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RESIDENTIAL RENTAL DEPOSITS:

How They Can be Applied Without Breaking the Law!

By

Paul De Francesca

Lawyer

Abstract

Landlords should carefully review all rental applications and tenancy agreements. It is clear that any deposit under a residential lease is to be applied only towards security against the payment of the last month's rent. A landlord may not take a deposit to secure any other obligation. As well, a Landlord is not able to retain the deposit if it is able to re-rent the premises and mitigate its losses.

Full Article

Sarah Musilla ("the Tenant") appealed the order of the Landlord and Tenant Board ("the Board") and the review order dated July 24, 2009 dismissing her application for the repayment of a rent deposit. The Divisional Court dismissed the Tenant's appeal and the Tenant appealed to the Court of Appeal on a question of law alone.

At issue in the appeal was the proper interpretation of s. 107(1) of the *Residential Tenancies Act*, c. 2006, S.O. 2006, 17 ("the Act"), a provision requiring a landlord to repay a rent deposit if vacant possession of a rental unit is not given to a prospective tenant.

The Tenant submitted a rental application for an apartment unit to the respondent Avcan Management Inc. ("the Landlord"). With the application, she provided a cheque for $1,145.00, which was the equivalent of one month's rent. The rental application form contained a clause dealing with the forfeiture of the rent deposit.

The Landlord wrote the Tenant a letter informing her that her application had been accepted. She was asked to contact the building superintendent to sign a Tenancy Agreement.

The Tenant wrote to the property manager of the Landlord, stating that she would not sign the Tenancy Agreement and requested the return of her rent deposit. After receiving the letter, the Landlord advertised the rental unit, but was not able to rent it until January 1, 2008.

The Landlord did not return the rent deposit, leading the Tenant to bring an application before the Board for the return of the deposit.

Residential Rental Deposits

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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. 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.

In the present case, the Tenant relied on s. 107(1) of the Act to claim return of her rent deposit. That provision states that "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."

The Board dismissed the Tenant's application, finding that the Landlord had not prevented the Tenant from taking possession of the unit. It held that a tenant cannot unilaterally terminate a tenancy prior to taking possession and then seek to have the rent deposit returned The Board and the Divisional Court held that s. 107(1) requires a landlord to return a rent deposit only if vacant possession is refused by a landlord. Where there is an agreement for rental of a residence and a tenant does not take possession of the residence when offered, the landlord is entitled to retain a rent deposit in accordance with the provisions in a rental agreement.

The Court of Appeal agreed with the reasons of the Divisional Court that s. 107(1) of the Act does not authorize a tenant to obtain the automatic return of a rent deposit where the landlord has done everything necessary to give the possession of the leased premises and the tenant has unilaterally repudiated the rental agreement.

In particular, the Court agreed with the following observation:

> When one looks at the words of s. 107(1), it is notable that the landlord is to return the deposit if vacant possession is 'not given' to the prospective tenant. The words 'not given' suggest that it is the refusal or inability of the landlord to provide the premises that triggers the obligation to return the deposit to the prospective tenant. In the present case, however, it was the tenant's action in refusing to take the unit that prevented her from taking possession, not any act of the landlord.

This interpretation accords with common sense and fairness. To permit a tenant, who is legally obligated to take possession, to regain a rent deposit where the landlord has done everything it was required to do in order to give possession would render meaningless the concept of a rent deposit to secure the tenant's obligation to pay rent.

However, the Court of Appeal qualified what the Divisional Court stated about a landlord's ability to retain a rent deposit. The Court stated that sections 105(1) and 106(10) of the Act provide that a landlord may only take a deposit as security against the payment of the last month's rent. The landlord may not take a deposit to secure any other obligation. Thus, if a tenant breaches a tenancy agreement and the landlord, in accordance with its obligation to mitigate its damages, is able to re-rent the premises without suffering any loss of rent, the landlord is not entitled to retain the rent deposit. The landlord cannot realize double payment by use of a deposit, nor can it apply the funds to any other purpose

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DE FRANCESCA LAW
744 Broadview Avenue, Suite 100, Toronto, Ontario M4K 2P1
Phone: (416) 778-4433 • Facsimile: (416) 778-4432 • Email: info@defranlaw.com • www.defranlaw.com