



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 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 from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The landlord confirmed receipt of the landlord's dispute resolution application ('Application'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the Application. All parties confirmed receipt of each other's evidentiary materials.

Issue(s) to be Decided

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

Are the tenants entitled to recover the cost of the filing fee for this application?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This fixed-term tenancy began on May 1, 2018 with monthly rent set at \$1,700.00. The tenancy continued after April 30, 2019 on a month-to-month basis. The tenants paid a security deposit in the amount of \$850.00, which the landlord still holds.

The tenants moved out on September 29, 2019. The tenants gave written notice to the landlord of the move-out, and provided a forwarding address on August 31, 2019.

Both parties arranged for a move-out inspection to be completed, which was scheduled for September 29, 2019. The tenants missed the inspection due to a scheduling error. The landlord has retained the tenants' security deposit, stating that the tenants had extinguished their rights to the return of the security deposit. The landlord testified that the tenants were provided three opportunities to attend an inspection as supported by the email correspondence between the parties. The tenants are requesting the return of their deposit, as well as recovery of the filing fee.

Analysis

Sections 35 and 36 of the *Act* set out the requirements for a move-out inspection. Section 35(2) of the *Act* requires that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

Residential Tenancy Regulation further clarifies the requirements for how two opportunities for an inspection must be offered to the tenants:

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.

As stated above, the landlord's final opportunity to attend an inspection must be proposed to the tenants in the approved form. The landlord failed to provide the tenants with the proposed time and date in the approved form, specifically RTB Form *RTB-22 Notice of Final Opportunity to Schedule a Condition Inspection*. I am not satisfied that the landlord has met the requirements of the *Regulation* and *Act*.

Section 36 (2) of the *Act* states that "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 if the landlord

(a) does not comply with section 35 (2) [*2 opportunities for inspection*]."

The consequence of not abiding by these sections of the *Act* is that "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", as noted in section 36(2) of the *Act*. In this case I find that the landlord failed to abide by the *Act* and *Regulation*, and therefore the landlord's right to claim against the security deposit is extinguished.

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "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."

In this case, I find it undisputed that the landlord had failed to return any portion of the tenants' security deposit within 15 days of the move-out date. There is no record that the landlord applied for dispute resolution to obtain authorization to retain any portion of the tenants' security deposit. The tenants gave sworn testimony that the landlord had

not obtained their written authorization at the end of the tenancy to retain any portion of their security deposit. In accordance with section 38 of the *Act*, I find that the tenants are therefore entitled to a monetary order in an amount equivalent to the original security deposit.

As the tenants were successful in their claim, I find the tenants are entitled to recover the cost of the filing fee for this application.

Conclusion

I issue a Monetary Order in the amount of \$1,800.00 in the tenants' favour, which allows for recovery of the filing fee, the return of the tenants' security deposit, as well as compensation for the landlord's failure to comply with section 38 of the *Act*.

The tenants are provided with this Order in the above terms and the landlord must be served with a copy of 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: March 12, 2020

Residential Tenancy Branch