Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNSD FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for an order for the return of double the security deposit as the security deposit was wrongfully retained by the landlord without making an application to keep it. Both parties appeared and gave testimony.

Issue(s) to be Decided

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

The burden of proof was on the applicant to prove that the deposit was paid and the burden of proof was on the respondent landlord to prove that the deposit was either returned or that the landlord had a right under the Act or by Order to keep it.

Background and Evidence

The tenant was seeking to receive a monetary order for the return of the security deposit paid at the start of the tenancy in January 2010 in the amount of $900.00. The tenancy ended on February 28, 201, a move-out inspection report was completed and the tenant provided a written forwarding address at that time. A copy of the move out condition Inspection report was submitted into evidence. The tenant stated that English is her second language and when the landlord presented the move-out inspection report and told the tenant to sign it at the bottom she did so. The form indicated that the landlord was seeking $150.00 for carpet cleaning, $100.00 for cleaning costs and “outstanding rent” shown as $1,800.00 for total charges of $2,050.00. The tenant testified that she did not agree with the landlord’s inclusion of loss of rent owed for the month of March. Although there was no specific space allotted on the landlord’s form for such comments, the tenant testified that she managed to indicate her disagreement in the margin beside the charges and just above her signature on the form.

The landlord pointed out that the tenant had willingly signed the "Condition Inspection Form" generated by the landlord for the landlord's use. The landlord's position was that the landlord had complied with sections 23 and 35 of the Act by completing the move-in and move-out condition inspection reports and that the tenant had agreed to the charges listed in the rows under the "Leaving Condition" including $150.00 for "*carpet cleaning*", $100.00 "*Total Damages and Cleaning*", and $1,800.00 "*Outstanding Rent*" for a total of $2,050.00, as indicated by her signature below the statement, "*The undersigned tenant(s) agree the (Landlord Ltd.) may deduct $2050 from the security deposit as payment….for the estimate of damages and other charges as set out above and agrees to pay the outstanding balance not satisfied by the security deposit and interest.*" With respect to the tenant's handwritten notation below this notation stating; "*I don't agree to pay rental for March*", just above her signature, the landlord did not agree that this nullified the tenant's commitment to pay the amounts shown on the form as damages.

Analysis

In regard to the return of the security and pet damage deposits, I find section 38 of the Act is clear. Within 15 days after the later of the day the tenancy ends, and the date the landlord receives the written forwarding, the landlord must either repay the security deposit or pet damage deposit to the tenant with interest or make an application for dispute resolution claiming against the security deposit or pet damage deposit. In this instance, the landlord repaid a portion of the deposit within the 15 days.

The Act states that the landlord can only retain a deposit without obtaining an order if the tenant agrees in writing that the landlord can keep it to satisfy a liability at the end of the tenancy. I find that, despite the fact that the tenant may have signed in agreement with the move-out condition inspection report, this did not constitute the required written permission under the Act that would allow the landlord to retain the deposit for the reasons below:

- First, I find that the $1,800.00 shown as "outstanding rent" for March would not be considered to be "outstanding rent" or rental arrears owed as of February 28, 2011. The obligation to pay rent is covered under section 26, of the Act which states that rent must be paid when it is due, under the tenancy agreement. I find that the tenancy had ended by March 1, 2011 so "rent" owed under section 26 was not applicable at that time. If the landlord was anticipating a loss of rent for the month of March 2011.

- I find that the $1,800.00 for loss of rent would be a claim for damages under section 7 of the Act. Awards for damages are intended to be restorative,

meaning the award should place the applicant in the same financial position had the damage not occurred. Therefore, a damage claim for a loss that had not yet occurred would not have merit under the Act or the agreement.

- I find that a move-in and move out condition inspection report is not the appropriate way for the landlord to include a claim for rent or loss of rent. This form is to be used in compliance with sections 23 and 35 of the Act, which does not apply to damages stemming from other contractual violations or matters unconnected to the pre-rental and post-rental condition of the unit.

- In addition to the above, I find that the format of the landlord's move-in and move out condition inspection report form falls short of what is required in the Residential Tenancy Regulation.

  Section 20 of the Residential Tenancy Regulation that that the following standard information must be included in a condition inspection report

  (1) A condition inspection report completed under section 23 or 35 of the Act must contain the following information:

  (a) the correct legal names of the landlord, the tenant and, if applicable, the tenant's agent;

  (b) the address of the rental unit being inspected;

  (c) the date on which the tenant is entitled to possession of the rental unit;

  (d) the address for service of the landlord;

  (e) the date of the condition inspection;

  (f) a statement of the state of repair and general condition of each room in the rental unit including, but not limited to, the following as applicable:

  (i) entry; (ii) living rooms; (iii) kitchen; (iv) dining room or eating area; (v) stairs; (vi) halls; (vii) bathrooms; (viii) bedrooms; (ix) storage; (x) basement or crawl space; (xi) other rooms; (xii) exterior, including balcony, patio and yard; (xiii) garage or parking area;

(g) a statement of the state of repair and general condition of any floor or window coverings, appliances, furniture, fixtures, electrical outlets and electronic connections provided for the exclusive use of the tenant as part of the tenancy agreement;

(h) any other items which the landlord and tenant agree should be included;

(i) a statement identifying any damage or items in need of maintenance or repair;

(j) appropriate space for the tenant to indicate agreement or disagreement with the landlord's assessment of any item of the condition of the rental unit and contents, and any additional comments;

(k) the following statement, to be completed by the tenant:

I, ...Tenant's name

[ ] agree that this report fairly represents the condition of the rental unit.

[ ] do not agree that this report fairly represents the condition of the rental unit, for the following reasons:
.....
.....

.....
.....

(l) a space for the signature of both the landlord and tenant.

(2) In addition to the information referred to in subsection (1), a condition inspection report completed under section 35 of the Act [condition inspection: end of tenancy] must contain the following items ***in a manner that makes them clearly distinguishable from other information in the report:***

(a) a statement itemizing any damage to the rental unit or residential property for which the tenant is responsible;

(b) if agreed upon by the landlord and tenant,

(i) the amount to be deducted from the tenant's security deposit or pet damage deposit,

(ii) the tenant's signature indicating agreement with the deduction, and

(iii) the date on which the tenant signed. ***(my emphasis)***

I find that the move out portion of the condition inspection report that was relied upon by the landlord, is not in compliance the above requirements under the Regulation because only the move-in condition inspection portion contains the mandatory statement required under paragraph **20(1)(K).** I find that this mandatory statement is missing from the move out condition inspection report. I also find that the structure of the form functions to deny the tenant an opportunity to put a comment in to dispute the landlord's assessment about the move-out condition as indicated on the form and the associated charges claimed by the landlord.

- In addition to the above defect, I find that the move-in and move out condition inspection report form generated by the landlord contravenes section **20(2)** of the regulation because the calculation of damages, for which the landlord purports to hold the tenant responsible, is integrated and not clearly distinguishable from the other columns showing the condition.

For the reasons above, I find that the information and any alleged consent by the tenant to the data contained on the move-in and move out condition inspection reports must be disregarded for the purpose of section 38 of the Act. I therefore find that the landlord did not have valid and compliant permission from the tenant to withhold any portion of the security deposit, nor did the landlord make application for an order to keep the deposits within 15 days.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and **must pay** the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. (my emphasis)

I find that although the landlord did not make application within 15 days to retain the security deposit, this was due to a genuine belief that valid legal permission was given by the tenant to retain the deposit. However, despite the landlord's honest mistake, I

find that I lack authority to waive or decline awarding the tenant double the deposit as required under section 38(6) as there is no discretion under the Act with respect to this provision.

I find that the tenant's security deposit with interest was $900.00 and the landlord failed to follow the Act in retaining the funds being held in trust for the tenant within 15 days. I find that the tenant is therefore entitled to compensation of double the deposit, amounting to $1,800.00 plus the $50.00 cost of the application totaling $1,850.00.

Conclusion

I find that the move-in and move-out condition inspection reports generated by the landlord were not presented to the tenant in a format that complies with the Act or Section 20 of the Regulation. I find that the tenant did not grant valid written permission for the landlord to keep the deposit.

I hereby issue a monetary order to the tenant in the amount of $1,850.00. This order is final and binding. It must be served on the Respondent and if necessary may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

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: July 14, 2011.

Residential Tenancy Branch