

## **DECISION**

### **Introduction**

This hearing dealt with the Landlord's Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for:

- an Order of Possession based on the vacate clause in a fixed term tenancy agreement under sections 44(1)(b) and 55 of the Act
- authorization to recover the filing fee for this application from the Tenant under section 72 of the Act

and the Tenant's Application for Dispute Resolution under the *Act* for:

- an order requiring the Landlord to comply with the Act, regulation or tenancy agreement under section 62 of the Act
- authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

### **Service of Notice of Dispute Resolution Proceeding (Proceeding Package)**

I find that the Landlord(s) acknowledged service of the Proceeding Package and are duly served in accordance with the Act.

### **Service of Evidence**

Based on the submissions before me, I find that the Tenant's evidence was served to the Landlord in accordance with section 88 of the Act.

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### **Issues to be Decided**

**Is the landlord entitled to an Order of Possession?**

**Is the tenant entitled to an order requiring the Landlord to comply with the Act, regulation or tenancy agreement?**

**Is the Landlord entitled to recover the filing fee for this application from the Tennant?**

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## **Background and Evidence**

I have heard all the testimony of the parties but will refer only to what I find relevant for my decision.

Both parties agree that the current Landlords bought the rental unit from the current Tenants.

Both parties provided copies of the tenancy agreement. The tenancy started on June 16, 2023, and gives an end date of September 30, 2023, with a vacate clause. Both the Landlord and Tenants initialed the vacate clause. The reason given for the vacate clause is, "this is part of a selling contract signed on". The rent is \$5500.00 per month.

The security deposit section is as follows, "the tenant is required to have \$100,000.00 holdback in the buyer's lawyer". The standard phrase "pay a security deposit of" is crossed out and replaced by "have".

The Landlord requests an order of possession based on the vacate clause in the tenancy agreement.

The Tenants affirm that the \$100,000 referred to in the tenancy agreement security deposit section is more than 50% of one month's rent. They are requesting the return of \$97,250.00 plus interest.

The Landlord provided a copy of the Contract of Purchase and Sale that is for the rental unit and is between the parties.

The relevant term in section 3 of the contract reads, "both of parties agree to have \$100,000 holdback until Sep.30, 2023, The seller will rent back from the buyer at the agreed rent \$5500 per month from completion date. The seller must vacate the house before or on Sep.30, 2023. The seller is not required to pay a security deposit but agree to keep the property in the same condition as when viewed on April 9, 2023."

## **Analysis**

**Is the landlord entitled to an Order of Possession?**

Policy Guideline 30 states that the reason for including a vacate clause must be indicated on the tenancy agreement and both parties must have their initials next to this term for it to be enforceable.

Both parties did initial the vacate clause in the tenancy agreement and a reason is included. However, Policy Guideline 30 further clarifies that a vacate clause can only be included in a fixed term tenancy in the following circumstances:

- the landlord is an individual who, or whose close family member, will occupy the rental unit at the end of the term, or
- the tenancy agreement is a sublease agreement.

The reason provided on the tenancy agreement is neither of the allowed reasons. The reason provided in the tenancy agreement is that it is part of a sales contract. The tenancy is not a sublease agreement, and whether or not the Landlords, or a close family member, intend to occupy the rental unit is irrelevant because it is not the reason given in the tenancy agreement for the existence of the vacate clause.

Therefore, I find that the Landlord is not entitled to an Order of Possession based on the vacate clause in a fixed term tenancy agreement under sections 44(1)(b) and 55 of the Act. Their application is dismissed without leave to reapply.

### **Is the tenant entitled to an order requiring the Landlord to comply with the Act, regulation or tenancy agreement?**

Section 1 of the Act defines a security deposit as, “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, not including post-dated cheques for rent, a pet damage deposit, or a fee prescribed under section 97 (2) (k) [regulations in relation to fees]

Section 17 of the Act states a landlord may require a tenant to pay a security deposit as a condition of entering into a tenancy agreement or as a term of a tenancy agreement.

Section 19 of the Act states a landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.

Section 5 of the Act states landlords and tenants may not avoid or contract out of this Act or the regulations and any attempt to avoid or contract out of this Act or the regulations is of no effect.

However, the relevant paragraph of the sales contract states the \$100,000.00 holdback will be held until September 30, 2023; it does not state the return of the \$100,000.00 is related to, or dependent on, the condition of the rental unit.

Furthermore, the same paragraph states, “the seller is not required to pay a security deposit.”

Therefore, although the security deposit section of the tenancy agreement refers to the \$100,000.00 holdback mentioned in the sales contract, I find the \$100,000.00 holdback is not a security deposit as defined by the Act and the Act has not been avoided.

I further find I do not have jurisdiction over a Contract of Purchase and Sale for a residential unit.

Therefore, I find that the Tenants are not entitled to an order for the return of any portion of the \$100,000.00. Their application for an order requiring the Landlord to comply with the Act, regulation or tenancy agreement under section 62 of the Act is dismissed without leave to reapply.

**Is the Landlord entitled to recover the filing fee for this application from the Tennant?**

As the Landlord was not successful in this application, the Landlord's application for authorization to recover the filing fee for this application from the Tenant under section 72 of the Act is dismissed, without leave to reapply.

**Is the Tennant entitled to recover the filing fee for this application from the Landlord?**

As the Tenant was not successful in this application, the Tenant's application for authorization to recover the filing fee for this application from the Landlord under section 72 of the Act is dismissed, without leave to reapply.

**Conclusion**

The Landlord's application is dismissed, in its entirety, without leave to reapply.

The Tenant's application is dismissed, in its entirety, without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: February 25, 2024

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Residential Tenancy Branch