

DECISION

DISPUTE CODES MNSD

INTRODUCTION

This hearing dealt with an application by the tenant pursuant to the *Residential Tenancy Act* for orders as follows:

1. Monetary order for return of pet damage or security deposit pursuant to Section 38.

The landlord appeared at the hearing of this matter and I accept that the landlord was properly deemed served with the Application for Dispute Resolution hearing package.

On the basis of the solemnly sworn evidence presented at the hearing a decision has been reached.

ISSUES TO BE DETERMINED

Did the landlord return all of the tenants' security deposit within 15 days of receipt of the tenants' forwarding address? If not, did the landlord have the tenants' permission to retain all or part of the deposit? If not, did the landlord make application to the Residential Tenancy Branch within 15 days of receipt of the tenants' forwarding address requesting an Order allowing the landlord to retain all or part of the deposit?

BACKGROUND AND EVIDENCE

The tenant testified that they paid the following deposits on December 2, 2008:

Security Deposit	\$3,750.00
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Pet Deposit	3,750.00
Furniture Deposit	3,750.00
Total Deposit Paid	\$11,250.00

The tenant testified that they vacated the premises on September 29, 2009 at which time the tenant says they provided the landlord with their forwarding address in writing. The tenant testified that the deposit was not returned to them and to date the entire deposit has not been returned. The tenants filed this Application for Dispute Resolution and, on December 29, 2009 the landlord returned the sum of \$6,481.29 to them. The tenant testified that they did not give permission to the landlord in writing or otherwise allowing the landlord to make any deductions from their deposit.

The landlord agreed that she received the tenants' forwarding address on September 29, 2009. The landlord submitted an undated form signed by the parties which states that the tenancy began on December 1, 2008, the total deposits held are \$11,250.00 and the tenancy ended September 30, 2009. The form also shows the landlord acknowledging receipt of the tenants' forwarding address and states:

Unique dealt with the tenant's security and pet deposits as follows:

Unique retained the deposit(s) and interest with the Tenant's permission beyond the 15 days in order to discuss:

- Linens, towels and inventory are subject to replacement pending full inspection.

The landlord agrees that they did not return the tenants' deposit but says they did not do so because they had the tenants' permission to retain the deposit for longer than the 15 days set out in the Act. The landlord says they sought this permission from the tenants because they were in discussion with them regarding the condition of the rental unit and/or its furnishings. The landlord testified that she was awaiting estimates for repairs and replacements for the rental unit.

The landlord agrees that they did return \$6,481.29 to the tenants on or about December 29, 2009 as stated by the tenant. The landlord testified that, while they have not yet done so, they intend to make a claim for a monetary order for damages to the rental unit.

FINDINGS

Section 38(1) of the *Residential Tenancy Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit.

The Act goes on to say that if the landlord fails to comply with Section 38(1), then the landlord may not make a claim against the deposit, and the landlord must pay the tenant double the amount of the deposit (Section 38(6)).

The landlord argues that the tenants' agreed that the landlord could retain the deposit longer than the 15 days. In this regard I note Section 5 of the Act which states:

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Therefore any agreement made between the parties which contravenes the Act or regulations is of no effect.

Even if I were to accept the validity of the parties' agreement allowing the landlord to retain the deposit longer than 15 days, the landlord has submitted no evidence to show that the tenants' agreed, in writing, to allow any deductions to be made from their

deposit. The tenant confirmed that they did not give permission verbally or in writing for any deduction to be made. Even though they had no such permission the landlords did make deductions.

I find that the evidence shows that the landlord has not complied with Section 38 of the Act. The landlord has not returned the security deposit within 15 days of receipt of the tenant's forwarding address. The tenants are therefore entitled to a monetary order amounting to double the deposit paid with interest calculated on the original amount only. As the evidence shows the landlord has returned a portion of the deposit, that sum will be deducted from this monetary award.

The tenants have not sought recovery of the filing fee they have paid for this application and therefore none is awarded.

Total monetary award payable by the landlord to the tenant:

Deposit paid on December 2, 2008	\$11,250.00
Double Security Deposit	11,250.00
Interest on original amount paid from date security deposit paid to date of this order	13.86
Less payment made	-6,481.29
TOTAL MONETARY AWARD	\$16,032.57

The tenants are provided with an Order in the above terms and the landlord must be served with a copy of this Order as soon as possible. Should the landlord fail to comply

with this Order, this Order may be filed in and enforced as an Order of the provincial Court of British Columbia, Small Claims Division.