



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

The tenant seeks recovery of his security deposit and recovery of the filing fee paid for this application.

This hearing was originally scheduled as a telephone conference call hearing held on January 21, 2013. That hearing was adjourned to February 19, 2013 as a face-to-face hearing to allow the tenant to avail herself of an interpreter.

Both parties appeared on both days of hearing and gave evidence under oath.

Issues(s) to be Decided

Is the tenant entitled to the orders sought?

Background and Evidence

The tenant gave evidence that this tenancy began in November 2011 and ended June 2012. The rent payable during the tenancy was \$2,585.00 per month and the tenant paid a security deposit of \$1,292.50 at the start of the tenancy. The tenant says that after the tenancy ended she provided her forwarding address to the landlord on July 9, 2012 by way of an email to which the landlord responded. The tenant did not supply a copy of the email in evidence prior to the hearing but did provide her iPhone at the hearing to show email correspondence between the parties. The tenant says that to date, despite the email provision of the forwarding address, the landlord has not returned her deposit.

The landlord denied receiving the tenant's forwarding address at any time prior to the receipt of the tenant's Application for Dispute Resolution. The landlord inspected the tenant's iPhone evidence at the hearing and pointed out that although there was an email discussion between them the email did not contain the tenant's forwarding

address. In any event, the landlord stated that she was out of the country at the time that the subject email was sent.

The tenant then said after she sent the email she realized she needed to send her address in writing and she did so. The tenant did not submit a copy of the correspondence but said it was in her car and could be brought into the hearing.

The landlord stated that only time she received the tenant's forwarding address was 3 months after the end of the tenancy set out on the Application for Dispute Resolution. The landlord agreed that she did not return the deposit stating that she spoke with 2 people who advised her that because the tenant broke the lease and the amount of the tenant's claim is the same as the same amount the landlord is due, that one sum would off-set the other. The landlord confirmed that she did not make an application to the Residential Tenancy Branch seeking to retain the deposit apparently on the presumption that she did not have to do so.

Analysis

Section 38(1) of the Act requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. There is no other means by which a landlord is able to retain a deposit and, if a landlord is out of the country and otherwise unable to attend to their duties as a landlord in this or any other regard, the landlord should ensure that an agent is available to comply with the Act on the landlord's behalf within the specified time limits.

If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must pay the tenant double the amount of the deposit (section 38(6)). If the tenant does not supply his forwarding address in writing within a year, the landlord may then retain the deposit.

The triggering event is the provision by the tenant of the forwarding address in writing. On this point the testimony of the tenant and the landlord is conflicting. The onus or burden of proof is on the party making the claim. When one party provides testimony of the events in one way and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails. I find this to be the case here and find that the tenant has failed to prove that she supplied her forwarding address in writing to the landlord.

However, the landlord has now received the tenant's forwarding address in the tenant's Application for Dispute Resolution. While this would not be considered proper provision of that address in the normal course, now that a hearing has taken place and I am satisfied that the landlord has the tenant's forwarding address and I order the landlord to return the tenant's deposit to her at the address on the tenant's Application or make application with the Residential Tenancy Branch seeking to retain the deposit if the landlord believes she has a claim within 15 days of the date of this Decision.

If the landlord does not comply with this Order the tenant is at liberty to reapply for recovery of her deposit.

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: February 19, 2013

Residential Tenancy Branch

