



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### **Dispute Codes**

Landlord's Application made September 2, 2016: MNSD; FF

Tenant's Application made September 16, 2016: MNSD; MNDC; FF; O

### **Introduction**

This Hearing was scheduled to consider cross-applications. The Landlord seeks to retain the security deposit in satisfaction of a claim for damages; and to recover the cost of the filing fee from the Tenant.

The Tenant seeks compensation for damage or loss under the Act, regulation or tenancy agreement; return of the security deposit; to recover the cost of the filing fee from the Landlord; and other unspecified orders.

Both parties attended the Hearing and gave affirmed testimony.

The Landlord stated that he was not sure if or when he served the Tenant with his Notice of Hearing documents. The Tenant stated that she was unaware of the Landlord's Application because she was not served with any documents by the Landlord. I find insufficient evidence that the Tenant was served with the Landlord's Notice of Hearing package.

The Landlord's Notice of Hearing package was available to the Landlord for service upon the Tenant on September 8, 2017. These documents are required by the Act and the Rules of Procedure to be served within 3 days of receipt. The Landlord provided no documentary evidence to the Residential Tenancy Branch in support of his \$3,300.00 claim and therefore, I find that the Landlord's Application does not comply with Section 59(2)(b) of the Act. Therefore, I refuse to accept the Landlord's Application pursuant to the provisions of Section 59(5) of the Act.

The Tenant testified that she mailed her Notice of Hearing documents and copies of her documentary evidence to the Landlord, by registered mail, on September 19, 2017. The Tenant provided the tracking numbers for the registered mail. I am satisfied that the Landlord was duly served with the Tenant's documents and Notice of Hearing, which service is deemed to have been effective 5 days after mailing the documents.

### **Issue(s) to be Decided**

Is the Tenant entitled to compensation under Section 67 of the Act? Is the Tenant entitled to return of the security deposit under Section 38 of the Act?

### **Background and Evidence**

The parties agreed on the following facts:

- On June 30, 2016, the Tenant gave the Landlord notice to end the tenancy.
- The tenancy began on September 15, 2014, and ended on July 31, 2016, when the Tenant moved out of the rental unit.
- Rent at the beginning of the tenancy was \$3,200.00, due on the 1<sup>st</sup> day of each month. The rent was increased to \$3,280.00 effective November 1, 2015. The Tenant paid rent by way of post-dated cheques.
- The Tenant paid a security deposit in the amount of \$1,600.00 and a pet damage deposit in the amount of \$1,600.00. The Landlord is holding those deposits in the total amount of \$3,200.00.
- The Tenant provided the Landlord with her forwarding address in writing, by registered mail sent August 22, 2016. The Landlord acknowledged receipt of the Tenant's forwarding address on August 28, 2016.

The Tenant gave the following additional testimony:

The Tenant testified that the Landlord did not return the Tenant's post-dated cheque for August, 2016's rent. She stated that on August 25, 2016, the Landlord cashed the Tenant's cheque. The Tenant provided a copy of the cheque in evidence, including the back of the cheque indicating that it had been cashed.

The Tenant testified that the Landlord did not want to complete a Condition Inspection Report at the end of the tenancy. She testified that she left the rental unit in reasonably clean and undamaged condition, except for normal wear and tear.

### **Analysis**

Section 67 of the Act provides that if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Schedule 5(4) of the regulations requires:

"The landlord must return to the tenant on or before the last day of the tenancy any post-dated cheques for rent that remain in the possession of the

landlord. If the landlord does not have a forwarding address for the tenant and the tenant has vacated the premises without notice to the landlord, the landlord must forward any post-dated cheques for rent to the tenant when the tenant provides a forwarding address in writing."

I find that the Landlord breached Section 5(4) of the regulations. Furthermore, I accept the Tenant's undisputed testimony that the Landlord cashed the Tenant's August 2016 rent cheque. I further find that the Landlord had no right under the Act to cash the Tenant's cheque for rent after the tenancy had ended. Therefore, the Tenant's claim with respect to this portion of her Application is granted.

Section 38 of the Act provides for how security deposits and pet damage deposits must be applied:

**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.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24

(1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(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, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(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]*.

(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.

(7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.

(8) For the purposes of subsection (1) (c), the landlord must repay a deposit

(a) in the same way as a document may be served under section 88 (c), (d) or (f) *[service of documents]*,

(b) by giving the deposit personally to the tenant, or

(c) by using any form of electronic

(i) payment to the tenant, or

(ii) transfer of funds to the tenant.

[Reproduced as written.]

Although the Landlord made an Application within 15 days of receipt of the Tenant's forwarding address, in this case, I find that the Landlord extinguished his right to claim against the security deposit under Section 38(5) of the Act. As the Landlord failed to serve the Tenant with his Application, I find that the Landlord's Application made September 2, 2016, was frivolous in nature and an abuse of the dispute resolution process. Pursuant to the provisions of Section 62(3) of the Act, I find that the Tenant is entitled to the compensation provided in Section 38(6) of the Act.

The Tenant also claimed for recovery of the cost of serving the Landlord by registered mail. There is no provision in the Act for recovery of these costs. Service may be completed by registered mail or by leaving the documents with the other party, or, if the other party is a landlord, with the landlord's agent. This portion of her claim is dismissed.

The Tenant's Application had merit and I find that she is entitled to recover the \$100.00 filing fee from the Landlord.

The Tenant has established a monetary award, calculated as follows:

Return of August 2016's rent to Tenant	\$3,280.00
Double the amount of the security deposit	\$3,200.00
Double the amount of the pet damage deposit	\$3,200.00
Recovery of the filing fee	<u>\$100.00</u>
TOTAL	<b>\$9,780.00</b>

### **Conclusion**

The Tenant is hereby provided with a Monetary Order in the amount of **\$9,780.00** for service upon the Landlord. This Order may be filed in the Provincial Court of British Columbia (Small Claims) 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: March 17, 2017

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Residential Tenancy Branch