



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 tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for the return of the security deposit, pursuant to sections 38 and 67 of the *Act*.

The landlord, his witness, the tenant 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 witness (JK) on behalf of the landlord was requested to call in after the landlord and tenant (CRB) had presented their evidence and testimonies.

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

Issues to be Decided

1. Is the tenant entitled to a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67 of the *Act*?

Background and Evidence

The landlord and tenant CRB testified that the tenancy began in June 2012. Rent in the amount of \$1160.00 per month was payable on the 1st day of each month. At the outset of the tenancy, the landlord testified that he collected a security deposit and pet damage deposit of \$580.00 each from the tenant CRB. A written tenancy agreement was signed by the landlord and CRB. In 2015, the partner of CRB moved into the rental unit JK.

On April 6, 2019, tenant CRB moved out of the rental unit due to a domestic incident. Police were called and CRB was removed from the rental unit. Concerns were raised by Family Services with regards to CRB use of "illicit substances" and the fact that the children of the relationship were being exposed to conflict between the parents (exhibit B). A no contact order from the Family Court came into effect the last week of May 2019.

Tenant CRB filed in evidence a letter dated April 18, 2019 (exhibit A). This letter was prepared but not signed but indicates that the intention of all the parties was to transfer the security deposit in Trust to the co-tenant JK.

The tenant CRB testified that he sent the landlord his forwarding address via letter and email, and this was entered into evidence. The landlord testified that he received the tenant's forwarding address in writing. Both parties agree that the landlord did not return any of the tenant's security deposit.

The landlord testified that he did not file an application with the Residential Tenancy Branch to retain any portion of the tenant's security deposit, as discussions took place between the parties CRB and JK to transfer the security deposit in "Trust" to the partner JK.

The landlord further testified that he did not return the tenant CRB security deposit because the tenant had transferred his interest in the security deposit over to his partner JK and her two dependent children.

The witness JK also testified that discussions took place between her partner CRB that the security and damage deposit was to be transferred over to the her and the two dependents in order that they could continue living at the property.

The tenant CRB testified that he did not provide the landlord with written authorization to retain any portion of his security deposit. He testified that discussions did take place with the landlord and then the landlord prepared the letter.

The landlord testified tenant CRB was given several opportunities by email and text to attend the move-out inspection but declined to do so between the period of April 2019 to last week of May 2019 and arrived at the property on September 4, 2019 to pick up his belongings.

The landlord testified that the tenant had also left the rental unit with damages. The landlord was informed to submit a separate application to the Residential Tenancy Board for any damages incurred and the fact that they could not be dealt with at this hearing.

Analysis

The parties attempted to provide testimonies in relation to matters involving the Family Law Act. I informed the parties that I had jurisdiction to deal with the security and pet damage deposit in relation to the Residential Tenancy Act, policy guidelines and Regulations.

Tenant JK moved into the rental unit in 2015 and the landlord acknowledged her as a resident. The landlord was aware that JK was living in the property. Therefore, when CRB left the tenancy, JK took on the liability for the rent and complied with the terms of the rental agreement, despite the fact that JK had not signed a formal rent agreement.

Section 38 of the Act requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing.

I have had the opportunity to view the letter dated April 18, 2019 (exhibit A) filed as evidence by the tenant CRB. This letter was prepared but not signed but indicates that the intention of all the parties was to transfer the security deposit in Trust to the co-tenant JK.

Testimonies from the landlord and JK indicate that the intention of all parties was to transfer the security and damage deposit to the tenant JK on April 18, 2019, when the April 18, 2019 letter was drafted.

Furthermore, the landlord provided testimony that he requested the tenant CRB on several occasions by email and text to attend the move-out inspections on the rental unit.

The landlord provided testimony that he waited until May 28, 2019 and a final text (exhibit C) was sent on May 30, 2019 to the tenant CRB, advising "you are allowed to have anyone represent you tomorrow for the walk through. Let me know tonight with representatives phone number so I can call and set a time with him/her"

Tenant CRB testified that he was unable to attend, as he required a "peace officer" to attend with him. The tenant CRB eventually went to the property on September 4, 2019 to pick up his remaining belongings.

Two opportunities for inspection

- 17** (1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.
- (2) If the tenant is not available at a time offered under subsection (1),
- (a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and
 - (b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.
- (3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

At the End of a Tenancy

Condition inspection: end of tenancy

- 35** (1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit
- (a) on or after the day the tenant ceases to occupy the rental unit, or
 - (b) on another mutually agreed day.
- (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
- (3) The landlord must complete a condition inspection report in accordance with the regulations.
- (4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.
- (5) The landlord may make the inspection and complete and sign the report without the tenant if
- (a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or

(b)the tenant has abandoned the rental unit.

Consequences for tenant and landlord if report requirements not met

36 1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if

(a)the landlord complied with section 35 (2) [*2 opportunities for inspection*], and

(b)the tenant has not participated on either occasion.

(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished.

I find tenant CRB had several opportunities to attend the move-out inspection between the period of leaving on April 6, 2019 and the effect of the restraining order by the Family Court in the final week of May 2019.

I find that the tenant has extinguished his right to recover the security deposit under section 36(1) of the Residential Tenancy Act.

Credibility:

Given the conflicting testimony between the landlord BP and the tenant CRB, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v Chorny* (1952), 2 DLR 354 (BCCA), which states at pages 357-358:

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances”

The tenant CRB provided testimony that he was unable to attend the condition inspection due to the restraining order from the police between the last week of May 2019.

I find that the tenant was given several opportunities to move his possessions, the landlord made several attempts by phone, text and emails to contact the tenant CRB, requesting him to attend the move out inspections.

Where the testimony of the landlord and the tenant differ, I accept the testimonies of the landlord and the co-tenant JK over that of the tenant.

Parties disagree

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. Has the tenant CRB provided any evidence beyond his testimony?

Whereas the landlord and co-tenant JK submits the tenant agreed to transfer the pet damage and security deposit, they acknowledge they did not get the final agreement in writing. In the absence of any written document to the contrary, I turn to the principle of estoppel and the testimony of the parties.

The landlord and co-tenant JK provided testimonies that there was a clear intention between all the parties that the damage and security deposit was to be transferred to the landlord to be held in trust, as a security deposit, for the co-tenant JK. Furthermore, several opportunities were given to tenant CRB to attend the property during the move-out inspection, which he failed to do so between the period of April 8, 2019 and May 28, 2019.

The landlord and co-tenant JK have provided equally plausible evidence that they were in negotiations with tenant, CRB as there are equally plausible versions of when the letter was requested. I find the tenant has not met the burden of proof to show his version is the one to be believed.

I find that the tenant CRB, did make an assurance to the landlord and his partner and co-tenant JK that were intended to effect the legal relations between the parties and be acted on accordingly, the tenant CRB, cannot afterwards be allowed to revert to previous legal relations, as if no such promises or assurances had been made, therefore I find the damage and security deposit of \$1160.00 to be held in Trust by the landlord for the tenant JK.

Conclusion

I dismiss the tenant's application for the return of pet damage and security deposit.
I order that the pet damage deposit and security deposit of \$1160.00 be held in Trust, a
by the landlord for the tenant JK.

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 20, 2019

Residential Tenancy Branch