Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNSD, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant seeking an order for the return of a portion of the security deposit retained by the landlord without authorization.

This matter was originally heard on February 19, 2014 and the decision issued on February 20, 2014 dismissed the tenant's application. The tenant made a successful application for Review Consideration and the matter was scheduled to be re-heard today.

Both parties were present at the rehearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

Issue(s) to be Decided

Is the tenant entitled to a refund of the portion of the security deposit allegedly not returned by the landlord pursuant to section 38 of the Act?

Preliminary Issues

Late Service of Hearing Package to Tenant

The landlord testified that they were not served with the Notice of Re-Hearing within 3 days as directed in the Review Consideration Decision dated March 19, 2014. The evidence on file confirms the following:

- The original hearing was held on February 19, 2014.
- The original decision was issued on February 20, 2014 dismissing the tenant's application.
- The tenant applied for Review Consideration on March 11, 2014.
- The tenant's application seeking a Review was considered and, in a decision dated March 19, 2014, a re-hearing of the dispute was allowed.
- The Notice of Hearing documents were issued on March 26, 2014 for a re-hearing scheduled to be heard on May 14, 2014.
- In the March 26, 2014 decision, the tenant was instructed to serve the Notice of Re-Hearing documents on the landlord within 3 days of receiving the Review Consideration decision.

According to the landlord, they did not receive the Notice of a Review Hearing until sometime in April 2014 and the landlord's position is that the tenant did not comply with the Act by failing to serve the Notice documents within 3 days after receiving the decision.

Section 89 of the Act states that an application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, must be given to one party by another, in one of the following ways:

(a) by leaving a copy with the person;

(b) if the person is a landlord, by leaving a copy with an agent of the landlord;

(c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;

The Act states that a person who makes an application for dispute resolution must give a copy of the application to the other party <u>within 3 days of making it</u>. (my emphasis)

I note that section 90 of the Act provides direction for when a document is deemed to have been served, as follows:

> <u>(a) if given or served by mail, on the 5th day after it is mailed</u>; (my emphasis)
>
> (b) if given or served by fax, on the 3rd day after it is faxed;

(c) if given or served by attaching a copy of the document to a door or other place, on the 3rd day after it is attached;

(d) if given or served by leaving a copy of the document in a mail box or mail slot, on the 3rd day after it is left.

I find that if the Review Consideration decision was rendered on March 26, 2014, and mailed to the tenant on that date, it would be deemed to have been received five days later on March 31, 2014.

If the tenant then served the Notice on the landlord within three days after receiving the decision package from Residential Tenancy Branch on March 31, 2014, in accordance with the Act, the Notices would have to be mailed by April 3, 2014.

Allowing for the 5-days deemed service for mailed documents under the Act, I find that the landlord should have received the Notice of Re-Hearing by April 8, 2014 for the tenant to be in compliance with the 3-day service deadline under section 89 of the Act.

The landlord was to able to give a precise date that the Notice of Re-Hearing was received by the landlord.

I find that the tenant may or may not have complied with the Act in regard to the serving of the application.

However, even if the landlord received the Notice after April 8, 2014, I find that this did not substantially prejudice the landlord because they already knew of the substance of the initial application and the evidence that the tenant had previously submitted for the first hearing held on February 19, 2014.

I find that, once the landlord received the tenant’s notification of the re-hearing “sometime in April”, they still had sufficient time to submit and serve their defence against the tenant’s claims before the May 13, 2014 rehearing date.

Accordingly, the hearing proceeded despite the landlord's objection regarding alleged late service of the landlord's rehearing Notice.

Service of Evidence Upon Which The Review Was Granted

The landlord testified that the tenant had also failed to serve the landlord with the evidence that the tenant had submitted with the tenant’s Application for Review Consideration. The landlord pointed out that the tenant relied on some documents allegedly in support of the tenant's claim that the decision of the

arbitrator had been obtained by fraud and the landlord feels that the tenant's failure to serve these evidentiary documents on the landlord as directed in the March 19th 2014 decision hampered the landlord's ability to defend against the tenant's claim for the rehearing .

I accept the landlord's testimony that the evidence submitted with the tenant's application for Review Consideration had not been served on the landlord, and that the evidence was only submitted it to the Residential Tenancy Branch.

The Residential Tenancy Rules of Procedure, Rule 3.1, requires that all evidence must be served on the respondent and Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding.

Given the above, I find I must decline to consider this evidentiary material submitted by the tenant with the tenant's Application for Review Consideration. . However verbal testimony from both parties was accepted.

Background and Evidence

The tenancy began on May 31, 2010 and ended on August 20, 2013. The tenant paid rent for August 2013 in full. The tenant testified that the landlord received the tenant's written forwarding address on August 24, 2013 and the copy of the move-out condition inspection report verified this to be true.

The tenant acknowledged that an agreement reached between the parties at the end of the tenancy permitted the landlord to retain $275.00 of the tenant's $550.00 security deposit being held. The tenant testified that the remaining $275.00 had never been refunded to the tenant. The tenant is claiming a refund of double the outstanding security deposit and seeking a Monetary Order of $550.00.

The landlord testified that they obtained a bank draft for $275.00 in the tenant's name. A copy of the bank draft was submitted into evidence. The landlord testified that the refund was delivered this to the tenant by securing the envelope to the tenant's door on September 6, 2013.

The landlord testified that, when the tenant alleged that the bank draft was never received by the tenant, the landlord attempted to have the draft cancelled and the funds re-issued to the tenant. However, according to the landlord, the bank requires that both the payers and the payees named in the bank draft come into the bank to complete specific forms before the funds can be released. The landlord testified that they, had

already complied with the mandatory procedure as the purchasers of the bank draft, by making the declaration required by the bank. The landlord pointed out that the tenant declined to take the required steps with the financial institution in order to have thebank draft funds released and continues to refuse to cooperate. The landlord made reference to a written communication from the tenant submitted into evidence refusing the landlord's request to make the mandatory declaration so that the bank-draft funds can be released to the tenant.

The tenant did not deny that he refused to go to the offices of the financial institution and sign a declaration. The tenant takes the position that the landlord was responsible for not ensuring that the remaining refund was properly served or given to the tenant and therefore the landlord must now pay the tenant an amount that is double the amount of the security deposit originally owed.

Analysis

In regard to the return of the security deposit and pet damage deposit, I find that section 38 of the Act is clear on this issue.

The Act states that the landlord can only keep a deposit to satisfy a liability or obligation of the tenant if, after the end of the tenancy, the tenant agrees to this in writing. I find that the tenant did agree that the landlord could retain a portion of the tenant's security deposit.

In order to make a claim against the deposit, the application for dispute resolution must be filed within 15 days after the forwarding address was received. In the alternative, the deposit must be refunded within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, whichever is later.

Based on the evidence and the testimony, I find that the landlord was required to refund the remaining security deposit within 15 days. I find that this would fall on or before September 10, 2013.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit, and must pay the tenant double the amount of the security deposit.

I accept the evidence that proves the landlord purchased a bank draft in the tenant’s name.

I also accept, on a balance of probabilities, that on September 7, 2013, the landlord placed the envelope, containing a refund of the security deposit in the form of a bank draft in the tenant's name, on the tenant's door. I

> Section 88 of the Act requires that all documents, other than those referred to in section 89 *[special rules for certain documents]*, **must be given or served in one of the following ways:**
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> (a) by leaving a copy with the person;
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> (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
>
> (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
>
> (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
>
> (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
>
> (f) by leaving a copy in a mail box or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
>
> **(g) by attaching a copy to a door or other conspicuous place at the address at which the person resides** or, if the person is a landlord, at the address at which the person carries on business as a landlord;
>
> (h) by transmitting a copy to a fax number provided as an address for service by the person to be served;
>
> (i) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;
>
> (j) by any other means of service prescribed in the regulations.
>
> (My emphasis)

I find that, while the above form of service was not likely well-suited for the purpose of leaving a refund for a tenant, it does technically comply with the methods of service permitted under the Act.

I therefore find that the landlord did refund the tenant's remaining security deposit within 15 days as required under section 38 of the Act.

I accept the tenant's testimony that, despite the landlord's service of the security deposit refund in accordance with the Act, the tenant did not actually receive the security deposit funds and was not able to cash the bank draft as it was evidently lost after being posted on the tenant's door. I find that the security deposit refund is still outstanding and the funds are still owed to the tenant

For this reason, I hereby order that both parties in this dispute cooperate in facilitating the release of the security deposit funds to the tenant. I order that the tenant be given another opportunity to complete the applicable bank forms and declarations necessary to have the funds of $275.00 to released to the tenant.

Given the above, I find that the tenant is not entitled to be compensated for the $50.00 cost of the application.

Conclusion

The tenant's application for a refund of double the security deposit was not successful. However the landlord and tenant are ordered to cooperate in completing the necessary paperwork to have the security deposit funds from the lost bank draft ,released to the tenant by the financial institution.

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: May 13, 2014

Residential Tenancy Branch