Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNR MNSD FF

Introduction

This Dispute Resolution hearing to deal with an Application by the landlord for a monetary order against the tenant for money owed or compensation for damage or loss under the Act, and to retain the security deposit as partial satisfaction for the amount claimed.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

Issue(s) to be Decided

Is the landlord entitled to monetary compensation under section 67 of the *Act?*

Preliminary Matter

Preliminary Issue - Service of Respondent's Evidence

The applicant landlord had served some of the documentary evidence on the tenant consisting of copies of text messages between the parties. This evidence was accepted by Residential Tenancy Branch on June 4, 2013.

The tenant testified that the evidence in question was apparently left at their service address without prior notification and they did not receive it until June 6, 2013.

The tenant testified that they had concerns about this evidence and alleged that the content of the texts had been altered by having their responses edited out.

The tenant testified that they immediately submitted their own evidence rebutting the landlord's evidence. The tenant's evidence was not found on file, but the landlord confirmed receipt of this material, which apparently consisted of a written statement by the tenant documenting the course of events from the tenant's perspective.

Residential Tenancy Rules of Procedure, requires that all evidence must be served on the respondent and Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding. I find that the applicant tenant did comply with this requirement.

Rule 4 states that, if the respondent intends to dispute an Application for Dispute Resolution, copies of all available documents or other evidence the respondent intends to rely upon must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute resolution proceeding but if the date of the dispute resolution proceeding does not allow the five (5) day requirement in a) to be met, then all of the respondent's evidence must be received by the Residential Tenancy Branch and served on the applicant at least two (2) days before the dispute resolution proceeding.

The "*Definitions*" portion of the Rules of Procedure states that when the number of days is qualified by the term **"*at least*"** then the first and last days must be excluded, and if served on a business, it must be served on the previous business day. Weekends or holidays are excluded in the calculation of days for evidence being served on the Residential Tenancy Branch.

I find that, the landlord's evidence was served to the RTB before the deadline but was not served on the tenant at least 5 days prior to the hearing. I find that the tenant did not have sufficient time in which to send in a response and still meet the evidence deadline. Accordingly, the landlord's documentary evidence of the text messages was excluded from consideration. However, the landlord was permitted to give verbal testimony with respect to the communication and the tenant was granted the opportunity to respond verbally.

In addition to the above, the landlord had submitted other evidence well within the deadline, which was not found in the Residential Tenancy Branch file. The tenant confirmed that they did receive this evidence, which apparently consisted of a copy of the move-in and move-out condition inspection reports and a copy of the mutual agreement to end tenancy.

The landlord was permitted to fax this evidence to the Residential Tenancy Branch so that it could be retrieved and considered.

Background and Evidence

The landlord was represented by an agent. The tenant objected to the agent's participation in the hearing, as they had dealt exclusively with the owner during their tenancy. The tenant pointed out that the agent was not present during their discussions and negotiations with the landlord. The tenant's position is that the landlord should have been present at the hearing as a witness.

The landlord's agent testified that the tenancy began on February 15, 2012 and ended on February 28, 2013 by mutual agreement. A copy of this document was in evidence. The landlord's agent stated that the tenants left their forwarding address on February 22, 2013, when they vacated.

The landlord's agent testified that the tenant only paid $600.00 of the $1,050.00 rent owed for January 2013 and failed to pay the remaining $450.00, which is still outstanding. The landlord is claiming monetary compensation for this.

The tenant acknowledged that the $450.00 was not paid and stated they gave the landlord their permission to deduct this amount from their security deposit, leaving only $75.00 of the security deposit still being held by the landlord for the tenants.

The tenant agreed that they did sign a mutual agreement to end the tenancy, but pointed out that this agreement was actually introduced and promoted by the landlord and they signed it at the landlord's request. The tenant testified that the reason given by the landlord for ending their tenancy was due to problems that were being reported about the tenant's dog by other residents living in the condominium complex. The tenant testified that it was later proven that the complaints were groundless, and the fines imposed by the Strata Council against them were overturned.

The landlord's agent confirmed that the strata fines were dropped and they are no longer claiming compensation for the fines.

The landlord's agent testified that the tenants failed to pay any rent at all for the month of February 2013, which was their final month of the tenancy, and the landlord is claiming $1,050.00 in compensation.

The tenant agreed that no rent was paid for the month of February, 2013. The tenant explained this is related to the fact that they were approached by the landlord in December 2012 an he convinced them that it was best to terminate the tenancy effective February 28, 2013. According to the tenant, they requested free rent for the

final month of the tenancy and the landlord agreed to waive the rent for February. The tenant pointed out that the landlord never objected to the unpaid rent for February or gave them a Notice to pay because they both agreed to the arrangement.

The landlord‘s agent conceded that she was not involved in managing the tenancy at the time that this discussion between the landlord and the tenants allegedly transpired as the landlord only hired the company to act as agent in February 2013 and they took over handling the rental unit since that time. However, according to the agent, the landlord told her that these tenants were never granted the final month of February as a rent-free month.

The landlord’s agent testified that they were also claiming a loss for the month of March 2013, in the amount of $1,050.00 because the tenant had refused the landlord access to show the rental unit, thereby delaying efforts to find a new tenant for March 1, 2013. The landlord’s agent testified that communications by text messages were ignored by the tenant and requests to view the unit were denied. The landlord testified that no access was granted until February 17, 2013.

The tenant testified that they were very willing to allow access, but, because of their dog, they needed to arrange to be there or to be given the opportunity to remove the animal before any scheduled showings.

The tenant testified that the landlord never gave formal notice or indicated that she had wanted to show potential renters through the unit and in fact the agent was not available for a period of time during February 2013.

The tenant testified that the landlord had known of their departure date since December 15, 2012 and therefore had ample opportunity to market the unit for new renters between December 2012 and February 2013. The tenant pointed out that they had even vacated earlier than agreed, on February 22, 2013, leaving the unit fully available and vacant for a week before March 1, 2013. The tenant testified that, at no time were they ever served with a valid 24 hour written notice by the landlord, as required under the Act.

The tenant does not agree with any part of the landlord’s claims and feels that they are entitled to the return of the remaining security deposit by law and that the landlord has no valid reason to retain it.

Analysis

Rent Owed

In regard to the rent being claimed by the landlord, I find that section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement.

Through testimony from both parties it was established that the tenant did not pay $450.00 rent when it was due in January 2013. When a tenant fails to comply with section 26, then section 46 of the Act permits the landlord to end the tenancy by issuing a Ten-Day Notice effective on a date not earlier than 10 days after the date the tenant receives it.

In this instance I find that the landlord did not issue a Ten Day Notice to End Tenancy for Unpaid Rent in January 2013 and apparently did not take any other steps to pursue the alleged $450.00 default until this application for dispute resolution was filed on March 14, 2013.

Based on the testimony of both parties, I find that the $450.00 in rent is still owed and the landlord is entitled to deduct it from the tenant's security deposit.

With respect to the landlord's claim for rent owed for February 2013, I accept the tenant’s testimony that the rent for their final month was waived by the landlord , who clearly instigated the ending of this tenancy.

Based on her conversations with the landlord, the landlord’s agent argued that the rent was never waived. However, the party with first-hand knowledge of what was discussed and agreed upon was not present at the hearing to testify or be cross examined by the respondents. I find that the respondents, on the other hand, were personally present during the alleged discussion and at the hearing.

Moreover, I note that no Ten Day Notice to End Tenancy for Unpaid Rent was ever issued when the February rent was not paid.

I find, on a balance of probabilities that the parties likely reached consent with respect to allowing the tenant to live in the unit for their final month rent-free as part of the mutually agreed-upon vacancy date put forth by the landlord.

Accordingly, I find that the landlord’s claim for compensation of $1,050.00 for the month of February 2013 must be dismissed.

Loss of Revenue

With respect to the claim for loss of revenue for the month of March 2013, I find that, an applicant’s right to claim damages from another party is covered by section 7 of the Act which states that if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Section 67 of the Act

grants an Arbitrator the authority to determine the amount and to order payment under these circumstances.

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, and
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.

I find that, as of mid December 2012, the landlord was aware that the tenants were vacating the unit effective February 28, 2013. I accept the landlord's agent's testimony that she initiated efforts to look at the rental unit on February 5, 2013.

However, section 29 of the Act states that a landlord must not enter a rental unit for any purpose unless the tenant gives permission at the time of the entry or at least 24 before the entry, the landlord gives the tenant written notice that includes the following information:

(i) the purpose for entering, which must be reasonable;

(ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

or an emergency exists and the entry is necessary to protect life or property.

In this instance, because the landlord did not properly issue a 24-hour written Notice under section 29 of the Act, I find that there was no genuine refusal of access by the tenant, in violation of the Act. Therefore I find that element 2, of the test for damages, has not been sufficiently met and the landlord's claim for loss of revenue founded on a violation by the tenant, must be dismissed.

Based on the evidence before me, I find that the landlord is entitled to compensation of $450.00 for the rent owed for the month of January 2013.

Return of Remaining Security Deposit

Section 38 of the Act deals with the rights and obligations of landlords and tenants in regard to the return of the security and pet damage deposits. Section 38(1) states that, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address the landlord must either repay the deposits, as provided under subsection 8, or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord was in possession of the tenant's security deposit held in trust on behalf of the tenant when the tenancy ended on February 22, 2013. I find that the tenant's forwarding address was given to the landlord at that time. Under the Act the landlord should either have returned the deposit or made an application for dispute resolution within the following 15 days.

While I accept that the tenant did give the landlord permission to retain $450.00 of their deposit for rent owed for January 2013, I find that the landlord retained the remaining $75.00 of the deposit beyond 15 days without making an application seeking to obtain an order to keep it.

Section 38(6) states: If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security or pet damage deposit, and

(b) must pay the tenant double the amount of the deposits

I find that the amount of the outstanding deposit as of the end of the tenancy was $75.00 and after the fifteen days had expired without the landlord fully complying with section 38(1), the tenant would therefore be entitled to double this amount, for a total refund of $150.00.

Based on the evidence, I hereby grant the landlord compensation of $450.00 that was agreed to by the tenant. I hereby dismiss the remainder of the landlord's monetary claim for rent and loss of revenue without leave.

I hereby grant a monetary order in favour of the tenant for $150.00, representing the return of double the portion of the security deposit not signed over to the landlord. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

As the landlord has not been successful in the bulk of the application, I find that the landlord is not entitled to be reimbursed by the tenant for the $50.00 cost of the application.

Conclusion

The landlord is partially successful in the application and entitled to retain a portion of the tenant's security deposit that was signed over by the tenant. The remainder of the landlord's application is dismissed in its entirety without leave to reapply. The tenant is granted a monetary order for a refund of the tenant's security deposit.

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: June 10, 2013

Residential Tenancy Branch