



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD FF O

Introduction

Pursuant to section 58 of the *Residential Tenancy Act*. (the *Act*), I was designated to hear this matter. This hearing dealt with the tenant's application for:

- an Order directing the landlord to return all or part of the damage deposit pursuant to section 38 of the *Act*;
- recovery of the filing fee from the landlord, pursuant to section 72 of the *Act*; and
- other unspecified relief.

Both the landlord and the tenant attended the hearing by way of a conference call. Both parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The tenant provided sworn testimony that the landlord was sent a copy of the Tenant's Application for Dispute Resolution ("dispute resolution") and evidentiary package by way of Canada Post Registered Mail on March 23, 2017. The landlord acknowledged receiving these documents. Pursuant to sections 88 & 89 of the *Act*, I find the landlord to have been duly served under the *Act*.

Following opening remarks, the tenant explained that an incorrect figure had been cited on his Monetary Order worksheet. He said that he wished to amend his application to reflect the proper figure related to his security deposit. Pursuant to section 64(3)(b), the tenant's application for a monetary award is amended from \$8,200.00 to \$7,500.00.

Issue(s) to be Decided

Should the landlord be directed to return the security deposit to the tenant?
Can the tenant recover the filing fee?

Background and Evidence

The tenant testified that the parties had signed a fixed-term tenancy that was set to run from September 1, 2015 to May 31, 2016. The tenant said that it was his understanding that following the conclusion of the fixed-term tenancy that this tenancy would continue

on as a month-to-month tenancy. Rent was \$2,500.00 per month and a security deposit of \$1,250.00 continues to be held by the landlord.

The landlord acknowledged that she has withheld the tenant's security deposit; however, she explained that the tenant caused over \$5,000.00 worth of damage to the rental unit.

During the course of the hearing the tenant testified that on May 28, 2016, the tenant and his roommates were given a 2 Month Notice to End Tenancy for Landlord's Use of Property citing the premises' will be occupied by the landlord or the landlord's close family members. On June 30, 2016, the tenant and his roommates vacated the rental unit; however, he explained that this 2 Month Notice given by the landlord was issued in bad faith and he saw new tenants moving into the rental unit on the same day that he and his roommates were vacating it. As part of the tenant's application for dispute resolution, the tenant has included a tenancy agreement signed between the landlord and tenants S.P. and J.P. This tenancy agreement displays the same address as the property in question, demonstrates that it was entered into on July 15, 2016 (but contains a mark noting that the suite may be occupied July 1, 2016) and shows a rent of \$3,000.00 per month.

The landlord strongly denies that the parties had a periodic tenancy following the expiration of their fixed-term tenancy. She agrees that the parties entered into a fixed term tenancy on September 1, 2015 but the landlord stated that this agreement was set to expire on April 30, 2016. The landlord said that she attended at the end of April 2016 expecting to find the property vacant. She explained that she was shocked to find the tenant still in occupation of the property. The landlord continued by stating that she was unsure how to proceed, and therefore issued the tenant a 2 Month Notice to End Tenancy, on April 28, 2016, as she sought to occupy the rental unit herself.

Two separate tenancy agreements were entered into evidence at the hearing. One, submitted by the landlord displayed a tenancy starting on 1 Sept 2105 (sic). In the section marked, 'Length of Tenancy', this tenancy agreement shows that it is for a fixed length of time, ending in 8 months on April 30, 2016. In the box marked 'at the end of this fixed length of time' it is noted, 'the tenancy ends and the tenant must move out of the residential unit. If you choose this option, both the landlord and the tenant must initial in the boxes to the right.' A close examination of the boxes directly to the right of these directions shows that neither the tenant nor the landlord initialed the boxes.

A second tenancy agreement submitted to the hearing by the tenant displays a fixed-term tenancy that began on September 1, 2015. In the section marked, 'Length of Tenancy', this tenancy agreement shows that it is:

- i) on a month-to-month basis
- ii) for a fixed length of time of 8 MOS (sic) ending on May 31, 2016
- iii) other periodic tenancy as indicated below – Terms on Addenda (sic)

Under subsection ii, in the box marked 'at the end of this fixed length of time' it is noted, 'the tenancy may continue on a month-to-month basis or another fixed length of time.'

The tenant is seeking a monetary award of \$7,500.00 for the landlord having allegedly misrepresented the reason for the issuance of a 2 Month Notice and because she has failed to return the security deposit.

Analysis

Section 38 of the *Act* requires the landlord to either return a tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the *later* of the end of a 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. However, 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). A landlord may also under section 38(3)(b), retain a tenant's security or pet deposit if an order to do so has been issued by an arbitrator.

No evidence was produced at the hearing that the landlord applied for dispute resolution within 15 days of receiving a copy of the tenant's forwarding address on, or around June 30, 2016, or following the conclusion of the tenancy. If the landlord had concerns arising from the damages that arose as a result of this tenancy, the landlord should have applied for dispute resolution to retain the security deposit. It is inconsequential if damages exist, if the landlord does not take action to address these matters through the dispute resolution process. A landlord cannot decide to simply keep the security deposit as recourse for loss.

While the landlord acknowledged that she kept the \$1,250.00 security deposit because of damage to the rental unit, no evidence was produced at the hearing that the landlord received 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*, nor did the landlord receive an order from an Arbitrator enabling her to do so.

Pursuant to section 38(6)(b) of the *Act*, a landlord is required to pay a monetary award equivalent to double the value of the security deposit if a landlord does not comply with the provisions of section 38 of the *Act*. The tenant is therefore entitled to a monetary award in the amount of \$2,500.00, representing a doubling of the tenant's security deposit that has not been returned.

The tenant has also applied for a monetary award of \$5,000.00. He is seeking this amount in satisfaction for vacating a rental unit after having been issued a 2 Month Notice to End Tenancy based on the landlord's use of property.

Section 51(1) of the *Act* states, "A tenant who receives a notice to end a tenancy under section 49 [*landlord's use of property*] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement." Testimony was provided to the hearing by both parties that the landlord fulfilled this requirement of the *Act* and provided the tenant with free rent for September.

The second portion of section 51 of the *Act* states, "In addition to the amount payable under subsection (1) [above], if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice, the landlord, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement."

I am satisfied based on the evidence before me and the testimony provided by the tenant that the landlord did not use the rental unit for the purpose stated in the 2 Month Notice to End Tenancy. The tenant submitted to the hearing a copy of a residential tenancy agreement signed by the landlord and two new occupants. During the course of the hearing the landlord said that she had no other choice but to serve the tenant a 2 Month Notice because he refused to leave the rental property following the conclusion of his tenancy. Furthermore, the landlord alleged that the tenant had forged a fixed-term tenancy agreement so that his move out date was set for May 31, 2016 versus the April 30, 2016 date to which the parties agreed.

I find the landlord's argument in this regard to be irrelevant. The fact remains that both tenancy agreements submitted at the hearing fail to display either the Landlord's or the Tenant's initials in the box instructing that, "The tenancy ends and the tenant must move out of the residential unit. If you choose this option, both the Landlord and the Tenant must initial in the boxes." Furthermore, the landlord chose not to seek an Order of Possession from the *Residential Tenancy Branch*, but rather ended the tenancy by way of a 2 Month Notice issued either on May 28, 2016 or April 28, 2016. Regardless of the date on which this notice was served, the landlord had certain obligations to fulfill by having served the tenant with this notice. As noted above, these obligations were not fulfilled and the tenant is therefore entitled under section 51(2) of the *Act*, to a monetary award of \$5,000.00 in reflection of this.

As the tenant was successful in his application, he may recover the filing fee associated with his application.

Conclusion

I issue a Monetary Order in the tenant's favour in the amount of \$7,600.00 against the landlord. The tenant is provided with a Monetary Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

Item	<u>Amount</u>
Return of Security Deposit (2 x \$1,250.00)	\$2,500.00
Penalty for 2 month notice (2 x \$2,500.00)	5,000.00
Recovery of Filing Fee	100.00
Total =	\$7,600.00

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 23, 2017

Residential Tenancy Branch