



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with an Application by the Tenant for a monetary order for return of double the security deposit paid to the Landlord and for the return of the filing fee for the Application, under the Residential Tenancy Act (the “Act”).

Only the Tenant appeared at the hearing. The Tenant provided affirmed testimony and was provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me.

The Tenant testified and supplied documentary evidence that he served the Landlord with the Notice of Hearing and Application for Dispute Resolution by registered mail, sent on June 3, 2015, and deemed received under the Act five days later. The Tenant had provided tracking information from Canada Post indicating the mail had been signed for on June 8, 2015. I find the Landlord has been duly served in accordance with the Act.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant facts and issues in this decision.

Issue(s) to be Decided

Has there been a breach of section 38 of the Act by the Landlord?

Background and Evidence

The Tenant was relocating for work purposes to the city where the subject rental unit is located. The Tenant’s new job was starting on May 1, 2015. In March of 2015, he viewed the rental unit online and made enquiries with the Landlord.

The Tenant accepted this rental unit and sent the Landlord a security deposit of \$425.00, and the monthly rent was to be \$850.00 for this rental unit (the “First Rental Unit”). The Tenant testified that the Landlord did not mention to him anything about signing a written tenancy agreement, although the Tenant presumed a written agreement would be prepared when he

moved into the rental unit. The Tenant was going to rent the unit for approximately five months until his girlfriend moved to the same city and they would then look to rent a larger suite.

The Tenant testified that the First Rental Unit was detached, according to the photos and information that he had.

The Tenant testified that about two weeks after he sent the Landlord his security deposit she sent him a text message informing him that her current renter had decided not to move out of the First Rental Unit, and offered the Tenant a different suite at the back of the property (the "Second Rental Unit").

The Tenant let the Landlord know he would be arriving at the rental unit property on May 1, 2015, and would give her the first month of rent, and confirmed she had received the security deposit.

On May 1, 2015, the Tenant went to the property. He noticed there was a large tarp over the roof of the property where the Second Rental Unit was located. He testified that he suspected the roof was leaking and that is why the tarp was there. He testified that he noticed large amounts of garbage bags outside the property. The Tenant testified that when he walked inside the Second Rental Unit it was dirty and felt dingy, and it was not like the pictures he had viewed. He testified that as he walked through the rooms he opened a door and there was a barking dog in a bedroom. The Landlord informed the Tenant that this was her bedroom.

The Tenant testified that it made him very uncomfortable knowing the Landlord was only a bedroom door away from him, which had never been mentioned in their previous communications regarding either the First or the Second Rental Unit. This combined with the condition of the Second Rental Unit, led the Tenant to inform the Landlord that he was not interested in shared accommodations or living in the Second Rental Unit. He testified he told the Landlord she had not informed him of this, and the Second Rental Unit was not what he had agreed to rent from her.

According to the Tenant the Landlord stated that this was not shared accommodation, since she kept the bedroom door locked and sometimes slept in the cottage. The Tenant was unsure where this cottage was located.

The Tenant requested his security deposit back from the Landlord but the Landlord refused to return the deposit to him. The Tenant testified that the Landlord informed him she had lost rent because he did not take the Second Rental Unit. The Tenant did not agree to the Landlord keeping any portion of the security deposit.

On May 6, 2015, the Tenant provided the Landlord with a written notice of the forwarding address to return the security deposit to, by sending it registered mail to the Landlord. In

evidence the Tenant provided a copy of the registered mail receipt. The Tenant also supplied tracking information from Canada Post indicating the mail had been signed for on May 9, 2015.

Analysis

Based on the above, the undisputed testimony and evidence, and on a balance of probabilities, I find as follows.

The Act contains comprehensive provisions on dealing with security and pet damage deposits. Under section 38 to the Act, the Landlord is required to handle the security deposit as follows:

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

...

(6) If a landlord does not comply with subsection (1), 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, pet damage deposit, or both, as applicable.

[Reproduced as written.]

I note that neither a Landlord nor a Tenant may contract outside of or avoid the Act, pursuant to section 5 of the Act.

In this instance I find there was an oral tenancy agreement and the Landlord breached this agreement and the Act by failing to provide the rental unit the Tenant had agreed to rent.

The Tenant had initially agreed to the First Rental Unit, but the Landlord sought to replace it with the Second Rental Unit. However, the Landlord failed to fully describe to the Tenant the condition of the Second Rental Unit or that she was going to be living in close proximity to him.

Given the testimony of the Tenant on the condition of the rental unit, I find the Landlord also breached section 32 of the Act by failing to provide a rental unit suitable for occupation by the Tenant. Lastly, I note that fixed term tenancy agreements must be in writing and therefore, I find this could not have been a fixed term tenancy.

Simply put, I find the Landlord failed to provide the rental unit that had been bargained for and failed to disclose material information regarding the living arrangements and accommodations.

The Tenant did not agree that the Landlord could retain any portion of the security deposit.

There was also no evidence to show that the Landlord had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenant, to retain a portion of the security deposit, as required under section 38.

The Landlord is in the business of renting and therefore, has a duty to abide by the laws pertaining to Residential Tenancies.

Therefore, I find the Landlord has breached section 38 of the Act.

The security deposit is held in trust for the Tenant by the Landlord.

At no time does the Landlord have the ability to simply keep the security deposit because they feel they are entitled to it or are justified to keep it. If the Landlord and the Tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the Landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

It is not enough that the Landlord feel they are entitled to keep the deposit, based on unproven claims.

The Landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from an Arbitrator, or with the written agreement of the Tenant. Here the Landlord did not have any authority under the Act to keep any portion of the security deposit. Therefore, I find that the Landlord is not entitled to retain any portion of the security deposit.

Having made the above findings, I must Order, pursuant to sections 7, 38 and 67 of the Act, that the Landlord pay the Tenant the sum of **\$900.00**, comprised of double the security deposit (2 x \$425.00) and the \$50.00 fee for filing this Application.

Conclusion

The Landlord has breached the Act by failing to deal with the security deposit in accordance with section 38. The Landlord also breached section 32 of the Act by failing to provide a rental unit suitable for occupation by the Tenant.

The Tenant is given a formal Order in the above terms and the Landlord must be served with a copy of this Order as soon as possible. Should the Landlord fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

This decision is final and binding on the parties, except as otherwise provided under the Act, and 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: November 03, 2015

Residential Tenancy Branch

