Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **MNDCT, FFT**

Introduction
The words tenant and landlord in this decision have the same meaning as in the *Residential Tenancy Act, (the "Act")* and the singular of these words includes the plural.

This hearing dealt with an application filed by the tenant pursuant the *Residential Tenancy Act* (the "*Act*") for:

- A monetary order for damages or compensation pursuant section 67; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

The tenant DB and both landlords attended the hearing. The landlords acknowledged service of the tenant's Notice of Dispute Resolution Proceedings package and the tenant acknowledged service of the landlord's evidence. The tenant advised that some of the landlord's digital evidence could not be accessed however I advised both parties that only the issues identified in the tenant's application for dispute resolution would be adjudicated upon during this hearing.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules") and that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation and potential fine under the Act. Each party was administered an oath to tell the truth and they both confirmed that they were not recording the hearing.

Preliminary Issues
The landlords uploaded a multitude of evidence related to damage they allege was caused by the tenants. I advised the parties that if the landlord was seeking compensation for damages or any other compensation from the tenants, they were

required to file their own application for dispute resolution. This hearing would be limited to those issues identified in the tenant's application, only.

The landlords argued that the agreement between the parties was an occupancy agreement, not a tenancy agreement that falls under the jurisdiction of the *Residential Tenancy Act*. I reviewed the agreement and I find that it constitutes a tenancy agreement as defined under the Act. Tenancy agreement is defined in the *Residential Tenancy Act* (RTA) as 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. Under a tenancy agreement, the tenant has exclusive possession of the site or rental unit for a term, which may be on a monthly or other periodic basis. Unless there are circumstances that suggest otherwise, there is a presumption that a tenancy has been created if the tenant gains exclusive possession of the rental unit or site, subject to the landlord's right to access the site, for a term; and the tenant pays a fixed amount for rent. Based on the fact that the tenants were the exclusive occupants of the rental unit from January 1, 2016, to the end of the tenancy in May of 2022, paying a fixed amount for rent, I find there to be a tenancy agreement binding the parties and that the Act applies.

Issue(s) to be Decided

Is the tenant entitled to recover the rent collected above the statutory limit collected during the tenancy?
Is the tenant entitled to a return of the security deposit (doubled)?
Can the landlord recover the filing fee?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.
The tenant gave the following testimony. The tenancy began on January 1, 2016, although she was able to move in 2 weeks early. Rent was originally set at $1,750.00

per month, including utilities. A security deposit of $875.00 was collected from the landlord which the landlord continues to hold. A condition inspection report was conducted with the landlord at the commencement of the tenancy.

On August 12, 2020, the landlords emailed the tenant, advising they were going to raise the rent from the current $1,850.00 per month to $1,950.00, an increase of $100.00. The tenant testified that she paid the additional rent increase because she "*didn't want to rock the boat".* She didn't complain as it was difficult to find alternate accommodations during the pandemic. The tenant testified that after she moved out, she found out that the increase was higher than the regulations allowed, being greater than the 2.6% allowable for that year. The tenant testified that she paid higher rent between October 1, 2020 and May 2022, although she acknowledged that she didn't pay any rent for the month of May, 2022.

The tenant testified that the landlords emailed her telling her that they wanted to move back into the rental unit. No formal notice to end tenancy in proper form was served upon her. The tenant was told to vacate by June 1, 2022. The tenant found a new place and emailed the landlord on May 5, 2022, telling the landlord that they have completely moved out of the rental unit. In the email, the tenant writes:

"We are both ill, so that's why I didn't call to let you know we were vacating now and didn't want to pass onto either of you. Keys are on the counter, your mail is in a blue Caposhie bag in Master bedroom closet…
There is of course normal wear & tear after 6 1/2 years of living there, but there is no damage done to your home.
Our new mailing address is:
[forwarding address provided]
Would appreciate our damage deposit sent to this address. Thank you for the last 6 1/2 years!
Take care, now we are quarantined for 14 days..."

The tenant testified that she never let the landlord know she planned on vacating the rental unit by May 5th. Rather, she told them the day she left, explaining they were both ill. The tenant testified that both she and the co-tenant were exposed to covid prior to moving out. The tenant did not arrange a date and time for a walkthrough with the

landlord but believes the landlords attended the residence on May 5th after she left, based on speaking to the next door neighbour.

The landlord TF gave the following testimony. The rent was raised effective October 1, 2020 to absorb the higher utility bills. The tenancy agreement capped the utilities at $250.00 per month but they were being exceeded by the tenants.

In their notice to vacate email sent April 20, 2022, provided as evidence, the landlords ask the tenants to do a walkthrough at 12 noon on the day they vacate or a mutually convenient time. The landlord testified that the tenants never told them they would be vacating the unit on May 5th, although they had previously notified them that they would be gone by May 15th. No date for a move-out condition inspection report was scheduled because the landlord was unaware the tenants had vacated the unit.

The landlord provided evidence of what she is alleging as damage to the rental unit. The landlord testified that she understood that at this hearing, she could provide the reasoning for retaining the tenant's security deposit, due to the damage done to the home. I reminded the landlord that she could file an application seeking compensation from the tenant for the damage alleged, but that would be adjudicated upon at a future hearing.

Analysis

- Compensation for overpayment of rent.

A landlord must not increase rent except in accordance with part 3 of the Act, pursuant to section 41. It must be calculated in accordance with the regulations, ordered by the director or agreed to by the tenant in writing. Pursuant to section 43(5), if a landlord collects a rent increase not in compliance with Part 3, the tenant may recover the increase.

Here, the tenant testified that she accepted the rent increase because she "didn't want to rock the boat" and because she didn't want to face the prospect of looking for another rental unit during the pandemic. It wasn't until after the tenancy ended that the tenant says she found out the rent increase was not compliant with the Act.

Estoppel is a legal doctrine which holds that one party may be prevented from strictly enforcing a legal right to the detriment of the other party, if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and has acted accordingly.

The tenant made a conscious choice to accept the increased rent rather than look for another place to rent. In her own words, she “didn’t want to rock the boat”. The tenant could have refused to accept the higher rent or challenged the attempted increase by filing an application for dispute resolution with the Residential Tenancy Branch. She did neither. I note that the landlords gave the tenant a full 3 months notice of the rent increase which I find would be a reasonable time frame for the tenant to make enquiries or do research to determine if the rent increase was compliant with the legislation.

By choosing to remain in the rental unit and start paying the higher rent, the tenant accepted that rent would increase by $100.00 per month. For the tenant to concede paying the increased rent and then seek to have the increased rent returned to her after the tenancy ended would be unjust. Once again, when the landlords served the notice of rent increase upon the tenant 3 months in advance of the increase, the tenant could have disputed it, or refused to pay it but she chose not to do so. Based on the legal doctrine of estoppel, I dismiss the portion of the tenant’s claim seeking to be compensated for the increased rent.

- Return of security deposit

Pursuant to section 38, a landlord must repay the tenant’s security deposit or make an application for dispute resolution claiming against the security deposit within 15 days after the tenancy ends and the date the landlord receives the tenant’s forwarding address. If the 15 days pass, and the landlord has done neither, the landlord may not make a claim against the security deposit and must pay the tenant double the amount of the security deposit pursuant to section 38(6). In this case, the tenancy ended on May 5, 2022, and the tenant advised the landlord of her forwarding address in the email dated the same day.

The return of a security deposit is closely related to the condition inspection report in accordance with Division 5 – At the End of a Tenancy in the *Residential Tenancy Act.* The landlord and tenant are required to attend the rental unit at the end of the tenancy to conduct a walkthrough and sign the condition inspection report when the rental unit is empty of the tenant's possessions. Pursuant to section 35, it is the landlord’s responsibility to schedule the inspection. If the landlords do not offer 2 opportunities for inspection, the right to claim against the security deposit is extinguished pursuant to section 36(2).

I find that the tenancy ended on May 5, 2022 and I deem the forwarding address served upon the landlords on May 8, 2022, three days after it was sent to them via email. The landlords have the obligation to propose one or more dates for the condition inspection report walkthrough with the tenant as soon as they know the rental unit is vacant and they receive the tenant's forwarding address, despite the tenant's allegation that they were under quarantine. Since this did not happen, I find the landlord failed to provide the 2 opportunities for inspection and they have extinguished their right to claim against the security deposit.

Section 38(5) and (6) of the Act state that when the landlord's right to claim against the security deposit is extinguished, the landlord may not make a claim against it and must pay the tenant double the amount of the security deposit or pet damage deposit, or both, as applicable. This is further clarified in Residential Tenancy Branch Policy Guideline PG-17 which says, in part C-3:

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 not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing; whether or not the landlord may have a valid monetary claim.

In this case, section 38(6) requires that the tenant's security deposit of $875.00 be doubled to $1,750.00. As the tenant's application was successful, the tenant is also entitled to recovery of the $100.00 filing fee for the cost of this application.

Conclusion

I issue a monetary order in the tenant's favour in the amount of $1,850.00.

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: February 24, 2023

Residential Tenancy Branch