



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FFT

Introduction

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

- monetary order for \$400 representing the return of the security deposit pursuant to sections 38 of the Act; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

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 tenant 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 tenant and I were the only ones who had called into the hearing.

The tenant testified that the landlord confirmed with him in writing (via text message) that the tenant may serve him via email. He did not upload this document prior to the hearing. I gave the tenant leave to upload this as well as a screenshot of the email attaching the notice of dispute resolution package and supporting documentary evidence during the hearing. The tenant did this, and the documents show that the landlord agreed he could be served via email and that the tenant sent the required documents to him via email on March 6, 2022.

Accordingly, I find that the landlord has been served with the required documents in accordance with the Act.

Jurisdiction

On the application, the tenant listed the landlord's address for service as the same address for the rental unit in which the tenant resided during the tenancy. The tenant testified that he rented one bedroom of a 3-bedroom apartment which is owned by the landlord. He testified that the landlord lived in one of the other bedrooms, and that the third bedroom is occupied by another tenant (who is not a party to this application). All three occupants of the rental unit shared a kitchen.

The tenant testified that he moved into the rental unit sometime between December 10 and 15, 2021. At that time, the landlord was living in the rental unit. However, the tenant testified that on January 8, 2022, the landlord temporarily relocated to another city to finish some school courses. The tenant testified that the landlord advised him he would be gone for three or four months. Prior to leaving, the landlord removed his personal effects from the bedroom he was using and put them in storage on the residential property. The landlord left his furniture in the bedroom.

The tenant testified that the landlord rented out his bedroom on a temporary basis for the time he was going to be away. I understand that this new occupant was to have vacated the rental unit upon the landlord's return.

I am unsure if that happened, as in early February 2022, the tenant vacated the rental unit due to an incident involving him and the third occupant.

Section 4(c) of the Act states:

What this Act does not apply to

4 This Act does not apply to

(c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,

At the start of the tenancy, the application of this section would have been simple enough. The tenant and the owner (the landlord) both resided in the rental unit and shared a kitchen, so the Act would not apply.

However, for roughly the last month of the tenancy, the landlord was not residing in the rental unit. Additionally, during this time, the landlord did not have a right to occupy the rental unit, as he rented out his bedroom to a third party. The landlord had a *reversionary* right to occupy (that is, the right to occupy would revert to him once the third party vacated the rental unit).

I find that this reversionary right of occupancy is insufficient to engage section 4(c) of the Act, as, at the time the tenancy ended (and the time leading up to it) the landlord did not have a right to share the kitchen with the tenant. I note that, had the landlord not re-rented his bedroom, and instead left it vacant, I would likely have found that the landlord had a continued right of occupancy to the rental unit and kitchen, given that his relocation was temporary. I likely would have declined jurisdiction on this basis.

I find that whether the tenancy agreement is subject to the Act or not can change depending on the circumstances of the living arrangement. I do not think it reasonable to find that if a living arrangement does not fall under the Act when it is created then the arrangement will never be subject to the Act, even if the circumstances changed to those which would cause the Act to apply if they were in place at the start of the

tenancy. Such a finding would open the door to abuse by unscrupulous landlord by giving a landlord a way to permanently avoid the Act.

Accordingly, I find that the Act applies to this living arrangement, as the landlord and the tenant did not share a kitchen and bathroom for roughly the last month of the tenancy.

Issues to be Decided

Is the tenant entitled to:

- 1) a monetary order of \$400, representing the return of his security deposit; and
- 2) recover the filing fee?

Background and Evidence

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

The parties entered into an oral, month to month tenancy agreement starting sometime between December 10 and 15, 2021. Monthly rent was \$800. The tenant paid the landlord a security deposit of \$400, which the landlord continues to hold in trust for the tenant.

The tenant testified that the landlord did not provide the tenant with a move-in condition inspection report when the tenancy started, although the tenant did document the condition of the rental unit himself when he moved in.

The tenant testified that he vacated the rental unit on February 2, 2022, following an incident with the occupant of the third bedroom in the rental unit. The tenant provided the landlord with his forwarding address, in writing via text message and a letter left on the counter of the rental unit kitchen on February 3, 2022. The landlord responded to the text message containing the forwarding address stating that he would forward the tenant's mail to that address.

The landlord has not returned the security deposit to the tenant, nor has he made an application to keep the security deposit with the Residential Tenancy Branch.

The tenant testified that he did not agree, in writing or otherwise, that the landlord could the security deposit, or any part of it, after the tenancy ended.

At the hearing, the tenant stated that he did not intend to waive any right to an award for the double the security deposit under the Act.

Analysis

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
- (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.

Based on the testimony of the tenant, I find that the tenancy ended on February 2, 2022 when the tenant vacated the rental unit (pursuant to section 44(1)(d) of the Act). I find that the tenant provided his forwarding address in writing to the landlord on February 3, 2022 via text message. Despite text message not being a mode of service set out at section 88 of the Act, I find that the tenant's texting his forwarding address to the landlord to be sufficient service for the purposes of the Act (per section 71), as the landlord responded to the next message and indicated that he would use the address to forward mail to the tenant. There is no doubt that the landlord received the text message or misunderstood its meaning.

I find that the landlord has neither returned the security deposit to the tenants nor made an application against the security deposit within 15 days of receiving their forwarding address, or at all.

It is not enough for the landlord to allege that he has suffered damage as a result of the tenant's actions. He must actually apply for dispute resolution, claiming against the security deposit, within 15 days from receiving the tenant's forwarding address.

The landlord did not do this. Accordingly, I find that he has failed to comply with his 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 against the security deposit within the specified timeframe:

- (6) If a landlord does not comply with subsection (1), the landlord
 - (a) may not make a claim against the security deposit or any pet damage deposit, and
 - (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 they pay the tenants double the amount of the security deposit (\$800).

As the tenant has been successful in the application, he is entitled to have the filing fee of \$100.00 repaid by the landlord.

Conclusion

Pursuant to sections 62 and 72 of the Act, I order that the landlord pay the tenant \$900 representing the return of double the amount of the security deposit plus 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 19, 2022

Residential Tenancy Branch