



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD FFT

Introduction

This hearing was convened by way of conference call concerning an application made by the tenant seeking a monetary order for return of all or part of the security deposit or pet damage deposit and to recover the filing fee from the landlord for the cost of the application.

The tenant attended the hearing with her daughter to translate and assist. The landlord also attended with Legal Counsel and a translator. The tenant and the landlord each gave affirmed testimony, and the landlord called 1 witness who also gave affirmed testimony. The parties, or counsel, were given the opportunity to question each other and the witness and to give submissions.

No issues with respect to service or delivery of documents or evidence were raised, and all evidence provided has been reviewed and is considered in this Decision.

Issue(s) to be Decided

Has the tenant established a monetary claim as against the landlord for return of all or part or double the amount of the security deposit?

Background and Evidence

The tenant testified that this fixed term tenancy started on July 11, 2017 and ended on January 10, 2018. Rent in the amount of \$4,500.00 per month was payable on the 1st day of each month and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenant in the amount of \$2,250.00 and no pet damage deposit was collected. No move-in or move-out condition inspection

reports were completed, however a copy of the tenancy agreement has been provided as evidence for this hearing.

The rental unit is a single family dwelling, and the tenant subleased during the fixed term and the landlord was advised of that before the tenancy agreement was signed. However, the tenant resided in the rental home for 1 ½ months during October and December, 2017 and January, 2018.

The tenant also testified that she did not return the key for the rental unit to the landlord at the end of the tenancy because the landlord wouldn't give back the security deposit. The tenant had cleaned the rental unit and the carpet, but the landlord said it wasn't good enough. The parties exchanged text messages about scheduling the move-out condition inspection, and on January 14, 2018 the tenant told the landlord that the tenant would not be participating and the landlord should complete the inspection. On January 12, 2018 the tenant sent a text message to the landlord, a copy of which has been provided for this hearing, as translated, which states, in part: "Please give me the written acceptance result and the detailed deduction of the deposit amount as soon as possible, so that we can understand the relevant details of the lease as soon as possible, thank you!" The landlord responded with a list of expenses totalling \$1,834.50 and showing the balance of the deposit returned to the tenant of \$415.50.

The tenant further testified that on February 9, 2018 the tenant sent the landlord her forwarding address by text message. The tenant sent the landlord a letter on February 27, 2018 by registered mail which also contained the tenant's forwarding address. The landlord returned something like \$400.00 or \$500.00 but the tenant didn't accept that. The tenant has not agreed in writing that the landlord retain any part of the security deposit, and the landlord has not served the tenant with an Application for Dispute Resolution claiming against the security deposit.

The landlord's witness testified that she is familiar with both parties.

The landlord asked the witness to do the check-out on January 10, 2018 at 2:00, and the witness and landlord went to the rental unit that day and the following day. On the first occasion the witness saw the tenant doing some cleaning work and no inspection was done.

The landlord testified that prior to signing the rental agreement the tenant told the landlord that she would be renting it for her own use, but that night advised that she was going to sublet.

The landlord gave the tenant at least 5 opportunities to participate in a move-out condition inspection. For the first 2 times, the tenant was there but hadn't finished her job, then on January 14 the tenant told the landlord to complete the inspection in the tenant's absence.

The tenant also told the landlord to keep the portion of the security deposit needed for repairs by text messaging, but no specific amount because the amounts weren't yet known.

The landlord did not make an Application for Dispute Resolution claiming against the security deposit, but provided the tenant with an accounting of the costs associated with repairs required at the end of the tenancy.

Submissions of the landlord's Legal Counsel:

Legal Counsel for the landlord made the following points in his submission:

1. The tenant's right to return of the security deposit is extinguished as per Section 36 of the *Residential Tenancy Act* by the tenant's failure to participate in the move-out condition inspection despite the landlord's several attempts to schedule it;
2. The tenant gave a material misrepresentation when the tenancy agreement was entered into;
3. The *Act* does not apply to premises used primarily as a business, which the tenant did having only lived in the rental unit for a total of 1 ½ months;
4. The tenant instructed the landlord to carry out repairs and authorized the landlord to use the security deposit.

Submissions of the tenant's assistant:

The tenant completed all cleaning work, but with all repairing the landlord wanted, it was not the tenant's responsibility. The text message was to get a detailed report of the amount the landlord was claiming, not an agreement to keep any portion of the security deposit. The tenant was trying to improve the cleanliness or whatever the landlord asked, which is why there were so many inspections scheduled, but finally felt she could not meet the landlord's standards so asked for the report.

Analysis

Firstly, the landlord's legal counsel raised misrepresentation by the tenant at the outset of the tenancy, and that since the tenant was subletting and not residing in the rental unit for the duration of the tenancy, the tenant was running a business and the *Residential Tenancy Act* does not apply. However, the parties entered into a written tenancy agreement, and the landlord testified that the tenant told the landlord on the evening that it was signed that the tenant intended to sublet. A tenant may not sublet without the landlord's written consent, however the landlord did not disagree. Had the landlord disagreed, the landlord had the right to end the tenancy for subletting without the landlord's written consent.

The *Residential Tenancy Act* does not apply to living accommodation included with business premises if they are rented under a single agreement. I find that a tenancy existed between the parties by virtue of the collecting of rent and a security deposit and signing a tenancy agreement, and the *Residential Tenancy Act* applies.

The *Act* requires a landlord to return a security deposit to a tenant within 15 days of the later of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing, or must make an Application for Dispute Resolution claiming against the security deposit within that 15 day period. If the landlord fails to do either, the landlord must repay the tenant double the amount.

The landlord's Legal Counsel submits that since the landlord gave the tenant several opportunities to conduct a move-in condition inspection report and the tenant failed to participate, the tenant's right to claim the security deposit is extinguished. However the *Act* also states that the landlord's right to make a claim against the security deposit for damages is extinguished if the landlord fails to ensure that the move-in condition inspection report is completed in accordance with the regulations. Further, the regulations require that the second opportunity must be with a notice in the approved form. The landlord has not done so. If the tenant then fails to participate, the landlord may complete the inspection in the absence of the tenant, but the landlord has not provided any evidence of completing a report at all. In both cases, move-in and at move-out the landlord failed to comply. Since the landlord did not give the second opportunity in the approved form, the tenant's right to return of the security deposit is not extinguished.

The landlord also disputes that the tenancy ended on January 11, 2018, given that the tenant never returned the key. The tenant does not dispute that, and the tenant has no right to retain it even if the landlord doesn't return the security deposit. However, the parties agree that the tenancy began on the 11th day of the month and rent was payable on the 1st of each month, and no one provided any testimony about whether or not the tenant paid a pro-rated amount for the first or last months of the tenancy. The fixed term states that the tenancy ended on January 10, 2018 and the landlord testified that it wasn't re-rented until April, 2018.

I prefer the evidentiary material, that the parties entered into a fixed term agreement ending on January 10, 2018, and I find that the landlord received the tenant's forwarding address in writing on March 4, 2018 which is 5 days after it was sent by registered mail. The landlord did not return the security deposit or make an Application for Dispute Resolution claiming against it within 15 days, and I find that the landlord must repay the tenant double the amount, or \$4,500.00.

Since the tenant has been successful with the application, the tenant is also entitled to recovery of the \$100.00 filing fee.

Conclusion

For the reasons set out above, I hereby grant a monetary order in favour of the tenant as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$4,600.00.

This order is final and binding and may be enforced.

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: September 06, 2018

Residential Tenancy Branch