Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

The tenants apply to recover the remainder of an $1800.00 security deposit, doubled pursuant to s.38 of the *Residential Tenancy Act* (the "*Act*"). By amendment they seek the equivalent of one month's rent required under s. 51(1) of the *Act* when a two month Notice to End Tenancy has been given and they seek the two month rent equivalent penalty prescribed by s. 51(2),(b) of the *Act* alleging the landlord did not occupy the premises for the required six months.

During the hearing the landlord acknowledged responsibility to pay the equivalent of one month's rent due under s. 51(1).

The landlord made a preliminary application to strike the tenants' amended claim because it was served by posting on her door; a method not within the rules set out in s.89 of the *Act*. The application was denied at hearing. She received the amendment and was prepared to deal with it at this hearing should her preliminary application be denied. If the application had been granted the tenants would be at liberty to re-apply and the parties would have had to return and recite many of the same facts.

All parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Has the landlord returned any of the deposit money? Has she incurred the doubling penalty under s. 38 of the *Act*? Has she or a close family member occupied the rental unit for six months following the two month Notice's effective date?

Background and Evidence

The rental unit is a four bedroom house. The tenants took possession in September 2016. The landlord failed to prepare a written tenancy agreement as she is required to do under s. 13(1) of the *Act*.

The parties agree that the landlord reserved for herself one of the bedrooms in the home though she was not entitled to share bathroom or kitchen facilities with the tenants.

The monthly rent was $1800.00. The landlord received $600.00 from each tenant towards a total security deposit of $1800.00.

The landlord served a two month Notice to End Tenancy in RTB form #32 on the tenants on April 7, 2017, with an effective date of June 1, 2017. The ground for the Notice was that the landlord or a close family member intended to occupy the premises.

The tenants vacated the premises on April 28. The tenant Ms. Y. testifies the landlord was given a written ten day Notice by the tenants on April 17, as permitted by s. 50 of the *Act*. She says the writing included a forwarding address for the tenants. The landlord denies receiving any such forwarding address notice.

On May 16 the landlord sent Ms. Y an Interac transfer of $500.00. The landlord claims to have withheld $100.00 pursuant to a written note authorizing her to do so. Ms. Y says she refused the transfer.

On the same day the landlord sent the tenant Mr. B. C.-H. an Interac transfer of $175.00, claiming that Mr. K.M. had agreed to a reduction of his $600.00 share of the deposit money for a $250.00 bed, $85.00 for movies he rented and $90.00 for damage. Mr. K.M. accepted the transfer money but at hearing disputes the $90.00 deduction for damage.

On the same day the landlord sent the tenant Mr. K.M. an Interact transfer for $500.00, withholding $100.00 from his share of the deposit money for cleaning. Mr. K.M. says he refused the transfer.

The tenant Ms. Y. testifies that on July 17, 2017 she searched the website AirBnB to discovery that the landlord was offering the premises for short term rental.

The landlord says that the AirBnB ad was an old one from 2014, occasionally updated by her. She says she did not rent out the premises after the tenants left until November 1, 2017. She says that she and her daughter made use of the home for the six months following the tenants' leaving. She says she removed the AirBnB ad about three or four weeks ago because she had rented the premises for November 1.

Analysis

Security Deposit

When a tenancy agreement is made with two or more tenants it is presumed that their obligations are joint, absent express words to the contrary (*Joint Obligations*, Glenville Williams).

In this case, though each tenant paid $600.00 toward the security deposit, the landlord held an undivided deposit of $1800.00 payable to the tenants together. Any of the three tenants could demand the whole and payment to one is considered to be payment to all three.

Section 38 of the *Act* requires that; a) once a tenancy has ended, and b) once the tenant has provided the landlord with a forwarding address in writing, the landlord must, within 15 days, either repay the deposit money or make an application for dispute resolution to keep all or any of it.

Section 38 further provides that if a landlord fails to comply she is penalized by having to account to her tenants for double the deposit amount remaining at the end of the tenancy.

A landlord is not required to account for deposit money that a tenant has agreed in writing the landlord may keep.

The landlord was entitled to withhold $250.00 of the deposit money by the authorization of Mr. B. C-.H.. sent April 24 as payment for a bed. As the authorization was from one of three joint tenants, the landlord was entitled to accept his authorization alone, without the need to consult the other two. If the other two tenants do not agree with Mr. K.M.'s

authorization for the landlord to keep the $250.00 from the deposit, that is a matter they must account for between the three of them.

The landlord did not have written authorization to keep any of the remainder of the deposit. Though Mr. B. C-.H. and the landlord traded texts about cleaning and movie rental charges, there is no definitive authorization in writing for the landlord to retain any money to pay for those items. Accepting a bare Interac payment for only part of money that is owed is not of itself an agreement to accept less.

Mr. B. C.-H. does not dispute that he owes $85.00 for movie rental charges. That debt is a joint debt owed by all three tenants.

The parties refer to a note apparently signed by Ms. Y. and the landlord on May 6, proposing the landlord retain an amount, for "TV and associated deductions." The note does not state any amount and is therefore not an authorization for the landlord to withhold any particular amount from the deposit money.

The Doubling Penalty

The tenants have not proved that they provided the landlord with a forwarding address in writing after the end of the tenancy. The tenants did not file a copy of the document. The tenant Ms. Y. says she gave it to the landlord on April 17 at the same time she gave the landlord the tenants' early notice to leave prior to the effective date of the landlord's two month Notice. The landlord denies receiving the forwarding address in writing. Only Ms. Y. testified to its being given. The burden to prove delivery of such a forwarding address in writing is on a tenant and, without corroboration and in the face of the landlord's denial of receipt, the tenants have not proved it.

However, I find that the landlord did receive a forwarding address in writing from the tenants when she was served with the tenants' application for dispute resolution in late May. That document provides an official written address where the remaining deposit money could have lawfully been sent. The landlord's receipt of the tenants' application started the 15 period in s. 38 for the landlord to either repay the remaining deposit money or make an application to keep all or a portion of it.

The landlord failed to comply with s.38 by either repaying the balance of the deposit money to the tenants or applying for an order to retain all or a portion of it. As a result, the landlord is subject to the doubling penalty in s. 38.

The amount to be doubled is the amount remaining unpaid at the end of the tenancy.

In calculating the amount to be doubled, a question arises whether the amount to be doubled is the original $1800.00 deposit or the $1550.00 left after the tenant authorized deduction for the bed or the remaining $875.00 after the Interac payments or a lesser sum.

The amount to be doubled under s. 38 is the original deposit, less any amount the tenants, at the end of the tenancy, have agreed in writing the landlord may keep or any amount remaining unpaid under a monetary order issued under the auspices of the director of the Residential Tenancy Branch.

Guideline 17 of the Residential Tenancy Policy Guidelines specifies what amounts are not to be doubled. It provides:

> 4. In determining the amount of the deposit that will be doubled, the following are excluded:
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> • any arbitrator's monetary order outstanding at the end of the tenancy;
> • any amount the tenant has agreed, in writing, the landlord may retain from the deposit for monies owing for other than damage to the rental unit;
> • if the landlord's right to deduct from the security deposit for damage to the rental unit has not been extinguished, any amount the tenant has agreed in writing the landlord may retain for such damage.

At the end of the tenancy the landlord had written permission to withhold only $250.00 from the deposit money. The tenants are entitled to a doubling of the $1550.00 remainder to $3100.00.

I find the landlord returned $675.00 of the deposit money to the tenants on May 16, 2017. The landlord's documents show that both the $175.00 transfer to Mr. B. C.-H. and the $500.00 transfer to Mr. K.M. were "completed" and a confirmation number issued by Interac. That is conclusive in my view, that the money was received by them. I do not accept Mr. K.M.'s testimony that he did not receive the $500.00.

While there is a "screen shot" of the landlord's record of sending the Interac transfer to Ms. Y., there is no such completion record or confirmation number for the Interac transfer and I accept her testimony that she did not accept the money transfer.

From the $3100.00 owed under s. 38, above, must be subtracted $85.00 conceded for movie rentals, the $175.00 paid to Mr. B. C.-H. and the $500.00 received by Mr. K.M. I award the tenants the remainder, $2340.00, under this head of the claim.

Two Month Penalty

Section 51(2) of the *Act* provides:

> (2) In addition to the amount payable under subsection (1), if
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> (a) 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
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> (b) 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,
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> 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.

It is apparent that during the six months following the end of this tenancy and particularly, on July 17, 2017, the landlord was advertising the entire rental unit on Airbnb. Her chronology of the use of the premises by her daughter and herself gives the appearance of only occasional times when either of them could be said to be residing there.

The landlord testifies that she had been advertising on Airbnb since 2014 and had updated the ad occasionally. It was shown at hearing that the ad had been removed by the hearing date. The landlord indicated she had removed the ad when she secured her present tenants November 1, 2017. The question remains unanswered why she would not have cancelled the ad when she secured these three tenants back in September 2016.

I consider it likely that the landlord was intentionally advertising the home for rent on Airbnb during the six months following the end of this tenancy and would have given up possession of the home to an appropriate Airbnb renter if it suited her..

However, in order to show a breach of s. 51 it is necessary to show more than an intention. A tenant claiming the double rent penalty must show that the landlord did not use the rental unit for herself or a close family member. Speculation is not sufficient warrant the double rent penalty. On the evidence presented at this hearing, it has not

been proved on a balance of probabilities that the landlord or a close family member ceased to occupy the rental unit at any time during the six month period. This item of the tenants' claim must be dismissed.

In result, the tenants are entitled to recover $1800.00 as the equivalent of one month's rent under s. 51(1) of the *Act*, $2340.00 pursuant to s. 38 of the *Act,* plus recovery of the $100.00 filing fee.

Conclusion

The application, as amended, is allowed in part. The tenants will have a monetary order against the landlord in the amount of $4240.00.

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: November 09, 2017

Residential Tenancy Branch