Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNSDS-DR, FFT

Introduction

This proceeding dealt with the Tenants' application under the *Residential Tenancy Act* (the "Act") for:

- return of the Tenants' security deposit in the amount of $2,500.00 pursuant to section 38.1; and
- authorization to recover the filing fee from the Landlords pursuant to section 72.

This matter was initially submitted as a direct request application. On July 13, 2022, an adjudicator of the Residential Tenancy Branch issued an interim decision (the "First Interim Decision") adjourning this matter to a participatory hearing on March 16, 2023, due to questions arising from the Tenants' application materials. Following the participatory hearing, I adjourned this matter to written submissions with a deadline of April 14, 2023, by way of a second interim decision dated March 16, 2023 (the "Second Interim Decision"). This decision should be read together with the First and Second Interim Decisions.

Preliminary Matter – Service of Dispute Resolution Materials

The parties submitted evidence and written submissions as per the instructions in the Second Interim Decision. I find the parties to be sufficiently served with each other's dispute resolution materials pursuant to section 71(1) of the Act.

Issues to be Decided

1. Are the Tenants entitled to a return of the security deposit?
2. Are the Tenants entitled to reimbursement of the filing fee?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony presented, only the details of the respective submissions and arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of this application and my findings are set out below.

This tenancy commenced on March 1, 2020 and was to be for a fixed term ending on March 1, 2021, and thereafter on a month-to-month basis. Rent was $2,500.00 per month. A copy of the tenancy agreement has been submitted into evidence.

According to the Landlords, they received $5,000.00 for the first and last month's rent as a deposit from one of the Tenants, TD. The Landlords applied $2,500.00 of this amount towards rent for the first month, March 2020, and held onto the remaining $2,500.00.

At the start of the tenancy, the Tenants rented the entire house. One of the Tenants, LFC, resided in the upper suite of the house with his family. The other two of the Tenants, LFD and TD, were in a relationship and resided in the basement suite.

The parties completed a move-in inspection walkthrough but did not sign a condition inspection report.

According to the Tenants, LFD and TD ended their relationship in June 2020. LFD and TD informed the Landlords in July 2020 that they would be moving out of the basement suite. The Landlords submitted that the Tenants had broken the lease and the Landlords did not have replacement tenants.

The Landlords agreed for LFC to remain in the upper suite. The Landlords moved into the basement suite in September 2020.

Starting in September 2020, LFC paid the Landlords $1,600.00 per month for the upper suite. The Landlords did not collect another security deposit from LFC. A copy of the new tenancy agreement between LFC and the Landlords is submitted into evidence.

LFC moved out of the upper suite on May 31, 2021. According to LFC, he requested a move-out inspection which was turned down by the Landlords. The parties did not complete any move-out condition inspection report.

According to LFC, he emailed a forwarding address to the Landlords on June 13, 2021. A copy of this email is submitted into evidence. The Tenants also submitted a Tenant's Notice of Forwarding Address for the Return of Security and/or Pet Damage Deposit (#RTB-47) dated May 15, 2022 into evidence (the "Tenant's Notice"). The Tenants submitted a signed and witnessed proof of service form indicating that one of the Landlords, RSD, was served with the Tenant's Notice in person on May 15, 2022. During the hearing on March 16, 2023, LFC explained that he went to RSD's workplace with his son and gave the Tenant's Notice to an employee working there.

The Landlords denied receipt of the Tenant's Notice or forwarding address in writing from any of the Tenants. RSD stated that he has two stores with over 55 employees. The Landlords argued that LFC should have gone through with a proper request instead of handing off an important document to a stranger. The Landlords argued that LFC did not follow proper procedure.

The Landlords submitted that in March and April 2021, water had started leaking into the downstairs bathroom from the upper suite. According to the Landlords, LFC informed them that his son had broken the tub. The Landlords submitted that temporary fixes were done to have the shower functioning, to prevent disrupting LFC's family and to avoid further damage. The Landlords submitted that LFC's family continued using the tub despite their request. The Landlords submitted additional reminder text messages into evidence. According to the Landlords, after their initial fiberglass fix for the tub failed to work, the Landlords hired a contractor for another temporary fix at a cost of $900.00. The Landlords submitted an email invoice dated June 5, 2021 into evidence. The Landlords further submitted that the temporary fixes to the bathtub no longer work, such that the Landlords are in the process of completely replacing the tub. The Landlords submitted an email repair quote of $3,653.00 to replace and install a new tub, dated February 6, 2022. The Landlords argued that the damage to the tub, which was over $5,500.00, was not typical wear and tear, so the Landlords did not return the security deposit.

LFC argued that the Landlords did not comply with the requirements of sections 19 and 20 of the Act with respect to security deposits. LFC argued that any claims for damages towards the security deposit of the original tenancy agreement were irrelevant because there were no concerns at the time that tenancy ended. LFC argued that the Landlord's claims for damages are associated with a different tenancy agreement, and the damages occurred more than six months after the original tenancy ended. LFC confirmed that the Tenants would not waive the doubling provisions of the Act.

Analysis

1. Are the Tenants entitled to a return of the security deposit?

Under section 38 of the Act, a landlord must (a) repay a security deposit to the tenant with interest or (b) make an application for dispute resolution claiming against the deposit, within 15 days after the later of:

- the tenancy end date, or
- the date the landlord receives the tenant's forwarding address in writing,

unless the landlord has the tenant's written consent to keep the deposit or a previous order from the Residential Tenancy Branch.

If a landlord does not comply with these requirements, the landlord may not claim against the deposit and must pay double to the tenant under section 38(6) of the Act. Section 38.1 of the Act allows a tenant to apply for return of double the deposit in accordance with the requirements of section 38 without a participatory hearing.

I note a landlord's right to claim against the security deposit for damage to the rental unit is also extinguished if the landlord does not offer the tenant opportunities for move-in or move-out inspections or does not provide the tenant with a completed condition inspection report in accordance with the Act and regulations. I find the parties attended a move-in inspection, but the Landlords did not give the Tenants a completed condition inspection report. As such, I find the Landlords' right to claim against the security deposit for damage to the rental unit was extinguished under sections 24(2)(c) and 38(5) of the Act. This means that the Landlords could not make an application to claim *against* the deposit for damage, but could make other claims against the deposit, or, after returning the deposit, still make an application to seek compensation for damage.

As mentioned in the First Interim Decision, the adjudicator found she was unable determine whether the tenancy had ended or continued with modified terms based on the Tenants' initial submissions.

According to Residential Tenancy Policy Guideline 13. Rights and Responsibilities of Co-tenants ("Policy Guideline 13"), if any tenant gives the landlord notice to end tenancy, or agrees with the landlord to end the tenancy, the notice or agreement to end tenancy applies to all tenants. Policy Guideline 13 further states that co-tenants wishing to remain in the rental unit should discuss the situation with the landlord, and if the landlord agrees to the tenant staying, the landlord and the tenant must enter into a new tenancy agreement.

Based on the parties' testimonies and the total evidence submitted, I find the Tenants' tenancy agreement with the Landlords ended after LFD and TD gave notice that they would be moving out. I find LFC entered into a new tenancy agreement with the Landlords for the upper suite commencing on September 1, 2020. Since I find there is insufficient evidence to indicate that rent of $2,500.00 was not paid in full for the month of August 2020, I fix the end date of the Tenants' tenancy to be August 31, 2020.

I note that I do not find LFC's tenancy agreement to be a modification of the parties' tenancy agreement, but a new and separate tenancy agreement due to the nature of the changes made. I find the differences between the two agreements include not only the parties to the agreement, the portion of the premises being rented, and the amount of monthly rent payable, but also the term of the tenancy. The Tenants' agreement was originally for a fixed term ending on March 1, 2021, but LFC's agreement was month-to-month starting in September 2020. I find these factors to indicate that a new tenancy agreement was formed.

Although the Landlords did not collect another security deposit from LFC, I find the new tenancy agreement does not mention the original security deposit at all and does not indicate that it was being carried over.

Based on the foregoing, I conclude that the Tenants' tenancy ended on August 31, 2020, and that the security deposit was not carried over to LFC's new tenancy.

I note that records of the Residential Tenancy Branch indicate the Tenants submitted this application on May 31, 2022. As such, I find this application was made within the two-year limitation period from the tenancy end date, in accordance with section 60(1) of the Act.

According to the Tenants, a forwarding address was emailed to the Landlords on June 13, 2021. The Landlords did not acknowledge receipt of this email.

Section 88 of the Act provides the acceptable ways in which documents such as a forwarding address letter may be served on a landlord. These methods include:

- Leaving a copy with the landlord or an agent of the landlord
- Sending a copy by mail or registered mail to the address at which the landlord resides, or to the address at which the landlord carries on business as a landlord
- Leaving a copy at the landlord's address with an adult who apparently resides with the landlord

- Leaving a copy in a mailbox or mail slot for the address at which the landlord resides, or at the address at which the landlord carries on business as a landlord

Email service is only permitted under section 88 of the Act, if, in accordance with section 43 of the regulations, the landlord had provided an email address as an address for service.

I find the Landlords provided a residential address for service on the first page of the tenancy agreement, but no email addresses for service. I find there is insufficient evidence to suggest that the Landlords had agreed to email service or had elsewhere provided their email addresses as addresses for service. I find the Landlords did not acknowledge receipt of the Tenants' June 13, 2023 email. As such, I am unable to find that the Landlords were served with the Tenants' forwarding address in writing in accordance with the Act, or were sufficiently served with the forwarding address in writing by June 13, 2021.

The Tenants' evidence is that they also served the Landlords with their forwarding address in writing by way of the Tenant's Notice given on May 15, 2022. However, I find that more than one year had passed between this date and the tenancy end date, which was August 31, 2020. Furthermore, I find the workplace where the Tenants say the left the Tenant's notice was RSD's separate business not related to the Landlords' leasing of the rental unit. I note that even if the Tenant's Notice had been given within one year of the tenancy end date, I would not be satisfied that service upon an employee of RSD's unrelated business constitutes service upon the Landlords' agent in accordance with section 88 of the Act. In my view, the employee was an agent of the unrelated business but not an agent of the Landlords personally.

Based on the foregoing, I conclude that the Tenants did not serve the Landlords with their forwarding address in writing within one year of the tenancy end date.

Section 39 of the Act states that despite any other provision of the Act, if a tenant does not give a landlord a forwarding address in writing within one year after the end of the tenancy, the landlord may keep the security deposit and the right of the tenant to the return of the security deposit is extinguished. However, considering this provision in the context of the Act as a whole, I find the "security deposit" mentioned in section 39 of the Act must be a reference to a security deposit that was collected in accordance with the Act. I do not find this provision to capture other amounts collected by a landlord in contravention of the Act, even if labeled as a security or damage deposit.

Section 19(1) of the Act states that a landlord must not require or accept a security deposit or pet damage deposit that is greater than half of one month's rent payable under the tenancy agreement. Section 19(2) of the Act further states that if a landlord accepts a deposit that is greater than the amount permitted under section 19(1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment. Section 19(1) stands in direct contrast to section 21 of the Act, which states that unless the landlord gives written consent, a tenant must not apply a security deposit as rent.

I find the Landlords effectively collected one month's rent as a security deposit, which exceeds the maximum amount allowed under the Act. I find there is insufficient evidence to suggest that the Tenants had pets and that half of the amount collected was for a pet damage deposit.

Accordingly, I find that pursuant to section 39 of the Act, the Tenants' right to the return of their security deposit in the amount of $1,250.00, the maximum amount allowed under the Act, is extinguished due to a failure to effect service of their forwarding address in writing on the Landlords within one year of the tenancy end date. I find this to be the case notwithstanding a finding that the Landlords' right to claim against the security deposit for damage to the rental unit was extinguished first pursuant to sections 24(2)(c) and 38(5) of the Act.

I find the balance of $1,250.00 held by the Landlords in contravention of section 19 of the Act to be an overpayment that must be returned to the Tenants.

Under section 62(3) of the Act, the director may make any order necessary to give effect to the rights, obligations, and prohibitions under the Act. Pursuant to sections 19 and 62(3) of the Act, I order the Landlords to pay the amount of $1,250.00 to the Tenants for the overpayment collected on the security deposit.

I note the Landlords primarily argued that they suffered loss in the form of damage to the property, which the Landlords say was caused by LFC's family in March or April 2021. However, the Landlords have not made an application to claim against LFC for that loss. The Landlords are at liberty to make an application within the applicable limitation periods.

I further note the Landlords emphasized that it was TD who paid the deposit to the Landlords. However, I find that since all three Tenants had signed the tenancy agreement, it does not matter which of the Tenants paid the Landlords, and all Tenants have standing to make this application.

2. Are the Tenants entitled to reimbursement of the filing fee?

The Tenants have been partially successful in this application. I award the Tenants reimbursement of 50% of their filing fee pursuant to section 72(1) of the Act.

The total Monetary Order granted to the Tenants is calculated as follows:

Item	**Amount**
Return of overpayment of Security Deposit above maximum amount allowed under the Act ($2,500.00 – $1,250.00)	$1,250.00
50% of Filing Fee	$50.00
Total Monetary Order for Tenants	**$1,300.00**

Conclusion

The Tenants' claims are granted in part. Pursuant to sections 19, 62(3), and 72(1) of the Act, I grant the Tenants a Monetary Order in the amount of **$1,300.00**. This Order may be served on the Landlords, filed in the Provincial Court of British Columbia, 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: May 10, 2023

Residential Tenancy Branch