Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding GREENAWAY REALTY and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSDB-DR, FFT

Introduction

On March 7, 2022, an Adjudicator appointed pursuant to the *Residential Tenancy Act* (the "Act") adjourned the Tenants' application for dispute resolution to a participatory hearing. She did so on the basis of an ex parte hearing using the Residential Tenancy Branch's direct request process. The Adjudicator adjourned the direct request for the following reasons:

> *I find that the tenants have not submitted a copy of a Proof of Service of Forwarding Address form to establish service of the forwarding address to the landlord.*
>
> *I also note that the tenants' notice to end tenancy states that the tenancy would end on November 1, 2021. However, the Tenant's Direct Request Worksheet indicates the tenancy ended on November 30, 2021. Furthermore, the worksheet indicates that the tenants vacated the rental unit on November 30, 2021.*
>
> *I find these discrepancies raise questions that can only be addressed in a participatory hearing.*

This hearing dealt with the Tenants' application under the Act for:

- return of double the Tenants' security deposit and pet damage deposit pursuant to sections 38, 38.1, and 67; and
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72.

The Landlord's agent KG and the Tenants' agent TG attended this hearing. They were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

All attendees at the hearing were advised that the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure") prohibit unauthorized recordings of dispute resolution hearings.

Preliminary Matter – Service of Dispute Resolution Documents

The parties did not raise any issues with respect to service of dispute resolution documents. KG acknowledged receipt of the Tenants' notice of dispute resolution proceeding package dated March 7, 2022 and evidence. TG acknowledged receipt of the Landlord's evidence. Based on the above, I find the Landlord was served with notice of this hearing in accordance with section 89 of the Act. I further find the parties were served with copies of each other's evidence for this hearing in accordance with section 88 of the Act.

Preliminary Matter – Notice to End Tenancy and Proof of Service

The Tenants submitted a corrected tenant's notice to end tenancy which states that the tenancy ended on November 30, 2021 instead of November 1, 2021. The Tenants also submitted a Proof of Service in form #RTB-41 which indicates that the Tenants' forwarding address was served on the Landlord via email on November 1, 2021. Based on the foregoing and the parties' testimonies, I find the tenancy ended on November 30, 2021. I further find that the Landlord was served with the Tenants' forwarding address on November 1, 2021 in accordance with section 88(j) of the Act. I find that this resolves the questions raised by the Adjudicator in the interim decision dated March 7, 2022.

Issues to be Decided

1. Are the Tenants entitled to return of double the Deposits?
2. Are the Tenants entitled to recover the filing fee?

Background and Evidence

This tenancy commenced on March 5, 2019 and ended on November 30, 2021. Rent was $2,250.00 per month. The Tenants paid a security deposit of $1,125.00 and a pet

damage deposit of $1,125.00 (collectively, the “Deposits”) which are held by the Landlord. A copy of the tenancy agreement has been submitted into evidence.

The parties agreed that a move-in inspection of the rental unit was done on March 4, 2019, and a condition inspection report was signed on March 5, 2019.

TG confirmed the Tenants gave notice to vacate the rental unit in November 2021. TG referred to a letter from the Landlord dated November 2, 2021 (the “First Notice”), which offered to schedule the move-out inspection for November 30, 2021 at 10:00 am.

TG testified that one of the Tenants, KS, had a premature baby and was unable to respond to text messages or emails. TG stated that by not replying to the Landlord, the Tenants believed that the move-out inspection would proceed as per the First Notice. TG stated that the Tenants never advised the Landlord that they could not do the move-out inspection at this time. TG stated that he attended the rental unit at 10:00 am on November 30, 2021 and no one was there.

TG stated that the Landlord never provided an opportunity for a second move-out inspection. TG stated that the Tenants had moved out of the rental unit in early November 2021. TG referred to a notice from the Landlord rescheduling the move-out inspection to 9:00 am on November 30, 2021 (the “Final Notice”). TG stated that the Final Notice was posted at the rental unit, where the Tenants no longer lived. TG argued that the Final Notice was not properly given.

TG argued the Landlord failed to give opportunities for a move-out inspection and the Landlord did not make an application to withhold the Deposits, so the Tenants are entitled to double the Deposits and the filing fee.

In response, KG argued that the Tenants have extinguished their right to the Deposits.

KG confirmed that a move-out request from the Tenants was received on November 1, 2021. KG explained the Landlord corrected the move-out date to November 30, 2021, which was then initialed by KS.

KG referred to an email from AB to KS dated November 2, 2022, which includes a move-out cleaning checklist, the First Notice, and the move-in condition inspection report. KG noted that AB had mentioned in the email that there was some known damage in the rental unit. KG stated that they did not hear back from the Tenants.

KG referred to a follow-up email sent to the Tenants on November 19, 2021 through a communication portal. A copy of this message has been submitted into evidence. KG confirmed that the Landlord did not hear back from the Tenants in response to this message.

KG testified that on November 22, 2021, a text message to confirm the move-out time was sent to KS.

KG testified that on November 23, 2021, a copy of the Final Notice was posted to the Tenants' door. A copy of the Final Notice has been submitted into evidence. The Final Notice is a notice of final opportunity to schedule a condition inspection in form #RTB-22. The Final Notice proposed that the condition inspection be done at 9:00 am on November 30, 2021. KG explained that they kept the date but changed the time to 9:00 am instead of 10:00 am.

The Landlord submitted a signed proof of service statement dated March 11, 2022 which indicates that the Final Notice was posted to the Tenants' door on November 23, 2021 by AB and witnessed by MB.

KG testified that the Final Notice was removed from the Tenants' door sometime in November 2021.

A move-out condition inspection report submitted into evidence by the Landlord indicates that AB completed the move-out inspection on November 30, 2021, and that the Tenants did not attend.

KG testified that the Tenants left personal items in the rental unit, as well as a dumpster in the driveway. KG referred to email and text correspondence dated between November 30 and December 3, 2021 between AB and KS. In an email with a timestamp of 9:40 am on November 30, 2021, AB wrote to KS that she had just returned from the move-out inspection. In the same email, AB informed KS that new tenants will be taking occupancy the next day and the locks will be changed later that day. AB also asked KS to ensure that the Tenants' personal items and dumpster are removed. The email correspondence indicates that AB and KS later agreed for KS's father to collect the items on or around December 2, 2021.

KG testified that she believed KS's father, TG, came to the rental unit to load the Tenants' belongings.

KG stated the Landlord subsequently received notice that TG would be acting as the Tenants' agent for this application. KG testified she reached out to KS and was informed that since TG had helped the Tenants move out, the Tenants told TG he could have whatever was left over in the Deposits. KG stated that at the time, she knew there wasn't anything left in the Deposits due to all the bills paid out and getting the rental unit ready for the next tenants.

KG referred to an email sent by AB to the Tenants dated January 1, 2022, which provides a summary of correspondence and attempts to schedule a move-out inspection to the Tenants. AB's email also mentioned that there was damage in the rental unit and the original washer and dryer were missing.

KG testified that the bills incurred for getting the rental unit ready for the next tenants exceed the total amount of the Deposits.

KG testified that while there was some correspondence about removal of the Tenants' belongings, but at no time did the Tenants or TG say they were waiting for the move-out inspection.

In reply, TG stated that he attended the 10:00 am move-out inspection but no one was there. TG stated the Tenants were not given a second opportunity for inspection. TG stated that KS had told AB in a phone call that the Tenants moved out of the rental unit in early November 2021.

TG argued that the Landlord did not give proper notice, the Tenants weren't given an opportunity to participate in a move-out inspection, and the Landlord did not make an application to withhold the Deposits. TG argued that the charges the Landlord had against the Deposits were unreasonable.

Analysis

1. Are the Tenants entitled to return of double the security deposit and pet damage deposit?

Sections 38(1) and 38.1 of the Act contain provisions regarding the return of security and pet damage deposits from a landlord to a tenant and when a landlord will need to pay a tenant double the deposits, as follows:

> **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
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
>
> 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.
>
> […]
>
> **Order for return of security and pet damage deposit**
> 38.1 (1) A tenant, by making an application under Part 5 [*Resolving Disputes*] for dispute resolution, may request an order for the return of an amount that is double the portion of the security deposit or pet damage deposit or both to which all of the following apply:
>
> (a) the landlord has not applied to the director within the time set out in section 38 (1) claiming against that portion;
>
> (b) there is no order referred to in section 38 (3) or (4) (b) applicable to that portion;
>
> (c) there is no agreement under section 38 (4) (a) applicable to that portion.
>
> (2) In the circumstances described in subsection (1), the director, without any further dispute resolution process, may grant an order for the return of the

> amount referred to in subsection (1) and interest on that amount in accordance with section 38 (1) (c).

In addition to the above, section 38(2) of the Act states that section 38(1) "does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24(1) [*tenant fails to participate in start of tenancy inspection*] or 36(1) [*tenant fails to participate in end of tenancy inspection]*" (emphasis added).

In this case, I find the evidence indicates that the parties did a move-in inspection and completed a condition inspection report at the start of the tenancy, such that neither party extinguished their rights to the Deposits under section 24 of the Act.

On this application, the Landlord argues that the Tenants have extinguished their right to the Deposits by not participating in the move-out inspection at the end of the tenancy. Section 36(1) of the Act states that if the landlord complied with the requirement for two opportunities for inspection and the tenant has not participated on either occasion, the right of a tenant to the return of a security deposit and a pet damage deposit is extinguished.

According to section 35(2) of the Act, the landlord must offer the tenant at least two opportunities, as prescribed, for the end of tenancy inspection. Section 17 of the Residential Tenancy Regulation (the "Regulations") explains the requirements for the two opportunities as follows:

> **Two opportunities for inspection**
> 17(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.
> (2) If the tenant is not available at a time offered under subsection (1),
> (a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and
> (b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.
> (3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

I find the Landlord proposed the first opportunity for inspection by issuing the First Notice to the Tenants on November 2, 2021, in accordance with section 17(1) of the Regulations.

I accept KG's testimony that there was no response from the Tenants despite the Landlord's subsequent email and text message reminders. I find that given the Tenants' lack of response to the First Notice, it was reasonable for the Landlord to issue the Final Notice proposing a second opportunity in accordance with section 17(2)(b) of the Regulations.

I find that the Final Notice is in the approved RTB form and contains the information required by the Regulations.

I note the Tenants dispute that the Final Notice was served properly.

Based on the evidence before me, I find that a copy of the Final Notice was posted to the front door of the rental unit on November 23, 2021. Section 88(g) of the Act permits documents to be served on a person by attaching to a door or other conspicuous place at the address at which the person resides.

I find there is insufficient evidence to conclude the Tenants had communicated to the Landlord that the Tenants would not be able to receive correspondence posted at the rental unit. I find that since the tenancy did not end until November 30, 2021, the Tenants still had their belongings inside the rental unit, and the Tenants still had access to the rental unit, the rental unit may be considered the Tenants' residence for the purpose of section 88(g). Furthermore, I accept KG's testimony, as supported by AB's emails, that the copy of the Final Notice posted to the front door had been removed by the time AB attended the rental unit to do the move-out inspection on November 30, 2021. I am therefore satisfied that the Final Notice was served on the Tenants in accordance with section 88(g) of the Act. I find that pursuant to section 90(c) of the Act, the Tenants are deemed to have received the Final Notice three days later on November 26, 2021. I do not find the Tenants to have provided compelling evidence to rebut the presumption of deemed receipt in the circumstances.

I find that despite the First Notice and Final Notice issued by the Landlord, neither of the Tenants attended at the rental unit for a move-out inspection.

I do not accept TG's argument that he was at the rental unit on the Tenants' behalf to do a move-out inspection on November 30, 2021 at 10:00 am.

First, I do not find the Tenants to have advised the Landlord in advance that TG would be acting as their agent for such an inspection. Sections 15(1) and (2) of the Regulations state that the tenant may appoint an agent to act on the tenant's behalf to attend a condition inspection and sign a condition inspection report, but the tenant "must" advise the landlord of this "in advance of the condition inspection". As such, while I accept that TG attended at the rental unit to pick up the Tenants' belongings, I do not find that TG attended as the Tenants' authorized agent for the purposes of a move-out inspection.

Second, I find there is a lack of evidence to suggest that either TG or the Tenants had attempted to contact the Landlord's representatives to inform them that TG was in fact at the rental unit at 10:00 am waiting for the move-out inspection to take place. In the absence of such evidence, I do not find TG's testimony that he was waiting at the rental unit for the inspection to be credible.

Furthermore, I find that AB had completed the move-out inspection by herself and informed the Tenants via email that she had done so by 9:40 am on November 30, 2021. I find KS's email reply to AB dated December 1, 2021 made no mention of the move-out inspection. I find there is a lack of evidence to suggest that the Tenants had expressed any intention or desire to participate in the inspection.

In summary, I find the Landlord had offered the Tenants two opportunities for an end of tenancy inspection in accordance with the Act and the Regulations, and the Tenants did not participate on either occasion. I conclude that the Tenants' right to the return of the Deposits is therefore extinguished under section 36(1) of the Act.

Residential Tenancy Policy Guideline 49. Tenant's Direct Request – Deposits states:

> **LEGISLATIVE FRAMEWORK**
> Section 38(1) of the Residential Tenancy Act says that within 15 days of the date a tenancy ends and the date the landlord receives the tenant's forwarding address in writing (whichever comes later) a landlord must:
>
> 1. Repay a security deposit and/or pet damage deposit to the tenant; or
> 2. Apply to the Residential Tenancy Branch to keep it.

The Act deems that if a landlord does not do either, they cannot claim against the deposit, and must pay the tenant double the amount of the deposit, unless:

1. The Branch previously ordered the tenant to pay money to the landlord, and the tenant has not paid it;
2. The tenant agreed in writing that the landlord could keep the deposit to pay a liability or obligation; or
3. The landlord offered the tenant at least two opportunities to inspect the unit at the beginning or end of the tenancy, and the tenant did not participate.

[…]

Monetary Order

The director may issue a monetary order, if the director is satisfied that:

1. The tenant served the landlord with their forwarding address in writing and 15 days have elapsed since the landlord was deemed served;
2. The tenancy ended, and 15 days have elapsed since the end date;
3. There is no outstanding order for the tenant to pay money to the landlord;
4. There is no written agreement that the landlord could keep the deposit; and
5. The tenant did not forfeit their right to claim against the deposit.

(emphasis added)

Residential Tenancy Policy Guideline 17. Security Deposit and Set-off further states:

C. RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH DISPUTE RESOLUTION

1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:

- a landlord's application to retain all or part of the security deposit; or
- a tenant's application for the return of the deposit.

unless the tenant's right to the return of the deposit has been extinguished under the Act.

(emphasis added)

As I have determined that the Tenants' right to the Deposits has been extinguished under section 36(1) of the Act, I find the Landlord is not required to return the Deposits to the Tenants or apply for dispute resolution under 38(2) of the Act.

The Tenants' claim for return of the Deposits is therefore dismissed without leave to re-apply.

2. Are the Tenants entitled to recover the filing fee?

The Tenants have not been successful in this application. I decline to award the Tenants reimbursement of their filing fee under section 72 of the Act.

Conclusion

The Tenants' application is dismissed in its entirety without leave to re-apply.

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 26, 2022

Residential Tenancy Branch