



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

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 their security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application pursuant to section 72.

The landlord's agent (the landlord) and Tenant D.S. (the tenant) attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant had an advocate attend the hearing to assist with submissions and to be the primary speaker for the tenants during the hearing.

While I have turned my mind to all the documentary evidence, including the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

The landlord acknowledged receipt of the Application for Dispute Resolution (the Application) and evidentiary package which were sent by way of Canada Post Registered mail on October 25, 2019. In accordance with sections 88 and 89 of the *Act*, I find the landlord has been duly served with the Application and evidentiary package.

The tenant confirmed receipt of the landlord's evidence package which was sent to them by way of registered mail on or about February 28, 2020. In accordance with section 88 of the *Act*, I find the tenants were duly served with the landlord's evidence.

Issue(s) to be Decided

Are the tenants entitled to a monetary award for the return of all or a portion of their security deposit?

Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

The tenant provided written evidence that this tenancy was scheduled to commence on October 01, 2019, with a monthly rent of \$2,050.00 due on the first day of each month.

The advocate submitted that the security deposit was paid to the landlord on August 06, 2019, but that the tenant did not actually move into the rental unit due to a change in the occupancy date instigated by the landlord to November 01, 2019.

The landlord confirmed that they are currently retaining the security deposit. The landlord did not dispute the date the security deposit was sent by the tenant but submitted that the landlord had not formally accepted the electronic transfer of the deposit until August 14, 2019, after the application for tenancy was approved.

The tenant also provided in evidence:

- A copy of a letter dated September 12, 2019, from the tenant to the landlord, with the tenant's forwarding address which the tenant requests the landlord send the deposit to as soon as possible;
- A copy of an e-mail dated September 20, 2019, from the landlord to the tenant, in which the landlord acknowledges receipt of the registered mail from the tenant requesting the tenant's deposit back. The landlord indicates that they have no intention of returning the deposit to the tenant;

The landlord provided in evidence:

- A copy of an agreement, signed by the tenants on August 07, 2019, regarding the deposit and possession date of the rental unit in which the tenants acknowledge that if the tenants cancel the tenancy agreement after it has been approved, and prior to the possession of the rental unit, they will forfeit their security deposit in its entirety. The agreement goes on to further state that the building is currently under construction and that the occupancy date of October 01, 2019 may change due to construction delays. The agreement indicates that the landlord will advise of any changes in the date of occupancy no later than August 24, 2019;
- A copy of an e-mail from the landlord to the tenant, dated August 20, 2019, in which the landlord informs the tenant that the rental unit will not be available on the commencement date noted on the tenancy agreement, October 01, 2019, due to unforeseen delays in the construction. The landlord states in the e-mail that they have adjusted the start date of the tenancy to November 01, 2019.
- A copy of an e-mail from the tenant to the landlord dated September 09, 2019, in which the tenant states that, when they sent their security deposit to the landlord, they were assured that an apartment would be available on October 01, 2019; and

- A copy of an e-mail from the landlord to the tenant dated September 10, 2019, in which the landlord refers to the waiver agreement signed regarding the security deposit and possession date. The landlord states in the letter that they will not return the tenants' security deposit as per the signed agreement.

The tenant submitted that they had sent the security deposit to the landlord via an electronic transfer of funds in the amount of \$1,025.00 on August 06, 2019, based on a verbal guarantee from the landlord's leasing agent that the rental unit would be available on October 01, 2019.

The advocate referred to their evidence showing that they requested the security deposit back from the landlord in writing, which was sent to the landlord on September 13, 2019, by registered mail. The advocate testified that the tenant was moving from a different province and had already provided notice to vacate the unit they were residing in at the time they received an e-mail from the landlord regarding the change in occupancy date from October 2019 to November 2019.

The advocate stated that the tenants were not provided with the agreement regarding the security deposit and possession date until after the deposit was provided to the landlord. The advocate stated that it was not possible for the tenant to delay their moving date and that the tenant had to secure permanent accommodations for October 1, 2019, at which time she was expecting her possessions to be arriving from her previous residence in a different province.

The landlord submitted that the rental unit in which the tenants were supposed to move into was in a building currently under construction. The landlord testified that, due to unforeseen circumstances with the construction, the rental unit was not going to be available for the tenants to move in on October 01, 2019. The landlord referred to the waiver that the tenants had signed and indicated that the landlord had provided notice to the tenants in accordance with that signed agreement before the landlord electronically accepted the security deposit. The landlord stated that they had provided notice of the delayed occupancy date to the tenant on August 20, 2019, in accordance with the signed agreement which stated that notice of delayed occupancy would be provided before August 24, 2019.

The landlord refuted the tenant's submission that the rental unit was verbally guaranteed to the tenant for October 01, 2019, but could not confirm this as the leasing agent is no longer working for the landlord.

Analysis

Having reviewed the evidence above, I find that the landlord acknowledged receipt of the tenant's forwarding address in an e-mail dated September 20, 2019. I accept the tenant's submission that they sent their forwarding address to the landlord via registered mail on September 13, 2019. In accordance with sections 88 and 90 of the Act, I find that the landlord was deemed served with the tenants' forwarding address on September 18, 2019, five days after its registered mailing

Section 45 of the Act establishes that a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice and is the day before the day in the month that rent is payable under the tenancy agreement. As I have found that the tenants' notice to end the tenancy and forwarding address were received by the landlord on September 18, 2019, I find that this tenant's notice to end the tenancy is in accordance with section 45 of the Act, based on the landlord's amended occupancy date of November 01, 2019.

Section 5 of the Act establishes that landlords and tenants may not avoid or contract out of this Act or the regulations and that any attempt to avoid or contract out of this Act is of no effect.

Section 38 (4) allows a landlord to retain from a security deposit if, at the end of the tenancy, the tenant agrees in writing that the landlord may retain an amount to pay a liability or obligation of the tenant.

If the landlord does not have the tenant's agreement in writing, section 38 (1) of the *Act* stipulates that within 15 days of either the tenancy ending or the date the landlord receives the tenant's forwarding address in writing, whichever is later, the landlord must either repay any security or pet damage deposit or make an application for dispute resolution claiming against the security deposit or the pet damage deposit.

I find there is no evidence submitted to show that, at the end of the tenancy, the landlord received the tenants' agreement in writing for the landlord to keep the security deposit or that the landlord applied for dispute resolution within 15 days of receiving the tenant's forwarding address to retain a portion of the security deposit as required under section 38 (1).

Section 38 (6) of the *Act* stipulates that a landlord who does not comply with section 38 (1) of the *Act* may not make a claim against the security deposit or any pet damage

deposit and must pay double the amount of the security deposit, pet damage deposit or both, as applicable.

Pursuant to section 38 (6) of the Act, I find that the landlord must pay the tenants double the security deposit.

Having made the above findings and pursuant to sections 38 and 67 of the *Act*, I find that the tenants are entitled to a monetary award of \$2,050.00, comprised of double the security deposit (2 x \$1,025.00).

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

As the tenants have been successful in their application, I allow the tenants' request to recover their filing fee pursuant to section 72 of the Act.

Conclusion

The tenants are successful in their Application.

Pursuant to sections 38, 67 and 72 of the *Act*, I grant a monetary Order in the tenants' favour in the amount of \$2,150.00, which is for double the security deposit and the recovery of the \$100.00 filing fee from the landlord.

The tenants are provided with this 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 Orders 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: March 30, 2020

Residential Tenancy Branch