Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- authorization to obtain a return of all or a portion of the security deposit, including double the amount, pursuant to section 38;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The hearing was conducted by conference call. All named parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions.

Preliminary Issue (alleged Charter of Rights violation)

The landlord submitted the tenant's application should be dismissed in its entirety due to alleged Charter violations.

Section 78.1 of the Act sets out that section 44, among others, of the *Administrative Tribunals Act* (the ATA) applies to the Residential Tenancy Branch. Subsection 44(1) of the ATA establishes that the Residential Tenancy Branch does not have jurisdiction over constitutional questions. I declined to dismiss the tenant's application on these grounds.

Issues

Is the tenant entitled to a return of all or a portion of the security deposit, including double the amount?
Is the tenant entitled a monetary order for compensation for damage or loss?
Is the tenant entitled to recover the filing fee for this application from the landlord?
Background (Facts not in dispute)

The rental unit is a 2 bedroom plus den condominium. The tenancy began on May 1, 2010 with a monthly rent of $2,000.00 payable on the 1st day of each month. The tenant assumed the lease from a previous leaseholder and paid a security deposit of $400.00 to the previous leaseholder. There were no submissions from either party on the amount of the damage deposit paid by the original leaseholder and how that damage deposit was handled when the tenancy was assumed by the tenant.

On January 27, 2016, Arbitrator J. Howell issued a decision following a hearing conducted on this same date with respect to the landlord's application for an additional rent increase. The outcome of the decision was that the parties reached a settlement agreement that the monthly rent for the rental unit would increase to $2,387.00 commencing March 1, 2016 without the requirement for the landlord to serve the tenant with a notice of rent increase.

On January 28, 2016, the day following the above hearing, the landlord served the tenant with a 2 Month Notice to End Tenancy for Landlord's Use of Property with an effective date of March 31, 2016.

The tenant vacated the rental unit on March 31, 2016. The rent for the month of March 2016 was withheld by the tenant pursuant to section 51 of the Act as compensation for one month's rent.

Evidence & Analysis

Is the tenant entitled to a return of all or a portion of the security deposit, including double the amount?

The tenant is claiming double the $400.00 security deposit arguing that the landlord failed to return the security deposit within 15 days of the date the landlord received the tenants forwarding address in writing. The tenant testifies that he provided the landlord with his forwarding address in writing by sending a letter to the landlord by regular mail on April 6, 2016. The tenant provided a video clip of this letter being deposited in the mailbox. The tenant submits that the security deposit of $400.00 was returned by the landlord by electronic mail transfer on May 5, 2016, which is past the 15 day requirement. The tenant did not accept the transfer.

The landlord acknowledged that it was his mistake to not send the $400.00 deposit within 15 days of receiving the forwarding address and submits that it was returned on May 5, 2016 but refused by the tenant. The landlord also initially argued that the

security deposit was only $350.00 as it included a $50.00 deposit for a parking pass which was not returned by the tenant. After the tenant pointed to an e-mail dated April 2, 2016 in which the landlord states that he agrees to return $450.00 which included $50.00 for the parking pass, the landlord acknowledged that the security deposit amount was $400.00.

Although the parties did not provide any submissions or evidence on when or how the damage deposit paid by the original leaseholder was handled or transferred to the tenant, I find the landlord was retaining a $400.00 deposit paid by the tenant to the previous leaseholder. I make this finding as the landlord acknowledged he was retaining this amount and attempted to return this amount to the tenant.

Section 38 of the Act provides that when a tenancy ends, the landlord may only keep a security deposit if the tenant has consented in writing, or the landlord has an order for payment which has not been paid. Otherwise, the landlord must return the deposit, with interest if payable, or make a claim in the form of an Application for Dispute Resolution. Those steps must be taken within fifteen days of the end of the tenancy, or the date the tenant provides a forwarding address in writing, whichever is later. A landlord who does not comply with this provision may not make a claim against the deposit and must pay the tenants double the amount of the security deposit and pet deposit.

I find the tenant did provide a forwarding address in writing to the landlord on April 6, 2016. Pursuant to sections 88 and 90 of the Act, the forwarding address is deemed to have been received by the landlord on April 11, 2016, five days after being deposited in the mail. The tenant's security deposit should have been returned by April 26, 2016. The deposit was not returned until May 5, 2016. The tenant's security deposit was not refunded within 15 days as required by section 38 of the Act and the doubling provisions of section 38 therefore apply.

I allow the tenants claim for return of the security deposit and award an amount of $800.00, which is double the original security deposit of $400.00.

Is the tenant entitled a monetary order for compensation for damage or loss?

The tenant is claiming an amount equivalent to double the monthly rent as compensation for the landlord not using the rental property for his own use after issuing the 2 Month Notice to End Tenancy effective March 31, 2016. The tenant also applied for compensation for moving costs and a reimbursement of a deposit paid for a parking pass but these clams were withdrawn by the tenant during the hearing.

In support of his claim for the compensation for an amount equivalent to double the monthly rent, the tenant submits as follows:

- The landlord did not move into the rental unit himself as after the tenant vacated the rental unit on March 31, 2016 the landlord moved in three new tenants, J.M., T.M. and M.L. He provided pictures of the building's entry door buzzer which shows that the two buzzer numbers for the unit were assigned to T.M. and M.L. The tenant submits that it is odd that neither of the buzzer numbers is linked to the landlord if he was himself living in the building.
- The tenant submitted two separate e-mails dated February 7, 2016 and March 2, 2016 in which the landlord was still attempting to get the tenant to agree to a rent increase after issuing the 2 Month Notice to End Tenancy and after an agreement had been reached in accordance with the January 27, 2016 hearing and decision.
- In response to the landlord's submissions of pictures which allegedly show the landlord's belongings in the rental unit, the tenant submits that these items could belong to anybody and there is no evidence they belong to the landlord nor do they support that the landlord is in fact living in the rental unit.
- The tenant claims the monthly rent used in the calculation of double the monthly rent should be $2387.00 as this amount was agreed to by the parties in the January 27, 2016 hearing and was to be effective March 1, 2016.

The landlord submits that he is utilizing the rental unit for his own personal use. The landlord submits there is no rule established under the Act for the length of time a landlord has move into the rental unit as long as it is done within a reasonable time. In support of his argument the landlord submits as follows:

- The other occupants that moved in to the rental unit are his friends. Occupant T.M. is the brother of his friend J.M. and he was only living in the rental unit temporarily for a period of 1 month. T.M. needed temporary accommodations so the landlord allowed him to stay in the rental unit for 1 month. After this month, T.M. moved out and the landlord moved in on May 1, 2016. The landlord provided a written statement from T.M. stating he is no longer living in the rental unit.
- The landlord submits that he did not move into the rental unit right away as there were some issues with bed bugs and unit requires some painting. The paint work was delayed to these proceedings.
- The landlord submitted some pictures of his clothes, shoes, T.V. and other items as evidence supporting he has moved into the rental unit.

- The landlord submits that he was going through a separation so was no longer living at home and was previously renting an apartment for which he paid $1550.00 per month rent. Moving into the rental unit with some roommates made sense for him financially.
- He does not need to be on the buzzer for the rental unit as he is a very busy person and doesn't spend that much time there. He stays there five nights per week and on the weekends stays in his family home.
- He did offer the tenant to continue staying at an increased rent after issuing the 2 Month Notice as he didn't want to be looking for other tenant's and he wasn't sure if he should be moving at the time.
- He later found other tenant's to share the rental unit with and it presented a good opportunity.
- The landlord argues that the monthly rent of $2387.00 was never agreed to and in either event the tenant never paid this amount as the month of March 2016 was the tenant's one free month under the 2 Month Notice.

Section 51 (2) of the Act provides that if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

I find that on a balance of probabilities the landlord has not moved into the rental unit nor did the landlord have any intention to move into the rental unit at the time of issuing the 2 Month Notice to end Tenancy. I make this finding as the evidence clearly supports that the landlord was trying to get the tenant to continue his tenancy at an increased rent amount. The landlord attempted to increase the rent after issuing the 2 Month Notice to End Tenancy and after an agreement had been reached by the parties in a previous hearing with respect to the rent amount being $2387.00 effective March 1, 2016. The decision dated January 27, 2016, issued by Arbitrator J. Howell clearly reflects this agreement. As the landlord was attempting to increase the rent after issuing a Notice to End Tenancy which was supposedly issued so the landlord could move into the rental unit, clearly the landlord had no intention to move into the rental unit. Further, I find the landlord's submission that he moved in 1 month after the other tenants moved in to be lacking credibility. The landlord testified that he could not move in sooner as there were issues with bed bugs and the unit needed to be painted. Although he stated that the painting had been delayed he provided no evidence in support of any bed bug treatments undertaken. Further I find it contradicting that three

other tenants could move in right away but he couldn't due to an issue with bed begs. Further, I find the pictures of items in the rental unit as submitted by the landlord are not sufficient evidence to establish that the landlord did in fact move into the rental unit on May 1, 2016.

I allow the tenants claim for an amount equivalent to double the monthly rent and award an amount of $4,774.00, which is double the monthly rent of $2387.00. Even though the tenant did not pay this new agreed upon amount as the month of March rent was the one month free rent, I find this amount was effective March 1, 2016 and forms the basis of calculating the double monthly rent amount.

Is the tenant entitled to recover the filing fee for this application from the landlord?

As the tenant was successful in this application, I find that the tenant is entitled to recover the $100.00 filing fee paid for this application from the landlord for a total monetary award of $5,674.00.

Conclusion

Pursuant to section 67 of the *Act*, I grant the tenant a Monetary Order in the amount of $5,674.00. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court 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: August 26, 2016

Residential Tenancy Branch