Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

On December 7, 2016 a hearing was conducted via the conference call between these two parties. The tenant served the landlord by registered mail and by email with the notice of hearing package seeking a monetary order for return of double the security deposit and recovery of the filing fee. The tenant's application was dismissed without leave to reapply. The tenant applied for a review of this decision. The arbitrator ordered the decision and accompanying order suspended pending a review hearing for the tenant's application.

This is a review hearing granted for the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for the return of double the security deposit pursuant to section 38 and 67 of the Act;
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. The tenant stated that the landlords were served with the notice of hearing package and the submitted documentary evidence to the landlord via Canada Post Xpress Post with a signature requirement on January 18, 2017. The tenant stated that an online search showed that the package was received by the landlords on January 20, 2017. The landlords confirmed receipt of the hearing package and the submitted documentary evidence, but argued that the package was not sent to their primary residence in Vancouver, but instead went to their place of business and their postal box. The landlord seeks an adjournment to allow them to submit documentary evidence in response to the tenant's claim and to argue that the Residential Tenancy Branch does not have jurisdiction in this matter. The landlords stated that they would be relying on a copy of the tenant's documentary evidence as well as 2 affidavits in response. Both parties agreed that the landlords relied upon the affidavits that they could read them

verbally for the record to respond to the tenant's claims. Both parties agreed that an adjournment was no longer required and the hearing proceeded. As both parties have attended and have confirmed receipt of the notice of hearing package and the submitted documentary evidence, I am satisfied that both parties have been sufficiently served as per sections 88 and 89 of the Act.

During the hearing the landlords provided a preferred mailing address for all future correspondence with the Residential Tenancy Branch. As such, the respondents' mailing address shall be updated.

The hearing commenced as scheduled but was unable to be completed on this date as extensive discussions were made by both parties. An adjournment is required for more time to complete the hearing. The continuation date of this hearing will be mailed along with this Interim Decision.

The hearing is adjourned. Both parties were cautioned that no further evidence would be accepted and that neither party may submit any further evidence.

On March 21, 2017 the hearing was reconvened with both parties who provided testimony and made submissions.

Issue(s) to be Decided

Does the Residential Tenancy Branch have jurisdiction?
Is the tenant entitled to a monetary order for return of double the security deposit and recovery of the filing fee?

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 / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

Both parties confirmed that the tenant resided at the rental unit from November 1, 2015 to April 30, 2016 inclusively and had paid $1,200.00 for each month. A $600.00 security deposit was paid.

The landlords argue that the Residential Tenancy Act does not apply as the rental property is shared with the owner/landlords.

The landlords provided affirmed testimony that this was their “vacation home” in which their family used whenever visiting the Whistler area. The property was insured as a “rooming house” and had 2 suites. One suite was rented out by the room and the other suite was for the exclusive use of the landlords. The landlords stated that they had access to the kitchen and bathroom when living next door. The landlords provided testimony that this property was used at least 2 days a month every year and that their primary residence was in Vancouver and that they received mail at their business office in Vancouver. The landlords stated that they shared the property with the tenant.

The tenant argued that the landlords did not share the kitchen or bathrooms, but that they were shared amongst the tenants. The tenant argued that the landlords had a separate living unit and that the kitchen and bathrooms were not shared with the owner/landlord when they were present. The tenant stated that the owner/landlords did not reside at the property and were seldom seen.

The tenant seeks a monetary claim of $1,300.00 for return of double the $600.00 security deposit and return of the $100.00 filing fee.

The tenant stated that her tenancy began on November 1, 2015 and continued inclusively until April 30, 2016. The landlord disputed this claim stating that the agreement was for only November 1-30 2015 and again April 1-30 2016. In response to this the tenant has provided copies of 4 etransfer payments of $1,200.00 for December 2015, January 2016, February 2016 and March 3016. The landlord clarified that after the tenant had begun the tenancy he would invite the tenant to continue residing at the rental property each month for the same agreed monthly amount. Both parties confirmed that the tenant paid a $600.00 damage deposit to the landlords.

The tenant provided a copy of the signed agreement which states in part,

> *Received from S.K….The sum of Twenty Five Hundred Dollars. The balance being $500 Five Hundred Dollars. This sum consists of $1200 for one room rental Nov 1-Nov 30th 2015 and one months rental April 1-April 30 2016. Also includes $600 Six Hundred Dollars Damage Deposit.*

Both parties agreed that this tenancy agreement ended on April 30, 2016 in which the tenant had vacated the property.

Both parties agreed that their primary form of communication was via text and email and that the tenant had provided her forwarding address for return of the $600.00 security deposit on May 13, 2016.

Analysis

Subsection 4 (c) of the Act states in part that this Act does not apply to living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation.

The landlords have submitted that the Act does not apply as the landlords have access and use the bathroom and kitchen in the suite. The tenant has argued that the landlords do not share the bathroom and kitchen and are seldom seen on the property. I accept the evidence of both parties and find that in this case that the Act does apply. The landlords have stated that they live in a separate suite on the property and have access to the shared bathroom and kitchen. The landlords provided undisputed affirmed testimony that they occupy the additional suite 2 days a month as their "vacation home" and that their primary residence is in Vancouver. The landlords also provided undisputed affirmed testimony that their mail is received at a business office in Vancouver. On this basis, I prefer the evidence of the tenant over that of the landlords that although the landlords have access to the suite it is not shared living space with the owner. The landlords have failed to provide sufficient evidence that the Residential Tenancy Branch does not have jurisdiction in this matter.

Section 5 of the Act states in part that landlords and tenants may not avoid or contract out of this Act or the regulations. I note this as the landlords have repeatedly stated during the hearing that he purposely structured his written agreement of tenancy to avoid the Act.

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to subsection 38(6) of the Act equivalent to the value of the security deposit.

In this case, the tenancy ended on April 30, 2016 and the landlord confirmed receipt of the tenant's forwarding address in writing on May 13, 2016. The landlords have acknowledged that they received a $600.00 security deposit and that the landlord still holds it without the permission of the tenant. As such, I find that the tenant has established a claim for return of the original $600.00 security deposit. The landlords retain the deposit without permission of the tenant nor has the landlords applied for dispute to retain it, I find that the landlords have failed to comply with section 38 (1) of

the Act. Section 38 (6) states that the landlords are required to pay a monetary award equal to the $600.00 security deposit for failing to comply with the Act.

The tenant having been successful is entitled to recovery of the $100.00 filing fee.

Conclusion

The tenant is granted a monetary order for $1,300.00.

This order must be served upon the landlords. Should the landlords fail to comply with the order, the 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: March 21, 2017

Residential Tenancy Branch