



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD

Introduction

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

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to obtain a return of her security deposit pursuant to section 38;

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to ask questions. The landlord confirmed that on April 2, 2013, the tenant handed him her written notice to end this tenancy by April 30, 2013. The landlord also testified that he received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail well in advance of this hearing. I am satisfied that the tenant served the landlord with the above documents in accordance with the *Act*.

Issues(s) to be Decided

Is the tenant entitled to a monetary award for losses arising out of this tenancy? Is the tenant entitled to a monetary award for the return of a portion of her security deposit? Is the tenant entitled to a monetary award equivalent to the amount of her security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*?

Background and Evidence

The tenant gave undisputed sworn oral testimony and written evidence that she commenced this periodic tenancy for a room in the basement of the landlord's house on February 6, 2013. Although she shared some common areas with other tenants in the basement, the parties agreed that she did not share either kitchen or bathroom facilities with the landlord who lived upstairs. The tenant said that she signed a document, described to her by the landlord as a "Boarders Agreement", in which she committed to pay monthly rent of \$550.00 on the first of each month. The landlord maintained that

this Agreement was not covered under the *Act* and was not a residential tenancy agreement.

The tenant did not dispute the landlord's sworn testimony that a security deposit of \$275.00 was paid to the landlord on the tenant's behalf by the Ministry of Finance (the Ministry). The tenant maintained that this occurred in February 2013. The tenant applied for a monetary award of \$345.50 for the landlord's failure to return all of her security deposit within 15 days of her providing her written notice to do so after her end to this tenancy.

The landlord testified that he returned \$204.50 of the security deposit to the Ministry on June 13, 2013. He confirmed that he has retained \$70.50 from the security deposit for this tenancy without obtaining the written consent of either the Ministry or the tenant. He confirmed that he has not applied for dispute resolution to obtain authorization to retain any portion of the security deposit. The landlord also confirmed that he received the tenant's forwarding address in writing on June 19, 2013. He maintained that any payment to be made regarding this security deposit should be made to the Ministry and not the tenant.

Analysis

Despite any statement in the "Boarders Agreement" to the contrary, I find that the written agreement entered into by the parties constituted a residential tenancy agreement as defined by the *Act*. I find that monthly rent was exchanged and all of the features of this tenancy, including the payment of a security deposit, were typical of a residential tenancy as set out in the *Act*. Section 5 of the *Act* specifically states that parties cannot contract out of their legal obligations under the *Act* by signing an agreement that states they will not be bound by the *Act*.

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 security deposit or file an Application for Dispute Resolution for an Order to make a claim to retain any portion of the security 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. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security 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."

In this case, I find that the landlord has retained a portion of the security deposit without any authority to do so.

The following provisions of Policy Guideline 17 of the Residential Tenancy Branch's Policy Guidelines would seem to be of relevance to the consideration of this application:

Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

- *If the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;*
- *If the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*
- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process;*
- *If the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;*
- *whether or not the landlord may have a valid monetary claim.*

Although the landlord has not complied with the above requirements of the Act, I am satisfied that he did return a \$204.50 portion of the \$275.00 security deposit for this tenancy within the time frame for doing so. I find that the landlord had no legal basis for withholding the remaining \$70.50 of the security deposit for this tenancy. The landlord did not file an application for dispute resolution within 15 days of receiving the tenants' forwarding address in writing, nor did he obtain the tenant's written permission to withhold these funds. As noted in Policy Guideline 17, the validity of any monetary claim that the landlord may have against the tenant has no bearing on the landlord's obligation to return the entire security deposit to the tenant in accordance with section 38 of the Act.

Under these circumstances, I find that the tenant is entitled to a monetary Order of \$70.50, the remaining portion of the security deposit for her tenancy. Pursuant to section 38(6) of the Act, I also find that the tenant is entitled to a monetary award of \$275.00 for the landlord's contravention of the requirements of section 38 of the Act. No interest is payable over this period.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms which allows the tenant to recover the unreturned portion of her security deposit plus a monetary award for the landlord's failure to comply with section 38 of the *Act*:

Item	Amount
Return of Remaining Portion of Security Deposit	\$70.50
Monetary Award for Landlord's Failure to Comply with s. 38 of the <i>Act</i>	275.00
Total Monetary Order	\$345.50

The tenant is 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: September 12, 2013

Residential Tenancy Branch

