



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding TPM Management Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking a monetary order for return of his security deposit. The hearing was conducted via teleconference and was attended only by the tenant and his counsel.

Issue(s) to be Decided

Whether the tenant is entitled to a monetary order for all or part of the security deposit pursuant to Sections 38, and 67 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The tenant testified that he served the landlord personally with the notice of this hearing on March 11, 2014 by delivering it to the landlord's office. I accept the tenant's undisputed testimony and I find that the landlord has been sufficiently served with the notice of hearing documents pursuant to the Residential Tenancy Act.

The tenant testified that the tenancy began on May 1, 2004 when he took over the tenancy from a previous tenant. He testified that the monthly rent of \$ 745.00 was due on the 1st of each month and that the security deposit of \$ 300.00 was paid on January 1, 2002 by the original tenant.

The tenant testified that on September 29, 2015 upon a complaint by the landlord, he was forcibly removed from his unit and apprehended by the police pursuant to section 28 of the Mental Health Act.

The tenant testified that the landlord had advised him they would be conducting a move out inspection on September 29, 2015 but ultimately completed one in his absence on September 30, 2015 without any advance notice. The tenant testified that at the landlord's request he signed at the bottom of the move out inspection report agreeing that he was not owed any balance of his security deposit. The document specifically stated "*No Return of*" adjacent to the heading "*Balance Due Tenant*". The tenant admitted noting these words on the Move Out Report when he signed it but testified he was mentally ill and under duress. The tenant testified that a move in inspection or written report were not done by the landlord at the commencement of his tenancy. Another document entitled "Security Deposit Refund" dated September 30, 2014 was given to the tenant by the landlord. It indicates that was keeping all of the security deposit for cleaning and disposal charges.

The tenant testified that he gave the landlord his forwarding address in writing on October 9, 2014 and has not received any of his deposit back.

His counsel submitted that as no move in inspection was conducted and as the move out inspection was done in the absence of the tenant without prior notice, that the report and consent with the tenant's signature is invalid. His counsel also submitted that as the tenant was mentally ill and under duress the document is equally invalid.

Analysis

Section 38(4) states that the landlord may retain an amount from a security deposit if at the end of a tenancy, the tenant **agrees in writing** that the landlord may retain the amount to pay a liability or obligation of the tenant.

The tenant submitted a copy of the move out report which the tenant signed agreeing that the landlord may retain all of his security deposit.

The tenant did not produce any independent or expert evidence corroborating any mental incapacity. Furthermore the only evidence from the tenant of duress was that "he felt he had to sign" the consent. The tenant has a strict burden of proof required to vitiate his consent whether by mental incapacity or duress. I find that the evidence adduced by the tenant falls well below that burden.

The tenant's submission that the landlord failed to conduct a move in inspection or conduct a move out inspection with his attendance and without giving him prior notice invokes several provisions of the Act.

Section 23 of the Residential Tenancy Act states:

Condition inspection: start of tenancy or new pet

- 23** (1) The landlord and tenant together **must inspect the condition** of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.
- (2) The landlord and tenant together must inspect the condition of the rental unit on or before the day the tenant starts keeping a pet or on another mutually agreed day, if
- (a) the landlord permits the tenant to keep a pet on the residential property after the start of a tenancy, and
 - (b) a previous inspection was not completed under subsection (1).
- (3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
- (4) The landlord must complete a condition inspection report in accordance with the regulations.**
- (my emphasis added)

Regulation 19 of the Regulations made pursuant to the Residential Tenancy Act states that a Condition Inspection Report must be in writing:

Disclosure and form of the condition inspection report

- 19** A condition inspection report must be
- (a) in writing,**
 - (b) in type no smaller than 8 point, and
 - (c) written so as to be easily read and understood by a reasonable person.

I find that the landlord failed to comply with section 23 of the Act by not completing a written move in inspection report in accordance with the aforementioned Regulations.

Accordingly I find that the landlord's right to claim against any of the security deposit for damage which I interpret to include cleaning and disposal charges, is extinguished by operation of sections 24(2) of the Act:

- 24** (2) The right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is **extinguished** if the landlord

- (a) does not comply with section 23 (3) *[2 opportunities for inspection]*,
 - (b) having complied with section 23 (3), does not participate on either occasion, or
 - (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.
- (my emphasis added)

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.

36 (2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property **is extinguished** if the landlord

- (a) does not comply with section 35 (2) *[2 opportunities for inspection]*,**
- (b) having complied with section 35 (2), does not participate on either occasion, or
- (c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

(my emphasis added)

I further find that the landlord failed to give the tenant at least two opportunities to attend the move out inspection prior to the landlord conducting one on its own. Accordingly the landlord's right to claim against the security deposit for damage including cleaning and disposal charges is equally extinguished pursuant to section 36(2).

Section 38(1) of the Act provides:

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.

(my emphasis added)

38(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

(my emphasis added)

38 (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]**.

(my emphasis added)

Accordingly I find that pursuant to section 38(5) of the Act the tenant's written consent for the landlord to retain the security deposit for damage inclusive of cleaning and disposal charges for the unit, is **not valid** as the right of the landlord to claim against it has been extinguished.

38(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.

Furthermore pursuant to section 38(1) of the Act the landlord has not returned the deposit or applied for an Order to retain any portion of it. Therefore pursuant to section 38(6) the landlord is now obliged to repay double the security deposit. I calculate that amount inclusive of interest to be: \$ 310.61 x 2 equal to \$ 621.22.

Conclusion

I have granted to tenant a monetary Order in the amount of **\$ 621.22**. This Order may be enforced in the Small Claims Court of BC. This decision and Order must be served on the landlord as soon as possible.

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: August 04, 2015

Residential Tenancy Branch

