



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF; MNSD

Introduction

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

- authorization to retain the tenant's security deposit, pursuant to section 38; and
- authorization to recover the filing fee for her application, pursuant to section 72.

This hearing also dealt with the tenant's cross-application pursuant to the *Act* for:

- authorization to obtain a return of double the amount of his security deposit, pursuant to section 38.

The landlord did not attend this hearing, which lasted approximately 21 minutes. The tenant attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The tenant stated that the landlord was served with a copy of the tenant's application for dispute resolution hearing package on December 4, 2017, by way of registered mail. The tenant provided a Canada Post tracking number verbally during the hearing. The tenant also provided a copy of the Canada Post tracking report indicating that the landlord received and signed for the package on December 6, 2017. In accordance with sections 89 and 90 of the *Act*, I find that the landlord was deemed served with the tenant's application on December 9, 2017, five days after its registered mailing.

The tenant stated that he served the landlord with the tenant's written evidence package on January 3, 2018, by way of registered mail. The tenant provided a copy of the Canada Post tracking report including the tracking number, indicating that the landlord received and signed for the package on January 5, 2018. In accordance with sections 88 and 90 of the *Act*, I find that the landlord was deemed served with the tenant's

written evidence package on January 8, 2018, five days after its registered mailing. I informed the tenant that I could not consider this written evidence package at the hearing because it was deemed received by the landlord late, less than 14 clear days prior to this hearing date, not including the date of service or the date of the hearing. This is as per Rule 3.14 of the Residential Tenancy Branch ("RTB") *Rules of Procedure*.

Preliminary Issue – Dismissal of Landlord's Application

Rule 7.3 of the RTB *Rules of Procedure* provides as follows:

7.3 Consequences of not attending the hearing: If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply.

In the absence of any appearance by the landlord, I order the landlord's entire application dismissed without leave to reapply.

Issue to be Decided

Is the tenant entitled to a return of double the amount of his security deposit?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the tenant, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claims and my findings are set out below.

The tenant testified regarding the following facts. This tenancy began on November 1, 2014 and ended on April 30, 2016. Monthly rent in the amount of \$850.00 was payable on the first day of each month. A security deposit of \$425.00 was paid by the tenant and the landlord continues to retain the deposit. A written tenancy agreement was signed by both parties. The rental unit is the basement of a house, where the landlord occupied the upper floor with her husband. Move-in and move-out condition inspection reports were not completed for this tenancy. The tenant did not give the landlord written permission to keep any amount from the deposit. The landlord filed her application to retain the deposit on July 16, 2017.

The tenant stated that he provided a written forwarding address to the landlord in a letter, dated July 13, 2017, that was sent to her by registered mail on the same date. The tenant confirmed that he did not have the landlord's forwarding address until the above date. He said that the landlord abandoned the rental property on August 1, 2015 but her husband remained on the upper floor of the house. He claimed that the landlord did not provide him with a forwarding address when she left but she continued to cash his post-dated rent cheques. He stated that he found out the landlord's forwarding address from her husband when the rental property sold and the landlord's lawyer advised her husband's lawyer about the address. He maintained that the landlord's husband was not listed as a landlord on the parties' written tenancy agreement and he did not act as his landlord, so he could not name him in the tenant's application or serve him with tenancy-related documents.

The tenant seeks a return of double the value of his security deposit, totalling \$850.00.

Analysis

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a 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 (section 38(4)(a)) or an amount that the Director has previously ordered the tenant to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

Section 39 of the *Act* states the following:

39 Despite any other provision of this Act, if a tenant does not give a landlord a forwarding address in writing within one year after the end of the tenancy,
(a) the landlord may keep the security deposit or the pet damage deposit,
or both, and
(b) the right of the tenant to the return of the security deposit or pet damage deposit is extinguished.

Residential Tenancy Policy Guideline 17 states that if both parties' rights to the deposit are extinguished, the party who breached first, bears the loss. In this case, although the tenant did not provide a written forwarding address to the landlord until July 13, 2017, which is one year after the tenancy ended on April 30, 2015, breaching section 39 of the *Act*, I find that the tenant breached second after the landlord.

I find that the landlord's right to claim against the deposit for damages, which is what she claimed in her application scheduled to be heard at this hearing, was extinguished first for failure to complete move-in and move-out condition inspection reports, as per sections 24 and 36 of the *Act*. Therefore, I find that the landlord breached first before the tenant.

I also find that the tenant was unable to serve a written forwarding address to the landlord until July 2017 because the landlord abandoned the rental property in August 2015 and did not provide a forwarding address to the tenant. The only service address that the tenant had for the landlord was the rental property, as listed on the written tenancy agreement. I find that the tenant could not have served the landlord's husband as an agent of the landlord, because he was not listed as a landlord on the tenancy agreement, he did not act as the landlord during the tenancy, the landlord did not name him as her agent, and the landlord did not indicate that she was still carrying on business at the rental property after she had left.

The landlord did not return the security deposit to the tenant. Although the landlord made an application for dispute resolution to claim against this deposit, within 15 days of the written forwarding address being provided, I find that her right to claim was already extinguished for failure to complete move-in and move-out condition inspection reports. As noted above, I also dismissed the landlord's application to retain the deposit without leave to reapply, because she failed to appear at this hearing.

The landlord continues to hold the tenant's security deposit of \$425.00. Over the period of this tenancy, no interest is payable on the deposit. On a balance of probabilities and for the reasons stated above, I find that the tenant is entitled to double the value of his security deposit of \$425.00, totalling \$850.00, pursuant to section 38(6) of the *Act* and Residential Tenancy Policy Guideline 17.

Conclusion

I issue a monetary order in the tenant's favour in the amount of \$850.00 against the landlord. 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.

The landlords' entire application is dismissed without leave to reapply.

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: January 23, 2018

Residential Tenancy Branch