Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Eurowest Developments Inc and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **LL: MNRL-S FFL**
TT: MNSDB-DR

Introduction

This hearing dealt with applications from both the landlord and tenant pursuant to the *Residential Tenancy Act* (the "*Act*"). The landlord's application was originally heard on March 30, 2021 and a new hearing of their application was ordered by a Review Consideration decision of April 14, 2021.

The landlord applied for:

- A monetary award for unpaid rent, damages and loss pursuant to section 67;
- Authorization to retain the deposit for this tenancy pursuant to section 38; and
- Authorization to recover the filing fee from the tenant pursuant to section 72.

The tenant applied for:

- A return of their security and pet damage deposit pursuant to section 38.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The corporate landlord was represented by its agent (the "landlord").

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act*.

At the outset of the hearing the parties acknowledged that there was a typographic error in the tenant's application identifying the respondent and landlord and the name was corrected accordingly. The corrected name is used in the style of cause for this decision.

Issue(s) to be Decided

Should the decision of March 30, 2021 be affirmed, varied or set aside and replaced with a new decision.
Is the tenant entitled to an order as sought?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This periodic tenancy began in May, 2019. The monthly rent was $1,750.00 payable on the 15th of each month. The tenant was also responsible for paying their own utilities in the rental unit. A security deposit of $875.00 and pet damage deposit of $150.00 were paid at the start of the tenancy and are still held by the landlord.

The landlord submits that the tenant gave written notice to end the tenancy by email correspondence on November 3, 2020, failed to pay rent on November 15, 2020 and moved out on November 30, 2020. The landlord seeks the unpaid rent due on November 15, 2020 of $1,750.00. The landlord also seeks unpaid utilities in the amount of $252.00.

The tenant submits that they gave written notice to end the tenancy by email correspondence on October 15, 2020 and therefore were not obligated to pay rent on November 15, 2020. The tenant provided no cogent explanation of why they felt they were not obligated to pay any amount for the period from November 15 to November 30 when they were overholding if the tenancy ended pursuant to their notice on November 15, 2020. The tenant does agree that they are responsible for paying utilities for the tenancy and agrees with the landlord's monetary claim for $252.00.

The parties participated in a move out inspection on November 30, 2020 and the tenant provided their forwarding address on the condition inspection report completed on that date. The tenant submits that they did not provide written authorization that the landlord may retain any portion of the deposits for this tenancy.

Copies of the correspondence between the parties was submitted into evidence. The relevant portions of the October 15, 2020 correspondence reads:

> Tenant:
>
> I am looking at a place tomorrow, so if all goes well I am hoping to move the middle if next month.
>
> I will give notice as soon as I can.
>
> Landlord:
>
> … Yes, I accept your notice.
>
> Tenant:
>
> Just to confirm. It is not yet guaranteed as I don't visit the place until tomorrow.
>
> Landlord:
>
> Yes, no problem. Don't feel rushed [Tenant]. Find a place where you will be happy, I will be flexible about the notice.

The relevant portions of the subsequent correspondence between the parties in November 2020 reads as follows:

> Tenant (Nov 2, 2020) :
>
> I will be moving out on November 30th
>
> Landlord (Nov 3, 2020):
>
> Confirmed
>
> Tenant: (Nov 3, 2020):
>
> The date will be be Dec 2nd as there is a problem in finding movers.

In a separate email dated November 3, 2020 the tenant writes:

> I have given you 30 days notice. Yesterdays was the 2nd. That is 30 days. You keep my damage deposit and pet deposit keep it. I will be out Dec 1st.

The tenant testified that when they wrote to the landlord stating "You keep my damage deposit and pet deposit keep it" they were not providing written authorization that the landlord may retain the deposits.

The tenant gave testimony complaining about the landlord's failure to accommodate their schedule and needs. The tenant testified that they believe they have suffered detrimental health effects due to the landlord's conduct. The tenant submits that any statements made that imply the landlord is authorized to retain the deposits were made under duress.

Analysis

Section 38 of the *Act* requires the landlord to either return all of a tenant's security and pet damage deposit or file for dispute resolution for authorization to retain the deposits within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing.

In the present case the parties agree that the tenant provided a forwarding address on the condition inspection report completed on November 30, 2020. The landlord filed their present application for authorization to retain the deposits on December 9, 2020, within the 15 days provided under the *Act*.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

As the parties agree that there is a utility arrear of $252.00 under the tenancy agreement and that the tenant is obligated to pay that amount I issue a monetary award in that amount to the landlord.

Section 45 of the *Act* provides that a tenant may end a periodic tenancy by giving notice to the landlord on a date no earlier than one month after the date the landlord receives the notice and is the day before the date in the month when rent is payable under the tenancy agreement.

The tenant submits that the correspondence of October 15, 2020 constitutes notice effective on November 14, 2020, the date that is the day before rent is payable. I do not find the tenant's position to be at all persuasive. Notice provided on October 15, 2020 would be effective on December 14, 2020, the date that is no earlier than one month after the notice is given and the day before rent is due under the tenancy.

From an ordinary reading of the correspondence between the parties is clear that the correspondence of October 15, 2020 is not intended to be notice to end the tenancy. When the landlord communicates to confirm the tenancy will end, the tenant states "it is not guaranteed" and makes clear that this is not notice pursuant to the *Act*. The evidence shows that the tenant subsequently gives notice on November 2, 2020 and references their correspondence as notice to end the tenancy.

I do not find the statement by the landlord that they will be flexible to be a waiver of their right to be paid the monthly rent owing under the tenancy agreement or that the tenant would be allowed to disregard the provisions of the *Act*. I accept the testimony of the landlord that they did not intend to waive their right to collect the rent or to allow the tenant to overhold the rental unit without any payments.

In any event, pursuant to section 5 of the *Act* landlords and tenant may not avoid or contract out of the *Act* or regulations and any attempt to do so is of no effect.

I find that the tenant was obligated to pay monthly rent in the amount of $1,750.00 on November 15, 2020 and they failed to do so. I accept that there is an arrear for this tenancy of $1,750.00 as at the date of the hearing arising from the tenant's failure to abide by the agreement and make rent payment on the date it was due. I therefore issue a monetary award in the amount of $1,750.00 in the landlord's favour.

As the landlord was successful in their application, they are also entitled to recover the filing fee from the tenant.

In accordance with sections 38 and the offsetting provisions of section 72 of the Act, I allow the landlord to retain the tenant's security and pet damage deposit in partial satisfaction of the monetary award issued in the landlord's favour.

Conclusion

The tenant's application is dismissed without leave to reapply.

The decision and order of March 30, 2021 are affirmed.

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: August 25, 2021

Residential Tenancy Branch