Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNSD, MNDC, FF

Introduction

This hearing convened as a result of an Application for Dispute Resolution filed by the Tenant for a Monetary Order for return of double the deposits paid, compensation for money owed and recovery of the filing fee paid for the claim.

The hearing originally occurred on April 12, 2016. The hearing did not complete within the scheduled time and was adjourned to May 19, 2016.

Both parties appeared at both hearing dates, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form and make submissions at the hearing.

The parties confirmed receipt of all evidence submissions and there were no disputes in relation to the evidence submissions

I have reviewed all evidence and testimony before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*; however, I refer only to the evidence relevant to this my Decision.

Issues to be Decided

Is the Tenant entitled to monetary compensation from the Landlords, including, return of double the deposits paid, compensation for money owed, and recovery of the filing fee?

Background and Evidence

The Tenant testified that he initially moved into the rental unit for a six month fixed term in December of 2012. The Tenant stated that after the expiration of this term, the parties entered into a further 1 year fixed term commencing June 1, 2013 which included an optional month to month tenancy following the initial year. He confirmed the tenancy continued on a month to month basis on the same terms as the initial agreement.

Introduced in evidence was a copy of the residential tenancy agreement pertaining the current tenancy. Monthly rent was payable in accordance with a Schedule which was intended to form part of the tenancy agreement and which provided that rent was payable in accordance with a schedule as follows:

June 1, 2013	Rent due $2,250.00	Utilities due $300.00
July 1, 2013	Rent due $2,250.00	Utilities due $300.00
August 1, 2013	Rent due $2,250.00	Utilities due $300.00
September 1, 2013	Rent due $2,250.00	Utilities due $300.00
October 1, 2013	Rent due $2,250.00	Utilities due $300.00
November 1, 2013	Rent due $2,250.00	Utilities due $300.00
December 1, 2013	Rent due $2,250.00	Utilities due $300.00
January 1, 2014	Rent due $2,250.00	Utilities due $300.00
February 1, 2014	Rent due $2,250.00	Utilities due $300.00
March 1, 2014	Rent due $2,250.00	Utilities due $300.00
April 1, 2014	Rent due $2,250.00	Utilities due $300.00
May 1, 2014	Rent due $2,250.00	Utilities due $300.00

This schedule was not signed by the parties although there was provision made for their signatures. The Landlords submitted in evidence the Schedule (dated October 1, 2012) from the original tenancy agreement which was signed.

Also introduced in evidence was a document, dated May 27, 2013 regarding the utility and snow removal payments and which read as follows:

> *This letter is to form an agreement between the below signed parties, with regards to the submission of an estimated monthly payment amount due first day of each month, for utilities and snow removal. At the end of the tenancy period, an accounting of all invoices and advance will be conducted, and the tenants agree to pay any outstanding charges, and the Landlord agrees to refund any overpayments within 10 days after the tenancy end date.*
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> *Based on the previous 12 month period, we estimate that the monthly remittance will be $300.00.*

This letter was also not signed by the parties although there was provision made for their signatures. Again, the Landlords submitted in evidence the letter (dated October 1, 2012) relating to utility and snow removal agreement contained in the original tenancy agreement which was signed.

The evidence before me was that the parties did not do a reconciliation of the utility/snow removal prepayment/deposits at the end of the first term, and these amounts were simply carried forward to the subject tenancy.
The Tenant testified that paid a total of $11,900.00 as a deposit as follows:

November 15, 2012 (which was paid pursuant to the first six month term and which he confirmed was carried over to the subject tenancy; and which was noted on page 3 of the subject tenancy agreement).	$2,150.00
Cleaning deposit pursuant to letter dated October 1, 2012 and signed by the parties (which was again carried over to the subject tenancy)	$150.00
$300.00 per month "utility deposit" paid for the 33 month total tenancy term	$9,600.00
TOTAL	$11,900.00

The Tenant also sought the sum of $275.00 in compensation for snow removal for the 2013-2014 winter season. He confirmed this amount was compensation for his time as, although the parties agreed the Landlords would arrange for snow removal, he in fact took care of this task.

The Tenant also notes that the agreement between the parties was that the Tenant was to pay $300.00 per month towards utilities *and* snow removal and that in the 2013-2014 year the Landlords discontinued this service yet continued to receive the $300.00 per month.

The Tenant submitted that although he paid $300.00 per month as a utility deposit, for a total of $9,600.00 for utilities, the actual cost of his utilities was only $6,468.18 such that he significantly overpaid his utilities. He confirmed that he received a copy of the bills and further confirmed that there was not dispute that the total amount of utilities charged was $6,468.18 such that the Tenant overpaid by $3,131.82. The Tenant submits that this additional sum of $3,131.82 was more properly characterized as a utility *deposit* such that he should be entitled to claim return of double this amount pursuant to section 38 of the *Residential Tenancy Act.*

The Tenant vacated the rental unit on August 31, 2015. Introduced in evidence was a letter from the Tenant dated June 5, 2015 wherein he provided his notice to end the tenancy, as well as providing his forwarding address for the purposes of return of his deposits.

The testimony of the Tenant was that the Landlords did not perform an incoming condition inspection report in accordance with the *Residential Tenancy Act* and the Regulations. The Tenant testified that an informal move out condition inspection was completed on September 2, 2015 with the Tenant and the Landlords' agent. The Tenant stated that no report was completed or signed and no damages were identified. He stated that the Landlord, R.S., then went into the rental unit 8 days later, did not give the Tenant an opportunity to attend and then emailed him with a list of "issues". He confirmed that if there were issues, she should have filed for dispute resolution as required by the *Act*.

The Tenant testified that the Landlords then sent a cheque for $4,355.41 dated September 24, 2015. The Tenant's understanding was that the Landlords used the balance sheet (provided as

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The balance sheet provided by the Landlords indicates their position is that the Tenant paid a total of $2,300.00 for the following deposits: a $2,150.00 security deposit in 2012; and a, $150.00 cleaning deposit in 2012.

The document also references the $300.00 per month, or $9,600.00 total payments as a "Utilities Down Payments".

The Landlord, R.S., confirmed that she did not perform a move in condition inspection report in accordance with the *Residential Tenancy Act* and Regulations although she said that she did a "walk through" with the Tenant while she was on the phone.

R.S. also stated that she disputed the Tenant's claim for snow removal as she claimed that the year the Tenant was claiming snow removal was the year that the community in which the rental unit was located had a historic low snowfall and the Landlords did not arrange snow removal to save money for all the tenants. R.S. further stated that she did not charge the Tenant for any snow removal that year which was ultimately his responsibility and should have been paid from the $300.00 per month utility down payment.

Each party gave closing submissions as follows.

The Tenant submitted that the $300.00 per month payments were an illegal deposit collected by the Landlord and subject to the doubling provisions of section 38(6) of the *Residential Tenancy Act.* In support he referred to *Residential Tenancy Policy* 29 and submitted that the $300.00 per month payment was "money paid to secure possible future expenses" and therefore a deposit.

The Tenant further argued that the $300.00 per month payments were in fact a utility/snow removal security *deposit* and should be added to the initial deposit. He notes that on the cheque provided by the Landlords, the Landlords called it a "utilities deposit". He further notes that on the tenant reconciliation, the Landlords also called it a "utilities down payment" which the Tenant says is another way of saying deposit.

The Tenant also submitted that this amount of $300.00 per month was excessive, requested at a time other than when the tenancy began and should attract a $5,000.00 fine as provided for in section 95 of the *Residential Tenancy Act*.

The Tenant stated that all the funds received by the Landlords were a deposit according to the *Policy Guidelines*. The deposit was not returned within 15 days and the Landlord did not do an inspection at the end of the tenancy thereby extinguishing her rights to claim against it. In all the circumstances he requested return of double the deposits paid.

R.S. argued that the $300.00 per month was a utility *prepayment*, not a deposit. She further stated that as utilities are due monthly, they charged the Tenant monthly in advance rather than waiting for the utility bill to arrive.

R.S. also ~~calimed~~ claimed that the Tenant's claim that rent was $4,300.00 per month and was reduced during the summer season because it was a seasonal property was incorrect. She stated that the neighborhood in which the rental property was located prohibits short term rentals. She said that the reason the rent was reduced was because he was struggling financially and he was a very nice person. She also stated that she now charges $4,500.00. R.S. then said she did the inspection report on the phone, because this is a "family house". She also stated that she believed it was relevant that the home was fully furnished.

R.S. also argued that the cleaning fee was a separate agreement with the Tenant and argued that she dealt with these deposits "appropriately", by informing him of the deductions to these deposits.

R.S. then argued that the *Residential Tenancy Act* favours tenants, not landlords. She reiterated that the $300.00 payment was an "estimate", a monthly remittance, not a deposit. She further stated that any overpayment was paid back to the Tenant at the end of the tenancy once the amount was reconciled as agreed.

R.S. completed her case by stating that there were times that the Tenant was operating an AirBnB which was contrary to the terms of the tenancy agreement as well as the community bylaws.

In summation R.S. stated that she should not be required to pay double, as this whole discussion and argument really was about $400.00. She claimed the Tenant was away and there were "timing issues" and that really he was upset with not having his cheque within 15 days.

Analysis

In the case before me, the parties agreed that the sum of $2,150.00 was paid as a security deposit. The parties also agreed that the Tenant paid a further sum of $150.00 as a cleaning deposit and the sum of $300.00 per month as a utility/snow removal deposit/prepayment. The Tenant argues all sums paid meet the definition of a security deposit. The Landlords argue only the initial $2,150.00 meets this definition. The Tenant seeks a doubling of the amounts paid arguing that the Landlords breached section 38 of the *Residential Tenancy Act.*

Section 1 of the *Residential Tenancy Act* provides as follows:

> **"security deposit"** means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:

(a) post-dated cheques for rent;

(b) a pet damage deposit;

(c) a fee prescribed under section 97 (2) (k) *[regulations in relation to fees]*;

Residential Tenancy Policy Guideline 29 – Security Deposits provides further clarification as what payments form part of a security deposit and includes the following:

- The last month's rent;
- A fee for a credit report or to search the records of a credit bureau;
- A deposit for an access device, where it is the only means of access;
- Development fees in respect of a manufactured home site;
- A move-in fee in respect of a manufactured home;
- Carpet cleaning deposit ***or other moneys paid to secure possible future expenses****;*
- Blank signed cheques provided as security, where the amount could exceed one –half of one month`s rent;
- A furniture deposit in respect of furnished premises.

[Emphasis Added]

Policy Guideline 29 continues as follows:

> The *Residential Tenancy Act* requires that a security deposit must not exceed one-half of one month's rent. If one or more of the above payments, together with other moneys paid, exceeds one-half of one month's rent then the remedies afforded by the *Act* would be available to the tenant. In addition, the Act provides that a landlord who contravenes these provisions commits an offence and is liable, on conviction, to a fine of not more than $5,000.00.
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> …
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> In addition, the *Residential Tenancy Act* provides that a landlord must not require that a security deposit be paid except at the time that the tenancy agreement is entered into…

Based on the above, the testimony of the parties and the evidence before me, and on a balance of probabilities, I find that the utility/snow removal deposit of $9,600.00 ($300.00 per month) and the cleaning deposit of $150.00 meet the definition of a security deposit.

I further find that the Tenant agreed that the sum of $6,468.18 could be taken from the $9,600.00 utility/snow removal deposit leaving a total of $3,131.82 held in trust by the Landlords as a security deposit at the end of the tenancy.

There was no evidence to show that the Landlords had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenant, to retain a portion of the security deposit. While the Tenant agreed the utility/snow removal deposit could be reduced by the amount actually charged for the utilities and snow removal, he did not agreed that the Landlords could retain any further amounts from his deposits paid.

The security deposit is held in trust for the Tenant by the Landlords. The Landlords may only keep all or a portion of the security deposit through the authority of the Act, such as an Order from an Arbitrator or the written agreement of the Tenant. As the Landlords did not have the Tenant's consent, the Landlords were required by section 38(1) of the *Residential Tenancy Act,* to apply for dispute resolution. In failing to do so, the Landlords have breached section 38(1) of the *Act*.

R.S. submitted that as this was a "family house" she did not perform inspections as required by the law. As she is in the business of renting, it is her responsibility to familiarize herself with the governing legislation. Whether she rents a family home, an apartment in a rental building, or a suite in her home, she has a duty to abide by the laws pertaining to residential tenancies.

By failing to perform incoming or outgoing condition inspection reports in accordance with the *Residential Tenancy Act* and the *Regulations*, the Landlords have also extinguished her right to claim against the security deposit, pursuant to sections 24(2) and 36(2) of the *Act*.

Section 38(6) provides that if a Landlord does not comply with section 38(1), the Landlord must pay the Tenant double the amount of the security deposit. This is a mandatory section. Therefore, having made the above findings, I must Order, pursuant to section 38 and 67 of the *Act*, that the Landlords pay the Tenant double the security deposit paid.

Residential Tenancy Policy Guideline 17—Security Deposit and Set off, clause 5, Example B, provides that in the event the parties agree the Landlord may use a portion of the security deposit, the agreed upon amount is to be deducted *before* doubling of the deposit. Accordingly, I find the Tenant is entitled to the sum of **$10,863.64** calculated as follows:

Security deposit paid at beginning of tenancy	$2,150.00
Cleaning deposit	$150.00
Balance of utility/snow removal deposit remaining after payment of agreed upon sum of $6,468.18 for utilities used during the tenancy	$3,132.82
TOTAL DEPOSITS HELD IN TRUST AT END OF TENANCY	$5,431.82
X2 pursuant to section 38(6)	**$10,863.64**

I decline the Tenant's claim for further compensation for snow removal. As the parties agreed he would ultimately be responsible for the amount, and he was not charged for snow removal for the applicable season, I find that he is not entitled to further compensation in this regard.

I also note that R.S.' submissions with respect to the Tenant operating an AirBnB is irrelevant to whether he was entitled to return of his deposits. Further, the fact the rental is furnished, and rent was reduced during the tenancy, is similarly not relevant to whether the Landlords complied with section 38 of the *Residential Tenancy Act.* Finally, I note that pursuant to section 5 of the *Act,* the parties are not able to avoid, or attempt to contract out of the *Residential Tenancy Act,*

The Tenant, having been substantially successful, is entitled to recover the **$100.00** filing fee.

As such, I find the Tenant is entitled to ~~award the Tenant~~ the total sum of **$11,863.64.**

The parties agree that the Landlord paid the Tenant the sum of $4,355.41 on September 24, 2015. Accordingly, this amount is to be deducted from the Tenant's entitlement to $11,863.64 pursuant to this my Decision such that the Tenant is therefore awarded the sum of $6,608.23 and I grant him a Monetary Order in this amount. This Monetary Order must be served on the Landlord by the Tenant and if necessary, the Monetary Order may be filed in the B.C. Provincial Court (Small Claims Division) and enforced as an Order 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: June 17, 2016
Corrected: July 20, 2016

Residential Tenancy Branch