Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Sutton Select Property Management
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S, FFL

Introduction

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

- Unpaid rent;
- Recovery of the filing fee; and
- Authorization to withhold the security deposit against any amounts owed by the Tenants.

The hearing was convened by telephone conference call and was attended by the agent for the Landlord (the Agent) and the Tenants, all of whom provided affirmed testimony. As the Tenants acknowledged receipt of the Application and Notice of Hearing and the Landlord's documentary evidence, the hearing proceeded as scheduled and the documentary evidence before me from the Landlord was accepted for consideration. No documentary evidence was submitted by Tenants for my consideration. 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 I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with 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 the decision and any orders issued in their favor will be emailed to them at the email addresses provided in the hearing.

Preliminary Matters

Preliminary Matter #1

At the outset of the hearing I identified that the landlord named in the Application, a corporation, is different than the landlord named in the tenancy agreement, also a corporation.

The Agent stated that they are the owner of the corporation named in the tenancy agreement as the landlord, which is a property management company, and that they named the property owner as the Landlord in the Application as they manage the property on behalf of the owner.

No documentation was submitted for my review linking the alleged property owner, the Applicant named in the Application, to either the rental unit or the tenancy to which this the Application relates. As a result, I do not find it reasonable or appropriate to name the alleged property owner as the landlord. As the tenancy agreement in the documentary evidence before me lists the Agent's property management company as the Landlord and all of the parties agreed that the Agent's property management company operated the property as the Landlord throughout the tenancy, I find that the property management company named in the tenancy agreement as the Landlord, is the Landlord for the purpose of the Application and I have amended the Application accordingly.

Preliminary Matter #2

Although the Tenants appeared at the hearing as scheduled, they requested an adjournment as they wanted an opportunity to submit documentary evidence for my consideration which they stated they had not yet submitted.

Rule 7.8 of the Rules of Procedure states that at any time after the dispute resolution hearing begins, the arbitrator may adjourn the dispute resolution hearing to another time and that a party or a party's agent may request that a hearing be adjourned.

Rule 7.9 of the Rules of Procedure sets out the following criteria for considering whether to grant an adjournment. Without restricting the authority of the arbitrator to consider other factors, rule 7.9 states that the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- the oral or written submissions of the parties;

- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

The Agent argued that the Tenants should not be granted an adjournment to submit evidence as they have already had sufficient time to do so . The Agent stated that the Tenants were each sent the Landlord's documentary evidence and the Notice of Dispute Resolution Proceeding Package, including a copy of the Application and the Notice of Hearing, by registered mail on September 25, 2020, the same day that the Notice of Dispute Resolution Proceeding Package became available to them from the Residential Tenancy Branch (the Branch), and provided me with the registered mail tracking numbers, which have been recorded on the cover page of this decision.

Canada Post tracking information shows that the registered mail was sent as described above and delivered on September 29, 2020. During the hearing the Tenants confirmed receipt on this date.

Although the Tenants acknowledged that they did not have a good reason for not gathering, servings, and submitting documentary evidence in relation to this Application, they stated that they have cognitive difficulties and that their physical and mental health have suffered as a result of the pandemic. One of the Tenants also stated that that have knee problems which require surgery and have been restricted to a wheelchair.

When asked what documentary evidence they would gather, serve and submit if provided with an adjournment, and why it was relevant to the Landlord's Application seeking unpaid rent and retention of the security deposit, they stated that they withheld rent as the property was uninhabitable as the Landlord had failed to complete necessary repairs and maintenance and as a result, they were unable to rent out rooms in the property as planned, which was the intended income source for the payment of rent.

Although the Tenants stated that their cognitive difficulties and poor physical and mental health contributed to their inability to submit evidence for my consideration prior to the hearing, no documentary evidence was submitted for my consideration in support of this testimony. As a result, I do not accept that this was the case. I also find that the Tenants' request for an adjournment arises primarily from their failure to act diligently in

preparing for the hearing, despite having sufficient time to do so. Further to this, I find that the evidence that the Tenants wish to submit, evidence that the rental unit was not properly repaired or maintained by the Landlord, does not give rise to an entitlement under the Act to withhold rent. Section 26 of the Act is clear that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent. Tenants who believe that their rental units require renovations or repairs may complete emergency repairs under section 33 of the Act, if applicable, and seek reimbursement of these repairs from their landlord as prescribed, or may file an Application for Dispute Resolution with the Branch seeking the completion of the renovations or repairs by the landlord, monetary compensation for loss of use/loss of quiet enjoyment, or both, but cannot simply withhold rent without the landlords consent.

During the hearing the parties agreed that the Tenants did not have the Landlord's consent to withhold rent and the Tenants stated that they did not have evidence of another right under the Act to have withheld rent, such as overpayment of a security deposit or reimbursement of repairs completed pursuant to section 33 of the Act, to submit.

Based on the above, I am not satisfied that an adjournment will result in resolution. I am also not satisfied that it is required for the Tenants to have a fair opportunity to be heard, as they have been aware of the Application, the Landlords evidence and the hearing date and time since September 29, 2020, and have therefore had ample time to collect, serve, and submit any documentary evidence they wanted considered at the hearing. The Tenants also have an ability to provide oral evidence and testimony at the hearing with regards to their claims, so I find that the Tenants are barred or prevented from submitting evidence in their own defence as the result of not having been granted an adjournment. Finally, I find that there is significant prejudiced to the Landlord in granting the adjournment as they have already waited several months for a hearing, would be required to wait several more months as the result of an adjournment, and the claim relates to a several months of unpaid rent.

For the above noted reasons, I declined to grant an adjournment as requested by the Tenants and the hearing proceeded as scheduled. The Tenants were advised that they remain at liberty to file a claim for monetary loss or other money owed in relation to their allegations that the Landlord did not properly repair or maintain the rental unit, should they wish to do so.

Issue(s) to be Decided

Is the Landlord entitled to recovery of unpaid rent?

Is the Landlord entitled to recovery of the filing fee?

Is the Landlord authorized to withhold the security deposit against any amounts owed to the Landlord by the Tenants?

Background and Evidence

The tenancy agreement in the documentary evidence before me for consideration, signed December 8, 2018, states that the 16 month fixed term tenancy commenced on January 1, 2019, and was set to end on April 30, 2020. The tenancy agreement states that rent in the amount of $1,800.00 is due on the first day of each month, that a $700.00 security deposit was required, and contains a $3,600.00 liquidated damages clause. It also contains a move out clause stipulating that the Tenants must vacate the rental unit on April 30, 2020, for demolition. During the hearing the parties agreed that these are the correct terms for the tenancy agreement, except for the amount of the security deposit, which was $900.00. They also agreed that the $900.00 security deposit is still held by the Landlord.

The parties agreed that the tenancy ended on August 30, 2020, as set out in the tenancy agreement and although they agreed that some amount of rent is outstanding, they dispute the amount owed. The Agent stated that $7,974.86 in outstanding rent is currently owed by the Tenants as they did not pay any rent for five months (April 2020 – August 2020) and provided a tenant rent ledger for my review showing the above noted amount is owed. The Tenants denied that this amount of rent is owed, stating that they only owe $3,600.00 in rent for July and August of 2020. The Tenants also stated that rent in the amount of $1,800.00 shows as unpaid on the rent ledger submitted by the Agent for September 2020, after they had already vacated, which is incorrect. The Agent acknowledged that the rent ledger includes outstanding rent for September 2020, in error, and therefore reduced the amount of the Landlords claim by $1,800.00 to $6,174.86.

During the hearing I pointed out that a balance appears to have been carried forward since February 4, 2019, as the result of a rent adjustment and inquired with the Agent what this balance was for as it was not clear to me from the ledger alone. The Agent

was unable to answer, with any level of certainty or clarity, how the rent adjustment was calculated or why.

Although the Tenants stated that they had provided the Landlord with their forwarding address in writing on August 31, 2020, they did not submit any proof and the Agent could not recall if this was the case or not.

Analysis

Section 26 (1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent.

Based on the documentary evidence before me and the affirmed testimony of the parties, I find that rent in the amount of $1,800.00 was due on the first day of each month under the tenancy agreement starting on January 1, 2019, and ending on August 30, 2020, the date the tenancy ended. Although the Tenants stated that they withheld rent due to the state of the rental unit and the Landlords failure to repair and maintain it, as stated in the preliminary matters section of this decision, this is not a valid reason under the Act to withhold rent. As there is no evidence or testimony before me that the Tenants had a right under the Act to withhold or deduct rent, I find that they did not.

Although the Tenants denied owing rent for months other than July and August of 2020, no proof of rent payments in these, or any other months, were submitted by them for my consideration. In the rent ledger submitted by the Agent the only rent payments showing between April 1, 2020 – August 30, 2020, are a $1,027.00 payment on April 30, 2020, and a $1,800.00 payment on June 1, 2020. As a result, I accept that these were the only rent payments made by the Tenants during this period and find that the Tenants therefore owe $6,173.00 in unpaid rent for this period. Although the Landlord also sought $1.86 for a balance carried forward from February 4, 2019, as a result of a “rent adjustment” according to the ledger, I have not granted them recovery of this amount as they could not provide me with any information on how this rent adjustment was calculated or why.

Having made the above findings, I will now turn my mind to the matter of retention of the security deposit. Policy Guideline 17 states that the arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions

permitted under the Act, on a landlord's application to retain all or part of the security deposit, unless the tenant's right to the return of the deposit has been extinguished under the Act, whether or not the tenant has applied for dispute resolution for its return. Policy Guideline 17 also states that unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing.

As neither party raised arguments during the hearing that the other party had extinguished their rights in relation to the security deposit, I am not satisfied that extinguishment occurred on the part of either party. During the hearing the Tenants testified that they had given their forwarding address in writing to the Landlord on August 31, 2020, and while the Agent stated in the hearing that they did not know if this was the case as these records would be at the office, they did not deny that this occurred or provide me with an alternate date for receipt of the Tenants' forwarding address. As a result, I accept the Tenants' affirmed testimony and find that they served the Landlord with their forwarding address in writing on August 31, 2020.

Based on the above, and as there is no evidence before me that the Landlord had another right under the Act to retain the Tenants' security deposit, I find that the Landlord was required to either return the Tenants' security deposit to them in full or file a claim against it with the Branch by September 15, 2020, pursuant to section 38 (1) of the Act. As the Landlord's Application seeking retention of the security deposit for unpaid rent and recovery of the filing fee was not filed until September 21, 2020, I find that the Landlord therefore breached section 38(1) of the Act. As the Tenants did not waive their right to the return of double the amount of their security deposit at the hearing, I therefore find that the Tenants are entitled to the return of double the amount of their security deposit, $1,800.00, pursuant to section 38(6) of the Act.

As the Landlord was at least partially successful in their Application, I grant them recovery of the $100.00 filing fee pursuant to section 72(1) of the Act. Pursuant to Policy Guideline 17, I set-off the amount owed to the Landlord for unpaid rent and recovery of the filing fee ($6,273.00) with the amount owed to the Tenants for the return of double the amount of their $900.00 security deposit ($1,800.00), and find that the Tenants therefore owe $4,473.00 to the Landlord.

Pursuant to section 67 of the Act, I therefore grant the Landlord a Monetary Order in the amount of $4,473.00 and I order the Tenants to pay this amount to the Landlord.

Conclusion

Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order in the amount of **$4,473.00**. The Landlord is provided with this Order in the above terms and the Tenants must be served with this Order as soon as possible. Should the Tenants 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: December 9, 2020

Residential Tenancy Branch