

IN THE MATTER between **FLB**, Applicant, and **YHNI**, Respondent.

AND IN THE MATTER of the **Residential Tenancies Act** R.S.N.W.T. 1988, Chapter R-5
(the "Act");

AND IN THE MATTER of a hearing before **Adelle Guigon**, Rental Officer,

BETWEEN:

FLB

Applicant/Tenant

-and-

YHNI

Respondent/Landlord

REASONS FOR DECISION

Date of the Hearing: April 25, 2017

Place of the Hearing: Yellowknife, Northwest Territories

Appearances at Hearing: FLB, applicant
AAM, representing the respondent

Date of Decision: June 26, 2017

REASONS FOR DECISION

An application to a rental officer made by FLB as the applicant/tenant against YHNI as the respondent/landlord was filed by the Rental Office November 30, 2016. The application was made regarding a residential tenancy agreement for a rental premises located in Yellowknife, Northwest Territories. The filed application was served on the respondent/landlord by registered mail signed for December 5, 2016.

The applicant/tenant alleged the respondent/landlord had disturbed the tenant's enjoyment of the rental premises and had failed to return the security deposit in accordance with the *Residential Tenancies Act* (the Act). An order was sought for the return of the security deposit and absolution from the obligation to pay lost future rent.

A hearing was scheduled for April 25, 2017, in Yellowknife, Northwest Territories. FLB appeared as applicant/tenant. AAM appeared representing the respondent/landlord.

Tenancy agreement

The parties agreed and evidence was presented establishing a residential tenancy agreement for a fixed-term commencing August 1, 2016, and ending October 31, 2016. The parties agreed that the landlord ended the tenancy August 31, 2016, when he vacated the rental premises. I am satisfied a valid tenancy agreement was in place between the parties in accordance with the Act.

Security deposit

The tenant claimed the landlord improperly withheld his security deposit and requested its return.

Section 18(3) of the Act requires a landlord to return the security deposit with an itemized statement of account to the tenant within 10 days of the tenant vacating the rental premises.

Section 18(4) of the Act permits a landlord to retain all or part of the security deposit against rental arrears.

Section 18(7) of the Act requires a landlord who intends to withhold all or part of the security deposit to give the tenant written notice of that intention – detailing the reasons – within 10 days of the tenant vacating the rental premises.

The landlord acknowledged retaining the security deposit against the rent for September. The landlord confirmed that he did not provide the tenant with any written notice of his intention to withhold the security deposit.

If the security deposit is going to be withheld against rental arrears, rental arrears must have accrued as of the day the tenant vacated the rental premises. The security deposit may not be retained against lost future rent.

In this case, the tenant vacated the rental premises August 31, 2016. The rent for September was not due until September 1, 2016. As such, the tenant did not carry rental arrears and the landlord was not entitled to retain the security deposit.

By failing to return the security deposit with an itemized statement of account by September 10, 2016, the landlord failed to comply with his obligation under section 18(3) of the Act. By failing to notify the tenant of his intention to retain the security deposit and why by September 10, 2016, the landlord failed to comply with his obligation under section 18(7) of the Act. I find the tenant is entitled to the return of his security deposit in full, with interest, in the amount of \$1,900.08.

Disturbances - smoking

The tenant testified that within days of moving into the rental premises he noticed cigarette smoke entering the premises which disturbed his and his family's enjoyment and possession. The landlord was notified verbally of the smoke problem on August 7th, followed by a written notice on August 8, 2016, of the tenant's intention to vacate the rental premises August 31st.

A few days later the landlord posted an undated notice to the tenants of the residential complex that smoking is not allowed inside the apartment building and that all must respect each other's privacy and good health. The notice also indicated that the "central air make-up system circulates air [to] all the units in the building."

The written tenancy agreement does not state that the rental premises and residential complex are non-smoking areas. While it may have been discussed between the landlord and tenant, non-smoking provisions were not included in the written tenancy agreement and therefore it would be unreasonable for the tenant to expect that any of the other tenants would be expected not to smoke in the building.

What is not unreasonable for the tenant to expect is a rental premises adequately sealed against smoke and odours migrating from other rental premises in the building. The landlord's effort to resolve the tenant's complaint consisted only of imposing a previously unwritten rule on all tenants in the building which effectively denies a smoker already in occupancy of their right to smoke in their rental premises. Such a demand cannot be upheld if the written tenancy agreement did not already contain a condition establishing the rental premises and/or residential complex as non-smoking.

As I have found in previous similar cases, this issue is not about whether or not smoking is permitted in the rental premises or residential complex. Nor is this issue about whether or not the rental premises and residential complex are in a good state of repair, fit for habitation, and in compliance with health, safety, maintenance and occupancy standards required by law. This issue is about whether or not the tenant's enjoyment and possession of the rental premises and residential complex was interfered with by the landlord's action or failure to act.

While it was the actions of other tenants smoking that created the undesirable environment for the applicant/tenant, there were no established prohibitions on the other tenants from smoking in the building. It falls then to the landlord to ensure that the building's air handling system adequately redirects the smoke outside the building and/or the individual units are adequately sealed to reduce the migration of smoke-infested air between them. By failing to take adequate actions to address the tenant's complaint, the landlord facilitated the disturbance to the tenant's enjoyment and possession of the rental premises and residential complex.

I am satisfied that the tenant's enjoyment and possession of the rental premises and residential complex was disturbed by the presence of second-hand smoke and that the landlord failed to take adequate actions to address the disturbance. I find the tenant entitled to compensation for the disturbance equal to 25 percent of the rent for August 2016 in the amount of \$475.

Lost future rent

The tenant gave the landlord written notice on August 8, 2016, of his intention to vacate the rental premises August 31, 2016. Section 51(1) of the Act requires a tenant who wishes to terminate a fixed-term tenancy agreement to give the landlord at least 30 days' written notice for the last day of the fixed term. In this case, the tenancy agreement was for a fixed-term ending October 31, 2016. By ending the tenancy agreement August 31, 2016, the tenant effectively abandoned the rental premises. By failing to give written notice in accordance with the Act, the tenant remains liable for the rent until the last day of the fixed-term or until the landlord secures a new tenant, whichever comes first.

Section 5(2) of the Act obligates a landlord to mitigate his losses where a tenant has abandoned the rental premises by re-renting the rental premises as soon as practicable after the tenant vacates and at a reasonable rate. In this case, the landlord did not commence his search for a new tenant until some time in September and was unable to secure a new tenant until December 1, 2016. The landlord had more than three weeks to begin advertising the rental premises, yet he chose not to do so until after the tenant actually vacated. I am not satisfied the landlord made adequate efforts to mitigate his losses.

The tenant's failure to give proper notice in accordance with the Act must be balanced with the landlord's failure to make adequate efforts to mitigate his losses. With that in mind, I am prepared to grant the landlord the lost rent for September, but not for October. An order for the respondent to pay the September rent will take into account the abatement of rent granted earlier for the smoking disturbances.

Orders

An order will issue:

- requiring the landlord to return the security deposit to the tenant in the amount of \$1,900.08;
- requiring the tenant to pay rental arrears to the applicant in the amount of \$1,425.

Adelle Guigon
Rental Officer