



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

FFT MNSD

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- A return of the deposit for this tenancy pursuant to section 38; and
- Authorization to recover the filing fee from the landlord pursuant to section 72.

Both parties were represented at the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord was represented by their agent (the "landlord").

The tenant testified that they had served the landlord with their application for dispute resolution dated September 17, 2019 and evidence by registered mail sent on September 20, 2019. The tenant provided a valid Canada Post tracking number as evidence of service. The landlord disputed that they had been served with the tenant's materials. Despite the landlord's testimony disputing service, I find that the tenant has provided evidence by way of a tracking number and find that the landlord is deemed to have been served with the tenant's materials on September 25, 2019 in accordance with sections 88, 89 and 90 of the *Act* and in any event has been sufficiently served in accordance with section 71.

Issue(s) to be Decided

Does this matter fall within the jurisdiction of the Residential Tenancy Branch?

Is the tenant entitled to a return of the deposit paid for this tenancy?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

The parties agreed on the following facts. This tenancy began in August 2018 and ended in 2019. The monthly rent was \$550.00. A security deposit of \$550.00 was collected at the start of the tenancy and is still held by the landlord. The rental unit is a room in a basement suite of a detached building. The landlord occupied the main floor of the building.

The landlord testified that they are not the owners of the property nor were they acting as an agent on behalf of the owners. The landlord further testified that while the landlord occupied the main floor of the rental property they freely entered the basement area and shared the kitchen and bathroom amenities located throughout the building.

The tenant disputes that the facilities for the rental unit were shared with the landlord. The tenant submits that they, and other occupants had exclusive use of the basement and the facilities therein. The tenant submitted into documentary evidence a copy of a tenancy agreement with the landlord titled "Lodging Agreement".

The landlord submits that the living arrangement does not fall within the jurisdiction of the Act. The landlord further submits that the tenant abandoned the rental unit without sufficient notice, caused losses to the landlord who needed to change the locks to the rental unit and damage to some of the items left in the rental unit.

The tenant testified that they served the landlord with their forwarding address in writing on September 1, 2019 by text message and subsequently by mail. The tenant provided copies of the correspondence as evidence of service. The landlord disputes that they ever received the tenant's forwarding address.

The tenant gave evidence that they have not given authorization that the landlord may retain any portion of the deposit for this tenancy.

Preliminary Analysis - Jurisdiction

Landlord is defined in section 1 of the *Act* as:

- (a) The owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
 - (i) permits occupation of the rental unit under a tenancy agreement, or

(ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement...

(c) a person, other than a tenant occupying the rental unit...

Residential Tenancy Policy Guideline 19 provides that a sublet is where the original tenancy agreement remains in place and the tenant and the sub-tenant enter into a new sub-lease agreement. The tenant effectively becomes the “landlord” of a new sub-lease tenancy agreement.

Guideline 19 provides that, “unless the tenant is acting as an agent on behalf of the landlord if the tenant remains in the rental unit, the definition of landlord in the *Act* does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate, with no rights or responsibilities under the *Residential Tenancy Act*.”

In the present circumstance the landlord submits that they are neither the owner of the property nor were they acting on behalf of the landlord when they allowed the tenant to occupy the rental suite. The landlord testified that they were themselves tenants of the rental property under a separate tenancy agreement and allowed the tenant to occupy the premises while continuing to reside in the property.

The landlord submitted no documentary evidence in support of their submissions nor did they provide details about the supposed original tenancy agreement between the landlord and the owner of the property.

The tenant submitted a written agreement signed by the parties which clearly establishes the tenant’s right to occupy the property in exchange for monthly rent in the amount of \$550.00. The tenant testified that the landlord occupied the main floor of the building and they had exclusive use of the basement suite with other occupants.

Based on the paucity of evidence I am unable to find that the arrangement between the parties does not fall under the jurisdiction of the Residential Tenancy Act. The parties conducted themselves as landlord and tenant throughout the duration of the agreement. The parties provided little evidence as to who is the registered owner of the property and whether the landlord was acting on behalf of a third-party landlord. I am not satisfied by the explanation of the landlord that the relationship between the parties is not one of landlord/tenant. I find, based on the evidence of the parties, that this is a tenancy that falls within the jurisdiction of the *Act* and the Branch.

Analysis

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 \$550.00 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 \$550.00 payment was comprised of a \$275.00 security deposit and \$275.00 towards the monthly rent for this tenancy.

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.

Furthermore, section 24 of the *Act* sets out that if the landlord does not prepare a condition inspection report at the start of the tenancy or fails to provide the tenant with 2 opportunities to participate in an inspection, their right to claim against the security deposit is extinguished.

I accept the evidence of the parties that no condition inspection report was prepared at anytime for this tenancy. Consequently, pursuant to section 36(2) of the *Act* I find that the landlord has extinguished their right to claim against the security deposit.

I accept the evidence of the tenant that they have provided their forwarding address to the landlord in writing, first by text message sent on September 1, 2019 and subsequently by letter sent on that date. While the landlord disputes that they received the tenant's forwarding address they provided no cogent reason why they did not receive the information either by text sent to a phone number with which the landlord was conducting communication with the tenant or at their address of service by letter. I am satisfied with the tenant's evidence and testimony that the landlord was served with their forwarding address in writing. I find that the landlord is deemed served with the forwarding address on September 6, 2019, five days after mailing, in accordance with sections 88 and 90 of the *Act*.

I find that the landlord has failed to return the tenant's security deposit in full nor have they filed an application for authorization to retain the deposit. The landlord gave some testimony about the condition of the suite and rental arrears but I find this to be

irrelevant to the matter at hand. If the landlord had concerns regarding their own losses they ought to have filed an application for authorization to retain the deposit.

I accept the tenant's 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 tenant is entitled to a \$550.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

As the tenant was successful in their application they are also entitled to recover the filing fee for this application from the landlord.

Conclusion

I issue a Monetary Order in the tenant's favour in the amount of \$925.00 against the landlord in the following terms:

Item	Amount
Double Security Deposit (2 x \$275.00)	\$550.00
Rent Overpayment (\$275.00)	\$275.00
Filing Fee	\$100.00
TOTAL	\$925.00

The tenant is 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: January 17, 2020

Residential Tenancy Branch