



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding JADE AGENCIES LTD. and JADE INVESTMENTS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with the tenant's application for return of the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matter – Naming of landlord

The tenant had named an individual as the landlord on her Application for Dispute Resolution yet the written tenancy agreement provided as evidence names two different corporations as being the landlord. The landlord named on the tenant's Application for Dispute Resolution appeared at the hearing and confirmed that she is the principle of the two corporations identified on the tenancy agreement. I found that the individual named on the application and the two corporations identified on the tenancy agreement meet the definition of landlord under section 1 of the Act and I amended the application to name all three landlords.

Issue(s) to be Decided

Is the tenant entitled to return of a security deposit in the amount of \$750.00?

Background and Evidence

The parties entered into a tenancy that started in August 1998. The tenancy ended in June 2016 pursuant to a *2 Month Notice to End Tenancy for Landlord's Use of Property* that was upheld in a previous dispute resolution proceeding (file number provided on cover page of this decision).

The tenant seeks return of a \$750.00 security deposit she says was paid to the landlord in 1998.

The parties provided consistent testimony that the landlord did not invite the tenant to participate in a move-out inspection and did not prepare a move-out inspection report. The tenant did not authorize the landlord to retain or made deductions from the security deposit. As for the tenant's forwarding address, the tenant testified that she maintained the same post office box after her tenancy that she had during the tenancy and the landlord knows her post office box number. I noted that the tenant had provided a post office box and a physical address with her Application for Dispute Resolution. The tenant confirmed that she can receive mail at either address.

Having heard the tenant had not provided the landlord with a forwarding address in writing prior to filing her Application for Dispute Resolution I found the tenant's request for return of the security deposit to be premature.

The landlord denied that the tenant paid a security deposit. Accordingly, I continued to hear from the parties so that I may determine whether the tenant's application for return of the security deposit should be dismissed outright or dismissed with leave.

Both parties provided consistent testimony that over the 18 years the tenant occupied the rental unit the parties executed a number of written tenancy agreements and extensions. I was provided a copy of one of the written tenancy agreements made in August 2009 and signed by the landlord only.

In the above described tenancy agreement the rent is set at \$1,600.00 per month. The tenant testified that at the end of the tenancy the tenants were paying rent of \$1,650.00 per month. The landlord testified that the rent was actually \$1,640.00 per month but that it was increased to \$1,750.00; however, the tenants did not pay the increased amount.

On the second page of the tenancy agreement there is a clause that provides for the security deposit.

"THAT the Lessee agrees to pay \$750.00 as a damage/cleaning deposit. This will be refunded at the end of the term if the premises are left clean and undamaged. In the event that the LESSEE should vacate the premises prior to the termination date of this Lease, or if it should become necessary for the LESSOR to terminate the Lease for non-payment of rent, then the Security Deposit, shall be forfeited to the LESSOR as well as the three months' rent."

The landlord had provided a written response to the tenant's application. The landlord took two positions with respect to the tenant's request for return of a security deposit: 1) that the tenant did not pay a security deposit and 2) that the landlord incurred significant costs to rehabilitate the property after the tenant vacated that "far exceeded the total of your (unpaid) deposit". As evidence for this proceeding, the landlord provided copies of several invoices and receipts for property repairs and renovations.

The landlord's lawyer indicated that he was prepared to show that the tenants caused damage to the property and the tenancy agreement provides that the landlord may retain the security deposit in such case. I did not permit such submissions since the landlord has not filed a damage claim against the tenant; the landlord has lost the right to make a claim against the security deposit for damage to the property in failing to perform a move-out inspection with the tenant as provided under section 36 of the Act; and the Act prohibits automatic forfeiture of a security deposit under section 20 of the Act and any such term in a tenancy agreement is not enforceable under section 6 of the Act.

The landlord was also of the position the tenant failed to pay rent for May 2016 and June 2016. The tenant responded by stating that she did pay rent for May 2016 and that she was entitled to withhold rent for June 2016 since her tenancy came to an end pursuant to a 2 Month Notice. Since a tenant may withhold rent for their last month of tenancy where their tenancy has ended pursuant to a 2 Month Notice, I informed the parties that the landlord may make a claim for unpaid rent for May 2016 if in fact rent was not paid for that month but that the matter was not before me as the landlord has not yet made such a claim.

As for whether a security deposit was paid, the tenant maintained her position that one was paid in 1998 in the amount of \$750.00. The tenant submitted that the landlord would not have permitted the tenancy to continue with several tenancy agreements and extensions over 18 years had it not been paid. The tenant pointed out that the landlord had pursued her to pay amounts she was not required to pay, such as an illegal rent increase, house insurance and rent for June 2016.

The landlord stated that a security deposit was not collected in 1998 or any other time but that she did nothing about it because the tenant had trouble paying the rent and insurance as it was. The tenant refuted these statements in testifying that she refused to pay an illegal rent increase and that the landlord had wanted the tenant to pay for house insurance which is not a tenant responsibility.

I attempted to explore with the landlord the method in which she attempted to increase the rent from \$1,640.00 to \$1,750.00 but the landlord's responses were evasive and the landlord's lawyer tried to change the subject. The tenant pointed out that the illegal rent increase was a subject raised in the previous Application for Dispute Resolution she had filed. I referred to the tenant's previous Application for Dispute Resolution and I note that she had raised the issue of an illegal rent increase and supplied evidence of such. The Arbitrator hearing that Application for Dispute Resolution did not make any mention of the illegal rent increase in the written decision but according to the tenant the Arbitrator had said orally that the rent increase was not valid based on the evidence that had been submitted so the tenant did not pay the increase. The tenant also pointed out that she was never evicted for unpaid rent.

The landlord's lawyer pointed out that the term in the tenancy agreement does not indicate a security deposit was paid, but merely that it would be paid, and the tenant did not provide evidence to show it was paid.

Analysis

The issue to determine is whether the tenant provided a security deposit of \$750.00 to the landlord, and if so, when. The tenant bears the burden of proof as the applicant. The burden of proof is based on the balance of probabilities (more likely than not).

Upon consideration of everything before me, I provide the following findings and reasons.

I found the tenant's submissions that she paid a security deposit at the start of the first tenancy to be consistent throughout her testimony. I also found her other testimony in regard to the landlord's improper attempt to increase the rent to be straightforward and consistent with submissions and evidence provided with her previous Application for Dispute Resolution. In contrast, the landlord became evasive when prompted to answer questions that were unfavourable to her position, such as the questions concerning her attempts to increase the rent.

I found the tenant effectively rebutted the landlord's implication that the tenant had "trouble" paying the rent and insurance in explaining that she refused to pay an illegal rent increase and house insurance that is the landlord's responsibility and that she had a right under the Act to withhold rent for June 2016. I find the fact that the landlord again raised the issue of an unpaid rent increase during this proceeding, despite the illegal rent increase being raised at the previous hearing, leads me to accept the tenant's position that the landlord would not have continued to enter into tenancy

agreements with the tenant if the security deposit had not been paid. As such, I find the landlord's statements that the tenant did not pay a security deposit and the landlord chose to nothing about it to be unlikely.

Of further consideration is that the landlord presented evidence pertaining to unpaid rent for May 2016 and damage when such issues would be entirely irrelevant if a security deposit had not been paid. I find the landlord's attempt to make submissions more in keeping with a position that the landlord should be entitled to retain the security deposit.

In light of all of the above, I find that it is more likely than not that the tenant did pay a security deposit of \$750.00 at the start of the first tenancy agreement, as the tenant submitted. Using August 1, 1998 as the date the security deposit was paid, I calculate the accrued interest on the \$750.00 security deposit to be \$89.54.

Having been satisfied that the tenant paid a security deposit I dismiss the tenant's request for its return with leave to reapply in the event the landlord does not administer it in accordance with the Act. **I further ORDER the landlord to administer the \$750.00 security deposit, and interest of \$89.54, in accordance with section 38 of the Act.**

The landlord is considered to be in receipt of the tenant's forwarding address in writing as of the date this decision is received by the landlord. The forwarding address is that which appears on the tenant's Application for Dispute Resolution. In order to comply with section 38(1) of the Act, the landlord must either return the full amount of the security deposit and interest to the tenant or make an Application for Dispute Resolution to make a claim against it within 15 days of receiving this decision.

The landlord is reminded that the landlord has lost the right to make a claim for damage against the security deposit; however, the landlord retains the right to make an Application for Dispute Resolution seeking a Monetary Order for any damages or loss related to this tenancy, including damage. Further information concerning security deposits may be found in Residential Tenancy Policy Guideline 17: *Security Deposits and Set-Off* found on the Residential Tenancy Branch website.

Conclusion

The tenant's application was pre-mature and dismissed with leave.

I have found that the tenant did pay a \$750.00 security deposit in August 1998 and the landlord is holding a security deposit and interest, totalling \$839.54, as of today's date.

The landlord has been ordered to dispose of the security deposit and interest in a manner that complies with section 38 of the Act.

On the day the landlord receives this decision the landlord is considered to be in receipt of the tenant's forwarding address in writing. The tenant's forwarding address is that which is provided on the tenant's Application for Dispute Resolution that is the subject of this proceeding.

Should the landlord fail to comply with section 38(1) of the Act, the tenant may make another Application for Dispute Resolution seeking return of double the security deposit, plus interest.

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 22, 2017

Residential Tenancy Branch