



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 tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

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

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The landlord's representative (the landlord) confirmed that he received a copy of the tenants' dispute resolution hearing package sent by the tenants by registered mail on or about February 23, 2012. I am satisfied that the tenants served this package and their written evidence to the landlords in accordance with the *Act*.

The landlord said that he had not sent the tenants a copy of the one page of written evidence that the landlord sent to the Residential Tenancy Branch to support the landlord's position. As the landlord did not share his written evidence with the tenants, I told the parties at the hearing that I would not be considering the landlord's written evidence.

Issues(s) to be Decided

Are the tenants entitled to a monetary award equivalent to the amount of their pet damage and 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 landlord?

Background and Evidence

This tenancy commenced as a one-year fixed term tenancy on September 1, 2010. At the expiration of the fixed term, the tenancy continued as a periodic tenancy. Monthly rent by the end of this tenancy was set at \$825.00, payable in advance on the first of each month. The tenants paid a \$412.50 security deposit on August 25, 2010 and a \$412.50 pet damage deposit on or about August 27, 2010.

The parties agreed that the tenants vacated the rental unit on December 31, 2011. The following day, the parties conducted a joint move-out condition inspection of the rental unit, at which time the tenants provided their forwarding address in writing to the landlord. The landlord confirmed receiving the tenants' forwarding address in writing on January 1, 2012.

The landlord testified that he sent the tenants' a January 15, 2012 cheque for the return of their pet damage and security deposits before January 15, 2012. The landlord testified that the cheque to the tenants for \$825.00 was returned to the landlord by Canada Post on January 24, 2012.

The female tenant (the tenant) submitted written evidence that she attended the landlord's office on January 26, 2012 at which time one of the landlord's representatives advised her that she had the pet damage and security deposit cheque for her which had been returned in the mail. The tenant stated in her written evidence that the landlord's \$825.00 cheque was then handed to her, "crumpled, with no envelope and dated for January 15th." The tenant maintained that all of the tenants' other mail has been delivered without incident to their new mailing address.

The tenants applied for a monetary award of \$825.00 plus the return of their filing fee because the tenants did not believe that the landlords mailed the pet damage and security deposit cheque to them within the 15-day time limit established under the *Act*. They also noted that they never received any phone call from the landlord with respect to the alleged return of the landlord's cheque on January 24, 2012.

The landlord said that he intended to call the tenants a few days after the landlords received the returned cheque, but the tenant attended the landlord's office on January 26, 2012 and was given the cheque at that time.

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 pet damage and security deposits (the deposits) or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposits. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposits, and the landlord must return the tenant's deposits plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the deposits (section 38(6) of the *Act*). With respect to the return of the deposits, the triggering event is the latter of the end of the tenancy or the tenant's provision of the

forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a 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.” No such written agreement is in place in this situation.

In this case, the evidence is that the tenants ended their tenancy on December 31, 2011 and provided their forwarding address in writing to the landlord on January 1, 2012. Thus, the landlord’s 15-day period for taking action with respect to the deposits commenced on January 1, 2012.

The parties agreed that a representative of the landlord gave the tenant a cheque for the deposits on January 26, 2012, but only after the tenant attended the landlord’s office to obtain a copy of the joint move-out condition inspection report. The issue before me is whether the landlord complied with the requirement under section 38(1) of the *Act* and whether the landlord’s failure to comply leads to a monetary award in the tenants’ favour in the amount of the deposits.

The landlord did not enter any written evidence that I can consider to support the landlord’s claim that the landlord did attempt to return the tenants’ deposits by regular mail prior to the end of the 15-day statutory time period for doing so. Although the landlord testified that he recalled sending the January 15, 2012 cheque to the tenants, he testified that the landlord had not retained the returned envelope confirming the mailing of that cheque prior to the end of the 15-day period. The landlord said that the landlord has a process in place whereby all deposit cheques are returned to tenants in accordance with the 15-day statutory time period for doing so. Although the landlord is a professional company managing a number of tenancies, the landlord submitted no admissible written evidence to demonstrate that the deposit cheque was in fact sent to the tenants and returned by Canada Post. In fact, the landlord produced little other than oral testimony from the landlord’s representatives at this hearing to confirm that the deposit cheque was sent to the tenants at their correct address and returned by Canada Post. The failure of the landlord to take any action with respect to the alleged return of the deposit cheque until the tenant attended the landlord’s office also calls into question whether the cheque was sent and returned by Canada Post.

Based on a balance of probabilities, I find that the landlord has not returned the deposits within 15 days of receipt of the tenants’ forwarding address in writing. The tenants are therefore entitled to a monetary award equivalent to the amount of the pet damage and security deposits, \$825.00 in total, in accordance with section 38(6) of the *Act*. No interest is payable on this monetary award.

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

Conclusion

I issue a monetary Order of \$875.00 in the tenants' favour which allows them a monetary award for the landlord's failure to comply with section 38 of the *Act* and to recover the tenants' filing fee for their application.

The tenants are provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord 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 25, 2012

Residential Tenancy Branch