



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding AAA Property Management Services
and [tenant name suppressed to protect privacy]

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 double her security and pet damage deposits (the deposits) pursuant to section 38; and
- authorization to recover her 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 landlords' agent at this hearing (the agent) testified that the landlords received copies of the tenant's dispute resolution hearing package sent by the tenant by registered mail on July 20, 2013. I am satisfied that the tenant served the hearing packages and copies of the tenant's written evidence package in accordance with the *Act*.

Issues(s) to be Decided

Is the tenant entitled to a monetary award for the return of her deposits? Is the tenant entitled to a monetary award equivalent to the amount of her deposits as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*? Is the tenant entitled to recover the filing fee for this application from the landlords?

Background and Evidence

The agent and the tenant signed the Residential Tenancy Agreement (the Agreement) for this periodic tenancy on September 3, 2012. According to the terms of that Agreement, the tenant was to take possession of the rental unit on October 1, 2012. Monthly rent was set at \$1,700.00, payable in advance on the first of each month. The Agreement required the tenant's payment of an \$850.00 security deposit by September 3, 2012 and a \$500.00 pet damage deposit by October 1, 2012.

The tenant submitted undisputed written evidence that on February 27, 2013 the tenant's husband sent Landlord KM an email advising that the tenants were planning to

end their tenancy by March 31, 2013. Both parties agreed that the tenant followed up the email notice with a March 2, 2013 letter advising Landlord KM that the tenant was planning to end this tenancy by March 31, 2013. Both parties agreed that the tenancy ended on March 31, 2013, at which time vacant possession of the rental unit was surrendered to the landlords.

The tenant applied for a monetary award of \$2,700.00 plus the recovery of the \$50.00 filing fee for her application. She requested a return of double the deposits as she maintained that the landlords had failed to return her deposits within the 15 day time period required by section 38 of the *Act*. The tenant supplied written evidence of the Agreement, her monthly rent payments by cheque throughout this tenancy (including receipts for her first three payments), as well as emails and letters regarding her attempts and the attempts by her husband to recover their deposits from the landlords. The tenant's undisputed emails included the following May 13, 2013 to Landlord KM, which reads as follows:

I... spoke with Mr. P (the agent) last week and he says that you have to pay our deposit. We don't know what's going on between both of you, bat (sic) that isn't our business. We don't understand why you want us involved in this matter. We followed all instructions of the contract, paying on time the deposit and rent, taking care of the house, deliver it on time and in good conditions. We didn't cause any problem as your tenants. So, we need to know when we will receive our deposit money.

The tenant gave sworn testimony that she paid the \$850.00 security deposit in cash to the agent on September 3, 2012, as set out in the Agreement. She said that she requested a receipt for this cash payment, but the agent would not give her one. She testified that the agent gave her the key to the rental unit at that point. The tenant also gave sworn testimony that she paid the \$500.00 pet damage deposit in cash to the agent on October 1, 2012, the date when the tenancy was to begin. She said that she requested a receipt from the agent, but he again refused to issue one to her. She testified that her husband witnessed her make both of the above cash payments to the agent and also witnessed the agent refuse to issue receipts for these payments. She testified that she would not have been allowed to move into the rental unit had she not complied with this requirement of the Agreement and paid her rent for October 2012 at that time. She testified that she and her husband began moving into the rental unit during the first week of October 2012.

The tenant's husband gave sworn testimony that he witnessed his wife make both of the above payments to the agent. He testified that there were two separate deposit payments. He said that the first of these payments was for the security deposit. He

said that this payment occurred when the agent and tenant signed the Agreement. He testified that the second payment occurred at the beginning of October 2012, when the tenant paid the “dog” deposit. He testified that he and his wife requested written receipts for both of these payments, but the agent said that he would issue these later. The tenant’s husband testified that the agent never gave them receipts for these cash payments. He said that since they had the keys to the rental unit and had signed the Agreement, they felt that this signified the landlords’ confirmation that they had complied with the terms of the Agreement, including the payments of their deposits.

The landlords submitted no written evidence for this hearing. The agent gave sworn testimony that the landlords have not returned the tenant’s deposits because she never made these deposits as required by the Agreement. The agent said that he asked the tenants to pay their deposits each month for the three months that he was dealing with them at the beginning of this tenancy. He testified that the tenants said that they would make these payments each month, but never did. He said that he alerted those who took over management of this tenancy after the first three months that the deposits had not been paid. He testified that he was unaware of any emails, letters, or other documents to demonstrate efforts by the landlords to obtain the required deposits from the tenant as set out in the Agreement.

The agent explained that he was not aware of the tenant’s attempt to recover deposits for this tenancy until shortly after the tenant applied for dispute resolution. Initially, the agent said that the first explanation provided to the tenant as to the landlords’ reasons for refusing to return the deposits was at this hearing. Later in the hearing, the landlord said that he called the tenant after he was forwarded information from the landlords and spoke with her twice to question why she was proceeding with this application to recover deposits that she had never paid.

Initially, the tenant said that this hearing was the first time that she had learned that the landlords’ were refusing to return her deposits because they claimed she had not paid these deposits. Later in the hearing, she corrected her previous testimony by stating that the agent had called her and she had spoken with him about this matter. She testified that the agent told her that he had no record of her having paid the deposits. The issue of whether the agent had a record of receiving the deposits is different than the agent’s claim that the tenant was advised by telephone that the landlords were refusing to return the deposits because they were never paid.

Analysis

The key matter in dispute is whether the tenant paid the deposits to the agent for forwarding to the landlords. The tenant and her husband testified that the tenant made

cash payments to the agent in accordance with the amounts and dates identified in the Agreement. Although there were slight differences in their sworn testimony, I find that their accounts of these events for the most part very similar. The absence of cash receipts to demonstrate the tenant's security and pet deposit payments is a definite obstacle to the tenant's claim for a return of double her deposits. However, the tenant and her husband testified that they requested but were not provided receipts by the agent for these payments. The agent denied having received any such payments from the tenant.

To the extent possible when confronted with conflicting sworn testimony of this type, I look to written evidence and the sequence of events to determine on a balance of probabilities which sworn testimony most likely represents what actually transpired. In this case, I find it unlikely that an agent representing a landlord would agree to sign an Agreement on September 3, 2012 calling for an \$850.00 security deposit that same day and release keys to the rental unit to the tenant without first ensuring that the tenant had indeed made the security deposit payment called for in that Agreement. I also find it unlikely that a landlord would allow a tenancy to continue without some form of written action regarding an unpaid \$500.00 pet damage deposit that was due on the first day that the tenant was legally entitled to occupy the rental unit. I also find it unlikely that an agent for a landlord would fail to keep some type of written record of efforts to recover unpaid deposits that the agent maintained have been owed by the tenant since the day that the Agreement was signed until the end of that tenancy many months later. In this case, the landlord submitted no written evidence in the form of a tenant rent ledger to record amounts owing and payments made during this tenancy.

The tenant also produced copies of emails and the May 23, 2013 letter requesting the return of her deposits. Each of these documents provided the landlords or their agent an opportunity to advise the tenant that no deposits would be returned because the landlords maintained that no deposits had been paid. The agent produced no such evidence and did not dispute the authenticity of the tenant's emails. What emerges from my review of this set of circumstances is a pattern of the landlords directing the tenant back and forth between Landlord KM and the agent. Until the agent finally spoke with the tenant in response to her application for dispute resolution, neither the landlords nor the agent had given the explanation provided by the agent at this hearing for the landlords' failure to return the deposits.

Based on a balance of probabilities and after taking into account the above factors, I find that it is more likely than not that the tenant did make cash payments to the agent for her security deposit and pet damage deposit for this tenancy. In coming to this conclusion, I rely heavily on the agent's signing of the Agreement on the same date that

the security deposit was due. I find it extremely unlikely that the agent would have signed this Agreement without insisting on receiving the tenant's security deposit payment at that time. Similarly, the landlords did not take any action pursuant to the *Act* to attempt to obtain compliance with the Agreement, which could have included the issuance of a 1 Month Notice to End Tenancy for Cause.

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 deposits 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 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 deposits 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, the tenant supplied written evidence that she mailed her May 23, 2013 letter containing her forwarding address to Landlord KM that same day. The agent testified that he "did not think" that the tenant's May 23, 2013 letter was received by the Landlord KM. However, earlier in this hearing, he admitted that he was only consulted regarding the tenant's application relatively recently. I find the agent's evidence regarding his claim that Landlord KM did not receive the tenant's May 23, 2013 letter was very hesitant and demonstrated considerable uncertainty. By contrast, the tenant entered into written evidence a Canada Post Customer Receipt to confirm this mailing. I also find that the undisputed emails supplied by the tenant demonstrated that the landlords were referring the tenant back and forth between the agent who the tenant maintained received her deposits to Landlord KM, who would be ultimately responsible for the return of the deposits.

Pursuant to sections 88 and 90 of the *Act*, I find the tenant's mailing of May 23, 2013 containing her forwarding address was deemed served to the landlords on May 28, 2013, the fifth day after its mailing.

Based on the evidence before me, I find that the landlords have not returned the deposits within 15 days of receipt of the tenant's forwarding address in writing. The landlords have not applied for dispute resolution to retain the deposits and there is no evidence that the tenant agreed in writing to let the landlords keep the deposits. Under

these circumstances, I find that the tenant is therefore entitled to a monetary order amounting to double the deposits with interest calculated on the original amount only. No interest is payable over this period.

Having been successful in this application, I find further that the tenant is entitled to recover the \$50.00 filing fee paid for her application.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the tenant to recover her original deposits, to obtain a monetary award equivalent to the amount of her original deposits for the landlords' failure to comply with the provisions of section 38 of the *Act*, and to recover her filing fee from the landlords"

Item	Amount
Return of Pet Damage & Security Deposits (\$850.00 + \$500.00= \$1,350.00)	\$1,350.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the <i>Act</i>	1,350.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	\$2,750.00

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order 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: October 09, 2013

Residential Tenancy Branch

