



**Order under Subsection 135
Residential Tenancies Act, 2006**

Citation: Serfaty v Arruda, 2023 ONLTB 74304

Date: 2023-11-15

File Number: LTB-T-068185-22

In the matter of: 678 Adelaide Street W,
Toronto M6J1B1

Between: Nicole Serfaty
Jordan Collett Tenants

And

Maria Martins Landlord

Fatima Arruda Landlord's Agent

Nicole Serfaty and Jordan Collett (the 'Tenants') applied for an order determining that Maria Martins (the 'Landlord') and Fatima Arruda (the Landlord's Agent) collected or retained money illegally.

This application was heard by videoconference on June 28, 2022 and November 2, 2023.

The Landlord. The Landlord's Agent and the Tenant Jordan Collett attended the hearing. **Determinations:**

1. The Landlord's Agent and the Landlord requested an adjournment because the Landlord was not served a Notice of Hearing and the Landlord's Agent only became aware of the hearing when the Tenant Nicole Serfaty (NS) sent her the evidence around October 27, 2023. She said they were not prepared to proceed with the hearing. She also stated that they will not be able to return for a new hearing soon because the Landlord was scheduled for a surgery in the next two weeks.
2. The Tenant objected to the adjournment request because the Landlord put forward the same reasons when the hearing was adjourned on June 28, 2022, and the Tenants would be prejudiced by further delay.
3. Based on the last hearing, the Tenants amended the application to correctly name the Landlord and also amended the amount of claim, but they did not add the Landlord's address to the file. Therefore, the Notice of Hearing was only sent to the Landlord's Agent. The Landlord's Agent confirmed that the address on file was the correct address for her. The Board's records show that the Notice of Hearing was mailed to all Tenants and the Landlord's Agent on August 16, 2023 deemed served on August 21, 2023. Based on all

this information I find that the Landlord was served via the Landlord's Agent by the Board more than two months before this hearing.

4. The Landlord's Agent was present at the last hearing on June 28, 2022 which means that the Landlord was aware of the proceedings against her and could have submitted their evidence to the Board anytime after that day. The Landlord and the Landlord's Agent are related to each other, and it is more than likely on a balance of probabilities that the Landlord was aware of the proceedings and chose not to submit anything to the Board and the Tenants. Therefore, I denied the adjournment request.

T1 Application

5. As explained below, the Tenants did not prove the allegations contained in the application on a balance of probabilities. Therefore, the application is dismissed.
6. The Tenants are claiming that the Landlord has kept half month of their last month's rent deposit illegally.

Background Information

7. The tenancy was to begin January 1, 2022. No written lease agreement was signed till the date the Tenants decided not to continue with the agreement.
8. The Tenants went to see the rental unit sometime in November 2021. On or around November 29, 2021, the parties agreed to a tenancy agreement with the start date of January 1, 2022. The Landlord's Agent listed out the terms for her to get the lease agreement ready which was payment of last month's rent deposit, optional first month's rent plus a \$500.00 security deposit. Even though this security deposit is illegal as per the *Residential Tenancies Act, 2006* (the "Act"), this was reversed back by the Tenants. Therefore, it is not before me that the Landlord collected an illegal security deposit for the purpose of this application.
9. The Tenants gave the Landlord a cheque dated November 25, 2021 in the amount of \$4,600.00 for the first and last in the Landlord's name and a cheque dated December 31, 2022 in the amount of \$500.00 as security deposit in the Landlord's Agent's name.
10. The Landlord's Agent deposited the cheque in her bank, and it cleared on or around December 4, 2021. The Tenant NS texted the Landlord's Agent to say that their bank informed them that a cheque dated December 31, 2022, was cashed even though it was post-dated for a year later. She also stated that the Tenants' bank was reversing the transaction and that they would provide a new cheque soon.
11. This caused the Tenants to decide on or around December 5, 2021 that they would not be renting the rental unit from January 1, 2022. They informed the Landlord's Agent of the same and the Landlord's Agent agreed to reimburse \$5,100.00 back to the Tenants on or around December 6, 2021 once the funds were deposited in the Landlord's account.
12. The Tenant NS told the Landlord's Agent that the \$500.00 was already reversed so the

Landlord only owes them \$4,600.00. The Landlord returned the Tenants \$2,300.00 on December 15, 2021 and another \$1,150.00 on February 2, 2022. This application claims the balance of the deposit in the amount of \$1,150.00.

Tenant's testimony

13. The Tenant JC testified that the Landlord cashing the post-dated cheque prior to the date was a major cause of concern for the Tenants about the Landlord's intentions. He added that he and his wife have been Landlords before and know that the \$500.00 security deposit is illegal, and the Landlord should not have asked for it. They had consented to pay the security deposit because they wanted the rental unit and that is why they decided to post-date the cheque to December 31, 2022.
14. He also stated that the communication between the parties turned hostile after they decided not to rent the unit and the Landlord's Agent promised to pay back the rent deposit in full yet backtracked on it later. The Tenant stated that the Landlord's Agent changed in her mind and then informed them that she will only return the deposit if the rental unit gets re-rented.
15. He also added that the Landlord's Agent texted NS and told her that she will return their half month's rent deposit for January 2022 and they should sign a waiver that they would not proceed with further action which they declined.

Landlord's Agents testimony

16. The Landlord's Agent testified that the Tenants did inform her that they would not be taking occupancy of the rental unit on January 1, 2022 and since she cannot force anyone, she accepted it. She also testified that she was unaware of the cheque being post-dated to end of December 2022. The Tenants had never spoken to her about it and what good would a security deposit be if it's dated for the end of the tenancy. Unaware of the date, she deposited the cheque, and her bank cleared it. She was surprised when the Tenant NS raised it as an issue.
17. She also testified that there are many other messages which the Tenants have chosen to not include in their evidence where she told them that she will return the deposit once the rental unit is re-rented. She testified to advertising the rental unit right away on all social media like Facebook Marketplace and paid sites like Kijiji. She also added that no one wanted to move in on January 1, 2023 due to Christmas season but she did re-rent the place for January 15, 2023. She tried convincing the new tenant to move in earlier, but he declined. She also testified that she informed the Tenants via text that the rental unit was rented and gave them their money back for the half month.
18. The Landlord's Agent submitted that she has been fair in the process and the Tenants are very aware that she made genuine efforts to re-rent the unit and she was in constant communication with them. She testified that she did ask the Tenants to sign the waiver once she returned the half month's rent deposit after the property was rented on January 15, 2023.

Analysis

19. [Subsection 105\(1\)](#) of the [Act](#) provides that the only security deposit that a landlord can collect is a rent deposit collected in accordance with s. 106. "Security deposit" is defined in s. 105(2) to mean money, property or a right paid or given by, or on behalf of, a tenant of a rental unit to a landlord or

to anyone on the landlord's behalf to be held by or for the account of the landlord as security for the performance of an obligation or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition.

20. Section 106 requires that the rent deposit be paid on or before entering a tenancy agreement and specifies that it must be applied to the last rent period before the tenancy terminates.

21. In the present case, the Tenants rely on [s. 107\(1\)](#) of the [Act](#) to claim return of their rent deposit. That provision states,

A landlord shall repay the amount received as a rent deposit in respect of a rental unit if vacant possession of the rental unit is not given to the prospective tenant.

22. It is established by uncontested testimony and evidence that the parties had a binding agreement. They had the essential elements of an agreement established - a start date, an end date and the monthly rent even though a written lease agreement was not signed yet. The parties agree that there was an agreement to rent the unit from January 1, 2022 with an end date of December 31, 2022. It is uncontested that the Tenants gave the Landlord a deposit for the first and last months rent. Before the scheduled start of the tenancy the Tenants unilaterally decided they no longer wanted to proceed with the tenancy agreement.

23. As stated above the Landlord did collect the first and last month's rent deposit but as evident from the text the Landlord's Agent sent the Tenant on or around November 25, 2021 she states that the Tenants need to pay only the last month's rent deposit and the security deposit immediately. The first month's rent is due on January 1, 2022. The Tenants choose to give the Landlord the first and last month's rent in the same cheque dated November 25, 2021. On December 15, 2021, the Landlord returned the first month's rent that the Tenants paid. The security deposit was reversed by the Tenants. Therefore, the Landlord only retained the last month's rent deposit. She also returned half month's rent deposit once the rental unit was rented.

24. Subsection 13(2) of the Act states: "A tenancy agreement takes effect when the tenant is entitled to occupy the rental unit, whether or not the tenant actually occupies it." This section means that if there is a binding agreement for a tenancy to begin on a set date, then the tenancy commences on that date regardless of whether the tenant goes into possession.

25. In this case there was a binding agreement for a tenancy to begin on January 1, 2022.

When the Landlords accepted the Tenant's cheque and the parties agreed to the essential terms of the tenancy, they formed a binding tenancy agreement. Therefore, pursuant to subs. 13(2) of the Act, the tenancy commenced on January 1, 2022 even though the Tenant did not move into the unit.

26. Pursuant to section 37 of the Act a tenancy agreement can only be terminated according to the provisions of the Act, which means a tenancy can only be terminated by proper notice, by way of agreement between the landlord and tenant, or by way of an order issued by the Board. In other words, a tenancy cannot be terminated by one party to it unilaterally repudiating it. Subsection 106(1) states that the deposit paid by the Tenant shall be applied to the rent due for the last month of the tenancy. In this case, that is the rent due for the month of January 2022. I say this because of subsection 88(3). That section is intended to limit the liability of a tenant who abandons a rental unit. Applying subsection 88(3) to this situation effectively ends the Tenant's liability for the rent and terminates the tenancy as of January 14, 2022 because the Landlord re-rented the unit for January 15, 2022.

27. Section 16 of the Act requires parties to mitigate their losses; in other words, a party who is going to be harmed by the actions of another must take steps to minimize the harm that is caused to them. In this case, the Landlords had a duty to mitigate their vacancy loss by taking reasonable steps to rent the unit for January 1, 2022.

28. The Landlord's Agent testified to her attempts to rent the rental unit and I find it credible that fewer people want to move around the holiday season so she could only rent it for January 15, 2022. This means that in this situation, the Tenant's liability for the rent stopped on January 15, 2022, which is the date the unit was re-rented. Therefore, the Tenant was required to pay the Landlord rent totalling \$1,150.00 for the period from January 1, 2022 to January 14, 2022.

29. In the leading case *Musilla v. Avcan Management Inc.*, 2010 ONSC 5425, the Div Court finds that

“(25) In my view, the interpretation of s. 107(1) advanced by the Tenant would deprive the words “rent deposit” of any meaning. The purpose of a deposit is to secure the performance of an obligation. If a tenant could change his or her mind about renting a unit and demand return of the rent deposit at any time prior to the date for taking possession, the rent deposit would lose its meaning. It would provide no security to the landlord for the tenant's performance of his or her obligation to take occupancy at the date agreed upon for possession.

...

“(27) As in *Opara*, above, the Tenant here was bound by the agreement with the Landlord. She was not entitled to the return of the rent deposit because it was her act of repudiation of the agreement that prevented her from taking possession of the unit, not the action of the Landlord. “

30. Even though the Tenant states that the Landlord's Agent's cashing the security deposit cheque earlier than the date of the cheque was the reason for them to back out of the agreement. I do not find in the evidence presented before me in the text messages that the Tenants tendered that they were unhappy about it. The Tenant states in the text message tendered, “They're reversing the transaction and we can bring you a new one upon signing the lease.” The whole issue here was miscommunication. At no point did the Landlord or

Landlord's Agent state that the rental unit was not available for occupation by the Tenants.

31. It is also not before me whether the Landlord's Agent told them she will return the full deposit. I am bound by Act when determining whether the Landlord is entitled to keep the deposit or not.

32. Pursuant to subsection 106(10) of the Act a landlord is mandatorily required to apply a deposit to the rent due for the last month of the tenancy. Because the Tenant had paid the first and last month's rent deposit in the form of the deposit, the Landlord did not have to pay the Tenants any monies back for the first fifteen days of the January 2022. Hence the Tenants' application is dismissed.

It is ordered that:

1. The Tenant's application is dismissed.

November 15, 2023

Date Issued

Sheena Brar

Member, Landlord and Tenants Board

15 Grosvenor Street, Ground Floor Toronto ON
M7A 2G6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.