



Date Issued: July 16, 2024
Dockets: LR24032
Type: Rental Appeal

INDEXED AS: 102953 PEI Inc. v. Michelle Burns
Order No: LR24-41

BETWEEN:

102953 PEI Inc. (the "Landlord")

Appellant

AND:

Michelle Burns (the "Tenant")

Respondent

ORDER

Panel Members:

Kerri Carpenter, Commissioner
M. Douglas Clow, Acting Chair

Compared and Certified a True Copy

(Sgd.) Michelle Walsh-Doucette

Commission Clerk
Island Regulatory and Appeals Commission

A. INTRODUCTION

1. This appeal was heard by the Commission on June 4, 2024, and asks the Commission to determine whether the Residential Tenancy Office (the “Rental Office”) erred in finding that the Tenant was entitled to a double return of her security deposit and a return of rent.

B. BACKGROUND

2. In November 2020, the parties entered into a verbal, month-to-month tenancy agreement for a rental unit located 178 Weymouth Street, Apartment 3, in Charlottetown (the “Rental Unit”). Rent was \$836.00 and a security deposit of \$400.00 was paid. The Tenant occupied the Rental Unit until in or around the end of November 2023, at which time she sublet the Rental Unit to a third party. The Tenant and Landlord were the subject of previous proceedings before both the Rental Office and the Commission.
3. Order LR24-04 of the Commission, issued February 13, 2024, upheld a previous Order of the Rental Office (being Order LD23-611) finding that the tenancy agreement between the parties ended on December 28, 2023.
4. On February 22, 2024, the Tenant filed a *Tenant Application to Determine Dispute (Form 2(A))* dated February 21, 2024 (the “Application”) with the Rental Office. The Application sought a return of the Tenant’s security deposit, and a finding for a return of rent for December 2023 in the amount of \$836.00.
5. A hearing was held before the Rental Office on April 2, 2024, and Order LD24-126 was issued on April 12, 2024. Order LD24-126 found that the Landlord did not comply with section 40 of the *Residential Tenancy Act* (the “Act”) and, therefore, the Tenant was entitled to double the amount of the security deposit in accordance with clause 40(4)(b) of the *Act*. Order LD24-126 ordered the Landlord to pay the Tenant \$814.20 for the security deposit. The Landlord was also ordered to return rent in the amount of \$80.90.
6. The Landlord appealed Order LD24-126 on May 1, 2024.
7. The Commission heard the appeal on June 4, 2024, by way of telephone conference. Dane Cutcliffe (“Mr. Cutcliffe”) participated as the representative of the Landlord and the Tenant participated on her own behalf.

C. DISPOSITION

8. The appeal is dismissed and Order LD24-126 is confirmed, subject to the variations as the set out in the Commission’s Order.

D. SUMMARY OF EVIDENCE

Landlord’s Evidence

9. Among other evidence, Mr. Cutcliffe filed a written statement with the Commission (Exhibit A-1) outlining his position on appeal. In summary, he submitted that the Tenant’s unlawful sublet arrangement resulted in damages to the Rental Unit, including a broken window when the subtenants regained entry into the apartment building after they had previously

vacated. Mr. Cutcliffe submitted photographs of the broken window (Exhibit A-6). Mr. Cutcliffe alleged that the subtenants' return to the building was motivated by the Tenant's unwillingness to refund the subtenants' rent and security deposit. He provided evidence that the Tenant had charged the subtenants more rent and a higher security deposit than permitted by the *Act*. At the hearing, Mr. Cutcliffe testified that, in his opinion, the Rental Unit would not have been damaged if the Tenant had returned the security deposit and December rent payment to the subtenants.

10. Mr. Cutcliffe also submitted a written timeline of the sublet arrangement that ultimately lead to the Tenant's eviction that was confirmed in Commission Order LR24-04.
11. Mr. Cutcliffe submitted, both in his written submission and in his testimony at the hearing, that it was his understanding the tenancy materially ended when the dispute related to the eviction was resolved with the issuance of Commission Order LR24-04 on February 13, 2024. For this reason, he argues that the Rental Office Order LD24-126 is "logically flawed".
12. Mr. Cutcliffe submitted that the Landlord was not given sufficient time to submit the proper documentation prior to the Tenant's Application seeking return of the security deposit that was filed on February 21, 2024, only 8 days after the tenancy terminated. Meanwhile, on February 14, 2024, Mr. Cutcliffe had emailed the Tenant indicating the Landlord's intention to retain the security deposit (Exhibit A-4), and seeking her agreemetrn. Mr. Cutcliffe testified that he did this on the understanding that, per subsection 40(3)(a) of the *Act*, the Landlord may retain the deposit if the Tenant agreed in writing within 15 days. However, he testified that before the 15-day period elapsed, the Tenant had filed her Application and did not respond to his email.
13. Mr. Cutcliffe did acknowledge that the Tenant had not responded to the email agreeing that the Landlord could retain the security deposit.

Tenant's Evidence

14. The Tenant did not submit any documentary evidence. At the hearing, the Tenant did acknowledge there was damage to the Rental Unit, but submitted that was because the Landlord changed the locks on the subtenants. The Tenant testified that, in her interpretation, the *Act* is clear and the Landlord had 15 days to make application for the security deposit. He did not do this. Therefore, the penalty to return double the amount applies.
15. The Tenant also testified about the reason for her eviction, submitting that the alleged unauthorized sublet was not grounds for eviction.

E. ANALYSIS

16. The issue in this present appeal is whether the Rental Office was correct in finding that the Tenant was entitled to a double return of her security deposit in accordance with section 40 of the *Act*, and a return of rent in the amount of \$80.90.

Security Deposit

17. Section 40 of the *Residential Tenancy Act* governs the return of security deposits and sets the requirements a landlord must follow in order to make a claim against a security deposit. Several subsections of section 40 are relevant to this appeal and read:

40. Return of security deposit

- (1) Except as provided in subsection (2) or (3), within 15 days after the date the tenancy ends or is assigned, the landlord shall either
 - (a) issue payment, as provided in subsection (5), of any security deposit to the tenant with interest calculated in accordance with the regulations; or
 - (b) make an application to the Director under section 75 claiming against the security deposit.

[...]

Retention by landlord, other circumstances

- (3) A landlord may retain an amount from a security deposit if
 - (a) at the end of a tenancy, the tenant agrees in writing that the landlord may retain the amount to pay a liability or obligation of the tenant; or
 - (b) after the end of the tenancy, the Director orders that the landlord may retain the amount.

Consequences of non-compliance

- (4) Where a landlord does not comply with this section, the landlord
 - (a) shall not make a claim against the security deposit; and
 - (b) shall pay the tenant double the amount of the security deposit.

18. As can be seen, the *Act* imposes a strict 15-day time limit. A landlord is required to either return the security deposit or make an application to the Director claiming against the security deposit, within 15 days after the tenancy ends (subsection 40(1)).

19. Subsection 40(3) provides an exception to this requirement where the tenant agrees in writing that the landlord may retain all or some of the security deposit. In the absence of such an agreement, and where a landlord does not comply with subsection 40(1), they are prohibited from claiming against the security deposit and must pay the tenant “double the amount of the security deposit” (subsection 40(4)).

20. As a starting point to our analysis, the Commission must first determine when the Landlord’s 15-day time limit started running. It is here that we depart from the findings of the Rental Office Order LD24-126. In that Order, the Residential Tenancy Office found that the tenancy ended December 28, 2023, which means the Landlord had until January 12, 2024, to either return the security deposit or make application to the Director in accordance with subsection 40(1) of the *Act*. The Commission disagrees with this finding.

21. In our opinion, for the reasons that follow, the Landlord had until February 28, 2024 – being 15 days from the date of Commission Order LR24-04, issued February 13, 2024 – to comply with subsection 40(1) of the *Act*. This is because the appeal of Rental Office Order LD24-126 acted as an automatic stay of that order, in accordance with subsection 89(6) of the *Act*. A stay “abridges for a defined period the effect of a previous court order”.¹
22. Therefore, despite the finding that the tenancy actually ended on December 28, 2023, as found in the Rental Office Order, the appeal process postponed the effect of Order LD24-126. As a result, the Landlord was only truly in a position to act on his obligations respecting the end of the tenancy on February 13, 2024, when the Commission Order was issued giving effect to the end of the tenancy. In our opinion, any other conclusion would make it impossible for the Landlord to comply with the security deposit provisions of the *Residential Tenancy Act* because he would have been required to fulfil those obligations by a date that had long since passed.
23. Therefore, we find that the Landlord had until February 28, 2024, to make application to retain the security deposit.
24. In this case, the Landlord admitted that he did not make application to the Director to retain the security deposit. While he tried to seek the written agreement of the Tenant, in accordance with subsection 40(3)(a), the evidence is clear that the Tenant did not agree in writing. Further, despite the Tenant making application to the Director before the 15-day time limit elapsed, the *Act* does not account for this. Subsection 40(1) makes it clear that the onus is on landlords to bring proceedings to prove their right to the tenant’s security deposit rather than putting the onus on the tenant to bring proceedings to get the security deposit back.²
25. The language of section 40(4) is non-discretionary.³ Both the Commission and the Rental Office are administrative bodies created by statute and are bound to apply the legislation as written. In this case, the Landlord did not comply with the requirements of the *Residential Tenancy Act* and did not file an application with the Rental Office to make a claim against the security deposit within 15 days. Therefore, the consequences set out in subsection 40(4) apply.
26. Accordingly, the Commission agrees with the outcome of Order LD24-126 in that respect. The Landlord shall pay the Tenant double the amount of the outstanding security deposit, plus accrued interest on the original (non-doubled) deposit amount:

Security Deposit	\$400.00
Interest on Security Deposit ⁴	\$16.51
Double Security Deposit per s. 40(4)	<u>\$400.00</u>
Total	\$816.51

¹ *Alberta Energy Regulator v. Grant Thornton Ltd*, 2017 ABCA 278, at para 59.

² Citing from *Brown v. British Columbia (Residential Tenancy Branch Tribunal)*, 2010 BCSC 861, at para 27.

³ Citing from *Abboud v. Jung*, 2020 BCSC 736, at para 88.

⁴ Calculated from November 1, 2020, to the date of this Order.

27. The total amount the Landlord must pay to the Tenant in respect of the security deposit is: \$816.22.

Return of Rent

28. With respect to the Tenant's claim for return of rent, the Commission agrees with the findings of the Rental Office Order LD24-126. Commission Order LR24-04 confirmed the tenancy ended effective December 28, 2023. Therefore, the Commission finds that the Tenant is owed pro-rated rent for the three days in December following the December 28, 2023. This amounts to \$80.90 ($\$836/31 \text{ days} \times 3 \text{ days} = \80.90).

F. CONCLUSION

29. The appeal is dismissed. The Landlord shall pay to the Tenant \$897.41, representing a double return of the security deposit plus accrued interest of \$816.51 and return of rent in the amount of \$80.90.

IT IS ORDERED THAT

1. **The appeal is dismissed.**
2. **The Landlord shall pay the Tenant the sum of \$897.41 representing:**
 - (a) **Double security deposit plus accrued interest in the amount of \$816.51**
 - (b) **Return of rent for the period December 29-31, 2023, in the amount of \$80.90.**
3. **The Landlord shall pay the Tenant the sum of \$897.41 by Tuesday, July 30, 2024.**

DATED at Charlottetown, Prince Edward Island, Tuesday, July 16, 2024.

BY THE COMMISSION:

(sgd. Kerri Carpenter)

Kerri Carpenter, Commissioner

(sgd. M. Douglas Clow)

M. Douglas Clow, Acting Chair

NOTICE

Subsections 89 (9), (10) and (11) of the *Residential Tenancy Act* provides as follows:

89. (9) A landlord or tenant may, within 15 days of the decision of the Commission, appeal to the Court of Appeal in accordance with the *Island Regulatory and Appeals Commission Act* R.S.P.E.I. 1988, Cap. I-11, on a question of law only.

(10) Where the Commission has confirmed, reversed or varied an order of the Director, the landlord or tenant may file the order with the Supreme Court.

(11) Where an order is filed under subsection (10), it may be enforced as if it were an order of the Supreme Court.