



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:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord confirmed receipt of the tenant's application for dispute resolution ('applications'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenant's application. As both parties confirmed receipt of each other's evidentiary materials and that they were ready to proceed, I find that these documents were duly served in accordance with section 88 of the *Act*.

At the outset of the hearing, the landlord confirmed the spelling of his surname. As neither party was opposed, the landlord's name was amended to reflect the proper spelling of his name.

Preliminary Matter: Does the Residential Tenancy Branch have jurisdiction to hear the dispute between the parties?

Beginning in September of 2019 the tenant and a friend JP each rented a room from the landlord. The rent for each room was set at \$650.00, and the landlord collected a security deposit in the amount of \$325.00, which the landlord still holds. The tenant testified that JP had paid the security deposit on her behalf, but that the deposit was returnable to her. The landlord testified that the security deposit was paid by JP, and that JN had no right to claim it. The tenant moved out on October 30, 2019, providing a forwarding address that same day.

Although no written tenancy agreement exists, the tenant submitted a copy of her application for funding for the housing, which indicates that she does not share a kitchen or bathroom with the owner. The landlord submitted that he had only filled out

the landlord portion and signed the form, while the tenant filled out the rest and submitted it without him reviewing the details. The landlord testified that the tenant provided false information on the form, and that the form does not constitute a tenancy agreement.

The landlord testified that this tenancy does not fall under the jurisdiction of the RTB as he simply rented out the rooms to the tenants, and withheld one room for his personal use, as well as the right to use the common areas including the kitchen and bathroom.

The tenant testified that there were three bedrooms for rent, and that the landlord did not live there. The tenant is requesting the return of her security deposit, as well as compensation for the landlord's failure to return her security deposit to her. The tenant called a witness, WN, who testified that he had helped JN move in. WN testified that the previous occupants were still moving out at the time, and that the landlord did not reside on the main floor with the tenant in any of the bedrooms. When cross-examined, JN confirmed that furniture was being stored in the third bedroom, but it did not appear that anyone was residing there.

The landlord testified that he had made it clear during the walk-through that he had retained the right to use the shared common areas, and the third bedroom. The landlord called his daughter BE as a witness, who testified that only the 2 bedrooms were rented out, to JN and JP. The landlord included the advertisements for rent in his evidentiary materials, which were posted by BE. One advertisement states "I have some bedrooms available...three rooms available and utilities will be included in rent. Some pets may be okay with deposit". The second advertisement states "Room for rent...Great location near stops and shopping. No drugs or alcohol please. No drama please. Small pet negotiable. Great for university or college student. Or long term. Unfurnished currently but may be able to provide some furnishings if you don't have". The landlord testified that the first advertisement had incorrectly noted that 3 bedrooms were for rent, when in fact it was two.

The landlord also included a signed letter from the other tenant JP dated April 22, 2020, which declares that she had answered an advertisement to rent a room from her friend BE, and that two rooms were offered for rent. JP wrote that she knew her friend JN was looking to rent a room, and JP and JN each rented a room from September 1, 2019 to October 31, 2019. JP wrote that there was no tenancy agreement as the rental was for a room only, with shared use of the common areas which included a kitchen, bathroom, and living room.

Analysis

Section 4(c) of the *Act* reads in part as follows:

- 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,...*

I have considered the testimony and evidence of both parties. In light of the fact that no written tenancy agreement exists, the tenant submitted a form used to obtain funding for the housing. The landlord disputes the validity of the form to support the agreement between both parties as he believes that the tenant made false claims on the form, specifically the box to confirm whether the tenant shared a kitchen or bathroom with the owner. I find in light of the disputed testimony, I find the form does not sufficiently support whether the landlord and tenant truly shared either room. For this reason, I must turn to the other evidence and testimony provided for this hearing.

Although the tenant called a witness, I find the witness's testimony did not clearly support whether the tenant shared a bathroom or kitchen with the owner or not. The witness was only present for the move-in, and was not present for the entire duration of the tenancy. I find WN's testimony does not sufficiently support whether the landlord had retained use of the bathroom or kitchen during the tenancy.

I find the landlord's witness, BE, to be inconsistent and therefore unreliable. BE testified that she had a potential applicant, "a guy", who was interested in renting the third bedroom, but later testified that there were only 2 rooms available for rent, and that although one of the advertisements stated "three rooms available", there were in fact only 2, and the applicants could pick which room to rent.

I find that the written statement from JP supports BE and the landlord's testimony that the rooms were rented with the understanding that the tenants would share the use of the common areas, which included the kitchen, bathroom, and living room. Although I am satisfied that the kitchen, bathroom, and living room were designated as common areas to be shared by all occupants, I am not satisfied that the evidence supports that the landlord shared the kitchen or bathroom with the tenants. For this reason, I find that this tenancy is not exempt from the *Residential Tenancy Act*, and I will consider the tenant's application.

Analysis: Is the tenant entitled to return of her security deposit?

The definition of a "tenancy agreement" is outlined in the following terms in section 1 of the *Act*:

"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;

Section 16 of the *Act* states the following about when a tenancy agreement takes effect.

Start of rights and obligations under tenancy agreement

16 The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

A tenancy can exist in the absence of a written tenancy agreement. I find that in this case, it was undisputed by both parties that the tenant owed monthly rent in the amount of \$650.00, and a security deposit in the amount of \$325.00 was to be held for this tenancy. Regardless of who paid the security deposit, I find that a separate tenancy existed between JN and the landlord, and that this \$325.00 was paid for this specific tenancy. Although the landlord testified that the matter of the security deposit was settled between himself and the parties who paid it, I find that the landlord failed to provide sufficient evidence to support this. I also find that the landlord confirmed that he was still in possession of the security deposit.

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 tenants agree in writing the landlord may retain the amount to pay a liability or obligation of the tenants."

In this case, I find that the landlord had not returned the tenant's security deposit to the tenant in full within 15 days of receipt of the tenant's forwarding address in writing, on

October 30, 2019. There is no record that the landlord applied for dispute resolution to obtain authorization to retain any portion of the security deposit, nor do I find that the landlord was in possession of any written authorizations for the landlord to retain the deposit.

In accordance with section 38 of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the original security deposit.

Conclusion

I issue a Monetary Order in the tenant's favour under the following terms which allows the tenant to recover the original security deposit, plus a monetary award equivalent to the value of his security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*.

Item	Amount
Return of Security Deposit	\$325.00
Monetary Award for Landlord's Failure to Comply with s. 38 of the <i>Act</i>	325.00
Total Monetary Order	\$650.00

The tenant(s) is 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: May 4, 2020

Residential Tenancy Branch