tenant’s written consent to retain it, or

make an Application for Dispute Resolution to claim against it. Section 38(6) provides that if the landlord violates section 38(1) the landlord must pay the tenant double the security deposit.

By way of a decision issued on February 19, 2021, an Arbitrator determined that the tenancy ended on December 20, 2020 due to unpaid rent. It is undisputed that the tenant retained possession of the unit after the tenancy ended ("over-holding") until she vacated on February 28, 2021.

The landlord has already been provided a Monetary Order for unpaid and/or loss of rent for the three months of December 2020 through February 2021 and in the same decision issued on February 19, 2021, the Arbitrator wrote, on page 3:

> *The landlord stated that they do not with to offset their monetary claim with the security deposit of $900.00 as the tenant has not vacated the rental unit.*

It is clear to me that the $900.00 security deposit continued to be held by the landlord in trust for the subject tenancy and the landlord did not request authorization to retain it for the unpaid rent when he had the opportunity to do so during the February 19, 2021 hearing. As such, I find the landlord was required to take action to dispose of the security deposit in a manner that complies with section 38(1) of the Act.

The tenant submitted that she provided a forwarding address to the landlord, in writing, shortly after she vacated, although she could not provide the date with certainty. In any event, the landlord confirmed that to be accurate and acknowledged receiving the tenant's forwarding address in March or April 2021. Accordingly, I find the landlord had 15 days from the date he received the tenant's forwarding address to take action to dispose of the security deposit in one of the permissible ways provided under section 38.

It is undisputed that the tenant did not provide the landlord written authorization to retain the security deposit. Nor, did the landlord refund the security deposit or file another Application for Dispute Resolution to seek authorization from an Arbitrator to retain it.

The landlord suggested that he retained the security deposit because the tenant's former husband moved back into the rental unit after the tenant vacated; however, that would be a new tenancy since the subject tenancy ended on December 20, 2020. I do not see any evidence that the tenant provided written authorization for the security

deposit to be transferred to a new tenancy agreement that formed between the landlord and the tenant's former husband after the subject tenancy ended.

In light of the above, I conclude the landlord failed to administer the security deposit in a manner that complies with section 38 of the Act and the tenant is entitled to a Monetary Order for return of double the security deposit, or $1800.00.

Compensation for lack of heat

A party that makes an application for monetary compensation against another party has the burden to prove their claim. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. Awards for compensation are provided in section 7 and 67 of the Act, and, as provided in Residential Tenancy Policy Guideline 16: *Compensation for Damage or Loss* it is before me to consider whether:

- a party to the tenancy agreement violated the Act, regulation or tenancy agreement;
- the violation resulted in damages or loss for the party making the claim;
- the party who suffered the damages 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.

Section 32 of the Act provides for obligations to repair and maintain a property, as reproduced below:

> **Landlord and tenant obligations to repair and maintain**
>
> **32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
>
> (a) complies with the health, safety and housing standards required by law, and
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.
>
> (2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

> (3) 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.
> (4) A tenant is not required to make repairs for reasonable wear and tear.
> (5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.
>
> [My emphasis underlined]

It was undisputed that the furnace pilot light would blow out from time to time in 2018 and 2019 due to strong winds in the area which would require manually re-lighting of the pilot light. I heard that before the tenant's husband moved out in early 2020, the tenant's husband would undertake to re-light the pilot light.

The parties were in dispute as to whether the furnace became completely inoperable starting in January 2020, as submitted by the tenant. Based on what is before me, I find the tenant's position lacks credibility. Despite stating the furnace was completely not working in January 2020 onwards, the tenant also made submissions that that a furnace technician was called to re-light the pilot light. In the tenant's hand-written notes, the tenant wrote that the heat was going out weekly in January and February 2020. In the tenant's notes regarding October 2020 the tenant wrote that the heat was going out daily and that she was told not to re-light the pilot light anymore. In the tenant's notes from January 2021, the tenant writes that the furnace is going out daily due to the pilot light. If the furnace was completely non-functional since January 2020, as the tenant claims, I find it is illogical that the tenant would record in her notes that the heat would go out weekly, then daily, and that a furnace technician came to re-light the pilot light. Rather, I find the tenant's evidence is more consistent with the landlord's position that the tenant has a tendency to exaggerate and that the pilot light would blow out but that the furnace was remained operational so long as the pilot light was lit. The landlord's position that the pilot light was prone to being extinguished when it was windy is also consistent with the parties' statements that the landlord installed a storm cap on the furnace chimney in December 2020.

The landlord acknowledged the rental unit is located in a windy area and that he was aware the pilot light would blow out from time to time; however, it may have been more frequent than that based on the tenant's notes. Fortunately for the landlord, the tenant's husband would re-light the pilot light when it blew out; however, re-lighting a pilot light for a heating appliance that is used regularly in the colder months is not typically

anticipated or required of a tenant. It would appear to me that after the tenant's husband moved out in early 2020 the tenant was not comfortable or unwilling to re-light the pilot light, which would explain the tenant's numerous calls to the landlord and the furnace technician and the use of space heaters. While the landlord did have a "storm cap" installed on the chimney in December 2020 in an attempt to address the down draft extinguishing the pilot light, in my opinion, it was a rather lengthy period of time for the tenant to wait for the landlord to address the issue of wind blowing out the pilot light. Therefore, I find the landlord took an unreasonable amount of time to take steps to address the issue of wind blowing out the furnace pilot light and the landlord violated the landlord's obligation under section 32 of the Act.

As for the gas fireplace, I was provided conflicting oral testimony as to whether it was operational and I find the conflicting oral testimony to be insufficient to meet the tenant's burden of proof.

The tenant submitted that she filed an Application for Dispute Resolution in October 2020 to seek repair orders concerning the furnace, among other things; however, a search of the Residential Tenancy Branch records shows the tenant filed for emergency repairs in December 2020, not October 2020. In any event, an outstanding repair issue is not a basis under the Act to withhold rent, which is what the tenant did starting in December 2020 and that resulted in her eviction from the rental unit. Accordingly, rent remains payable to the landlord and if a tenant suffers loss due to an outstanding repair, a tenant is at liberty to seek compensation from the landlord for damages and/or loss of use and enjoyment of the rental unit, which is the basis for the claim before me.

The tenant is seeking 100% of the rent paid or payable for the period of October 19, 2020 to the date she vacated the rental unit, or February 28, 2021. I find the tenant's claim for a 100% rent abatement to be excessive and unreasonable considering the tenant still had use of the rental unit to sleep, bath, eat, and other daily activities. Also, the tenant did have heat by way of space heaters, and to some extent the gas fireplace based on her own acknowledgement. The use of electric space heaters did not cost the tenant any money since electricity and gas were included in the tenant's rent payment. However, I also recognize that space heaters are inconvenient as they may have to be turned on and off, moved around to heat different rooms, and may not heat as evenly as a furnace that is ducted throughout the rental unit would.

Rather than deny the tenant's claim outright due to the unreasonable amount she is seeking, I find it appropriate to issue an award to recognize the inconvenience of having to deal with a furnace that was subject to going out during wind events and using space

heaters which would be inferior to use of a furnace. The tenant seeks compensation for approximately 3.5 months; however, I am not persuaded that the furnace was going out "daily" for those 3.5 months given the landlord's opposition, the installation of a storm cap on the furnace chimney in December 2020, the lack of corroborating evidence, and the tenant's lack of credibility and accuracy as I noted previously in this decision. Therefore, I make a nominal award of $100.00 to the tenant.

Filing fee

The tenant's application had some merit and I award the tenant recovery of the $100.00 filing fee she paid for her application.

Monetary Order

Based on all of my findings and awards above, I provide the tenant with a Monetary Order in the sum of $2000.00 [calculated as $1800.00 + $100.00 + $100.00].

As information for both parties, providing the tenant with a Monetary Order by way of this decision does not invalidate or void the Monetary Order issued to the landlord on February 19, 2021. Rather, both parties now have an enforceable Monetary Order against the other, for different amounts.

Conclusion

The tenant was partially successful in her claims against the landlord. The tenant is provided a Monetary Order in the sum of $2000.00 with this decision.

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: September 13, 2022

Residential Tenancy Branch