Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFL

Introduction

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

- a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

As both parties were present during the hearing, service of the tenant's notice of application for dispute resolution was confirmed, in accordance with section 89 of the *Act.*

Issues to be Decided

1. Is the tenant entitled to a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67 of the *Act*?
2. Is the tenant entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?
3. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on May 1, 2019 and has ended. This was originally a fixed term tenancy agreement set to end on November 1, 2019. Monthly rent in the amount of $850.00 was payable on the first day of each month. A security deposit of $500.00 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agreed on the following facts. The tenant contacted the landlord in July of 2019 an informed him that she planned on moving out of the subject rental property on November 1, 2019 but would like to move out earlier if possible. The landlord agreed to allow the tenant to move out at the end of August 2019.

The landlord testified that the tenant verbally agreed to forfeit 50% of her security deposit for breaking her lease and moving out at the end of August 31, 2019. The landlord testified that he asked the tenant if it was possible for her to move out one to two days before August 31, 2019 so that he could have the subject rental property cleaned and ready for the next tenant. The landlord testified that the tenant voluntarily agreed to move out early. The landlord testified that none of the above agreements were written out or evidenced by text messages.

The tenant testified that she did not agree to forfeit 50% of her security deposit and that the agreement was that the landlord would give her 50% of her security deposit when she moved out and the other 50% on November 1, 2019.

The tenant testified that the landlord asked her to move out a few days early and initially she thought she would be able to do so without issue, but her new living plans fell through and she wanted to continue to stay at the subject rental property, but the landlord would not let her. The tenant entered into evidence an email from the landlord dated August 19, 2019 which states:

> I was just reading your text. Sorry to hear that you had a trouble finding a room. Unfortunately I rented the room just couple of hours before I received your message and already received security deposit. I double check with them that whether there are any possibility to withdraw from their side. But unfortunately

> no. So I can not do anything at the moment I am really sorry. This student is arriving on 26th August. I am really sorry [tenant].

The landlord testified that the tenant did not arrive until September 1, 2019. A text message confirming same was entered into evidence. The landlord did not dispute writing the August 19, 2019 text message.

The tenant testified that she is seeking the return of 7 days rent rent in the amount of $191.94 from August 25-31, 2019.

The tenant testified that she emailed the landlord with her forwarding address on December 27, 2019. An email dated December 27, 2019 from the tenant to the landlord providing her forwarding address was entered into evidence. The landlord confirmed receipt of the tenant's forwarding address via email but could not recall on what date.

The tenant testified that she is seeking the return of double her security deposit because the landlord did not complete move in and out condition inspection reports in accordance with the *Act* and the landlord therefore had no authority to retain her security deposit.

The tenant testified that she is also entitled to double her security deposit because the landlord charged her a security deposit that is more that ½ of her monthly rent. The tenant entered into evidence a Residential Tenancy Branch Tenancy Agreement which states at section 4(B)(1)(a):

> The landlord agrees that the security deposit and pet damage deposit must each not exceed one half of the monthly rent payable for the residential property.

Section 4(B)(3) states:

> If a landlord does not comply with subsection (1), the landlord
> (a) may not make a claim against the security deposit or pet damage deposit, and
> (b) must pay the tenant double the amount of the security deposit, pet damage deposit or both.

Analysis

Section 28 of the *Act* states that the tenant is entitled to exclusive possession of the rental unit for the duration of the tenancy. I find that the tenant did not exclusive

possession of the rental unit from August 26-31, 2019 as the landlord did not allow the tenant to reside at the subject rental property on those days. This is evidenced by the August 19, 2019 email from the landlord to the tenant which was entered into evidence. I therefore find that the tenant is entitled to a pro-rated amount of rent as per the following calculation:

> $850.00 (rent)/ 31 (days in August) = $27.42(daily rate) * 6 (days tenant did not have access to the subject rental property) = $164.52.

The tenant entered into evidence a Residential Tenancy Branch Tenancy Agreement which states at section 4(B)(1)(a):

> The landlord agrees that the security deposit and pet damage deposit must each not exceed one half of the monthly rent payable for the residential property.

Section 4(B)(3) states:

> If a landlord does not comply with subsection (1), the landlord
> (a) may not make a claim against the security deposit or pet damage deposit, and
> (b) must pay the tenant double the amount of the security deposit, pet damage deposit or both.

I find that the Residential Tenancy Branch Tenancy Agreement contains a typo. Section 4(B)(3) should read:

> If a landlord does not comply with subsection (1)(c), the landlord
> (a) may not make a claim against the security deposit or pet damage deposit, and
> (b) must pay the tenant double the amount of the security deposit, pet damage deposit or both.

I so find as the *Act* does not allow the tenant to receive double her security deposit if the landlord over charges the security deposit. Section 19 of the *Act* pertains to the tenant's remedy when more that 50% of the rent is charged by the landlord for the security deposit. Section 19 states:

> (1)A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.

(2)If a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment.

I therefore dismiss the tenant's claim for double her security deposit based on section 4 of the tenancy agreement.

Section 88 of the *Act* states:

All documents, other than those referred to in section 89 *[special rules for certain documents]*, that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:

(a)by leaving a copy with the person;

(b)if the person is a landlord, by leaving a copy with an agent of the landlord;

(c)by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;

(d)if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;

(e)by leaving a copy at the person's residence with an adult who apparently resides with the person;

(f)by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;

(g)by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;

(h)by transmitting a copy to a fax number provided as an address for service by the person to be served;

(i)as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;

(j)by any other means of service prescribed in the regulations.

The tenant testified that she served the landlord with her forwarding address via e-mail. E-mail is not a method of service permitted under section 88 of the *Act.* I find that the tenant did not serve the landlord with her forwarding address in accordance with section

88 of the *Act.* While the landlord confirmed receipt of the tenant's forwarding address via e-mail, he could not recall on what date he received it. The tenant testified that the email was sent 17 days before this hearing; however, it is not clear on what date the landlord received it. Overall, I am not satisfied that the landlord received the tenant's forwarding address at least 15 days before this hearing.

Section 38 of the Act requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. I find that the tenant has not proved that the landlord received her forwarding address at least 15 days before this hearing and has not served the landlord with her forwarding address in writing, in accordance with section 88 of the *Act.* I find that the landlord was however, provided with the tenant's forwarding address through the tenant's application for dispute resolution.

Residential Tenancy Branch Practice Directive 2015-01 states:

> Arbitrators are directed to not make an order for return of the Deposits (whether in the original amount or doubled as per paragraph 38(6)(b) of the *Act*), based on the date the Application was served or filed by the Tenant….
>
> The arbitrator should:
>
> - dismiss the tenant's application with leave to reapply;
> - explain that **the Tenant** must serve the Landlord with the Tenant's forwarding address in writing.

Pursuant to Residential Tenancy Branch Practice Directive 2015-01, I dismiss the tenant's application for the return of her security deposit with leave to reapply. If the tenant wishes to pursue her claim for double her security deposit, she must serve the landlord, in accordance with section 88 of the Act, with her forwarding address in writing and be prepared to prove service at any subsequent hearing. The tenant has leave to file a new application with the Residential Tenancy Branch for double her security deposit.

As the tenant was successful in her application, I find that she is entitled to recover the $100.00 filing fee from the landlord, pursuant to section 72 of the *Act.*

Conclusion

I issue a Monetary Order to the tenant in the amount of $264.52.

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. 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: January 14, 2020

Residential Tenancy Branch