Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSDS-DR, FFT

Introduction

On October 7, 2020, the Tenant applied for a Dispute Resolution proceeding seeking a Monetary Order for a return of double the security deposit pursuant to Section 38 of the *Residential Tenancy Act* (the "*Act*") and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Tenant attended the hearing; however, the Landlord did not make an appearance at any point during the 25-minute teleconference. All parties in attendance provided a solemn affirmation.

The Tenant advised that the Notice of Hearing and evidence package was served to the Landlord by registered mail on November 2, 2020 (the registered mail tracking number is noted of the first page of this Decision). The tracking history indicated that this package was delivered on November 4, 2020. Based on this undisputed evidence, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was served the Notice of Hearing and evidence package. Furthermore, as this evidence was served in accordance with the timeframe requirements of Rule 3.14 of the Rules of Procedure, I have accepted this evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to a return of double the security deposit?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

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

The Tenant advised that the tenancy started on June 6, 2020 and that the tenancy ended on September 1, 2020. Rent was established at $850.00 per month and it was due on the first day of each month. As well, he stated that a security deposit of $425.00 was also paid. A copy of the written tenancy agreement was submitted as documentary evidence.

He advised that he provided the Landlord with his forwarding address in writing on September 21, 2020 by registered mail (the registered mail tracking number is noted of the first page of this Decision). The tracking history indicated that this package was delivered on September 22, 2020. He stated that the Landlord returned $305.00 of his security deposit on September 18, 2020, and he never gave her written consent to keep any portion of this deposit. As such, he is seeking a return of double the portion of the security deposit not returned, in the amount of **$240.00**, pursuant to Section 38 of the *Act*. He was also seeking compensation in the amount of **$13.40** for the cost of registered mail; however, there are no requirements in the *Act* that provide for this compensation. As such, this portion of the claim is dismissed in its entirety.

While the tenancy agreement that was submitted as documentary evidence was titled Residence Contract Shared Housing Room Rental (the “Agreement”), it is the Tenant’s belief that this situation falls under the jurisdiction of the *Act*. He stated that when he first went to view the rental unit, an agent for the Landlord asked for a security deposit before entering into a tenancy. He told this person that he was not required to provide a security deposit prior to entering into a tenancy agreement pursuant to Section 20 of the *Act*. Once informed of this, the agent did not pursue obtaining a security deposit at that time.

Furthermore, he advised that the Landlord portrayed herself as the landlord of the building, that she did not live in the building, that he paid her by electronic transfer every month, and that all of the residents of the building considered themselves tenants under the *Act*. He also cited Section 5 of the *Act* to emphasize that the Agreement was an attempt by the Landlord to contract outside of the *Act*.

Analysis

Upon consideration of the testimony before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Before addressing the Tenant's claims with respect to the security deposit, I must first make a determination on whether or not this tenancy falls under the jurisdiction of the *Act*. I find it important to note that in the Agreement, the Respondent indicates that they are not the owner of the rental unit, but they are the tenant that rents out the entire building from the owner. In turn, the Respondent then rents out the individual rooms in the building. Furthermore, it states that this Agreement constitutes a "licensee/licensor relationship" between the Applicant and the Respondent, that this is not a sublease agreement, that the Applicant is simply an occupant of the rental unit, and that the *Act* does not apply to this situation.

When assessing this situation, I find it important to cite the following paragraph from Policy Guideline # 19 with respect to this scenario:

> Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as 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.
>
> The use of the word 'sublet' can cause confusion because under the Act it refers to the situation where the original tenant moves out of the rental unit, granting exclusive occupancy to a subtenant, pursuant to a sublease agreement. 'Sublet' has also been used to refer to situations where the tenant remains in the rental unit and rents out space within the unit to others. However, under the Act, this is not considered to be a sublet. If the original tenant transfers their rights to a subtenant under a sublease agreement and vacates the rental unit, a landlord/tenant relationship is created and the provisions of the Act apply to the parties.

In my view, after hearing testimony from the Tenant and reviewing the evidence before me, it is clear from the Agreement that the Respondent has rented out the building from the owner and is a tenant of the owner. Furthermore, the Respondent does not live in the rental unit or the building for that matter, but simply re-rents the individual units to

other people. There is clearly no intention here by the Respondent to remain in the building and rent out a room or space within the building to another party. Despite the efforts in the Agreement to portray the Applicant as an occupant where the *Act* has no jurisdiction, I find that the Respondent appears to be managing these rentals as part of a business, and this is a blatant attempt to contract outside of the *Act* for financial gain.

Moreover, the Agreement indicates that this is a "licensee/licensor relationship"; however, Policy Guideline # 9 outlines licences to occupy. While most of this pertains to the *Manufactured Home Park Tenancy Act*, this guideline does outline some other factors that may distinguish a tenancy agreement from a licence to occupy. These include:

- payment of a security deposit;
- the parties have a family or personal relationship, and occupancy is given because of generosity rather than business considerations

Given that a security deposit was paid, and as there is no evidence of a family or personal relationship, I do not find that this is a licence to occupy.

Consequently, I find that the Respondent meets the definition of "landlord" as contemplated by the *Act*. Therefore, I am satisfied that the Respondent in this Application is a Landlord as defined by the *Act*, that the Applicant in this Application is a Tenant as defined by the *Act*, and that there is a Landlord/Tenant relationship between the parties. Therefore, despite the Landlord's efforts to portray this as a situation where the *Act* has no jurisdiction, I am satisfied that the parties are bound by the rights and/or obligations under the *Act*.

As such, Section 38(1) of the *Act* requires the 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 in full 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 pay double the deposit to the Tenant, pursuant to Section 38(6) of the *Act*.

Based on the undisputed evidence before me, I am satisfied that the Tenant provided his forwarding address in writing to the Landlord by registered mail on September 21, 2020. As the tracking history indicated that this package was confirmed delivered on September 22, 2020, the Landlord would have had 15 days from this date to either return the deposit in full or make an Application to retain the deposit. While the Landlord

returned a portion of the deposit, a balance was retained without the Tenant's written consent. The Landlord must have returned this balance in full or made an Application to keep the amount by October 7, 2020, and if the Landlord did not do either, the Tenant could then make an Application for double the deposit on October 8, 2020. However, as the Tenant made this Application on October 7, 2020, he was a day early.

As the Tenant made his Application within the Landlord's 15 days to either return the balance of the deposit or file an Application for Dispute Resolution, I find the Tenant's Application to be premature. Therefore, the Landlord is put on notice that they now have the Tenant's forwarding address and they must deal with the security deposit in accordance with Section 38 of the *Act*. The Landlord is deemed to have received this Decision 5 days after the date it was written and will have 15 days from that date to deal with the deposit. If the Landlord does not deal with the security deposit pursuant to Section 38 of the *Act* within 15 days of being deemed to have received this Decision, the Tenant can then re-apply for double the deposit, pursuant to the *Act*.

As the Tenant was not successful in this Application, I find that the Tenant is not entitled to recover the $100.00 filing fee.

Conclusion

Based on my findings above, I dismiss the Tenant's Application for a return of double the security deposit with leave to reapply.

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: February 4, 2021

Residential Tenancy Branch