Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) that was filed by the Tenants under the Residential Tenancy Act (the Act), seeking:

- The return of double the security deposit;
- Compensation for monetary loss or other money owed; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant A.J. (the Tenant), who stated that they are also an Agent for the remaining Applicants/Tenants, and the Landlord, both of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although the Tenant testified that their documentary evidence and the Notice of Dispute Resolution Proceeding Package, including a copy of the Application and the Notice of Hearing, were emailed to the Landlord on April 3, 2020, at an email address regularly used by the parties throughout the tenancy for correspondence regarding tenancy matters, and in accordance with the Director's Order for Substituted Service effective between March 30, 2020, and June 23, 2020, the Landlord denied receipt. The hearing was subsequently adjourned to allow the Tenants an opportunity to provide proof of email service for my consideration, for the Tenants to re-serve their evidence and the Notice of Dispute Resolution proceeding Package on the Landlord, and to allow the Landlord an opportunity to submit documentary evidence for consideration.

An Interim Decision was made on July 27, 2020, and the reconvened hearing was set for September 21, 2020, at 9:30 A.M. A copy of the Interim Decision and the Notice of Hearing was sent to each party by the Residential Tenancy Branch (the Branch) in the

manner requested by them at the hearing. For the sake of brevity, I will not repeat here all of the matters covered or the orders made in the Interim Decision. As a result, the Interim Decision should be read in conjunction with this decision.

The hearing was re-convened by telephone conference call on September 21, 2020, at 9:30 A.M. and was again attended by the Tenant and the Landlord. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. All testimony provided was affirmed.

The Tenant submitted proof that the Notice of Dispute Resolution Proceeding Package and all of their evidence, was sent to the Landlord by email on April 3, 2020, as stated by them at the original hearing, and in accordance with the Director's Order for Substituted Service, as directed by me in the Interim Decision. The Tenant also submitted a registered mail tracking number and receipt as verification that they re-served the Landlord with the Notice of Dispute Resolution Proceeding Package and all documentary evidence already submitted to the Branch for consideration at the original hearing, by registered mail, on July 28, 2020, in accordance with the orders set out by me in the Interim Decision. The Canada Post website confirms the that the registered mail was sent as described above and received on July 30, 2020.

Despite the above, the Landlord again denied initial receipt by email and stated that they had also not received the registered mail package noted above. At the original hearing and in the Interim Decision, I was very clear with the parties about how documentary evidence was to be served and when, and the Landlord confirmed their mailing address at the original hearing for the purpose of service. The Landlord also agreed that the email address used by the Tenant was their correct email address, that this email address had regularly been used to correspond about the tenancy, and requested that this same email address be used by me for the purposes of sending them a copy of the Interim Decision.

Although the Landlord denied receipt of the email and suggested that the email was likely automatically sorted to the spam folder and automatically deleted without their knowledge on the basis that it came from a different email address than the one regularly used by the Tenant, I do not accept this argument. The Landlord provided no documentary or other evidence to support this argument, which I find purely speculative in nature. On the contrary the Tenant provided documentary evidence showing that the email was sent on April 3, 2020, to an email address the Landlord agrees is correct and that the parties agree was regularly used throughout the tenancy to correspond regarding tenancy matters. Further to this, the email address for the Tenant contains the

first and last name of the Tenant, and as a result, I find that it would be easily identifiable by the Landlord as belonging to the Tenant and easily distinguishable by the Landlord from spam.

Based on the above, I find that the Landlord was deemed served with the Tenants' email containing the Tenants' documentary evidence and the Notice of Dispute Resolution Proceeding Package on April 6, 2020, three days after the email was sent, in accordance with the Director's Order for Substituted Service.

In addition to the above, I also find that the Landlord was re-served with the above noted documents by registered mail on July 30, 2020, at the address for service provided by them at the original hearing for this purpose, within the timelines set out by me in the Interim Decision and in compliance with sections 88(c) and 89(1)(c), as indicated by the Canada Post tracking information associated with the registered mail tracking number provided by the Tenant.

Although the Landlord stated that they did not receive the registered mail and that it may have been received by someone else as they are not the only person who resides at that address, I do not accept this argument. The Landlord was advised at the original hearing that the Tenant would be sending the above noted documents by registered mail and the Landlord provided the address they wished to be used for this purpose during the original hearing. As a result, I find that it was incumbent upon the Landlord to be diligent in monitoring their residence and/or associated mailboxes for its receipt and as set out above, I am satisfied that the Tenant sent the registered mail to the Landlord in compliance with the Act. Section 88(e) of the Act also states that documents left with an adult who apparently resides with the person being served constitutes valid service under the Act. As a result, I find that even if the documents had been left with another adult residing at the residence with the Landlord by Canada Post, this would still constitute valid service on the Landlord under the Act.

Based on the above, I find that the Landlord's denial of receipt is more likely than not an attempt to avoid service and as I am satisfied as set out above that the Landlord was served the documentary evidence before me from the Tenants and the Notice of Dispute Resolution Proceeding Package, including a copy of the Application and the original Notice of Hearing, on two occasions and by two different service methods, the hearing of the Tenants' Application therefore proceeded as scheduled and I accepted the Tenants' documentary evidence for consideration in this matter.

As the Landlord stated that they had not served any documentary evidence on the Tenants' or submitted any evidence to the Branch for consideration at the hearing, the hearing proceeded based only on the documentary evidence of the Tenants and the testimony provided by the parties and the Witness.

Although I have reviewed all evidence and testimony before me that met the requirements of the Rules of Procedure, I refer only to the relevant and determinative facts, evidence and issues in this decision.

At the request of the parties, copies of this decision and any orders in their favor will be sent to them by email at the email addresses confirmed by them in the hearing.

Issue(s) to be Decided

Are the Tenants entitled to compensation for monetary loss or other money owed?

Are the Tenants entitled to the return of double the amount of their security deposit?

Are the Tenants entitled to recovery of the filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me, signed by all parties, states that the fixed term tenancy began on November 1, 2019, and was set to end on April 30, 2020. The tenancy agreement states that rent in the amount of $7,200.00 is due on or before the fist day of each month, by etransfer, and sets out the following rent payment schedule:

RENT SCHEDULE

November-Prepaid
December-Rent due on the 1st
January-Rent due on the 1st
February-Rent due on the 1st
March-Rent due on the first
April-Prepaid

Section 6 of the tenancy agreement states that the Tenants agree to:

> "*deposit with the Landlord the sum of $14,400 ($7200.00 x 2) as prepaid rent to be applied to the rent for the first and last month of the term or any renewal term. If this Residential Tenancy Agreement is renewed by agreement or operation of*

> *law and the rent is increased, the Tenant agrees to deposit an additional sum with the Landlord so that the amount held by the Landlord is equal to the total monthly rent payable by the Tenant for the last month of the renewed Residential Tenancy Agreement*."

The tenancy agreement also states that a security deposit in the amount of $3,600.00 is to be paid.

Although the parties agreed that the $3,600.00 security deposit was paid, which the Landlord acknowledged has not been returned to the Tenants, and that $7,200.00 in rent was paid at the start of the tenancy, they disagreed about why this amount was paid. The Tenant stated that the $7,200.00 was paid as first and last months rent as set out in the tenancy agreement. The Landlord disagreed, stating that in fact the Tenants were charged double the normal rent amount for the first month and no rent for the last month, as it is common practice in the area in which the rental unit is located to give the last month free. The Landlord stated that there is email communication between themselves and the Tenants to this effect, which the Tenant denied. A copy of this alleged email communication was not submitted by the Landlord for my review or consideration.

The Tenant stated that they and the other Tenants had difficulty paying rent in February and March of 2020 and the parties agreed that a 10 Day Notice was personally served on the Tenants on March 3, 2020, as a result. The 10 Day Notice in the documentary evidence before me is signed and dated March 2, 2020, has an effective date of March 13, 2020, and states that as of March 1, 2020, $6,300.00 in rent was outstanding for February and March of 2020.

Although the Tenant stated that they and the other Tenants covered by the tenancy agreement vacated the rental unit by March 13, 2020, in compliance with the effective date of the 10 Day Notice, the Landlord stated that they were unaware until the first hearing on July 23, 2020, that the Tenants had vacated the rental unit as they had never followed up with the Tenants after service of the 10 Day Notice, had not verified whether the Tenants had vacated and had not sought enforcement of the 10 Day Notice. The Landlord also stated that the Tenants were clearly still in the rental unit after March 13, 2020, as they have a witness who heard people in the rental unit after that date.

The Tenant responded by stating that there was another tenant in the rental unit who was covered under a separate tenancy agreement and for whom the 10 Day Notice did

not apply. As a result, the Tenant stated that it was their understanding that this other tenant stayed behind in the rental unit after they left, as their separate tenancy agreement with the Landlord had not ended. The Landlord did not dispute this testimony.

The Landlord called the Witness A.W. during the September 21, 2020, hearing who stated that they live directly below the rental unit and heard people in the rental unit as recently as June and July of 2020. When asked, the Witness acknowledged that they never met or saw the Tenants and do know who was in the rental unit at the times they heard people present there.

The Tenant stated that as they and the other Tenants covered by the tenancy agreement vacated the rental unit on or before March 13, 2020, in accordance with the 10 Day Notice, there was no agreement for the Landlord to keep prepaid rent for April 2020 for any amounts owed for January or February of 2020, and the Landlord had not sought an order from the Branch for lost rent for April 2020, the Landlord had no lawful right under the Act to keep the $7,200.00 in rent pre-paid for April 2020. The Tenants therefore sought its return. The Tenant also stated that the Landlord had no right under the Act to collect last months rent at the start of the tenancy but did so as it is common practice in the area for landlords to take advantage of tenants due to the largely international population and the lack of available rental accommodation in the area.

The Landlord denied taking advantage of the Tenants and reiterated their position that last months rent was not pre-paid as it was “free” and that the Tenants had instead paid double the monthly rent amount for the first month. The Tenant responded by stating that even if double the first months rent had been paid as alleged by the Landlord, the Landlord still had no lawful authority to do this, and therefore that amount should still be returned. The Landlord also argued that no amount of rent should be returned to the Tenants as there was no mutual agreement to end the tenancy, they had not followed up on enforcement of the 10 Day Notice, and the Tenants had not given notice to end their tenancy and therefore rent for April 2020 was still due in accordance with the tenancy agreement.

The Tenant responded by stating that no notice to end tenancy or mutual agreement to end the tenancy was required as they had simply complied with the 10 Day Notice served on them by the Landlord. When asked, the Landlord acknowledged that they had never expressly withdrawn or cancelled the 10 Day Notice but argued that it should not constitute a valid notice to end tenancy as they never followed up on its enforcement.

The Tenant stated that they are also entitled to the return of double the amount of the $3,600.00 security deposit, as there was no agreement at the end of the tenancy that the Landlord could keep it, no other right by the Landlord under the Act to have retained it, and the Landlord was provided with forwarding addresses for all of the Tenants by email on March 13, 2020. In support of this testimony the Tenant submitted a copy of the email sent to Landlord containing the forwarding addresses and I note that the email address used for the Landlord is the same email address which I have already found earlier in this decision constitutes a valid email address for the Landlord which the parties regularly used throughout the tenancy to communicate regarding tenancy matters. As a result, the Tenant stated that the Landlord either had to return their deposit to them, or file a claim against it with the Branch, which they did not do.

While the Landlord acknowledged that they had not returned the Tenants' security deposit, they denied receipt of the forwarding addresses by email and therefore argued that there was no obligation under the Act for them to have returned it.

The Tenants also sought recovery of the $100.00 filing fee.

Analysis

Section 7 of the Act states that if a landlord or tenant does not comply with the Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

Section 13(2)(f)(iv) and (v) of the Act state that tenancy agreements must contain the amount of rent payable for a specified period, and the day in the month, or in the other period on which the tenancy is based, on which the rent is due.

Although the Landlord acknowledged that the tenancy agreement in the documentary evidence before me states that first and lasts month rent is to be paid at the start of the tenancy, they argued that this rent payment schedule is incorrect, and that the Tenants in fact paid twice as much rent for November and no rent for April 2020, as is the common practice in the area in which the rental unit is located. Not only do I find that there is no documentary or other evidence to support the Landlords testimony that the rent payment schedule was anything other than that set out in the tenancy agreement, I find their testimony in this regard entirely implausible.

According to the tenancy agreement rent in the amount of $7,200.00 was due each month and I find it contrary to common sense as well as ordinary human experience

that a landlord would simply give one months free rent in the amount of $7,200.00 without any evidence to support such an agreement or a legal obligation to do so. I therefore find it more likely than not that first and last months rent was therefore paid by the Tenants at the start of the tenancy, as stated by the Tenant in the hearings and as set out in the tenancy agreement, and that the Landlord's testimony that the last months rent was simply "free", is an attempt to avoid any obligations they may have under the Act to repay this amount to the Tenants.

Further to this, section 14 of the Act states that standard terms of tenancy agreements, cannot be changed and that changes to other terms may only occur by mutual agreement. As the Tenant denied any agreement to change the rent payment schedule set out in the tenancy agreement and the Landlord did not provide documentary evidence to corroborate their testimony that agreement to change the payment terms was agreed to by email, I therefore find that it is more likely than not that no such change occurred.

Although there was a disagreement between the parties about the amount of rent due at the start and end of the fixed term of the tenancy agreement, in the absence of compelling documentary or other evidence to the contrary, and based on the above analysis, I accept that the rental payment schedule was as set out in the written tenancy agreement signed by all parties. As a result, I find that rent was $7,200.00, due on the first day of each month, and that first and last months rent (November 2019 and April 2020) were to be paid together at the start of the tenancy.

Having made this finding, I will now turn my mind to the parties' arguments about whether $7,200.00 in rent should be repaid to the Tenants. In arguing that no rent should be returned to the Tenants, the Landlord first argued that no rent was in fact paid for April 2020, as the Tenants actually paid double rent for November 2019, and therefore no rent for April 2020 should be returned. As I have already found above that rent for April 2020 was in fact pre-paid by the Tenants at the start of the tenancy in the amount of $7,200.00, I therefore dismiss this argument as without merit.

The Landlord then argued that as there was no agreement to end the tenancy early, the Tenants are therefore be responsible to pay April 2020 rent in the amount of $7,200.00 and therefore no rent for April is owed back to them. However, the parties agreed that a 10 Day Notice was personally served on the Tenants on March 3, 2020, with an effective date of March 13, 2020, and by the Landlords own admission, this notice was never expressly cancelled or withdrawn. As a result, I find that it was not necessary for there to be any agreement to end the tenancy, mutual or otherwise, or for the Tenants

to have given notice to end the tenancy, as an undisputed 10 Day Notice was served and the Tenants were legally obligated pursuant to section 47(5) of the Act to vacate the rental unit by the effective date, March 13, 2020, which the Tenant testified that they all did.

Although the Landlord called a witness during the September 21, 2020, hearing who stated that they live directly below the rental unit and heard people in the rental unit after March 3, 2020, the witness acknowledged that they never saw the Tenants and do not know who was in the rental unit. As a result, I find the Witness' testimony of little assistance in corroborating the Landlords testimony that the Tenants did not vacate the rental unit in accordance with the effective date of the 10 Day Notice. Further to this, the Tenant stated that another occupant of the rental unit had a separate tenancy agreement with the Landlord which did not end as a result of the 10 Day Notice, and that this occupant therefore stayed behind in the rental unit until the end of their tenancy agreement, which the Landlord did not dispute. As a result, the Tenant argued that it was likely this occupant that the witness heard.

Based on the above and as the tenancy agreement clearly states in bold letters that the rental premises will be shared with the listed tenants as well as other tenants on separate leases, I find that I am satisfied on a balance of probabilities that the Tenants vacated the rental unit on or before March 13, 2020, as a result of the 10 Day Notice and that any persons remaining in the rental unit after this date were likely other occupants under separate tenancy agreements with the Landlord, or their guests.

As the parties agreed in the hearing that there was no agreement for the Landlord to have kept the $7,200.00 in rent pre-paid for April 2020, at the end of the tenancy, which I have already found above is March 13, 2020, and there is no evidence before me that the Landlord had, at the time the tenancy ended, a Monetary Order from the Branch allowing them to keep this amount for outstanding rent or for lost rent for April 2020, I find that the Landlord had no lawful right to keep it at the end of the tenancy. I also find that the Landlord had no right under the Act to have required the Tenants to pre-pay last months rent at the start of the tenancy.

Based on the above, I find that the Landlord therefore owes the Tenants $7,200.00 in rent unlawfully collected as pre-payment for April 2020 at the start of the tenancy, and not returned to the Tenants when the tenancy ended on March 13, 2020. If the Landlord believes that they are entitled to unpaid rent during the tenancy or for loss of rent after the end of the tenancy, they remain at liberty to file an Application for Dispute Resolution with the Branch in this regard.

Despite the above, even if I had found that the Tenants had paid double rent for November 2019 and no rent for April 2020 as argued by the Landlord, I find that the Landlord would none the less be obligated to return the overpaid rent amount to the Tenants, as they had no lawful authority to charge double the rent amount set out in the tenancy agreement for the first month.

I will now turn my mind to the matter of the security deposit. The Tenant submitted a copy of an email sent to the Landlord on March 13, 2020, in which the forwarding addresses for all of the Tenants were provided. Although the Landlord denied receipt on the basis that it came from a different email address than the one regularly used by the Tenant, I do not accept this argument. The Landlord provided no documentary or other evidence to support their testimony that it was never received, and I am satisfied that the email address used for the Landlord by the Tenant was a valid email address for the Landlord, as it is the email address provided to me by the Landlord in the hearing for the purpose of receiving a copy of this decision and other correspondence from the Branch, and the parties were in agreement at the hearing that this email address was regularly used for communication regarding the tenancy. As a result, I find that the Landlord's denial of receipt is more likely than not an attempt to avoid any obligations they had to return the security deposit paid by the Tenants or any consequences under the Act for having failed to return it in the timelines required.

I therefore find that I am satisfied on a balance of probabilities, that the Tenants' forwarding addresses were sent to the Landlord in writing on March 13, 2020, as I find that email communication qualifies as a written form of communication, and deem it served on the Landlord three days later, on March 16, 2020, pursuant to sections 71(2)(b) and (c) of the Act. I have used this timeline for deeming the email received as it is the same timeline set out for deeming that items physically placed in a mailbox are received and the same timeline set out for email service in the now repealed Director's Order for Substituted Service.

As there is no evidence or testimony before me that the Landlord had any other right under the Act to retain the Tenants' security deposit, or that the Tenants extinguished their right to the return of their deposit, I therefore find that the Landlord was required by section 38(1) of the Act to either return it to the Tenants' in full or file an Application for Dispute Resolution with the Branch seeking its retention, no later than March 31, 2020. As the parties agreed that the deposit has yet to be returned, I am satisfied that the Landlord breached section 38(1) of the Act and that the Tenants are therefore entitled to the return of double its amount, $7,200.00, pursuant to section 38(6)(b) of the Act.

As the Tenants were successful in their Application, I also award them recovery of the $100.00 filing fee pursuant to section 72(1) of the Act. Pursuant to section 67 of the Act, I therefore grant the Tenants a Monetary Order in the amount of $14,500.00; $7,200.00 in unlawfully collected pre-paid rent for April 2020, plus $7,200.00 for double the amount of the security deposit, plus $100.00 for recovery of the filing fee.

Conclusion

Pursuant to section 67 of the Act, I grant the Tenants a Monetary Order in the amount of **$14,500.00**. The Tenants are 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 Act.

Although this decision has been rendered more than 30 days after the close of the hearing, contrary to section 77(1)(d) of the Act, I note that section 77(2) of the Act states that the Director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period in subsection (1)(d).

Dated: October 28, 2020

Residential Tenancy Branch