



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD OLC FF

Introduction

This hearing was convened as a result of the tenant's application for dispute resolution under the *Residential Tenancy Act* (the "*Act*"). The tenant applied for monetary order for the return of her security deposit, for an order directing the landlord to comply with the *Act*, and to recover the cost of the filing fee.

An agent for the tenant, A.S. (the "agent") attended the teleconference hearing on behalf of the tenant who she indicated was in Nepal currently and was unable to call into the teleconference hearing as a result. The agent indicated that she was representing the tenant which was supported by the application and the documentary evidence. The agent gave affirmed testimony, was provided the opportunity to present her evidence orally and in documentary form prior to the hearing, and make submissions during the hearing.

As the landlord did not attend the hearing, service of the Notice of a Dispute Resolution Hearing (the "Notice of Hearing"), the Application for Dispute Resolution (the "Application") and documentary evidence were considered. The agent provided affirmed testimony that the Notice of Hearing, Application and documentary evidence were served on the landlord by registered mail on August 18, 2016 and submitted a tracking document in evidence supporting that the registered mail package was signed for and accepted on August 19, 2016. Based on the evidence before me, I find the landlord was served as of August 19, 2016, the day the landlord's registered mail package was signed for and accepted. In addition, according to the online registered mail tracking information, the landlord refused to accept a second registered mail package containing additional evidence mailed on January 23, 2017. I find the landlord is deemed served to have accepted that second registered mail package five days after it was mailed pursuant to section 90 of the *Act*. The tracking number of the second registered mail package has been included on the cover page of this decision for ease of reference. I note that refusal on the part of the landlord to accept registered mail does not constitute

grounds for a Review Consideration. I deem the landlord served with the second registered mail package on January 28, 2017. I also note that the tracking number submitted in evidence supports that a signature was required by the recipient based on the online tracking information.

Issues to be Decided

- Is the tenant entitled to the return of her security deposit under the *Act* and if so, should it be doubled pursuant to section 38 of the *Act*?
- Has the tenant provided sufficient evidence to support that the landlord should be directed to comply with the *Act*, regulation or tenancy agreement?

Background and Evidence

According to the agent the tenant paid a security deposit of \$490.00 in January 2014 when a month to month tenancy started and monthly rent was \$980.00 per month. The agent stated that the tenant vacated the rental unit on October 5, 2015.

The agent referred to an email submitted in evidence dated February 16, 2016 from the tenant and was addressed to the agent of the landlord, B.C., and included the forwarding address of the tenant. The agent also referred to an email submitted in evidence dated February 23, 2016 in which the landlord agent B.C. responded to the tenant's February 16, 2016 email and reads in part:

“...Please forward your rent for the full month of October, 2015, at which time we will process a refund of your deposit...”

[reproduced as written]

The agent confirmed that the tenant did not agree at any time to surrender any portion of the tenant's \$490.00 security deposit to the landlord and the agent stated that the tenant will not waive any doubling of the security deposit under the *Act* if she was so entitled to double the amount of her security deposit. The agent stated that neither the landlord nor an agent for the landlord has returned any of her \$490.00 security deposit.

Analysis

Based on the above, and the tenant's undisputed documentary evidence and the undisputed agent's testimony and on a balance of probabilities, I find that the landlord has breached of section 38 of the *Act*.

Firstly, I note that the landlord was served with the Notice of Hearing, Application and documentary evidence and did not attend the hearing which I find results in this tenant's Application being unopposed by the landlord. Secondly, there was no evidence before me to support that the tenant had agreed, in writing, that the landlord could retain any portion of the tenant's \$490.00 security deposit, which has accrued no interest to date. Thirdly, there was also no evidence to show that the landlord applied for dispute resolution, within 15 days of the end of the tenancy date of October 5, 2016 or the date of receipt of the forwarding address of the tenant which the landlord's agent confirmed receiving by responding to the February 16, 2016 email on February 23, 2016. While email is not the preferred method of service for the tenant's written forwarding address due to service issues that could arise, I am satisfied that the landlord was sufficiently served as the landlord's agent responded to the tenant's email dated February 16, 2016 on February 23, 2016 which contained the tenant's written forwarding address.

Section 38 of the *Act* applies and states:

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.

[my emphasis added]

Based on the above, I find the landlord breached section 38 of the *Act* by failing to apply for dispute resolution or returning the tenant's security deposit in full 15 days after February 23, 2016, the date the landlord's agent responded to the tenant's February 16, 2016 email which contained the tenant's written forwarding address.

The security deposit is held in trust for the tenant by the landlord. At no time does the landlord have the ability to simply keep the security deposit because they feel they are entitled to it or are justified to keep it. The landlord 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. In the matter before me, I find the landlord did not have any authority under the *Act* to keep any portion of the security deposit and did not return the security deposit to the tenant within 15 days of February 23, 2016 as required by the *Act*.

Section 38(6) of the *Act* 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. The legislation does not provide any flexibility on this issue. As a result, I grant the tenant **\$980.00** which is double the original security deposit amount of \$490.00.

As the tenant's application was successful, I also grant the tenant **\$100.00** for the full recovery of the cost of the filing fee under pursuant to section 72 of the *Act*.

Based on the above and pursuant to section 67 of the *Act*, I grant the tenant a total monetary order in the amount of **\$1,080.00**.

Given the above, I also make the following order:

I ORDER the landlord to comply with section 38 of the *Act* in the future. Failure to do so could lead to a recommendation for an administrative penalty under the *Act*. The maximum penalty for an administrative penalty under section 94.2 of the *Act* is \$5,000.00 per day and may be imposed for each day the contravention or failure continues.

Conclusion

The tenant's application is successful.

The landlord has breached section 38 of the *Act* and has been ordered to comply with section 38 of the *Act* in the future. The landlord has also been cautioned that failure to

comply with section 38 of the *Act* in the future could lead to a recommendation for an administrative penalty under the *Act*.

The tenant has been granted a monetary order in the amount of \$1,080.00 comprised of \$980.00 for the double security deposit of \$490.00, plus \$100.00 for the recovery of the cost of the filing fee. The monetary order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

This decision is final and binding on the parties, unless otherwise provided under the *Act*, and 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 20, 2017

Residential Tenancy Branch