



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD MNDC FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38;
- a monetary order for compensation for money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

The tenant's agent, DA, spoke on behalf of the tenant in this hearing, and had full authority to do so. Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord, RT, confirmed receipt of the tenants' application for dispute resolution ('application'). In accordance with section 89 of the *Act*, I find that the landlords were duly served with the tenants' application. As both parties confirmed receipt of each other's evidentiary materials, I find that these documents were duly served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Are the tenants entitled to the return of their security deposit?

Are the tenants entitled to a monetary order for compensation for money owed under the *Act*, regulation, or tenancy agreement?

Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This month-to-month tenancy began in 1998, and ended in April of 2017 after the tenants received a 1 Month Notice to End Tenancy for Cause on February 22, 2017, with an effective date of March 31, 2017. The tenants testified that the tenancy ended on April 2, 2017, while the landlords testified that the tenancy ended on April 25, 2017. Monthly rent was set at \$1,187.26. The landlords continue to hold the tenants' security deposit of \$350.00, which was originally paid on October 3, 1998 to a previous landlord. Both parties submitted a copy of the tenancy agreement in their evidence.

The tenants provided the landlords with their forwarding address on April 2, 2017.

The tenants applied for a monetary order as set out in the table below:

Item	Amount
Return of security deposit plus applicable interest	\$350.00
Compensation for landlord's failure to return security deposit	350.00
Refund of \$25.00 NSF fee x 2	50.00
Compensation for 2 Month Notice	1,187.26
Filing Fee	100.00
Total Monetary Order Requested	\$2,037.26

The tenants testified that the landlords failed to return their security deposit as required by section 38 of the *Act*.

The tenants also testified that the landlords had collected \$50.00 in NSF fees on two occasions, which exceeded the amount allowed under the *Act and Residential Tenancy Regulation*. The tenants supported these two \$50.00 payments with copies of their cheques in their written evidence. The tenants do not dispute the fact that the landlords were entitled to \$25.00 each for the two occasions, but request a refund of the \$25.00 paid above the allowable amount under the *Act and Regulation*. The landlord, RT, testified that the tenants had agreed to the increased fees as per the written tenancy agreement. The landlords submitted, in their evidence, a copy of the attached addendum, dated August 31, 2012, that reads “*pay a late fee of \$50.00 for rent that is not paid in full on or before 3rd of each and every month and pay a late fee of \$50.00 for NSF (bounced) checks*”.

The tenants also requested compensation equivalent to one months’ rent for the landlord’s failure to end this tenancy with a 2 Month Notice for Landlord’s Own Use.

Analysis

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant’s forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant’s security deposit plus applicable interest and must pay the tenants a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant’s provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if “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.”

In this case, I find that the landlords had not returned the tenants’ security deposit in full within 15 days of receipt of the tenant’s forwarding address in writing, or within 15 days of April 25, 2017, the date the landlords testified the tenancy had ended. There is no record that the landlords had applied for dispute resolution to obtain authorization to retain any portion of the tenants’ security deposit. The tenants gave sworn testimony

that the landlords had not obtained their written authorization at the end of the tenancy to retain any portion of the tenants' security deposit.

In accordance with section 38 of the *Act*, I find that the tenants are therefore entitled to a monetary order amounting to double the original security deposit, plus applicable interest.

Over the period of this tenancy, \$40.77 is payable as interest on the landlords' retention of the tenants' security deposit from October 3, 1998, when the deposit was originally paid, until the date of this decision, October 6, 2017. As per Residential Tenancy Policy Guideline 17, this interest is calculated only on the original security deposit amount of \$350.00, and this amount is not doubled.

Section 51 of the *Act* reads in part as follows:

***51** (1) 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.*

I find this tenancy ended on the basis of the 1 Month Notice issued to the tenants on February 22, 2017, and not on the basis of a Notice given under section 49 of the *Act*. The tenants did not file for dispute resolution within 10 days of receiving this 1 Month Notice, and moved out in April of 2017. Accordingly, the tenants' application for compensation under section 51 of the *Act* is dismissed.

Section 7 of the *Residential Tenancy Act Regulation* sets \$25.00 as the limit for NSF and late fees as summarized below:

7 (1) A landlord may charge any of the following non-refundable fees:

(d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent.

Section 5 of the *Act* states as follows:

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

In this case, the landlords had required the tenants to enter into a tenancy agreement that contained additional terms contained in an attached addendum. I find the additional term that required the tenants to pay a late fee of \$50.00 and a \$50.00 NSF fee is an attempt by the landlords to contract out of the *Act*, and therefore is of no effect. The tenants paid the \$50.00 on two occasions, and do not dispute the fact the landlords were entitled to \$25.00 on those two occasions. Accordingly, I find the tenants are entitled to their monetary claim of \$25.00 each for these two occasions when they were assessed a NSF fee above the allowable amount under the *Act* and *Regulation*.

I find that the tenants are entitled to recover the filing fee for this application.

Conclusion

I issue a **\$890.77** Monetary Order in the tenant's favour under the following terms which allows the tenants to recover the security deposit retained by the landlords, plus a monetary award equivalent to the value of their security deposit as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*. The tenants are also entitled to recover the cost of the filing fee for this application, as well as the \$50.00 paid above the allowable amount for NSF fees.

The tenants' application for compensation under section 51 is dismissed.

Item	Amount
Return of security deposit	\$350.00
Compensation for landlord's failure to return security deposit	350.00
Interest on original amount paid from date security deposit paid to date of this order	40.77
Refund of \$25.00 NSF fee x 2	50.00
Filing Fee	100.00
Total Monetary Order	\$890.77

The tenants are provided with this Order in the above terms and the landlord(s) must be served with a copy of this Order as soon as possible. Should the landlord(s) 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.

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: October 6, 2017

Residential Tenancy Branch