



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding REGIUS SUITES and [tenant name
suppressed to protect privacy]

DECISION

Dispute Codes OPT, FFT

Introduction

On August 27, 2021, the Tenants applied for a Dispute Resolution proceeding seeking an Order of Possession pursuant to Section 54 of the *Residential Tenancy Act* (the “Act”) and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

Tenant E.W. attended the hearing. R.B., the owner/Landlord, attended the hearing with M.W. attending as an agent for the Landlord. R.B. confirmed the correct name of the corporation that the Landlord’s company does business as. As such, the name of the Respondent was amended on the first page of this Decision to reflect this change.

At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited and they were reminded to refrain from doing so. All parties acknowledged these terms. As well, 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, by email, and by posting it to the Landlord’s office door on September 3, 2021 and M.W. confirmed that this package was received by registered mail and on the door. Based on the undisputed, solemnly affirmed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was duly

served the Notice of Hearing and evidence package. As such, I have accepted this evidence and will consider it when rendering this Decision.

M.W. advised that she served the Landlord's evidence to the Tenants, at the address they provided on the Application, by registered mail on September 22, 2021. The Tenant advised that they did not receive this evidence; however, he confirmed that they did not provide the Landlord with an updated address for service. As this was the only address that the Landlord was provided by the Tenants, and as this evidence was served to that address in accordance with the timeframe requirements of Rule 10.5 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

- Are the Tenants entitled to an Order of Possession?
- Are the Tenants 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 M.W. requested a deposit be sent to the Landlord on August 26, 2021, so Tenant N.R. sent this immediately and it was accepted by the Landlord. He testified that M.W. then sent them a copy of a tenancy agreement; however, they believed many of the terms in this agreement were unconscionable, so they did not sign it. The Tenants sent the Landlord a copy of a tenancy agreement that they had filled out themselves that they believed was more appropriate. On August 27, 2021, he submitted that M.W. informed them that the rental unit had now been rented to someone else, and she then made attempts to return the deposit. They have not yet accepted this deposit as they did not want this to reflect any acknowledgement that the tenancy had ended.

He referenced the documentary evidence submitted to support this position that they believe the Landlord entered into a month-to-month unwritten tenancy agreement by accepting money from them. They are still seeking an Order of Possession of the rental unit.

M.W. advised that she was in contact with N.R. and had sent her an application to rent on or around August 19, 2021; however, she did not receive a response. She stated that she informed N.R. that there was another serious prospective tenant interested in the rental unit, and N.R. asked her for the rental documents. She stated that she asked N.R. to send her a deposit on August 25, 2021 to "hold the suite", but she did not tell N.R. how much to send. She submitted that she noticed that N.R. sent a deposit via e-transfer to the wrong email address, but she did not notice how much of a deposit was sent. However, as this was the wrong email address, she provided the correct email address for the Landlord on August 26, 2021 and requested that N.R. re-send this deposit. N.R. then sent an amount of \$997.50, which was equivalent to a half a month's rent, on August 26, 2021. She stated that this e-transfer of funds was automatically accepted due to auto-deposit. She confirmed that this deposit was required to hold the rental unit until the Tenants' application to rent, credit check, and reference check were approved.

She submitted that after receiving this deposit, she continued to send administrative documentation to the Tenants to complete and return; however, they did not fill them out. She testified that as the Tenants were not responding to the request for these documents, she informed the Tenants that their tenancy was in jeopardy and will be rented to another tenant. As such, she rented the rental unit to another tenant and made attempts to return the deposit to the Tenants by electronic transfer.

R.B. advised that when they host a presentation to prospective tenants, any prospective tenant is told that a \$200.00 deposit will be required to hold the rental unit until they are approved as the successful tenant. He termed this an "earnest deposit", and he stated that this was permitted to be collected by the Government of Canada and was approved by the Real Estate Board. Provided that the prospective tenant passes the Landlord's process for selecting a suitable tenant, this \$200.00 is then considered a part of the security deposit and the remaining balance of the deposit is requested. Should the prospective tenant not qualify, then this \$200.00 is returned.

He advised that he was justified in asking for this deposit as this would be the only way for him to ensure that a potential successful tenant would be committed to seeing the rental process through. He refutes that this amount would be considered a fee. It is his

position that a tenancy was not created as the Tenants refused to complete any of the Landlord's documents that were required to confirm their suitability as successful applicants, despite already asking for and receiving monies. He did not specifically reference or directly point me to any of the documentary evidence that was submitted. He then claimed that the deposit that was requested, and that the Tenants subsequently sent on August 26, 2021, was never accepted.

Analysis

Upon consideration of the evidence 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.

Section 15 of the *Act* outlines that application and/or processing fees are prohibited from being collected. It states that:

A landlord must not charge a person anything for

- (a) accepting an application for a tenancy,*
- (b) processing the application,*
- (c) investigating the applicant's suitability as a tenant, or*
- (d) accepting the person as a tenant.*

When reviewing the totality of the evidence before me, the undisputed evidence is that on or around August 25, 2021, M.W. requested that the Tenants provide a deposit and that she noticed that N.R. sent a deposit to the wrong email address. M.W. then contacted N.R., informed her of the correct email address to use, and then requested that a deposit be re-sent to the Landlord, which was done on August 26, 2021.

To corroborate this exchange, the Landlord submitted documentary evidence of the text messages between the parties. On August 25, 2021 at 3:45 PM, M.W. sent the Tenants a text stating "If you are serious about the place and want to put down a deposit, I will let him know I have gone with another applicant." N.R. replies confirming that they would put down a deposit and asks her what the preferred method of payment would be, to which M.W. stated at 4:09 PM, "if you could please send your deposit to [redacted] that would be great... I will need to receive the deposit today." At 5:57 PM, the Tenants sent M.W. a text stating, "I just sent the deposit over. It was half a months[sic] rent correct?" and at 5:59 PM, M.W. responded with, "Thank you, rec'd the

deposit.”

On August 26, 2021 at 7:26 AM, M.W. sent a text to the Tenants stating, “you sent the deposit to the wrong email address. I am not sure if you are able to cancel it and resend to [redacted].” At 10:13 AM, the Tenants sent M.W. a text stating that they resent the deposit and M.W. replied with an email at 10:52 AM stating “Received, thank you.” The Tenants then send her an email at 3:17 PM stating, “Thank you for confirming the receipt of our deposit.”

Clearly from these exchanges, this can not be viewed in any other manner other than M.W. requesting that the Tenants send the Landlord some form of deposit. I find it important to note that while the Landlord contends that this was not a “fee”, he confirmed that what he termed an “earnest deposit” was required to be paid upfront as part of the process to determine the viability of a prospective tenant becoming the successful tenant. In my view, this process as described by the Landlord is entirely consistent with what is outlined in Section 15 of the *Act*, and this Section clearly indicates that monies can not be collected by the Landlord in order to commence this type of process.

Given that the Landlord has acknowledged that asking for monies contrary to the *Act* is his common practice, and given that it is undisputed that M.W. asked the Tenants twice to send a deposit, regardless of how much that is requested by the Landlord, I am satisfied that this practice is an attempt to contract outside of the *Act*.

I note that the Landlord then claimed that this amount from the Tenants was never accepted. I find this to be a curious submission as he acknowledged that his practice is to require an “earnest deposit” be paid to hold the rental unit for a prospective tenant. As it is always his practice to ask for these monies upfront, I am confused as to how he can then take the position that this money was somehow now not accepted. In my view, given that it is undisputed that M.W. requested the deposit, that the Tenants immediately sent it, and that M.W. confirmed receiving it, for the Landlord to then claim, on this one occasion, that this money was not accepted causes me to question his credibility. This appears to be a vain attempt to evade the fact that he has been collecting monies contrary to the *Act*.

As I am satisfied that monies have been exchanged, I find that a Landlord/Tenant relationship has been established, that an unwritten month-to-month tenancy was created, and that the Landlord has illegally prevented the Tenants from occupying the rental unit. As the Landlord has now rented the rental unit to another party, the *Act* does

not permit me to end this other tenancy and provide the rental unit back to the Tenants.

However, as the Landlord has clearly breached the *Act*, the Landlord is cautioned that the Tenants may apply for, and be awarded, monetary compensation suffered as a result of being denied occupancy of the rental unit. Furthermore, the parties are advised that as this Decision establishes that this tenancy has now been determined to have ended, the security deposit must be dealt with in accordance with the *Act*.

As the Tenants were successful in their claim, I find that the Tenants are entitled to recover the \$100.00 filing fee paid for this Application.

Conclusion

The Tenants are provided with a Monetary Order in the amount of **\$100.00** 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: October 1, 2021

Residential Tenancy Branch