Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNL, LRE, OLC, FFT
OPR, OPL, MNRL, MNDL-S, MNDCL

Introduction

This matter was originally heard on May 5, 2023, at 11:00 am. An adjournment was required due to the time constraints of the hearing, and an interim decision was issued. That interim decision must be read in conjunction with this decision. The hearing was reconvened on September 1, 2023, at 9:30 am and was attended by the tenant and the landlords. All testimony provided was affirmed.

The hearing picked up where it left off, and the participants were provided the opportunity to present their evidence orally and in written and documentary form, to call witnesses, and to make submissions at the hearing. The participants were advised that 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 participants 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. At several points during the hearing the tenant had to be muted due to their inability to control themselves and their inability to comply with these rules. The participants were also advised that personal recordings of the proceedings are prohibited and confirmed that they were not recording the proceedings.

Preliminary Matters

Preliminary Matter #1

As the parties agreed at the initial hearing on May 5, 2023, that the tenancy had ended and that the landlord had possession of the rental unit, the following claims were dismissed without leave to reapply, as they were moot:

- The tenant's claim for Cancellation of a Two Month Notice;

- The tenant's claim for an order suspending or setting conditions on the landlords' right to enter the rental unit;
- The tenant's claim for an order for the landlords to comply with the Act, regulation, or tenancy agreement;
- The landlords' claim for an order of possession based on the Two Month Notice; and
- The landlords' claim for an order of possession based on a 10 Day Notice.

As all the claims made by the tenant in their application were dismissed without leave to reapply as set out above, their claim for recovery of the $100.00 filing fee was also dismissed without leave to reapply.

Preliminary Matter #2

At the first hearing there was significant disagreement between the parties regarding service. Although the landlords acknowledged receipt of the tenant's Notice of Dispute Resolution Proceeding (NODRP) package and evidence, the tenant denied receipt of the landlords' NODRP package and amendment, as well as much of the landlords' documentary evidence.

The tenant stated that they only ever received documentary evidence from the landlords in response to their own application. They denied receipt of the landlords' NODRP, amendment, and any evidence relating to the landlords' application. The landlords provided affirmed testimony and documentary evidence that the above noted documents were sent to the tenant as required by registered mail on January 14, 2023, January 25, 2023, and March 2, 2023, and by email on April 13, 2023, in accordance with an order for substituted service made on April 11, 2023. The landlords submitted significant documentary evidence in support of service, including numerous registered mail receipts and tracking numbers, copies of the registered mail tracking information available from Canada Post, copies of the emails sent, and email delivery receipts.

Based on the documentary evidence before me from the landlords, as well as their affirmed testimony, I am satisfied that registered mail was sent to and received by the tenant at the rental unit address, as follows:

- registered mail containing the NODRP and evidence was sent on January 14, 2023, a notice card was left on January 16, 2023, and the registered mail was delivered on January 19, 2023;
- registered mail containing evidence was sent on January 25, 2023, a notice card was left on January 27, 2023, final notice was left on February 2, 2023, and the registered mail was delivered on February 7, 2023; and
- registered mail containing evidence was sent on March 2, 2023, a notice card was left on March 3, 2023, and the registered mail was delivered on March 5, 2023.

Based on the documentary evidence before me from the landlords, as well as their affirmed testimony, I am also satisfied that several emails containing the substituted service decision, the amendment, and documentary evidence were sent to the tenant on April 13, 2023, at the email address approved for service in the substituted service decision. Copies of the emails, which show the documents attached to each email, were submitted as well as email delivery receipts. Although the tenant repeatedly stated that these were not received as they went to their spam folder, no documentary or other corroboratory evidence of this was submitted. An adjudicator with the Residential Tenancy Branch (Branch) also ordered on April 11, 2023, that the tenant could be served by email at that email address. As a result, I find these emails deemed served on the tenant three days later, on April 16, 2023, pursuant to the order for substituted service, sections 71(1), 88(i), and 89(e) of the Act, and section 44 of the regulations.

While deemed service is a rebuttable presumption, as set out in Residential Tenancy Policy Guideline (Policy Guideline) #12, a party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date of receipt. Examples of corroboratory documentary evidence are also given in the Policy Guideline. I do not find the tenant's affirmed testimony that they did not receive the documents set out above sufficient on its own and in the absence of any corroboratory documents or evidence, to outweigh or overturn the deemed service presumptions set out in the Act and regulations. This is especially true, given that I am satisfied that the emails were sent to the email address permitted in the substituted service decision, and were delivered to that address successfully without being bounced back as undeliverable.

As a result, I find that the landlords' NODRP package was sent to the tenant by registered mail on January 14, 2023, and received by them on January 19, 2023. I therefore find it properly served on the tenant in accordance with the Act and the Rules of Procedure. I also find that the amendment was sent by email on April 13, 2023, and

deemed received by the tenant three days later, on April 16, 2023. I therefore accept the landlords' application and amendment for consideration.

I also find that the landlords' documentary evidence was served or deemed served on the tenant by registered mail and email on January 19, 2023, January 25, 2023, March 5, 2023, and April 16, 2023. Further to the above, I am satisfied by the Canada Post tracking information provided by the landlords that the registered mail deemed served on January 25, 2023, was successfully delivered on February 7, 2023. I am also satisfied by the testimony of the tenant at the hearings that they became aware, at least at some point, of the above noted emails as they acknowledged that they went to their spam folder.

Based on the above, I accepted all the documentary evidence before me from the parties for consideration.

Issue(s) to be Decided

Are the landlords entitled to recover $2,300.00 in unpaid rent?

Are the landlords entitled to $1,150.00 in compensation for damage?

Are the landlords entitled to $160.00 for unreturned keys and fobs?

Are the landlords entitled to retain all or a part of the security deposit?

Background and Evidence

The parties agreed that:

- the tenancy ended on March 17, 2023, due to a Two Month Notice;
- no rent was paid for the last month of the tenancy (February 18, 2023 – March 17, 2023);
- no compensation was paid to the tenant by the landlords under section 51(1) of the Act;
- no move-in or move-out condition inspections were properly scheduled or completed;
- no forwarding address was provided by the tenant to the landlords in writing; and
- no keys or fobs were returned at the end of the tenancy.

The tenancy agreement in the documentary evidence before me states that the fixed term tenancy commenced on October 17, 2021, that the tenancy would become month to month at the end of the fixed term on October 17, 2022, that rent in the amount of $2,300.00 was due on the 17th day of each month, and that a security deposit in the amount of $1,150.00 was required. At the hearing the parties confirmed rent was $2,300.00 per month at the time the tenancy ended, and that the landlord still holds the full security deposit amount in trust.

The landlords sought recovery of $2,300.00 in unpaid rent for the last month of the tenancy. However, the tenant stated that no rent was owed because of the Two Month Notice. The parties disagreed about the state of the rental unit, and the rented furniture at both the start and the end of the tenancy. The landlords argued that everything was in new or very good condition at the start of the tenancy and that everything was broken or damaged at the end. The tenant disagreed, stating that they kept the apartment in good condition and that all of the furnishings were old and used at the start of the tenancy, contrary to the landlords' testimony. Although they acknowledged that there was some wear and tear, as can be expected over the course of a one-year tenancy, they stated that there was no intentional damage. The parties accused each other of taking advantage them. The tenant also accused the landlords of improperly withholding their security deposit.

Although the tenant acknowledged failing to return the mailbox key, 3 keys and 3 fobs, they stated that they withheld them due to privacy concerns and because they wanted to check the mailbox when they returned to the country. The landlords stated that as they are residing in the property, they had to replace these items at a cost of $160.00. The tenant acknowledged that they could still return them, arguing that there was therefore no need to reimburse the landlords for their replacement.

Analysis

Although the tenant claimed that the landlords have withheld their security deposit improperly, I disagree. As the parties agreed at the hearing on September 1, 2023, that the tenant had not yet provided a forwarding address in writing, I find that the requirements set out under section 38(1) of the Act had not yet been triggered. As a result, I find that the landlords were not entitled to either return it or claim against it. If the tenant wishes to receive their security deposit, or any remaining portion thereof, back, they must provide the landlord with their forwarding address in writing within one year of the end date of the tenancy. The landlord will then be required to comply with section 38 of the Act.

The parties disagreed about the state of the rental unit, and the rented furniture at both the start and the end of the tenancy. Although the landlord provided photographs, they were not date stamped and no meta data showing when they were taken was submitted. As a result, I am not satisfied that the photographs submitted accurately show either the state of the rental unit at or just prior to the start of the tenancy, or at the end of the tenancy. Further to this, the parties agreed that move-in and move-out condition inspections and reports were not completed. As a result, I find that the landlord has failed to satisfy me that any damage shown in the photographs and alleged to have been caused by the tenant, occurred during the tenancy. As a result, I therefore dismiss the landlords' claim for $1,150.00 in repair and replacement costs without leave to reapply.

Although the landlords sought recovery of $2,300.00 in rent for the tenant's last month of occupancy, the parties agreed that the tenancy ended due to a Two Month Notice. The tenant stated that rent was withheld as a result, and I accept this as fact. Section 51(1) of the Act sates that a tenant who receives a notice to end a tenancy under section 49 is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement. The parties agreed that no compensation was paid to the tenant by the landlords. Section 51(1.1) of the Act states that a tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and that amount is deemed to have been paid to the landlord. As a result, I dismiss the landlords' claim for recovery of $2,300.00 in rent without leave to reapply, as I find that the tenant was entitled to withhold this amount under sections 51(1) and 51(1.1) of the Act.

The tenant acknowledged that as of the date of the hearing, they had not yet returned the mailbox key, three sets of keys, and three fobs, as they are out of the country and wanted to check the mailbox when they returned. Section 37(2)(b) of the Act states that when a tenant vacates a rental unit, the tenant must give the landlord all the keys or other means of access that are in the possession or control of the tenant that allow access to and within the residential property. As a result, I find that the tenant was not entitled to retain the above noted keys and fobs, regardless of their reasoning, after they vacated the rental unit. Further to this, as the tenancy is over, the tenant no longer has a right to access the building, the rental unit, or the mailbox. The tenant is cautioned that accessing any of the above using the above noted keys and fobs may constitute one or more offenses under the criminal code of Canada.

The landlords stated that it cost them $160.00 to replace the above noted keys and fobs and I accept this as fact. Although the tenant disagreed that they should be responsible for this cost, as they can still return the keys and fobs, I disagree. The tenant breached section 37(2)(b) of the Act as set out above, and I am satisfied that this resulted in a loss of $160.00 by the landlords, who had to replace these items. The possible future return of the original keys and fobs does not erase this loss. As a result, I therefore grant the landlords the $160.00 sought, pursuant to sections 7 and 37(2)(b) of the Act. Additionally, I order the tenant to immediately return to the landlords, the above noted keys, and fobs, as they are not their property, the tenancy is over, and these items grant access to the building, mailbox, and rental unit.

Pursuant to section 72(2)(b) of the Act, I order that the landlords are entitled to withhold $160.00 from the tenant's $1,150.00 security deposit. The remaining balance and any interest owed must be dealt with in accordance with the Act.

Conclusion

The tenant's application is dismissed without leave to reapply. The majority of the landlord's claims are also dismissed without leave to reapply. However, I grant their claim for recovery of the $160.00 paid to replace unreturned keys/fobs. Pursuant to section 72(2)(b) of the Act, the landlords are therefore entitled to withhold $160.00 from the tenant's $1,150.00 security deposit. The remaining balance and any interest owed must be dealt with in accordance with the Act.

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, nor my authority to render it, are affected by the delay.

This decision is made on authority delegated to me by the Director of the Branch under Section 9.1(1) of the Act.

Dated: October 10, 2023

Residential Tenancy Branch