Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSDS-DR, FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- monetary order for $2,600 representing two times the amount of the security deposit, pursuant to sections 38 and 62 of the Act; and
- a monetary order for $2,600 representing the return of an improperly collected "break fee" at the start of the tenancy, pursuant to section 62
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

This matter was reconvened from an *ex parte,* direct request proceeding by way of an interim decision issued August 9, 2021.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 2:00 pm in order to enable the landlord to call into the hearing scheduled to start at 1:30 pm. The tenants and their counsel ("**HF**") attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Dispute Resolution Proceeding. I used the teleconference system to confirm that the tenants, HF, and I were the only ones who had called into the hearing.

HF stated that her assistant served that the landlord with a copy of the interim decision, the notice of reconvened hearing, supporting documentary evidence, and all other required documents via registered mail on August 12, 2021. She provided a Canada Post tracking number confirming this mailing which is reproduced on the cover of this decision. I find that the landlord is deemed served with these documents on August 17, 2021, five days after they were mailed, in accordance with sections 88, 89, and 90 of the Act.

Issues to be Decided

Are the tenants entitled to:

1) an order cancelling the Notice;
2) a monetary order of $5,200; and

3) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the tenants, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the tenants' claims and my findings are set out below.

Tenant KM and the landlord entered into a written, fixed term tenancy agreement starting March 1, 2019 and ending March 1, 2021. Monthly rent was $2,600 and is payable on the first of each month. KM paid the landlord a security deposit of $1,300, which the landlord continues to hold in trust for KM. In addition to security deposit, the KM paid the landlord a "break fee" of $2,600 at the start of the tenancy.

The tenancy agreement is a standard #RTB-1 form agreement, with an addendum which includes the following terms:

> EARLY TERMINATION OF LEASE
> The landlord and tenant acknowledge the above reference residential and/or commercial lease agreement is intended to be a two year residential and/or commercial lease. If the tenant is unable to fulfill the full term of the lease agreement for any reason, the tenant agrees to provide two months' notice to end tenancy by email communication during which two months, the rent will be paid in full. During this time the landlord will have the right to show the suite to perspective tenants with 24 hours' notice by email. In addition, a break-fee equal to one months' rent ($2600) as well as the $1300 security deposit referenced in the lease agreement will be owing if the lease ended earlier than March 1, 2021. The break fee and security deposit will be collected prior to the commencement of the lease and no later than February 5, 2019 and both will be held by the landlord and returned in full at the end of the lease. The tenant acknowledges that both the security deposit and the break fee will be owing to and retained by the landlord if the lease ends prior to March 1, 2021 for any reason. If the tenant finds a suitable subletter (a person and or business to be approved at the sole discretion of the landlord) to take over the duration of the lease without any interruption of the lease, then the break fee shall be returned in full and there shall be no penalty for ending the lease early period any damages that occur through the lease period will be deducted from the ($1300) security deposit only. The tenant acknowledges and understands that some businesses and/or candidates may not be welcome or approved by the landlord. For the avoidance of such doubt, if there is any interruption to monthly lease payments between March 1, 2019 and March 1, 2021 the break fee and security deposit will be due in full.
>
> […]

NATURE OF BUISNESS + INSURANCE
It is understood the tenant may want to carry on a retail store carry slash sell vaping tools and products but will not sell tobacco, cannabis and or any other controlled substance. If the nature of the business changes substantially from the description, the tenant is required to notify the landlord and will require written approval to change the nature of the business. Any business run given the unit must be legally permitted. The tenant agrees there required and solely liable to secure any business licenses required by the city of [redacted] and pay any taxes, expenses, liabilities related to the business. The tenant will provide a record of business insurance to the landlord within 15 days of the commencement of the lease and prior to changing the nature of a business being run from the site (with approval).

The rental unit is located on the ground floor of a mixed-use building. The rental unit is zoned for both residential and commercial use. HF stated that the rental unit was advertised as mixed-use by the landlord. A copy of this advertisement was not entered into evidence.

KC testified that the rental unit was divided into two parts, a smaller, store-front portion that people entered into from the front door and a larger, residential portion separated from the store-front portion by a sliding wall. KC estimated the residential portion was 60% of the available square-footage of the rental unit.

KM and KC testified that in April or May 2019, KM “sub-let” the rental unit to KC. KC was not required to pay KM any rent, rather he was permitted to reside in the rental unit full-time in exchange for looking after the rental unit. KM testified that he intended to open a business in the store-front portion of the rental unit soon after entering into the tenancy agreement. However, he testified that due to regulatory and licensing issues he did not do so until February or March 2020. The tenancy ended April 1, 2020 when the tenants vacated the rental unit. Up until this point KC continued to reside in the rental unit.

The tenants conducted a move-in condition inspection with the landlord, but were never given the opportunity to conduct a move-out condition inspection.

KM testified he sent the landlord his forwarding address by registered mail on April 3, 2020. He did not retain a copy of this letter for his records, so one was not entered into evidence. He did provide a Canada Post tracking number for the mailing, which is included on the cover of this decision.

HF stated that she sent a further copy of the tenants’ forwarding address to the landlord via registered mail on January 21, 2021. A copy of this letter was submitted into evidence. A copy of the Canada Post tracking number is included on the cover of this decision.

HF argued that the tenancy is a residential tenancy, as the majority of the square-footage of the rental unit was used for residential, as opposed for commercial, purposes for the duration of the tenancy. Additionally, she argued that for the majority of the tenancy, the rental unit was *only* used for residential purposed. She stated that the facts the rental unit was zoned for both commercial and residential, that the advertisement marketed the rental unit as such, and the tenancy agreement only stated that the rental unit *may* be used for commercial purposes all support a finding that the tenancy agreement is governed by the Act.

As such, she argued, the tenants are entitled to the return of double the security deposit, as the landlord has failed to return it within 15 days of the tenancy ending or receiving the tenants' forwarding address.

She also argued that the landlord collected the break fee at the start of the tenancy in contravention of the Act, as the Act limits the amount of a deposit that can be collected at the start of a tenancy to half of one month's rent. Accordingly, she argued that the break fee must be returned.

Analysis

I accept the uncontroverted testimony of the tenants, in its entirety. While there are some gaps in the documentary evidence, the documents that have been provided corroborate their testimony to the extent that I find the whole of their testimony to be persuasive.

1. Jurisdiction

Before determining if the tenants are entitled to the relief sought, I must determine if the tenancy falls within the jurisdiction of the Act. RTB Policy Guideline 14 discusses commercial tenancies:

> Neither the *Residential Tenancy Act* nor the *Manufactured Home Park Tenancy Act* applies to a commercial tenancy. Commercial tenancies are usually those associated with a business operation like a store or an office. If an arbitrator determines that the tenancy in question in arbitration is a commercial one, the arbitrator will decline to proceed due to a lack of jurisdiction. For more information about an arbitrator's jurisdiction generally, see Policy Guideline 27 - "Jurisdiction."
>
> Sometimes a tenant will use a residence for business purposes or will live in a premises covered by a commercial tenancy agreement. The Residential Tenancy Act provides that the Act does not apply to "living accommodation included with premises that (i) are primarily occupied for business purposes, and (ii) are rented under a single agreement.

> To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the "predominant purpose" of the use of the premises is. Some factors used in that consideration are: relative square footage of the business use compared to the residential use, employee and client presence at the premises, an visible evidence of the business use being carried on at the premises.

I do not find that the "predominant purpose" of the use of the rental unit was commercial for the following reasons:

- the tenants operated a business out of the rental unit for only two months of the twelve months of the tenancy;
- the rental unit was occupied for residential purposes for eleven of the twelve months of the tenancy;
- the living area was larger than the store-front area;
- the rental unit was zoned for both residential and commercial use;
- the rental unit was markets as for both residential and commercial use;
- the tenancy agreement did not require that the rental unit be used for commercial purposes, it only stated in the addendum that "the tenant *may* want to carry on a retail store"; and
- there is no distinction in the tenancy agreement between the store-front and the residential space or any indication that the spaces could have been rented separately.

As such, I find that the predominant purpose of the rental unit was residential. Accordingly, I find that the tenancy agreement is governed by the Act.

2. Return of Security Deposit

Section 38(1) of the Act states:

> **Return of security deposit and pet damage deposit**
> 38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
>
> (a) the date the tenancy ends, and
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> (b) the date the landlord receives the tenant's forwarding address in writing,
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> the landlord must do one of the following:
>
> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

Based on the testimony of the tenants, I find that the tenancy ended when they vacated the rental unit on April 1, 2021. Based on the evidence before me, I find that, at the

latest, the tenants sent their forwarding address to the landlord by registered mail on January 21, 2021.

The landlord has not returned the security deposit to the tenants within 15 days of receiving their forwarding address, or at all.

The landlord has not made an application for dispute resolution claiming against the security deposit within 15 days of receiving the forwarding address from the tenants, or at all.

Accordingly, I find that the landlord has failed to comply with her obligations under section 38(1) of the Act.

Section 38(6) of the Act sets out what is to occur in the event that a landlord fails to return or claim the security deposit within the specified timeframe:

> (6) If a landlord does not comply with subsection (1), the landlord
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> (a) may not make a claim against the security deposit or any pet damage deposit, and
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> (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

The language of section 38(6)(b) is mandatory. As the landlord has failed to comply with section 38(1), I must order that she pay the tenants double the amount of the security deposit ($2,600).

3. Break-Fee

In addition to the $1,300 security deposit, the landlord collected a “break fee” of $2,600 at the start of the tenancy.

Section 1 of the Act defines security deposit as follows:

> "**security deposit**" means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:
>
> (a) post-dated cheques for rent;
>
> (b) a pet damage deposit;
>
> (c) a fee prescribed under section 97 (2) (k) [regulations in relation to fees];

The *Residential Tenancy Regulation* (the “**Regulation**”) permit the following fees to be charged:

Refundable fees charged by landlord

6(1) If a landlord provides a tenant with a key or other access device, the landlord may charge a fee that is

(a)refundable upon return of the key or access device, and

(b)no greater than the direct cost of replacing the key or access device.

(2) A landlord must not charge a fee described in subsection (1) if the key or access device is the tenant's sole means of access to the residential property.

Non-refundable fees charged by landlord

7(1) A landlord may charge any of the following non-refundable fees:

(a) direct cost of replacing keys or other access devices;

(b) direct cost of additional keys or other access devices requested by the tenant;

(c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;

(d) subject to subsection (2), an administration fee of not more than $25 for the return of a tenant's cheque by a financial institution or for late payment of rent;

(e) subject to subsection (2), a fee that does not exceed the greater of $15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;

(f) a move-in or move-out fee charged by a strata corporation to the landlord;

(g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

Neither of these sections permits a landlord to charge a fee at the start of the tenancy which the landlord may retain on the event a tenancy breaks a fixed-term tenancy agreement.

As such, I find that the “break fee” amounts to a “security deposit” as defined in section 1 of the Act. The landlord holds it as security against the tenants ending the tenancy in advance of the end of the fixed term.

Section 19 of the Act limits security deposits to an amount no greater than one half of the monthly rent. At the start of the tenancy, the landlord collected $3,900 from KM as security against his breach of the tenancy agreement or Act. This amounts to one and a half times the monthly rent.

Section 20 of the Act states:

Landlord prohibitions respecting deposits

20 A landlord must not do any of the following:

[…]

> (b) require or accept more than one security deposit in respect of a tenancy agreement;
> […]
> (e) require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement.

As such, the clause in the addendum allowing the landlord to retain the security deposit or break fee in the event the tenant ending the tenancy prior to the end of the fixed term is not valid and of no force or effect.

I find that the landlord collected the "break fee" of $2,600 in contravention of the Act. Accordingly, she is not entitled to retain it and it must be returned to the tenants. I order that the landlord pay the tenants $2,600 representing the return of the "break fee".

As the tenants have been successful in their application, they are entitled to have their filing fee of $100.00 repaid by the landlord.

I note that I make no findings as to whether the tenants vacated the rental unit in breach of the Act or the tenancy agreement, or whether the landlord is entitled to recover damages resulting from this action. Rather, this decision is decided on the narrow grounds of whether the landlord complied with her obligations under section 38 of the Act and whether she was permitted to collect the "break fee" at the start of the tenancy.

Conclusion

Pursuant to sections 62, 65, 67, and 72 of the Act, I order that the landlord pay the tenants $5,300, representing the following:

Description	Amount
Return of double the security deposit	$2,600.00
Return of the break fee	$2,600.00
Filing Fee	$100.00
Total	**$5,300.00**

I order the tenants to serve a copy of this decision and attached order on the landlord as soon as possible upon receipt.

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 8, 2022

Residential Tenancy Branch