Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSDS-DR, FFT

Introduction

The Tenants seek the following relief under the *Residential Tenancy Act* (the "*Act*"):

- Pursuant to s. 38, return of the security deposit withheld by the Landlord; and
- Return of their filing fee pursuant to s. 72.

J.B. and R.B. appeared on their own behalf as Tenants. The Landlord did not attend, nor did someone attend on their behalf.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing.

Pursuant to Rule 7.1 of the Rules of Procedure, the hearing began as scheduled in the Notice of Dispute Resolution. As the Landlord did not attend, the hearing was conducted in their absence as permitted by Rule 7.3 of the Rules of Procedure.

This matter was originally filed as a direct request but was adjourned to a participatory hearing following the interim reasons issued by the Adjudicator on November 4, 2021.

The Tenants advise that the Notice of Dispute Resolution for the participatory hearing and their evidence was served on the Landlord by way of registered mail. The Tenants provide a copy of the registered mail tracking information, indicating that the package was sent on November 8, 2021. The Tenants indicate that the package was returned to them.

Policy Guideline #12 states the following with respect to service via registered mail:

> Where a document is served by Registered Mail or Express Post, with signature option, the refusal of the party to accept or pick up the item, does not override the deeming provision. Where the Registered Mail or Express Post, with signature option, is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.

Presently, the Tenants are entitled to serve the application materials for the participatory hearing by way of registered mail as per s. 89 of the *Act*. The information provided by the Tenants clearly indicates that the registered mail was sent to the Landlord's mailing address as listed in the tenancy agreement. The Tenants confirmed that the only mailing address they received from the Landlord was the one provided by the Landlord in the tenancy agreement.

I find that the Tenants served the Landlord with their application materials for the participatory hearing by way of registered mail sent on November 8, 2021 in accordance with s. 89 of the *Act*. Pursuant to s. 90 of the *Act*, I deem that the Landlord received the Notice of Dispute Resolution for the participatory hearing and the Tenants' evidence on November 13, 2021.

Issue(s) to be Decided

1) Are the Tenants entitled to the return of their security deposit?
2) Are the Tenants entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

The Tenants confirmed the following details with respect to the tenancy:

- They took possession of the rental unit on June 1, 2021 and vacated the rental unit on July 31, 2021.
- The tenancy was for a two-month fixed-term period. The rental unit was furnished.
- Rent of $3,400.00 was due on the first day of each month.

- The Landlord asked for a security deposit of $1,700.00 from the Tenants.

The Tenants provide a copy of the written tenancy agreement. The tenancy agreement is signed by the Tenants alone. The Tenants advised that they signed the tenancy agreement and emailed the signed tenancy agreement to the Landlord. The further advise that the Landlord failed to provide them with a copy of the tenancy agreement signed by the Landlord.

The Tenants testified that no written move-in or move-out inspection was ever conducted and that they did not receive the same from the Landlord. J.B. advises that an informal walkthrough was conducted when they took possession where they inspected the unit and discussed matters.

After the Tenants vacated the rental unit, I am told they provided their forwarding address to the Landlord by way of email sent on August 6, 2021. A copy of the email was put into evidence by the Tenants.

J.B. testified that the Landlord returned $1,341.72 to them on August 9, 2021 by way of email and e-transfer. The Tenants further indicate that they did not consent to the amount deducted. The Tenants admit that they did consent to a $75.00 cleaning fee, which is set out in clause XI of the tenancy agreement. They confirm the Landlord did not file an application to claim against the security deposit.

The Tenants seek the return of the balance of the security deposit less the $75.00 they agreed to be deducted, which they say totals $283.28.

Analysis

The Tenants seek the return of the balance of their security deposit.

I pause to consider the issue of the tenancy agreement not being signed by the Landlord. I do not find this point to be relevant. I accept the Tenants testimony that they signed the tenancy agreement, sent it to the Landlord, and that the Landlord failed to return a signed copy to them. I would note that the Landlord's failure to do so is in breach of their obligation under s. 13 of the *Act*.

In any event, I am satisfied that there is a tenancy along the terms listed in the written tenancy agreement provided by the Tenants. I make this finding based on the fact that

the Tenants complied with their obligations to pay rent and the security deposit in the amounts listed within the tenancy agreement and on the undisputed evidence of the Tenants that the Landlord failed to provide them with a signed copy.

Section 38(1) of the *Act* sets out that a landlord must either repay a tenant their security deposit or make a claim against it by filing an application with the Residential Tenancy Branch. The landlord must either repay or claim against the security deposit within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later. A landlord may not claim against the security deposit if the application is made outside of the 15-day window established by s. 38.

Under s. 38(6) of the *Act*, when a landlord fails to either repay or claim against the security deposit within the 15-day window, the landlord may not claim against the security deposit and must pay the tenant double their deposit.

With respect to the relevant deadline, I accept that the tenancy ended on July 31, 2021 as listed in the tenancy agreement. However, the Tenants indicate that they served the Landlord with their forwarding address by way of email sent on August 6, 2021. Service via email is permitted under s. 88 of the *Act* provided that the parties agree in writing beforehand that email is an approved form of service. This is set under s. 43 of the Regulations.

Within the tenancy agreement, under clause XIV, the Landlord provides their contact details, which includes a phone number and their email. I find that the Landlord provided her email address as an approved form of service as contemplated by s. 43 of the Regulations by including it within the tenancy agreement. This is supported by the conduct of the parties, as they appear to have communicated primarily through email, including the sending of the tenancy agreement and the return of the security deposit by the Landlord. I find that the Tenants provided the Landlord with their forwarding address on August 6, 2021 by way of the email provided by the Tenants in their evidence. Accordingly, the Landlord had until August 15, 2021 to either claim against the security deposit or return it.

Under s. 24(2) of the *Act*, a landlord's right to claim against the security deposit is extinguished if the landlord does not complete an inspection report at the beginning of the tenancy and give it to the tenant.

I accept the Tenants' undisputed testimony that no written move-in inspection report was completed as contemplated by s. 23 of the *Act*. Only an informal walkthrough was conducted, where it appears the parties orally discussed the condition of the rental. This is not an acceptable form of a move-in inspection as set out under the *Act* as no written report was ever produced. Given this, I find that the Landlord's right to claim against the security deposit for damages was extinguished by virtue of s. 24(2) of the *Act*. I further accept that the Tenants did not consent to the Landlord withholding $283.28 when the security deposit was returned on August 9, 2021 and that they only consented to the withholding of $75.00.

I find that the Landlord failed to comply with s. 38(1) of the *Act* as they could not claim for damages caused by the Tenants by virtue of their right being extinguished and they did not return the security deposit in full or file an application claiming against the security deposit within 15-days. The doubling provision set out under s. 38(6) is thus triggered.

I note that the Tenants claim filed as a return of the $283.28, which is the amount that was withheld by the Landlord. However, the process established by s. 38 and the wording of s. 38(6) is not permissive. Where a landlord fails to comply with the process set out under s. 38(1) they may not claim against the security deposit and must pay the tenant double the security deposit. The Tenants sought the return of their security deposit, which is governed by s. 38. Their misunderstanding of s. 38(6) is no bar to its application, which, as stated above, is mandatory.

Policy Guideline #17 provides guidance with respect to the application of the various sections of the *Act* that relate to the return of a security deposit. It provides various examples, the following of which is relevant to the present matter:

> Example C: A tenant paid $400 as a security deposit. The tenant agreed in writing to allow the landlord to retain $100. The landlord returned $250 within 15 days of receiving the tenant's forwarding address in writing. The landlord retained the $50 without written authorization.
>
> The arbitrator doubles the amount that remained after the reduction authorized by the tenant, less the amount actually returned to the tenant. In this example, the amount of the monetary order is $350 ($400 - $100 = $300 x 2 = $600 less the amount actually returned $250).

The security deposit was $1,700.00 and the Tenants admit that they consented to the withholding of $75.00 beforehand. I accept that the Landlord returned $1,341.72 on August 9, 2021 as advised by the Tenants during the hearing. Applying the formula as described by Policy Guideline #17, the following is the result:

$1,700.00 - $75.00 = $1,625.00 x 2 = $3,250.00 – $1,341.72 = $1,908.28

I find that the Tenants are entitled to $1,908.28 pursuant to s. 38 of the *Act*.

Conclusion

The Tenants are entitled to $1,908.28 under s. 38 of the *Act* as the Landlord failed to repay the security deposit or file an application against it within the 15-day period required under s. 38(1) of the *Act*.

As the Tenants are successful in their application, I order pursuant to s. 72(1) of the *Act* that the Landlord pay the Tenants filing fee of $100.00.

Taking the amounts listed above into account, I make a total monetary order pursuant to sections 38, 72, and 67 in the amount of **$2,008.28**. The Landlord shall pay this amount to the Tenants.

It is the Tenants obligation to serve the monetary order on the Landlord. If the Landlord does not comply with the monetary order, it may be filed by the Tenants with 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: March 15, 2022

Residential Tenancy Branch