Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFT 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 his/her/their security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord did not attend this hearing, although I left the teleconference hearing connection open for the duration of the hearing in order to enable the landlord to call into this teleconference hearing. The tenants attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing.

The tenants testified that the landlord's agent JM ("**JM**") was personally served the notice of dispute resolution package on May 30, 2019. I find that the landlord was deemed served with this package on May 30, 2019, in accordance with section 88 and 89 of the Act.

Preliminary Issue – Jurisdiction

The tenants uploaded the first page of their tenancy agreement, which is titled "License to Occupy Contract/Agreement". On this page, there appears the following hand-written term:

> As per section 4 of the RTA occupants expressly understand/accept that the space is shared with the landlord.

I understand this clause to be referring to the section of the Act titled “What this Act does not apply to”. The hand-written clause appears to characterize the rental arrangement such that it would fit into the scenario set out at section 4(c) of the Act, which reads:

> **4** This Act does not apply to
> […]
> (c)living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,

The tenants testified that at the start of the tenancy, JM told the tenants that one bedroom in the rental unit would remain vacant for the use of the landlord or his family. The tenants testified that during the tenancy, neither the landlord nor any family member used or resided in this room. They further testified that one month into the tenancy this bedroom was rented out to two other individuals unknown to the tenants (without notice to the tenants).

Based on the uncontroverted evidence of the tenants, whom I find to be credible, I find that the landlord did not occupy any part of the rental unit, and that, notwithstanding the hand-written term above, the tenants did not share the rental unit with the landlord.

I find that the hand-written term is an attempt of the landlord to circumvent the application of the Act (which, I note, is curious given the tenancy agreement refers to and relies to section 9(3) of the Act later in the tenancy agreement).

Section 5 of the Act is designed to prevent this. It reads:

> **This Act cannot be avoided**
> **5** (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
> (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

I must also note that, despite the contract whereby the tenants rented the rental unit being called a “license to occupy”, I find that it is, in fact, a tenancy agreement. Section 1 of the Act defines “tenancy agreement”:

> **"tenancy agreement"** means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;
>
> [emphasis added]

Accordingly, I find that I have jurisdiction to hear the tenants' application.

Issue(s) to be Decided

Are the tenants entitled to the return of the security deposit?
Are the tenants entitled to the reimbursement of the filing fee?

Background and Evidence

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

The parties entered into a written fixed term tenancy agreement starting January 15, 2019 and ending March 15, 2019. Monthly rent is $1,000.00. The tenants paid the landlord a security deposit of $500.00. The landlord still retains this deposit.

The parties are not named on the front page (the only one submitted into evidence) of the tenancy agreement. However, the tenants both testified that the landlord named on this application was their landlord during the tenancy (and the owner of the rental unit).

The tenants testified that no move-in or move-out inspection report was provided to them by the landlord.

The tenants vacated the rental unit on March 15, 2019.

The tenants submitted screenshots of a text message conversation with JM from March 28, wherein they try to arrange for a move-out inspection, and JM alleges that the tenants caused two thousand dollars in damage to the rental unit.

On April 15, 2019, tenant DV hand-delivered a letter containing the tenants' forwarding address to the landlord's agent JM. A photograph of this letter was entered into evidence.

The tenants testified that they did not have the landlord's contact information, and that all communication they had with the landlord was through JM. They testified that JM accepted their monthly rent payments.

The tenants testified that they have yet to receive their security deposit back from the landlord, and that the landlord has not made an application for dispute resolution claiming against the security deposit for the alleged damage to the rental unit.

Analysis

As discussed above, I accept the tenants' uncontroverted evidence as credible. They were forthright in their testimony, and their testimony was internally consistent. As such, I find that the named landlord is properly a party to this application, and that JM is his agent.

Section 38(1) of the Act states:

> **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
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
>
> 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.

Based on the testimony of the tenants, I find that the tenancy ended on March 15, 2019, and that the tenants provided their forwarding address in writing to the landlord on April 15, 2019.

I find that the landlord has not returned the security deposit to the tenants within 15 days of receiving their forwarding address, or at all.

I find that the landlord has not made an application for dispute resolution claiming against the security deposit within 15 days of receiving the forwarding address from the tenants.

It is not enough for the landlord (or his agent) to allege the tenants caused damage to the rental unit. He must actually apply for dispute resolution, claiming against the security deposit, within 15 days from receiving the tenants' forwarding address.

The landlord did not do this. Accordingly, I find that he has failed to comply with their obligations under section 38(1) of the Act.

Section 38(6) of the Act sets out what is to occur in the event that a landlord fails to return or claim the security deposit within the specified timeframe:

> (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.

The language of section 38(6)(b) is mandatory. As the landlord has failed to comply with section 38(1), I must order that they pay the tenants double the amount of the security deposit ($1,000.00).

As the tenants have been successful in their application, they are entitled to have their filing fee of $100.00 repaid by the landlord.

Conclusion

Pursuant to sections 38, 67, and 72 of the Act, I find that the tenants are entitled to a monetary order in the amount of $1,100.00, comprised of an amount equal to double the security deposit, and the filing fee.

Should the landlord 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: September 05, 2019

Residential Tenancy Branch