Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

Decision

Dispute Codes: MNSD, MNDC, FF

Introduction

The hearing was convened to deal with an application by the tenant for the return of double the $800.00 security deposit minus the $500.00 already returned by the landlord. The tenant was also seeking reimbursement for the $50.00 fee paid for this application.

This Dispute Resolution hearing was also convened to deal with a cross application by the landlord for a monetary claim of $1,550.00. The landlord was also seeking reimbursement for the $50.00 fee paid for this application.

Both the landlord and tenant were present and each gave testimony in turn.

Issues to be Decided for the Tenant's Application

The issue to be determined based on the testimony and the evidence is whether the tenant is entitled to return of double the security deposit under section 38 of the Act.

Issues to be Decided for the Landlord's Application

The landlord was seeking a monetary order for loss of rent and the issues to be determined, based on the testimony and the evidence, is whether the landlord is entitled to compensation under section 67 of the *Act* for loss and damages.

Background and Evidence

The fixed-term tenancy began on August 7, 2010 to expire on April 30, 2011 with rent of $1,550.00 and a security deposit of $800.00.

The parties agreed to end the fixed term tenancy early and a copy of the landlord's consent dated October 6, 2010 was submitted into evidence. This letter stated the following, (reproduced as written):

> "*It is totally fine for me that you have decided to move out the suite at the end of October. I will collect all keys and check the suite at 5 pm Oct 30 2010. You'd better move all your stuffs, clean the suite and restore the suite to the conditions as you moved in before 5 pm.*"

The landlord testified that, with this consent notice, it was her expectation that the tenants would contact her prior to moving and on October 30, 2010 and that they would be present at 5:00 p.m. to hand over all three sets of keys confirming that they had vacated. The landlord testified that, had they followed this process properly, it would permit the landlord to re-rent the suite to another renter for November 2010. However, according to the landlord, the tenants did not contact the landlord on October 30 and some of the keys were not returned until November 5, 2010. The landlord attributed this failure on the part of the tenants as the cause for losing potential rental income for the month of November 2010. The landlord stated that she felt that she could not proceed to re-rent the unit until the move-out inspection was jointly completed and all of the keys were given back.

The landlord acknowledged that the suite was left clean and undamaged and that she did receive the tenants' written forwarding address on November 2, 2010. However, because the tenants had not followed the process outlined on the landlord's consent letter, the landlord stated that she felt justified in keeping a portion of the tenant's security deposit as a "penalty" in the amount of $100.00 for the failure to return the keys on time and $200.00 for not giving adequate notice to move. The landlord returned the remainder of $500.00 on November 30, 2010.

The landlord testified that after returning a portion of the deposit , she then decided that the tenants owed a full month rent in damages, because she had lost rent due to:

- the premature ending of the fixed term tenancy by the tenant,
- the over-holding by the tenant into the following month,
- the tenant's failure to report when they had vacated,
- the tenant's failure to participate in the move out inspection meeting
- the tenant's failure to return all of the keys before November 1, 2010.

Because the landlord was not successful in re-renting the suite for the month of November, she made an application for dispute resolution on December 23, 2010 seeking $1,550.00 in compensation.

The tenant testified that they had given notice to end the fixed term tenancy early and the landlord agreed in writing to accept their proposed ending effective for October 31, 2010. The tenant pointed out that they had moved out earlier and were gone by October 23, 2010, having returned some of the keys. The tenant testified that all of the keys had been surrendered to the landlord by November 2, 2010. With respect to meeting the landlord on October 30, 2010 for a condition inspection, the tenant testified that the note from the landlord only stated that the *landlord* would check the suite. Moreover, according to the tenant, the landlord had seen the unit after it was cleaned

and stated that she was satisfied with the condition. The tenant testified that the landlord's failure to find a new renter was not connected in any way to the tenants. The tenant testified that the landlord's application to be reimbursed for a full month rent for November was apparently filed in reprisal to the tenants' application for return of the remainder of their security deposit. The tenant felt that the landlord's application had no merit pursuant to the Act or the Agreement.

The tenant testified that they had furnished the forwarding address by November 2, 2010 and landlord had failed to refund all of the tenant's security deposit within fifteen days. The tenant is seeking double the security deposit pursuant to the provisions in section 38 of the Act.

Analysis: Tenant's Application

The tenant made application for the return of the security deposit and section 38 of the Act deals with this issue. Section 38(1) states that within 15 days of the end of the tenancy and receiving the tenant's forwarding address a landlord must either:

- repay any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations OR
- make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that because the tenancy was ended and the forwarding address was given to the landlord on or around November 2, 2010, under the Act the landlord should either have returned the deposit or made an application for dispute resolution within the following 15 days. However, the landlord's application for dispute resolution was not processed until December 23, 2010, beyond fifteen days.

Section 38(6) If a landlord does not act within the above deadline, the landlord; (a) may not make a claim against the security deposit or any pet damage deposit, and; (b) must pay the tenant double the amount of the security deposit.

Based on the above, I find that the tenant is entitled to receive double the $800.00 security deposit in the amount of $1,600.00 less $500.00 already paid by the landlord.

Analysis: Landlord's Application

In regard to the landlord's claim for monetary damages, an applicant's right to claim damages from the other party is covered under, Section 7 of the Act which states that 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.

Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount of , and order a party to pay, compensation to the other party.. It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent.

I find that the evidence and testimony of both parties established that the tenant did not violate the tenancy agreement by terminating the tenancy prior to its expiry date. The fact is, these two parties subsequently made a mutual agreement to end the tenancy early, as confirmed in writing by the landlord on October 6, 2010. I find that the landlord gave permission for the tenant to vacate by October 31, 2010 and that the tenant duly honoured this subsequent agreement by vacating on or before the date agreed upon.

With respect to the tenant's failure to attend to do the move-out inspection on October 30, 2010 as instructed by the landlord in her letter, I find that this failure to respond was not material to the landlord's claim of loss. I find that the testimony from both parties confirmed that the rental unit was left in a reasonably clean and undamaged condition. Had the inspection occurred this would have been the outcome and there would be no impediment to re-renting the unit in such a case.

I also do not accept that the tenant's failure to contact the landlord on October 30, 2010 to confirm that they had vacated, would justify an automatic presumption by the landlord that the tenants were still living in the unit on that date. Because the tenants had agreed to leave, I find that the landlord could presume that they had left unless there was a

clear indication that this did not occur. In any case, I find that the landlord had the ability to confirm whether or not the unit was vacant at any time during the month of October by posting notification that the landlord would be entering the suite.

With respect to the tenant's late surrender of some of the keys, I accept the landlord's testimony and find that the tenant failed to follow the Act in this regard. However, I do not find that the absence of the keys caused the landlord a financial loss equivalent to one month rent.

Section 25 (1) of the Act states that, at the request of a tenant at the start of a new tenancy, the landlord must: (a) rekey or otherwise alter the locks so that keys or other means of access given to the previous tenant do not give access to the rental unit, and; (b) pay all costs associated with the changes under paragraph (a).

I find that the landlord could have taken steps to confirm that the unit was vacant and finding it so, would be at liberty to change the locks for the new tenant, should one have been ready to move in on November 1, 2010.

I find that the landlord has not offered sufficient proof to satisfy any element of the test for damages. Accordingly I find that the landlord's application must be dismissed.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of $1,150.00 including $1,100.00 for the remaining deposit and the $50.00 cost of filing the application. Accordingly I hereby issue a monetary order in favour of the tenant for $1,150.00.

Based on the testimony and evidence presented during these proceedings I find that the landlord is not entitled to compensation and the landlord's application is dismissed in its entirety without lave to reapply.

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: April 2011.

Residential Tenancy Branch