



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 an application by the tenant pursuant to the Residential Tenancy Act (the Act) for orders as follows:

- a) An Order to return double the security deposit pursuant to Section 38; and
- b) To recover the filing fee for this application.

SERVICE

Both parties attended the hearing and the tenant provided evidence that of service to the landlord of the Application for Dispute Resolution by registered mail and by email with his forwarding address. The landlord agreed they had received them as stated. I find the documents were served pursuant to sections 88 and 89 of the Act for the purposes of this hearing.

Issue(s) to be Decided:

Has the tenant proved on the balance of probabilities that he is entitled to the return of double the security deposit according to section 38 of the Act?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to present evidence and make submissions. The parties agreed the tenant had paid a security deposit of \$1085 in September 2014 and agreed to rent the unit for \$2175 a month on a fixed term lease to March 30, 2015. The tenant gave notice in writing on December 26, 2014 together with his forwarding address and vacated the unit on January 6, 2015 as he was accepted into a University program that was out of Province. The tenant's deposit has never been returned and he gave no permission to retain any of it.

The landlord said they retained the deposit for the tenant had broken the fixed term lease, they have been unable to re-rent the suite and have suffered rental loss, agent's fee and cleaning costs. They have not filed an Application to claim against the deposit as they do not consider the tenancy at an end as the lease is until March 30, 2015 and

they have not been able to re-rent. The landlord submitted that the tenant had given him permission to retain the deposit in an email where he asked for pictures of the claimed damages.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

Analysis:

The Residential Tenancy Act provides:

Return of security deposit and pet damage deposit

*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.

(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.

In most situations, section 38(1) of the Act requires a landlord, within 15 days of the **later 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 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 pay the tenant double the amount of the security deposit (section 38(6)).

We discussed section 38 and the possibility of settlement in the hearing and were somewhat distracted by the landlord's claim for damages and construing an email as an agreement to keep the deposit. I find on examining the agreed facts and the legislation that this tenancy is not ended. The tenant's notice to end his tenancy early is not effective as according to section 44 (2)(b) a tenant cannot end a fixed term tenancy until the end of the fixed term.

I find the fixed term does not expire until March 30, 2015 and the landlord has not accepted an early end of the tenancy as he has not been able to re-rent although he

has tried through an agent. Therefore I find the tenant would not be entitled to the return of his security deposit (or double it) until 15 days after the end of the tenancy. I therefore find that this Application of the tenant is premature and give him leave to reapply after the tenancy is ended. I caution the landlord that they cannot just retain the deposit for damages or rental loss but must file an Application to claim against the deposit within the time limitations set out in section 38.

Conclusion:

I dismiss the application of the tenant; it is premature as the tenancy is not ended. I give him leave to reapply and find him not entitled to recover filing fees.

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: February 19, 2015

Residential Tenancy Branch

