



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38; and
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

The landlords did not attend this hearing, although I waited until 3:24 p.m. in order to enable them to connect with this hearing scheduled for 3:00 p.m. Both tenants attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions.

The tenants gave sworn testimony that they sent a copy of their dispute resolution hearing package to the landlords by registered mail on March 20, 2012. They said that they had a Canada Post Tracking Number to confirm this mailing to the only mailing address they had for the landlords, the dispute address, where the landlords resided. As I wanted to ensure that the landlords had been properly notified of the tenants' application for dispute resolution including the date and time for this hearing, I asked the tenants to fax me by 12:00 p.m. on April 10, 2012 a copy of Canada Post documentation to confirm their registered mailing of this package to the landlords. I subsequently received this confirmation by fax from the tenants. In accordance with sections 89 and 90 of the *Act*, I am satisfied that the landlords were deemed served with the tenants' dispute resolution hearing package on March 25, 2012, five days after the tenants sent this package by registered mail.

Issues(s) to be Decided

Are the tenants entitled to a monetary award for the return of their security deposits?
Are the tenants entitled to a monetary award equivalent to the amount of their security deposits as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*? Are the tenants entitled to recover the filing fee for this application from the landlords?

Background and Evidence

The tenants testified that on November 23, 2011, they entered into an oral residential tenancy agreement with the landlords when they forwarded their \$450.00 security

deposit into the landlords' bank account by direct deposit. This tenancy for rooms in a rental home was to commence on January 1, 2012 for an agreed monthly rent of \$900.00.

The tenants entered oral and written evidence that the female landlord (the landlord) called them on November 25, 2011 to advised them that she needed them to pay their January 2012 rent as soon as possible so that she could make her mortgage payment. The tenants testified that they told her that they could not pay their January 2012 over one month in advance, but that they would be paying their January 2012 rent as scheduled on January 1, 2012. They entered undisputed written evidence that the landlord refused payment for January 1, 2012, at which time they gave their 1 Month Notice to end this tenancy. They testified that they requested a return of their security deposit in calls to the landlord made between November 25, 2011 and February 17, 2012. They testified that they sent their forwarding address in writing to the landlord at the only address she had provided to them in a registered letter of February 20, 2012. They entered a copy of the Canada Post Customer Receipt including a Tracking Number to confirm their February 20, 2012 registered mailing of this letter to the landlord. They said that the landlord resides at the rental property. They said that their February 20, 2012 registered letter was returned undelivered.

The tenants applied for a return of their \$450.00 security deposit and the recovery of their filing fee from the landlords. In considering this application, I have based my decision on limited written evidence from the tenants and their oral testimony at this hearing. The landlords did not enter any evidence or testimony.

Analysis

Section 38(1) of the *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 in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. 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 return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address in writing. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant."

Based on the evidence before me, I find that an oral tenancy agreement was established between the parties on November 23, 2011, when the landlords received the tenants' \$450.00 security deposit. According to the *Act*, I find that the tenancy commenced that date and both parties would then be held responsible for the duties and obligations set out in the *Act* as of that date, even though the tenants never occupied the rental premises.

I also find that both the landlords and the tenants did not comply with their obligations under the *Act* with respect to this tenancy. While the *Act* allows a landlord to request and obtain a security deposit to hold a rental unit for tenant in advance of the occupancy date, the *Act* does not permit a landlord to demand the first monthly payment in advance of the tenants' scheduled occupancy of the rental unit or in advance of the due date for the first monthly payment for the tenancy. Once a tenancy has been entered into by parties, the *Act* sets out specific rights and obligations with respect to ending a tenancy. A tenant cannot end even an oral tenancy agreement without providing a written notice to end a tenancy. In this case, again based on the limited evidence before me, I find that both parties contravened the *Act*. The landlord's demand for a payment of rent not due until January 1, 2012 and the tenants' oral notice to end this tenancy both contravened the *Act*.

In situations where both parties have contravened the *Act*, I give consideration to which party took this action first and whether their action breached a material term of their tenancy agreement and effectively ended the tenancy. In a case such as this one when only an oral tenancy agreement was entered into, comparison cannot be made to the stated terms of the written residential tenancy agreement. However, based on the tenants' undisputed evidence, I find on a balance of probabilities that the landlords were the first to contravene the *Act* in this instance. The landlord contravened what would be expected to be a standard term of this tenancy agreement by demanding payment for rent for January 2012 almost 5 weeks before that payment would be considered due. Since this was a fundamental term, perhaps the most fundamental term, of the oral tenancy agreement, I find that the landlords breached a material term of the tenancy agreement and ended the tenancy on November 25, 2011. Although I have no evidence that the tenants ended their tenancy in writing as required by section 52 of the *Act*, I find that the landlords ended the tenancy on November 25, 2011, thus freeing the tenants from their responsibility of complying with their obligations to provide written notice at the end of this tenancy. I also find that the landlord's action precipitated the tenants' decision to not take occupancy of the rental unit in January 2012.

In this case, the evidence is that the tenants provided their forwarding address in writing by registered mail on February 20, 2012. In accordance with sections 89 and 90 of the *Act*, I find that the landlords were deemed served with the tenants' forwarding address in writing on February 25, 2012. Therefore the landlords were required to return the tenants' security deposit in full or apply for dispute resolution to retain any portion of their deposit within 15 days of February 25, 2012. They did not do so.

I find that the landlords have not returned the tenants' security deposit within 15 days of their deemed receipt of the tenants' forwarding address in writing. As such, I find that the tenants are entitled to a monetary order amounting to double their security deposit. No interest is payable over this period.

Having been successful in this application, I find further that the tenants are entitled recover their \$50.00 filing fee paid for this application.

Conclusion

I issue a monetary Order in the tenants' favour in the following terms which allows the tenants to recover their security deposit and their filing fee, plus a monetary award equivalent to the amount of their security deposit resulting from the landlords' failure to comply with the provisions of section 38 of the *Act*.

Item	Amount
Return of Tenants' Security Deposit	\$450.00
Monetary Award Equivalent to amount of Tenants' Security Deposit for Landlords' Failure to Comply with Section 38 of the <i>Act</i>	450.00
Filing Fee	50.00
TOTAL MONETARY ORDER	\$950.00

The tenants are provided with these Orders in the above terms and the landlord(s) must be served with a copy of these Orders as soon as possible. Should the landlord(s) fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: April 11, 2012

Residential Tenancy Branch