

## **DECISION**

Dispute Codes      MNSD, FF

### **Introduction**

This is an application filed by the Tenant for a monetary order for the return of double the security deposit and the recovery of the filing fee.

Both parties attended the hearing by conference call and gave testimony. As both parties have attended the hearing and have confirmed receipt of the submitted evidence, I am satisfied that both parties have been properly served.

It was clarified with both parties that the Tenant's application is to be amended to correct the proper last name of the Landlords from S to D as per the signed tenancy agreement. The application is amended by consent.

### **Issue(s) to be Decided**

Is the Tenant entitled to a monetary order?

### **Background, Evidence and Analysis**

This Tenancy began on April 15, 2011 on a month to month basis as shown by the submitted copy of the signed tenancy agreement. Both parties agreed that the monthly rent was \$1,200.00 payable on the 1<sup>st</sup> of each month. A security deposit of \$600.00 was paid and that the Tenancy ended at the end of July 2012. Both parties also agreed that the Tenant gave their forwarding address in writing to the Landlord in a letter dated August 2, 2012 and that the Landlords received shortly thereafter.

Section 38 of the Residential Tenancy Act states,

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) 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, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

(7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.

(8) For the purposes of subsection (1) (c), the landlord must use a service method described in section 88 (c), (d) or (f) *[service of documents]* or give the deposit personally to the tenant.

Section 38 of the Act is clear, where the Landlord has failed to return the security deposit within 15 days of the later of receiving the forwarding address in writing and

when the tenancy ends. Both parties agreed that the Landlord failed to comply with this. The Landlord's agent cites, Section 38 (2) of the Act stating that the Tenants right to the security deposit was extinguished because they failed to participate in a condition inspection report for the move-in or the move-out. The Tenants dispute this stating that her mother attended a walk-through inspection with the Landlord. The Landlord disputes this stating that the Tenant's mother was not accepted to perform the inspection.

Section 35 of the Residential Tenancy Act states,

**Condition inspection: end of tenancy**

- 35 (1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit
- (a) on or after the day the tenant ceases to occupy the rental unit, or
  - (b) on another mutually agreed day.
- (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
- (3) The landlord must complete a condition inspection report in accordance with the regulations.
- (4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.
- (5) The landlord may make the inspection and complete and sign the report without the tenant if
- (a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or
  - (b) the tenant has abandoned the rental unit.

It is clear by the evidence provided by both parties that no documented condition inspection report was completed by both parties. Section 35(2) of the Act states that 2 opportunities must be offered by the Landlord to the Tenant. The Landlord states that this was done. The Tenant disputes this stating that a walk-through was completed by her mother with the Landlord.

The onus or burden of proof is on the party making the claim, in this case the Landlord has made the claim that the Tenant extinguished their right to the return of the security deposit by not participating in a move-out inspection. This is disputed by the Tenant.

The Landlord is also making a claim that the Tenant surrendered the return of the security deposit. This is also in dispute by the Tenant. When one party provides evidence of the facts in one way and the other party provides an equally probable explanation of the facts, without other evidence to support their claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails. I find on this basis that the Landlord has failed in their claim that the Tenant extinguished their right for the return of the security deposit. The Landlord has also failed to prove that the Tenant gave permission to the Landlord to keep the security deposit.

The Tenant has established a claim for the return of the \$600.00 security deposit. The Tenant has also satisfied me that the Landlord failed to comply with Section 38 of the Act and is entitled to the return of an amount equal to the \$600.00 security deposit. The Tenant is entitled for the recovery of the \$50.00 filing fee. The Tenant is granted a monetary order under section 67 for the balance due of \$1,250.00.

#### Conclusion

The Tenant is granted a monetary order for \$1,250.00.

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: November 19, 2012.

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Residential Tenancy Branch