Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FFT

Introduction

This hearing dealt with a tenant's application for return of double the security deposit.

Both parties appeared or were represented at the hearing. The parties were affirmed and the parties were ordered to not record the proceeding. Both parties had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

The hearing was held over two dates and an Interim Decision was issued on May 7, 2021. The Interim Decision should be read in conjunction with this decision.

As seen in the Interim Decision, I authorized and ordered the parties to submit additional evidence with respect to an assignment of the tenancy agreement, if any, and to serve the same additional evidence to the other party. During the period of adjournment, I received additional evidence from both parties and I confirmed at the start of the reconvened hearing that it had been served upon the other party. The tenant pointed out that the landlord had submitted additional evidence after the deadline for doing so; however, he was agreeable to its admittance since he sought to rely upon some of the landlord's late filed evidence. Accordingly, I have admitted and considered all of the documentary evidence provided by both parties in making this decision.

It should be noted that at the end of the teleconference call I provided the parties with my preliminary findings orally. Upon further deliberation and review of the materials, my final decision may differ from my oral preliminary findings. This written decision takes precedence over the preliminary oral findings I gave during the teleconference call.

Issue(s) to be Decided

1. Was the tenancy agreement assigned?
2. Is the tenant entitled to return of double the security deposit?
3. Award of the filing fee.

Background and Evidence

The named tenant became a tenant of the rental unit on February 5, 2020 when an addendum was created for an existing tenancy agreement between the landlord and a tenant referred to by initials AR. The tenant, AR and the landlord's agent signed the addendum recognizing the tenant as a co-tenant. In June 2020 AR notifies the landlord of his intention to move out on September 1, 2020 but that the named tenant wished to remain. The named tenant and the landlord execute a new tenancy agreement dated August 28, 2020, identifying the named tenant as the only tenant.

The tenancy agreement dated August 28, 2020 reflects a tenancy on a month to month basis set to begin on September 1, 2020. The landlord collected a security deposit of $600.00 from the tenant on August 31, 2020 and the tenant was required to pay rent of $1200.00 on the first day of every month.

On October 5, 2020 the tenancy agreement was amended to add a co-tenant (referred to by initials BA) by way of an addendum that recorded the written agreement of the tenant, BA, and the landlord's agent. BA gave the tenant $300.00 toward one-half of the security deposit already paid by the tenant.

On October 24, 2020 the named tenant sent the landlord an email giving notice to end the tenancy effective November 29, 2020; informing the landlord that November 2020 would be the last month the tenant was paying rent; but, informing the landlord that BA would like to continue to live in the rental unit. The landlord's agent acknowledged receipt of the email the same day by stating "noted with thanks." In the same email, the landlord's agent also instructed a different landlord's agent to proceed to prepare a sublet agreement for BA to sign.

The landlord's agent and BA signed a new document dated October 26, 2020. The document appears to be a new tenancy agreement between the landlord and BA providing that a month to month tenancy would start on December 1, 2020 in exchange for rent of $1200.00 and a security deposit of $600.00; however, near the top of the

documents is the following statement: “Assigned lease from original agreement dated August 28th, 2020”.

The tenant presented a moving company receipt showing he moved his possessions out of the rental unit on November 29, 2020. BA retained possession of the rental unit.

On December 12, 2020 the tenant sent the landlord a registered letter requesting return of the $600.00 security deposit and provided his forwarding address. The landlord received the letter on December 18, 2020. On December 19, 2020 the tenant followed up with an email stating essentially the same thing as in the registered letter. The named tenant did not authorize the landlord to retain any portion of the security deposit.

The landlord responded to the named tenant that the security deposit would be refunded once BA paid the landlord the security deposit. On December 21, 2020 the landlord sent an email to BA requesting that he pay $600.00 to the landlord for the security deposit. BA responded that he had already paid $300.00 when he moved in so he should only have to pay another $300.00. The landlord told BA that he would have to sort out with the tenant as what he had paid to the tenant when he moved in between them.

On December 23, 2020 the named tenant sent BA $300.00.

Several more email communications took place between the landlord and the tenant. In essence, the landlord stated that they were waiting for BA to send them $600.00 before they would refund $600.00 to the tenant and that assignment of the tenancy agreement would not be complete until BA paid the security deposit. Alternatively, the landlord states it needs to see proof of a deposit transfer between the tenant and BA. The tenant responded that the tenancy agreement had not been assigned.

Eventually on January 28, 2021, BA paid the landlord $600.00 for the security deposit. The landlord communicated to the tenant that it had received $600.00 from BA and the landlord offered to refund $600.00 to the tenant. The tenant declined the offer, indicating he had already this Application for Dispute Resolution seeking return of double the deposit and the tenant remained of the position he was entitled to doubling.

The landlord was of the position that the tenancy agreement the tenant and BA had with the landlord was assigned to BA. The landlord was of the position that the tenant did not notify the landlord he had moved out until the email of December 19, 2020 was received. The landlord was of the position that it did not have to refund any deposit to

the tenant until such time another deposit was received from BA and only after the landlord has received the second deposit does the landlord have to refund the first deposit to the tenant. The landlord remains of the position that it owes the tenant $600.00 since the landlord is holding two deposits of $600.00 now, but not double the deposit.

The tenant argued that there was no meeting of the minds with respect to assignment of the tenancy and he did not agree to assignment of the tenancy by way of implied or express consent or his signature. Further, his obligations under the tenancy ended at the end of November 2020 pursuant to his notice to end tenancy. The tenant was of the view the landlord proceeded to enter into a new agreement with BA just as the landlord had done previously when the tenant's former roommate AR moved out September 1, 2020. Further, the tenant argued that refunding of the security deposit to him should not be dependent on when or if BA pays a security deposit.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

Section 38(1) of the Act provides that the landlord has 15 days, from the date the tenancy ends or the tenant provides a forwarding address in writing, whichever date is later, to either refund the security deposit, get the tenant's written consent to retain it, or make an Application for Dispute Resolution to claim against it. Section 38(6) provides that if the landlord violates section 38(1) the landlord must pay the tenant double the security deposit.

It is undisputed that on December 18, 2020 the landlord received a forwarding address from the tenant, in writing, upon receipt of the registered letter sent on December 12, 2020. It is also undisputed that the tenant did not authorize the landlord to retain any portion of the security deposit.

At issue is when the tenancy ended, if it did, or was it assigned. The tenant was of the position the tenancy ended at the end of November 2020. The landlord was of the position the tenancy was not ended because it was assigned.

Upon review of the tenancy documents, I find the subject tenancy was a month to month tenancy and effective October 5, 2020 it became a co-tenancy. Section 45 of the Act provides that a month to month tenancy is ended by the tenant by way of a written

notice to end tenancy given at least one month in advance. Where there is a co-tenancy, the tenancy may be ended when only one of the co-tenants gives notice to end tenancy and such a notice would require all tenants to vacate the rental unit by the effective date.

The tenant argued that he gave the landlord written notice to end tenancy on October 24, 2020 to end the tenancy effective November 29, 2020, via email. Since the rent was payable on the first day of every month, the effective date should have read November 30, 2020 pursuant to section 45 of the Act. Regardless of an incorrect effective date, section 53 of the Act provides that the stated effective date automatically changes to comply with the Act.

Although email was not a permissible method of service at that time the tenant's notice was given it is clear from all of the evidence before me that the parties routinely communicated by email, including the signing of tenancy documents using DocuSign sent via email. I am also satisfied the landlord's agent received the email on October 24, 2020 as he responded to it and proceeded to take action to prepare new documents for BA to sign on October 26, 2020. Therefore, I deem the landlord sufficiently served with the tenant's notice to end tenancy on October 24, 2020 pursuant to the discretion afforded me under section 71 of the Act and I this notice to end tenancy was to be effective on November 30, 2020.

The tenant provided a moving company receipt as evidence that he vacated the rental unit on November 29, 2020 and it is undisputed that BA remained in possession of the rental unit. At issue is whether BA's continued occupation of the rental unit was provided under a new tenancy agreement, an assignment of the August 28, 2020 agreement, or something else.

The parties were in dispute as to whether the August 28, 2020 tenancy agreement was assigned to BA. Where a tenancy agreement is assigned, all of the benefits and obligations of the agreement are transferred from the assignor to the assignee. In essence, the tenancy agreement carries on with assignee stepping in the shoes of the assignor. Where it is the tenants who are the assignor/assignee the new tenant gains all the benefits of the original tenant of the tenancy agreement (including the security deposit that the landlord is holding in trust) and the obligations under the tenancy agreement (paying rent, etc.). As such, where a tenancy agreement is assigned from one tenant to another tenant, the landlord does not become involved in collecting another security deposit from the assignee or refunding the security deposit to assignor.

Rather, it would be upon the assignor and assignee to deal with the security deposit between themselves.

Since this was a co-tenancy, it is important to recognize that one co-tenant has the authority and ability to amend or end the tenancy agreement and the actions of the one co-tenant are binding upon all of the co-tenants. Just as the tenant gave a notice to end tenancy, it was binding upon him and BA even though BA did not sign or give a notice to end tenancy. Under the same rationale, BA, as a co-tenant, would have the authority to assign the tenancy agreement and it would be binding upon all co-tenants.

In order for a tenancy agreement to be assigned, section 34(1) provides that it requires the written consent of the landlord.

From the document dated October 26, 2020 it appears that BA assigned the original tenancy agreement to himself, to be the sole tenant, with the agreement of the landlord, as evidenced by the signatures of both BA and the landlord. Had BA and the landlord truly assigned the tenancy agreement, completely and unconditionally, the security deposit would become BA's security deposit exclusively and the landlord would not be involved in obtaining another deposit from BA or refunding a security deposit to the tenant. Rather, it would be between the tenant and BA to deal with the deposit. Thus, it leads to me question why the landlord proceeded to request BA pay a deposit since the landlord was already holding a deposit and the landlord considered the tenancy assigned.

One of the elements for a contract assignment, under common law, is that an assignment must be absolute and not conditional or partially assigned. Section 91 of the Act provides that: "Except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia."

When I turn to email communications the landlord's agent wrote to the tenant, I see:

> On January 26, 2021 at 8:38 a.m.:
>
> *"Because your assigned tenant didn't pay a deposit since beginning so that <u>your assignment didn't transfer properly</u>, which means you are still in the lease and deposit.*
>
> *<u>Unless your assignee</u>, [BA] or you can provide us with a deposit transfer proof between Blake and you."*

On January 26, 2021 at 9:18 a.m.:

"Unless BA made a deposit payment to fully take over [the named tenant] lease. (The assigned lease won't complete until deposit payment made by [BA])"

[My emphasis underlined and names altered for privacy]

Considering the above communications from the landlord, it is apparent to me that assignment of the tenancy was conditional upon BA paying a deposit. As such, I find the assignment was conditional and not completed before the subject tenancy ended on November 30, 2020.

In light of all of the above, I find the tenancy ended with the tenant's notice to end tenancy. The tenancy agreement was not assigned unconditionally or completely before the tenancy ended. Accordingly, I find the tenancy came to an end on November 30, 2020 and the landlord was required to comply with section 38(1) of the Act by either: refunding the security deposit, making a claim against it, or getting the tenant's or BA's written consent to retain it within 15 days after December 18, 2020 (the date the landlord received the tenant's forwarding address). The landlord did not get the tenant's consent or BA's consent to retain and transfer it to the new tenancy as evidenced by the landlord's repeated requests for BA to pay the security deposit. The landlord did not offer to refund the security deposit to the tenant but that was not until January 28, 2021 which is well over 15 days after receiving his forwarding address. Therefore, I find the landlord failed to comply with section 38(1) of the Act and the tenant is entitled to doubling of security deposit under section 38(6) of the Act.

Given the tenant's success in this matter, I further award the tenant recovery of the $100.00 filing fee.

Provided to the tenant is a Monetary Order in the amount of $1300.00.

Conclusion

The tenant is provided a Monetary Order to enforce against the landlord in the sum of $1300.00 for return of double the security deposit and recovery of the filing fee.

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 07, 2021

Residential Tenancy Branch