Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FFT

Introduction

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

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenant "DO" (the "tenant"), the landlords TB, CD, and BG (collectively the "landlord"), and the landlords' bookkeeper CW appeared at the hearing. All parties present were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that she made two attempts to serve, by way of Registered Mail, the Tenants' Application for Dispute Resolution hearing package ("dispute resolution hearing package"), which included the tenants' evidence. The tenant testified that an initial attempt was made to serve the hearing package on July 26, 2019, but that the registered mailed package was returned unopened. The tenant asserted that a subsequent attempt was made to serve the dispute resolution hearing package via registered mail on September 02, 2019.

Although the landlord could not recollect the date on which the dispute resolution hearing package was received, the landlord did confirm receipt of the dispute resolution hearing package with accompanying evidence. Therefore, I find that the landlord was

served with the dispute resolution hearing package and the tenant's evidence in accordance with section 89 of the Act.

The landlord BG testified that a single document (an invoice) was entered as evidence, but that the evidence was not served to the tenant. However, the landlord BG asserted that the document was previously provided to the tenant. The tenant confirmed that she was in possession of the document; therefore, I accept that the tenant is in receipt of the single document representing the landlord's evidence.

Issue(s) to be Decided

Are the tenants entitled to a monetary award for the return of all or a portion of their security deposit? If so, should it be doubled?

Are the tenants entitled to recover the filing fee for this application from the landlord?

Preliminary Matter – Jurisdictional Issues

At the onset of the hearing, the landlord raised concerns related to jurisdictional issues. The landlord asserted that section 4(c) of the Act should be induced in the matter before me, thereby resulting in the Residential Tenancy Branch (RTB) not having jurisdiction to hear the tenant's application.

In order to determine whether the RTB has jurisdiction, the parties were granted an opportunity to provide submissions on the matter of jurisdiction, specifically, with respect to sections 4(a) and 4(c) of the Act.

The parties agreed that section 4(a) of the Act was not at issue, since the tenant was not, and had never been, a member of the cooperative identified as the owner of the premises in which the rental unit is located.

The landlord BG testified that the entity identified as the respondent landlord is a non-profit social-purpose cooperative. The landlord BG further provided that the premises in which the rental unit is located is a 25 acre village comprised of a farm, park, school, and residential village. The village consists of 16 buildings, some which include residential living units, and that there are shared communal kitchen and bathroom facilities.

The landlord BG provided that there is no one individual who is the owner of the cooperative or of the village; rather, the cooperative is comprised of a number of people, each of whom are members of the cooperative and are collectively owners of the cooperative as each member has an ownership share in the cooperative.

The landlord BG testified that she, along with landlord TB, resided at the village as their primary residence. Landlord BG provided that both she and landlord TB are members of the cooperative and have a collective ownership share in the cooperative. Landlord BG asserted that both she and landlord TB shared communal kitchen and bathroom facilities with the tenant during the course of her tenancy. Therefore, landlord BG contends that since the tenant shared kitchen and bathroom facilities with owners of the accommodation, section 4(c) of the Act is induced and precludes the RTB from exercising jurisdiction over the matter.

The tenant testified to confirm that she did use the same common kitchen and bathroom facilities as landlords BG and TB during her tenancy.

Section 4(c) of the Act provides as follows:

> **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,

In making a determination with respect to the application of section 4(c) of the Act, I note that, aside from a monthly invoice submitted as evidence by the landlord, neither party has provided or cited any documentary evidence to accompany their testimony on the issue of jurisdiction. Therefore, I will rely solely on the respective testimony provided by the parties.

I find that the individual landlords have not proven that they, as individuals—and not solely by virtue of being members of a collective cooperative group—are owners of the property which constitutes the cooperative village in which the rental unit is located. I find that the individuals have not provided any documentary evidence to establish that they have an ownership interest in the property that would fit the legal definition of ownership of real property commonly held in the province.

None of the individuals testified that they, as individuals, are registered owners of the property which comprises the rental unit, such that there is documentation registered with the Land Title Office which cites their names; nor have they asserted that they are on title as being owners of the property, or that their respective names are registered as owners on a land title certificate to demonstrate they have an ownership interest in the property.

Rather, the testimony provided by the individual landlords reinforces that the legal entity identified as the cooperative, using the name cited on the first page of this decision, is the legal owner. The invoice provided by the landlord as evidence also depicts that the name of the cooperative is referenced on the invoice and that the tenant submitted payment to the cooperative, and not to any particular individual.

The landlord's interpretation of "owner" is rooted in the general, broad notion that members of a co-operative, by virtue of their membership in the collective, are afforded an inherent, undefined ownership interest in the cooperative. The broad, undefined ownership status of a cooperative member is not quantifiable and is not akin to the fashion in which an ownership interest held by an individual would be empirically defined and registered with the Land Title Office.

In the absence of documentary evidence, I find that I cannot undertake a detailed examination of the ownership structure of the cooperative to find that the individuals BG and TB are owners and designate them as owners for the purpose of the Act in order to induce section 4(c) of the Act.

The testimony provided by landlords TB and BG demonstrates that members of the cooperative are given an inherent, default status as owner devoid of any specified or empirically defined stake in the property registered with the Land Title Office that would enable them to exercise the same legal actions that one would commonly associate with being an owner of, and having an interest in, a property, such as the ability to sell or transfer one's real property (or a portion or stake of the property) in a manner that would adhere to the legal framework within which real property is transferred in the province, whereby the property transfer and registration guidelines required by the Land Title Office are fulfilled.

Therefore, after considering the testimony before me, I find that the owner is the organization (the cooperative) itself. An entity, whether operating as a cooperative or corporation, cannot itself as an entity occupy the unit in a manner akin to an individual

owner. The organization cannot occupy the unit and share facilities as outlined in section 4(c) of the Act in order to satisfy the spirit and intention of that section of the Act.

Based on the foregoing, I find that the landlords TB and BG have not proven that they are owners, as defined above and within the intention of the Act, and therefore, I determine that section 4(c) of the Act does not apply in the matter before me. Therefore, I find that the RTB does have jurisdiction to hear the tenant's application.

Background and Evidence

I have reviewed all evidence before me that met the requirements of the Rules of Procedure. While I have considered documentary evidence submitted and all oral testimony of the parties, I will only refer to the evidence and facts which I find relevant in this decision. Not all details of the respective submissions and / or arguments of the parties are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

The parties agreed to the following facts. The parties agreed that the month-to-month tenancy began on December 08, 2018, and that a security deposit of $500.00 was provided by the tenant to the landlord. The monthly rent was set at $1,035.00, and was provided as payment for rent and meal expenses. The parties agreed that a written tenancy agreement was not signed at the start of the tenancy. The parties confirmed that on July 19, 2019, the landlord returned a partial amount of the security deposit, in the amount of $360.00, and that the landlord continues to hold the balance of the deposit in the amount of $140.00.

The parties agreed that a condition inspection report was not completed at the start of the tenancy, as a condition inspection was not conducted at the start of the tenancy. The parties agreed that a condition inspection was not conducted at the end of the tenancy, after the tenant had vacated the rental unit.

The parties agreed that the tenant provided a letter, dated May 08, 2019, in which the tenant provided written notice to end her tenancy. In the letter, the tenant conveyed that she would end her tenancy on July 01, 2019.

The tenant testified that she vacated the rental unit on June 15, 2019. The tenant asserted that she provided her forwarding address in writing to the landlord by way of

an email dated June 25, 2019, addressed to the landlord CD. The tenant testified that she provided her forwarding address in the email message, along with a request to have the landlord return her security deposit in full. The landlord CD testified to confirm receipt of the tenant's email and the forwarding address. The tenant provided a copy of the June 25, 2019 email message as evidence.

The tenant testified that the landlord retuned a partial sum of the deposit on July 19, 2019, in the amount of $360.00. The landlord agreed with this portion of the tenant's testimony.

The tenant seeks the return of the balance of the unreturned portion of the deposit held by the landlord, in the amount of $140.00. The tenant testified that she did not provide consent to the landlord to retain any portion of the deposit. The tenant asserted that she did not cause any damage to the rental unit and that the rental unit was cleaned at the end of the tenancy.

The landlords testified that after they received the tenant's forwarding address in writing on June 25, 2019 by way of email, the landlord did not have any consent in writing from the tenant which permitted them to retain the deposit. The landlord testified that it continues to hold a portion of the deposit, in the amount of $140.00 and has not made an Application for Dispute Resolution in order to retain the deposit.

The landlord asserted that after the tenancy had ended, the tenant did not adequately clean the rental unit. The landlord testified that it incurred a cost to have the rental unit cleaned. The landlord also provided that it incurred costs with respect to completing repairs as a result of damage purportedly caused by the tenant. The landlord CD provided that a partial amount of $140.00 was held from the deposit to account for costs incurred to clean and repair the rental unit, and that a partial amount of $360.00 was returned to the tenant on July 19, 2019.

Analysis

I find that the landlord received the tenant's forwarding address on June 25, 2019, by way of the tenant's email message sent on the same date.

Despite this method of service not being compliant with the requirements allowed under section 88 of the Act, the landlord CD acknowledged that she received the tenant's

email message containing a forwarding address and request to the have the deposit returned.

Furthermore, after receiving the tenant's email and forwarding address, the landlord CD was able to take subsequent action by acknowledging the tenant's request and returning a portion of the deposit.

Therefore, I find that the landlord has not been prejudiced by receiving the tenant's forwarding address in this manner and that it did not hinder the landlord's ability to take subsequent action after receiving the tenant's request.

Although not served with the forwarding address in accordance with section 88 of the Act, I find, based on landlord CD's testimony, that she received the tenant's forwarding address and request for full return of the deposit on June 25, 2019 and was sufficiently served with it pursuant to section 71(2)(c) of the Act, which allows an Arbitrator to find a document sufficiently served for the purposes of the Act.

Based on the testimony provided by the parties, I find that the landlord did not have the tenant's written consent to retain any portion of the security deposit, as the landlord provided affirmed testimony to convey this fact.

The security deposit is held in trust for the tenant by the landlord. At no time does the landlord have the ability to simply keep the security deposit because they feel they are entitled to it or are justified to keep it. The landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from an arbitrator, or the written agreement of the tenant.

Section 38(1) of the Act requires the landlord to either return a tenant's security deposit and/or pet damage deposit in full or file for dispute resolution for authorization to retain the deposit(s) 15 days after the *later* of the end of a tenancy, or upon receipt of the tenant's forwarding address in writing.

If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the Act*,* equivalent to double the value of the security deposit and/or the pet damage deposit. There are exceptions to this outlined in sections 38(2) to 38(4) of the Act. A landlord may also under sections 38(3) and 38(4) retain a tenant's security or pet deposit if an order to do so has been issued by an arbitrator or if the tenant

agrees in writing that the landlord may retain the amount to pay a liability or obligation of the tenant.

I find that a move-in condition inspection report was not completed in accordance with section 23 of the Act. I also find that a condition inspection was not completed at the end of the tenancy in accordance with section 35 of the Act. Therefore, I find the landlord extinguished its rights in relation to the security deposit under sections 24 and 36 of the Act. I find that the rights of the tenant's to seek return of their deposit has not been extinguished pursuant to the provisions of Residential Tenancy Policy Guideline 17, which states, in part, the following:

> *In cases where both the landlord's right to retain and the tenant's right to the return of the deposit have been extinguished, the party who breached their obligation first will bear the loss. For example, if the landlord failed to give the tenant a copy of the inspection done at the beginning of the tenancy, then even though the tenant may not have taken part in the move out inspection, the landlord will be precluded from claiming against the deposit because the landlord's breach occurred first.*

I find that the landlord breached its obligation first by not completing a condition inspection report at the start of the tenancy in accordance with section 23 of the Act. Additionally, the landlord did not offer the tenant an opportunity to attend a condition inspection at the end of the tenancy in accordance with section 35 of the Act.

The landlord did not adhere to the requirements of section 38(1) of the Act, as the landlord did not return the security deposit, in the amount of $500.00, as requested by the tenant, within 15 days of June 25, 2019, which is the later of the dates as stated in sections 38(1)(a) and 38(1)(b) of the Act.

No evidence was produced at the hearing that the landlord applied for dispute resolution claiming against the security deposit within15 days following the conclusion of the tenancy or after receiving the tenant's forwarding address.

If the landlord had concerns arising from the purported cleaning and repair costs that arose as a result of the landlord's assertion that the tenant did not clean the rental unit after she vacated the unit, the landlord should have applied for dispute resolution to retain the security deposit if the landlord determined that it had cause to do so.

Although the landlord testified that it incurred a cost to clean and repair the unit, it is inconsequential, within the context of this application, if the landlord suffered a loss as a result of the repair and cleaning costs, if the landlord does not take action to address these matters through the dispute resolution process. A landlord cannot decide to simply keep the security deposit and pet damage deposit as recourse for loss.

No evidence was produced at the hearing that the landlord received the tenant's written authorization to retain all, or a portion of the security deposit, to offset damages or losses arising out of the tenancy as per section 38(4)(a) of the Act, nor did the landlord receive an order from an Arbitrator enabling it to do so.

Section 38(6) of the Act sets out what is to occur in the event that a landlord fails to return or claim 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.

Pursuant to section 38(6)(b) of the Act, a landlord is required to pay a monetary award equivalent to double the value of the security deposit if a landlord does not comply with the provisions of section 38 of the Act. I find that the landlord failed to adhere to section 38(1) of the Act.

The language of section 38(6)(b) is mandatory. As the landlord has failed to comply with section 38(1), I must order that it pay the tenant double the amount of the security deposit, minus the amount already returned to the tenant.

Residential Tenancy Policy Guideline 17 states that "unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit." However, the tenant has not provided any such waiver; therefore the provisions of section 38(6)(b) must be applied.

The tenant is therefore entitled to a monetary award in the amount of $640.00, representing a doubling of the tenants' unreturned security deposit ($500.00 x 2), minus the $360.00 already returned to the tenant.

As the tenant was successful in this application, I find that the tenant is entitled to recover the $100.00 filing fee paid for this application.

Conclusion

Pursuant to sections 38, 67, and 72 of the Act , I issue a Monetary Order in the tenants' favour in the amount of $740.00 against the landlord, calculated as follows:

Item	**Amount**
Doubling of unreturned Security Deposit ($500.00 x 2)	$1,000.00
Subtract $360.00 already returned to tenant	-$360.00
Recovery of Filing Fee	$100.00
Total Monetary Award to Tenants	**$740.00**

The tenants are provided with a Monetary Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in 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: November 29, 2019

Residential Tenancy Branch