



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for authorization to obtain a return of all or a portion of the security deposit pursuant to section 38.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The tenant TR, (the "tenant") confirmed she was authorized to represent both co-tenants.

As both parties were in attendance I confirmed that there were no issues with service of the tenant's application for dispute resolution or the respective evidentiary materials. The landlord confirmed receipt of the tenants' application and evidence package. The tenant confirmed receipt of the landlord's evidence. In accordance with sections 88 and 89 of the *Act*, I find that the landlord was duly served with the tenant's application and evidence and the tenants were served with the landlord's evidentiary materials.

Issue(s) to be Decided

Are the tenants entitled to a monetary award equivalent to double the value of their security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*?

Background and Evidence

The parties agreed on the following facts. The parties entered into an agreement in October, 2016 for this fixed term tenancy to begin on November 1, 2016. The tenants paid a deposit of \$2,000.00 on October 11, 2016. The tenants subsequently advised the landlord they wished to cancel the tenancy agreement on October 27, 2016 and never took possession of the rental unit. The landlord confirmed the tenancy agreement

was cancelled by an email dated October 28, 2016. The landlord advised the tenants that he intended to retain the \$2,000.00 deposit as it was non-refundable. The tenants provided the landlord a forwarding address on November 9, 2016 requesting the return of the \$2,000.00 deposit.

The tenant testified that they believed that the \$2,000.00 deposit was a security deposit for the tenancy. The tenant said that while they discussed with the landlord the possibility of the landlord retaining the deposit if the landlord suffered rental losses from the cancellation of the tenancy agreement, they never gave written authorization that the landlord may retain the deposit.

The landlord testified that the \$2,000.00 deposit is a non-refundable deposit to secure the tenancy. The landlord said that the deposit would have become the rent for the month of November had the tenancy started. The landlord submitted into written evidence an email he sent the tenants on October 15, 2016 where he said, "Payment received of \$2000 for first months rent. Last month rent of \$2000 and damage deposit of \$1000 payable by Nov 1st, 2016 or when you move in whichever comes first." The landlord said that he is not required to return the \$2,000.00 deposit as it is not a security deposit but a non-refundable deposit to secure the tenancy. The landlord also testified that he was unable to find a suitable occupant for the rental unit for November, 2016 after the tenancy agreement was cancelled.

Analysis

Residential Tenancy Policy Guideline 29 provides that irrespective of any agreement between the parties, payments such as the one made on October 11, 2016 to secure the tenancy would be considered to form part of the security deposit. Consequently, I find that the \$2,000.00 payment made by the tenant on October 11, 2016 is considered a security deposit for this tenancy, pursuant to the *Act*.

Section 19 of the *Act*, requires that a security deposit must not exceed one-half of one month's rent. In the case at hand, the \$2,000.00 payment exceeds the one-half limit. Section 19(2) of the *Act* allows the tenant to deduct the overpayment from rent or otherwise recover the overpayment. Therefore, I find that the \$2,000.00 payment was comprised of a \$1,000.00 security deposit and \$1,000.00 towards the rent for November, 2016.

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in

writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the security deposit as per section 38(4)(a).

I accept the evidence of the parties that the tenant provided written notice of the forwarding address on November 9, 2016. Based on the undisputed evidence before me, I find that the landlord has not filed an application to retain the security deposit within the 15 day time limit and has failed to return the tenants' security deposit in full within the 15 days of November 9, 2016 afforded under the *Act*. I accept the tenants' evidence that they have not waived their right to obtain a payment pursuant to section 38 of the *Act* as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenants are entitled to a \$2,000.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

I find that an oral tenancy agreement was created by the parties on October 11, 2016. Under this tenancy agreement the tenants were obligated to pay \$2,000.00 rent by November 1, 2016. I find that the tenants gave notice to the landlord of their intention to end the tenancy by their email of October 27, 2016. Pursuant to the tenancy agreement the tenant was still obligated to pay the full November rent of \$2,000.00 by November 1, 2016. As detailed above, I find that \$1,000.00 of the \$2,000.00 paid by the tenants on October 11, 2016 was for the November rent. Therefore, the tenants owe an outstanding amount of \$1,000.00 for the remainder of the November rent. Consequently, in accordance with the offsetting provisions of section 72 of the *Act*, I find that the landlord is entitled to retain \$1,000.00 of the tenants' award for double the security deposit for the outstanding amount of November, rent.

I issue a monetary award in the tenants' favour in the amount of \$1,000.00 which is double the amount of the security deposit less the outstanding amount owed for the November rent.

I note that the landlord made demand for the last month's rent in addition to a security deposit in his email of October 15, 2017, a fee that is not permitted under the *Act*. A landlord is in the business of renting out premises and should be aware of what fees are permitted under the *Act*. The landlord's attempt to collect the last month's rent as well as characterizing a security deposit as non-refundable to the tenants is a violation of the *Act*.

Conclusion

I issue a Monetary Order in the tenants' favour in the amount of \$1,000.00 against the landlord. The tenants are provided with a Monetary Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this 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: June 9, 2017

Residential Tenancy Branch