



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FF MNDC MNSD OLC

Introduction

This hearing was convened in response to applications by the tenant pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The tenant requested:

- an Order to have the landlords comply with section 62 of the *Act*;
- a Monetary Order pursuant to section 67 of the *Act*;
- a return of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant was represented at the hearing by agent G.T. (the “tenant”), while the male landlord, S.N. appeared for the landlords.

S.N. confirmed receipt of the tenant’s applications for dispute resolution hearing package (“Application”) and evidence by Registered Mail. In accordance with sections 88 and 89 of the *Act*, I find that the landlords were duly served with the Application and evidentiary packages.

Issue(s) to be Decided

Is the tenant entitled to a return of the security deposit?

Is the tenant entitled to a Monetary Order?

Should the landlords be ordered to comply with the *Act*?

Can the tenant recover the filing fee for this application?

Background and Evidence

Testimony was provided by both the tenant and male landlord S.N. that this was a fixed-term tenancy that began on August 1, 2016 and was scheduled to end on July 31, 2017. The tenant contended in fact that the tenancy ended on December 16, 2016 while landlord S.N., stated that it ended on January 1, 2017. Rent was \$3,500.00 per month, while a security and pet deposit of \$2,500.00 were held by the landlords. The tenant acknowledged that the landlords had returned \$2,000.00 of these \$2,500.00 deposits.

The reason cited by both parties for the discrepancy in end of tenancy dates centers on a couch that was left in the rental until January 1, 2017. The landlord S.N. stated that this was done so without permission, while the tenant explained that she had assurances from the landlords that this would be permitted. Emails submitted to the hearing as part of the tenant's evidentiary package note that the 1 Month Notice for ending the tenancy was accepted by the landlords on November 16, 2016 and the tenant agreed to pay rent until the end of December 31, 2016. Subsequent emails from the landlords to the tenant demonstrate that the rental unit was advertised as being ready for occupancy starting on January 1, 2017.

The tenant is seeking a Monetary Order of \$4,000.00 in reflection of the \$500.00 in pet and security deposit that continues to be held by the landlords, as well as a return of the \$3,500.00 post-dated rent cheque that was cashed by the landlords on January 3, 2017.

During the course of the hearing, landlord S.N. explained that he had spoken to an information officer at the *Residential Tenancy Branch* and was informed that he had a right to keep the security and pet deposit in satisfaction of monies owed. Furthermore, he stated that he was also informed that he had a right to cash the rent cheque for January 2017 because of the loss of rental income he had suffered as a result of the tenant vacating the rental unit prior to the end of the fixed-term tenancy. S.N. pointed out that he had made significant efforts to mitigate his losses but was unable to find a tenant willing to rent the unit for \$3,500.00 and despite exploring numerous advertising avenues, the landlords could not find an occupant for their rental suite until February 1, 2017.

The tenant did not dispute the efforts made by the landlords to mitigate their loss; however, the tenant argued that the landlords had not been granted a Monetary Order by the *Residential Tenancy Branch*, they had not submitted a claim for any loss, and they had arbitrarily chosen to hold onto a portion of the security and pet deposits, as well as the January 2017 rent cheque. The tenant stated that the landlords should be ordered to comply with the *Act* and return the security deposit.

Analysis – Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit. One of these actions must occur within 15 days after the *later* of either the end of the tenancy and/or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. This provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy as per section 38(4)(a) of the *Act*.

No evidence was produced at the hearing that the landlords applied for dispute resolution within 15 days of receiving a copy of the tenant's forwarding address or following the conclusion of the tenancy on January 1, 2017. If the landlords had concerns arising from the tenant's early exit from the rental unit, the landlords need to address these matters within the parameters of the *Act*.

Landlord S.N. acknowledged that he kept \$500.00 of the tenant's security deposit because of damage to the rental unit. The landlords did not receive the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy as per section 38(4)(a) of the *Act*.

The landlords have not returned the tenant's security deposit in full as required by the *Act* nor have they filed for dispute resolution. The landlords are therefore required to pay double the value of the security deposit, pursuant to section 38(6)(b) of the *Act*.

I find that the tenant is entitled to receive double the value of his security deposit, \$5,000.00 less the \$2,000.00 amount already returned to the tenants ($2 \times \$2,500.00 = \$5,000.00$ – the \$2,000.00 returned to the tenant for a total of \$3,000.00).

Analysis - Monetary Order

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has

been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the tenant to prove her entitlement to her claim for a monetary award.

As mentioned previously, the tenant argued that the landlords are not entitled to retain the \$3,500.00 postdated cheque because they have not made an application for a Monetary Order pursuant to section 67 of the *Act*. The tenant stated the landlords have unilaterally chosen to award themselves entitlement to damages for their perceived loss and violated sections 7(4) and 14(a) of their residential tenancy agreement.

Emails provided to the hearing as part of the tenant's evidentiary package demonstrate that efforts were being made by the landlords to re-rent the unit for January 1, 2017; however, despite these efforts the landlords were unable to find a tenant until February 1, 2017. It is for this reason that the landlords cashed the rent cheque for January 2017.

If the landlords had concerns about potential financial loss that was the result of this tenancy, the landlords are required to address these through the provisions established under the *Act*. A landlord cannot simply assess potential damages they have incurred and apply monetary damages. Section 67 notes, *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 part*. The landlord stated in an email dated November 16, 2016 "that's fine [one month notice given by the tenant via email on November 16, 2016] the one month notice. Once house is cleared and cleaned I will have the cheques/DD available to you."

As the landlords have essentially given themselves a Monetary Order without legal authority to do so, I find that they have exceeded the scope of the *Act* in cashing the post-dated cheque without an order from an arbitrator appointed pursuant to the *Act*. For these reasons, I find that the tenant is entitled to a monetary award of \$3,500.00 to compensate her for the landlord's cashing of her post-dated January 2017 rent cheque.

The tenant stated that because the landlords have received no Monetary Order from an arbitrator appointed under the *Act* and have not made a claim against the tenant, the landlords should be directed to comply with the *Act* and return the remainder of the pet and security deposit, as well as the post-dated rent cheque for January 2017.

I agree with the tenant's argument. The effect of my monetary awards require the landlords to comply with the *Act* pursuant to section 62. Any actions they wish to take against the tenant must be handled within the parameters of the *Act*.

Since the tenant was successful in her application she may under section 72 of the *Act* recover the \$100.00 filing fee.

Conclusion

I am making a Monetary Order of \$6,600.00 in favour of the tenant as follows:

Item	Amount
Return of Security Deposit (\$2,500.00 x 2 less \$2,000.00)	\$3,000.00
Return of January 2017 rent	3,500.00
Recovery of Filing Fee	100.00
Total =	\$6,600.00

The tenant is provided with formal Orders in the above terms. Should the landlords fail to comply with these Orders, these Orders may be filed and enforced as Orders of the Provincial Court of British Columbia.

The landlords are ordered to comply with section 62 of the *Act*.

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: April 13, 2017

Residential Tenancy Branch

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.

(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.

(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.