

Residential Tenancies Tribunal

Decision 19-0025-01

Michael Greene
Adjudicator

Introduction

1. The hearing was called at **9:30 am on 13 May 2019** at Residential Tenancies Hearing Room, 84 Mt. Bernard Avenue, Lower Level, The Sir Richard Squires Building, Corner Brook, Newfoundland and Labrador. It was conducted by teleconference through the Bell Alliant Conferencing system.
2. The applicant, [REDACTED], hereafter referred to as the tenant, participated in the hearing and was represented by [REDACTED] through authorization on file.
3. The respondent, [REDACTED], hereafter referred to as the landlord, participated in the hearing.
4. The property in question is located at [REDACTED]. The respondent indicates that an agreement was reached with the applicant to rent the subject property on or about March 1, 2019 with the applicant providing a non-refundable holding deposit in the amount of \$325.00 for the month of February 2019. The applicant was to move into the property on 01 March 2019 and pay rent in the amount of \$600.00 and once this happened any deposit would be applied against payment of the security deposit.
5. The applicant in this matter indicates that the deposit she paid was a security deposit in the amount of \$325.00. The applicant indicates that she never moved into the property and the respondent re-rented the property on 26 February 2019 and is now seeking the refund of the security deposit.
6. There is a clear issue of jurisdiction in this claim/counterclaim that is required to be determined before the claims proceed. In the interest of not having the parties proceed with a full presentation of the merits of each of their claims, it was determined that the merits of jurisdiction would first be decided and an Order would be issued determining jurisdiction of the tribunal. From this decision, it would be determined if any further hearing would be required to be scheduled.

7. In a proceeding under the *Residential Tenancies Act, 2018*, the applicant has the burden of proof. This means the applicant has the responsibility to prove that the outcome they are requesting should be granted. In these proceedings the standard of proof is referred to as the balance of probabilities which means the applicant has to establish that his/her account of events are more likely than not to have happened.

Preliminary Matters

8. The Tribunal's policies concerning notice service requirements and hearing attendance has been adopted from the *Rules of the Supreme Court, 1986*.
 - a. Rule 29.05(2)(a) states *a respondent to an application must be served with claim and notice of the hearing 10 clear days prior to the hearing date* and, and where the respondent fails to attend the hearing, Rule 29.11(1) states *that the hearing may proceed in the respondent's absence so long as he/she has been properly served*.

The affidavit submitted by the applicant show that the respondent was served with the notice of this hearing on the **29 March 2019** by serving the documents by prepaid express post to the address [REDACTED].

The affidavit submitted by the respondent show that the applicant was served with the notice of this hearing on the **08 April 2019** by serving the documents by prepaid express post to the address [REDACTED].

9. The respondent filed a counter claim filed on 02 April 2019 to satisfy any required time frames set out in section 14 (11) of the *Residential Tenancies Act, 2018* and argued a motion of jurisdiction at the hearing.

Issues before the Tribunal

10. The parties are seeking the following:
 - a) An order of Jurisdiction of the Tribunal in this matter;

Legislation and Policy

11. The jurisdiction of the Director of Residential Tenancies is outlined in the *Residential Tenancies Act, 2018 (the Act)*, Section 47.
12. Also relevant and considered in this case are Sections 3, 9, 14 of *the Act*; and Policy 10-1: *Claims against a Security Deposit*.

Issue 1: Jurisdiction of the Tribunal on a matter of the Deposit

Relevant Submissions

Applicant Position

13. The applicant in this matter holds that the deposit paid (12 January 2019) to the respondent was that of a security deposit in the meaning of a security deposit under the *Residential Tenancies Act, 2018* which reads:

Security Deposit: means money or other value paid, or required to be paid under a rental agreement, by a tenant to a landlord to be held as security for

- i. *The performance of an obligation, or*
- ii. *a liability of a tenant*

14. The applicant argues that the respondent is not permitted to collect two deposits for the same property. The applicant indicates that she did not move into the property and did not provide a payment of \$325.00 on 01 February 2019. The applicant submitted a series of text communications (**Exhibit T # 1**) between the applicant and the respondent. The applicant referred to page 7 of the Guide for Landlord and Tenants online at www.gov.nl.ca

Respondent Position

15. The respondent presented the position that the deposit paid by the applicant was indeed a holding deposit for the purpose of “Holding” the unit for the applicant until 01 February 2019. The respondent submitted a copy of the receipt issued for the deposit (**Exhibit L # 1**) and indicated that it clearly states that it was “*a non-refundable down payment to hold property until 01 February 2019*”. The respondent also provided a typed version of her interpretation of the oral arrangement between the parties (**Exhibit L # 1**). Additionally, the respondent provided a text communication between the parties dated 05 February 2019 (**Exhibit L # 3**).

Analysis

16. I have reviewed the testimony and evidence of the applicant and respondent in this matter. As far as I can see, the only issue here that needs to be addressed:
 - i. Did the applicant pay a security deposit or a holding deposit; the conclusion will determine jurisdiction of this Tribunal.

17. As I understand the evidence, the parties discussed the possibility of the applicant renting the respondent's property located on Vaters Lane in the community of Botwood, NL. On or about 12 January 2019 a receipt was issued to the applicant in the amount of \$325.00 and clearly states "*Non-Refundable down payment – to hold property until February 1, 2019*". The question of jurisdiction is determinant on the fact if a relationship of a landlord and tenant existed as outlined in section 9 of the *Residential Tenancies Act, 2018* which reads:

9. (1) A relationship of landlord and tenant takes effect when the tenant is entitled to use or occupy the residential premises whether or not the tenant actually uses or occupies it.

(2) The doctrine of frustration of contract and the Frustrated Contracts Act apply to a rental agreement.

(3) A common law rule respecting the effect of the contravention of a material covenant by a party to a contract on the obligation to perform by the other party applies to a rental agreement.

(4) Where a relationship of landlord and tenant exists, a covenant concerning a thing related to the residential premises is considered to run with the land whether or not the thing is in existence at the time the relationship commenced.

18. The applicant was being held to an existing rental contract by her current landlord. The applicant did not complete the oral rental contract with the respondent for 01 February 2019. Up to the date of 01 February 2019, a relationship of a landlord and tenant did not exist. The applicant referred to the guide for Landlord and Tenant and specifically page 7 to reference the security deposit vs holding deposit issued. That section of the guide identified above reads:

A security deposit is different from a "holding deposit". Before entering into a rental agreement, a landlord may require a potential tenant to pay a deposit to "hold" a rental property while the tenants make up their minds on whether or not to rent the property. Often in this situation, a "holding deposit" is not refundable because the landlord may stop advertising the property or decline other offers to rent until the person who paid the "holding deposit" makes a decision. The payment or refund of a holding deposit is not regulated under the Residential Tenancies Act because a rental agreement has not yet been entered into and there is no landlord tenant relationship established.

It must be understood here that the guide offered online is NOT legislation and offers only information to guide landlords and tenants.

19. The applicant in this matter indicated that it was her opinion that the deposit was a security deposit. The only evidence submitted was a series of text messages (Exhibit T # 1) which is the same messages indicated in the respondent's submission as (Exhibit L # 3). These submissions state that the deposits were to hold the property for February. The respondent's submission of the written receipt (Exhibit L # 2) clearly outlines this as a holding deposit. In the face of the lack of corroborating evidence for the applicant's position, I weigh heavily the physical evidence of the respondents receipt.

20. The text communication between the parties offers an understanding of the events similar to what the respondent has outlined in their submission (Exhibit L # 1). It is clear from this communication that as of 05 February 2019 it was evident that the applicant had no intention of completing a rental contract with the respondent. Testimony from the applicant also indicates that another tenant was secured from 26 February 2019.
21. The evidence is clear on this issue and I accept the respondent's evidence that the deposit paid by the applicant on or about 12 January 2019 was indeed a holding deposit and that a relationship of a landlord and tenant did not exist. As such, I find that this tribunal does not have the jurisdiction to adjudicate on these matters and defers the issues to the appropriate court of jurisdiction.
22. As a result of the findings of this tribunal, the attached order will be the final order for these claims and no further hearings or orders will be issued regarding 2019 No. 23C or 2019 No. 25C.

Decision

23. The tribunal finds that there is no jurisdiction to adjudicate on these matters and defers the issues to the appropriate court of jurisdiction.

Summary of Decision

24. The tribunal does not have jurisdiction to adjudicate on these claims. No further sittings of these claims will be scheduled. This will be the only order issued.

13 September 2019

Date

Michael Greene
Residential Tenancies Tribunal