Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes NNSD, FFT

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; and
- authorization to recover his filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlords confirmed that they received the tenants' notice of dispute resolution package. I find that the tenants served the landlords with the notice of dispute resolution package in accordance with section 89 of the Act**.**

Preliminary issue – Landlord's evidence package

At the outset of the hearing, the tenants testified that they did not receive the landlords' evidence package until the evening of December 9, 2018 (via hand delivery). They believe that this is constituted late service. Residential Tenancy Branch Rule 3.15 reads:

> The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

The landlords served their evidence more than seven days before the hearing. I find that the landlords' evidence was served in accordance with the Act. I therefore admit the landlord's evidence package into evidence.

Issues to be Decided

1) Are the tenants entitled to a return of all or a portion of their security deposit?
2) Are the tenants entitled to recover their filing fee from the landlord?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the tenants' claim and my findings are set out below.

The parties entered into a fixed-term tenancy agreement with a start date of July 15, 2015 and an end date of July 15, 2018. The monthly rent was $4,200, (increased to $4,320 in July 2016). The landlords collected a security deposit in the amount of $2,100. The tenancy agreement ended on July 15, 2018. The tenants ceased residing at the rental property (the "**Property**") on that date.

The tenants testified that they participated in a move out inspection on July 15, 2018. On that same date they provided their forwarding address to the landlords via a letter. The landlords did not dispute this.

The landlords testified that, in the days following the end of the tenancy, they sent multiple emails to the tenants, indicating that the tenants had damaged the Property, and they the tenants were liable for the cost of repairs. In correspondence dated July 30, 2018, the landlords included a quote for repair to certain damage the landlords alleged were caused by the tenants. The tenants did not respond.

The tenants testified that they have not received any portion of the security deposit from the landlords, although the landlords did send them an e-transfer for the difference in amount between the quote to repair the alleged damage and the tenants' security deposit. The tenants testified they did not accept this e-transfer. The landlords gave no evidence to the contrary.

The landlords testified that they attempted in good faith to resolve the matter of the outstanding damages privately, between themselves and the tenants. They stated "we

thought part of the tenancy was to sort this dispute [the damage allegedly caused by the tenants] ourselves". The landlords testified that they did not make an application to the Residential Tenancy Branch to retain the tenants' security deposit.

The tenants testified that they wanted to avoid conflict with the landlords, and wanted to let the Residential Tenancy Branch resolve the matter of the damages.

Analysis

The application before me is for the recovery of the security deposit and filing fees only. I decline to hear the landlord's claim for damages as they have not made an application to recover them. This was explained to the parties at the outset of the hearing, and the parties indicated that they understood.

With regards to the issue of the return of the security deposit, section 38 of the Act, in part, reads:

> **Return of security deposit and pet damage deposit**
> 38(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a) the date the tenancy ends, and
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> (b) the date the landlord receives the tenant's forwarding address in writing,
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> the landlord must do one of the following:
>
> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.
>
> […]
>
> (3) A landlord may retain from a security deposit or a pet damage deposit an amount that
>
> (a) the director has previously ordered the tenant to pay to the landlord, and
>
> (b) at the end of the tenancy remains unpaid.
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> (4) A landlord may retain an amount from a security deposit or a pet damage deposit if,
>
> (a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or
>
> (b) after the end of the tenancy, the director orders that the landlord may retain the amount.

[…]

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I note that section 4 of the parties' tenancy agreement includes language substantially the same as that of section 38 of the Act.

In this case, the tenants both moved out and provided a copy of their forwarding address on July 15, 2018. Therefore, the landlords had 15 days from this date (i.e. July 30, 2018) within which to take the steps as set out in 38(1)(c) or (d). The landlords did neither.

There was no evidence to show that the tenants had agreed, in writing, to allow the landlords to retain any portion of the security deposit.

There was also no evidence to show that the landlords had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenants, as required under section 38 of the Act.

The landlords' testified of their intentions to attempt to resolve the matter of the alleged damage caused by the tenants privately, without resorting to the Residential Tenancy Branch. However, such intentions do not bind the tenants. The tenants are entitled to rely on the provisions of the Residential Tenancy Act and the terms of the tenancy agreement. The landlords are obligated to abide by these provisions and terms as well.

Therefore, I find the landlords have breached section 38 of the Act.

At no time is a landlord permitted to retain a security deposit because they feel they are entitled to it or are justified to keep it. If a landlord and a tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, a landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later, if they want to claim against the security deposit.

A landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from an Arbitrator, or with the written agreement of the tenant. Here, the landlords did not have any authority under the Act to keep any portion of the

security deposit. Therefore, I find that the landlords are not entitled to retain any portion of the security deposit.

I note that the landlords submitted evidence about the condition of the Property after the tenants left. No application to claim for these damages was before me; the landlords are not permitted to make a monetary claim through the tenants' application. The landlords ought to have filed their own application to keep the deposit with the 15 days of receiving the tenants forwarding address, as explained above.

The landlords may still file an application for alleged rent and alleged damages; however, the issue of the security deposit has now been conclusively dealt with in this hearing.

Having made the above findings, I order, pursuant to sections 38, 67, and 72 of the Act, that the landlords pay the tenants the sum of $4,300, comprised of double the security deposit (2 x $2,100) and the $100 fee for filing this application.

Conclusion

Pursuant to sections 38, 67, and 72 of the Act, I find that that the tenants are entitled to a monetary order in the amount of $4,300, comprised of double the security deposit (2 x $2,100) and the $100 fee for filing this application.

Should the landlords fail to comply with this order, this order may be filed in, and enforced as an order of, the Small Claims Division of the Provincial 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: December 19, 2018

Residential Tenancy Branch