Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW HEARING DECISION

Dispute Codes:

MNSD, OLC, FF

Introduction:

This matter was the subject of a dispute resolution hearing on December 18, 2017. At that hearing a Residential Tenancy Branch Arbitrator considered the merits of the Tenants' Application for Dispute Resolution in which the Tenants applied for the return of the security deposit, for an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act)* or the tenancy agreement, and to recover the fee for filing this Application for Dispute Resolution.

On December 19, 2017 the Arbitrator rendered a decision in which the Arbitrator concluded that the Tenants had paid a security deposit of $1,750.00 and that they signed the condition inspection report to indicate that they agreed the Landlord could retain their security deposit. The Arbitrator therefore dismissed the Tenant's Application for Dispute Resolution.

On January 02, 2018 the Tenants filed an Application for Review Consideration. On January 09, 2018 a different Residential Tenancy Branch Arbitrator granted the application for review and ordered that a review hearing be convened.

A review hearing was convened on February 06, 2018 with a different Residential Tenancy Branch Arbitrator. The hearing on February 06, 2018 was adjourned for reasons outlined in that Arbitrator's interim decision, dated February 06, 2018.

The review hearing was reassigned to me. The review hearing was convened on March 12, 2018 for the purposes of considering the merits of the Tenants' original Application for Dispute Resolution.

At the hearing on March 12, 2018 the female Tenant stated that she does not recall when the Application for Dispute Resolution was sent to the Landlord, via courier. Legal

Counsel for the Landlord stated that the Application was received by the Landlord, via courier, sometime in June of 2017. I therefore accept that the Landlord received the Application for Dispute Resolution.

On November 07, 2017 the Tenants submitted 27 pages of evidence to the Residential Tenancy Branch. The female Tenant stated that this evidence was served to the Landlord, via registered mail, on November 08, 2017. Legal Counsel for the Landlord acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On November 17, 2017 the Landlord submitted 21 pages of evidence to the Residential Tenancy Branch. Legal Counsel for the Landlord stated that this evidence was served to the Tenants, via registered mail, on November 17, 2017. The Tenants acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

The Tenants submitted 13 pages of evidence to the Residential Tenancy Branch with their Application for Review Consideration, which they wish to refer to during these proceedings. The female Tenant stated that this evidence was served to the Landlord, via courier, on January 11, 2018. Legal Counsel for the Landlord acknowledged receiving this evidence on February 05, 2018. As the Landlord has had ample time to consider this evidence it was accepted as evidence for these proceedings.

The advocate for the Tenants stated that the Tenants also submitted a one page letter from the female Tenant's employer with the Application for Review Consideration. He stated that this letter was served to the Landlord on January 11, 2018. Legal Counsel for the Landlord acknowledged receiving this letter on February 05, 2018.

The parties were advised that I was not in possession of the aforementioned letter. The hearing was adjourned, in part, to provide the Tenants with the opportunity to re-submit this letter. The letter was re-submitted to the Residential Tenancy Branch on March 22, 2017 and it was accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. The parties were advised of their legal obligation to speak the truth during these proceedings.

All of the evidence accepted as evidence has been reviewed, but is only referenced in this written decision if it is directly relevant to my decision.

Preliminary Matter #1

On March 19, 2018 the Landlord submitted 1 page of evidence to the Residential Tenancy Branch.

Rule 3.15 of the Residential Tenancy Branch Rules of Procedure stipulate, in part, that the respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

As evidence submitted on March 19, 2018 was not served to the Tenant prior to the review hearing date of March 12, 2018, I decline to accept that document as evidence.

Preliminary Matter #2

On April 30, 2018 the Tenant submitted an Amendment to an Application for Dispute Resolution, in which the Tenant submitted an additional claim. The Tenant applied for compensation of $3,500.00 for “stress and time”.

Rule 4.3 of the Residential Tenancy Branch Rules of Procedures stipulates that amended applications and supporting evidence should be submitted to the Residential Tenancy Branch directly or through a Service BC Office as soon as possible and in any event early enough to allow the applicant to comply with Rule 4.6.

Rule 4.6 of the Residential Tenancy Branch Rules of Procedures stipulates, in part, that a copy of the amended application and supporting evidence should be served on the respondents as soon as possible and must be received by the respondent(s) not less than 14 days before the hearing.

As the Tenant is attempting to amend this Application for Dispute Resolution after the proceedings have commenced, I find that they have not complied with Rule 4.6 of the Residential Tenancy Branch Rules of Procedures. I therefore decline to accept the Tenant’s amendment and will not consider the claim for “stress and time”.

Preliminary Matter #3

As outlined in my preliminary decision of March 12, 2018, the hearing on March 12, 2018 was adjourned, in part, to provide the Landlord with the opportunity to submit the original tenancy agreement. I deemed this necessary because at the hearing on March

12, 2018 the Tenants alleged that the tenancy agreement had been altered after they signed it.

The Landlord submitted the original tenancy agreement to the Residential Tenancy Branch on March 21, 2018. When the Tenants were asked which portion of the tenancy agreement had been altered the male Tenant stated that there had been a misunderstanding. He stated that the Tenants contend the condition inspection report was altered after they signed it. He stated that the Tenants do not allege that the tenancy agreement was altered after they signed it.

Preliminary Matter #4

Legal Counsel for the Landlord stated that the Landlord filed an Application for Dispute Resolution claiming against the security deposit but subsequently abandoned that claim because of information provided to her by the Residential Tenancy Branch. The file number for the Landlord's Application for Dispute Resolution was provided by the Tenant during the hearing, and it appears on the second page of this decision.

Residential Tenancy Branch records show that the Landlord's Application was filed on June 09, 2017 and that the Landlord cancelled the Application on June 13, 2017.

I find that the Landlord did not diligently pursue her Application for Dispute Resolution. For the purposes of section 38 of the *Residential Tenancy Act (Act*), I find that failing to pursue an application to retain the security deposit has the same effect as failing to file a claim against it.

Issue(s) to be Decided:

Are the Tenants entitled to the return of the security deposit?

Background and Evidence:

The Landlord and the Tenants agreed that:

- the tenancy began on June 01, 2016;
- rent of $3,500.00 was due by the first day of each month;
- a condition inspection report was completed on May 19, 2016;
- the tenancy ended on May 31, 2017;
- the Tenants provided mailed a forwarding address to the Landlord on March 05, 2017; and
- the Landlord did not return any portion of the security deposit.

The male Tenant stated that they were not provided with a copy of the condition inspection report that was completed on May 19, 2016 until it was provided to them as evidence for these proceedings. Legal Counsel for the Landlord stated that a copy of this report was provided to the Tenants on May 20, 2016, via email.

The female Tenant stated that the Landlord required a security deposit of $3,500.00. Legal Counsel for the Landlord stated that the Landlord required a security deposit of $1,750.00.

The tenancy agreement that was submitted in evidence indicates that a security deposit of $1,750.00 was paid.

At the hearing on March 12, 2018 the female Tenant stated that when the Tenant signed this tenancy agreement the agreement specified that a deposit of $3,500.00 was required. She stated that when the Tenants were provided with a copy of the tenancy agreement, the agreement specified that a deposit of $1,750.00 was required. She speculated that the tenancy agreement has been altered.

This hearing was adjourned, in part, to provide the Landlord with the opportunity to submit the original tenancy agreement.

At the reconvened hearing on May 30, 2018 the female Tenant stated that there had been a misunderstanding. She stated that she intended to testify that when the Tenants signed the condition inspection report that was completed on May 19, 2016 the report indicated that a security deposit of $3,500.00 had been paid and that when they received a copy of that report it had been changed to indicate that a deposit of $1,750.00 had been paid.

The Tenant submitted a bank draft, dated May 21, 2016, in the amount of $7000.00. The Tenant stated that $3,500.00 of this deposit was for rent for May of 2016 and the remaining $3,500.00 was the security deposit.

Legal Counsel for the Landlord acknowledged receipt of a $7,000.00 payment on May 21, 2016. She stated that $3,500.00 of this deposit was for rent for May of 2016 and $1,750.00 was the security deposit. She stated that the remaining $1,750.00 was a one-time payment to secure the rental unit and a payment in recognition of the fact the Tenants were planning on subletting the rental unit. She stated that there was a verbal agreement regarding the remaining $1,750.00 and that it was not, therefore, recorded on the tenancy agreement.

The Tenants submitted copies of cancelled cheques that indicate the Tenants paid $3,500.00 in rent for every month between July of 2016 and May of 2017.

The Landlord and the Tenants agreed that the male Tenant and an agent for the Landlord met on May 31, 2017 for the purpose of completing a final inspection of the rental unit. Legal Counsel for the Landlord stated that on May 31, 2017 the condition inspection report was completed and the male Tenant initialed an entry on the report which indicated that the Landlord could retain $1,750.00 from the security deposit.

At the hearing on March 12, 2018 the male Tenant stated that a report was not being filled out when the unit was inspected on May 31, 2017 and he was not asked to sign or initial the report. The Tenants contend that they were not given a copy of this report until it was served as evidence for these proceedings**.**

At the hearing on May 30, 2018 the male Tenant stated that he was given a copy of page 3 of the report, via text message, on June 01, 2017 at which time he realized that it had been initialed and dated in the area on the report that indicates the Tenants authorized the Landlord to retain a portion of the security deposit.

At the hearing on May 30, 2018 the male Tenant stated that when the condition inspection report was completed on May 19, 2016 he initialed the area on the report that indicates the Tenants authorized the Landlord to retain a portion of the security deposit. He stated that when he initialed the entry it indicated that he was authorizing the Landlord to retain $3,500.00 of the security deposit and when he received a copy of the report in 2017 it indicated that he was authorizing the Landlord to retain $1,750.00 of the security deposit.

Analysis:

Section 23(1) of the *Act* stipulates that the landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day. On the basis of the undisputed evidence I find that the rental unit was jointly inspected on May 19, 2016, which was prior to the start of the tenancy.

Section 23(5) of the *Act* stipulates that the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report, in accordance with the regulations. On the basis of the undisputed evidence, I find that both parties signed the condition inspection report when it was completed on May 19, 2016.

Section 18(1)(a) of the Residential Tenancy Regulation stipulates that the landlord must give the tenant a copy of the signed condition inspection report made under section 23 of the *Act*, "promptly and in any event within 7 days after the condition inspection is completed".

As the Landlord contends that a copy of the initial condition inspection report was provided to the Tenants on May 20, 2016; the Tenants contend that a copy of that report was not provided to them until it was served as evidence for these proceedings; and there is no evidence that corroborates the testimony of either party, I find that I have insufficient evidence to determine whether a copy of the report was provided to the Tenants on May 20, 2016.

Section 18(2) of the Residential Tenancy Regulation stipulates that landlords must use a service method described in section 88 of the *Act* to provide a copy of the condition inspection report to tenants. Section 88 of the *Act* does not permit service of documents via email.

Section 24(2)(c) of the *Act* stipulates that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

Even if I accepted the Landlord's submission that a copy of the condition inspection report was provided to the Tenants, via email, on May 20, 2016, I would have to conclude that it was not served in accordance with the regulations, because it was served via email. I therefore find that the Landlord's right to claim against the security deposit for damage is extinguished, pursuant to section 24(2)(c) of the *Act.*

On the basis of the copies of cancelled cheques submitted in evidence, I find that the Tenants paid $3,500.00 in rent for every month between July of 2016 and May of 2017. On the basis of the bank draft submitted in evidence and the undisputed evidence, I find that the Tenants paid $3,500.00 in rent for May of 2016. On the basis of this evidence I am satisfied that all of the rent was paid in full during this tenancy and that the remaining $3,500.00 that was paid on May 21, 2016 could not have been a rent payment.

On the basis of the testimony of both parties, I am satisfied that the Tenants paid a security deposit of at least $1,750.00 on May 21, 2016.

I find that there is insufficient evidence to establish that the remaining $1,750.00 that was paid on May 21, 2016 was paid as a security deposit. In reaching this conclusion I was influenced by the tenancy agreement, which was signed on May 18, 2016, that was submitted in evidence. The tenancy agreement clearly indicates that a security deposit of $1,750.00 was required. I find that the tenancy agreement is the best evidence of the amount collected as a security deposit.

On the basis of the documents submitted in evidence I find that condition inspection report indicates that the Tenants agreed that the Landlord could retain the security deposit of $1,750.00. Even if the amount on this report has been changed from $3,500.00, as the Tenants contend, I would still conclude that the tenancy agreement is the best evidence of the amount collected as a security deposit.

I find that the tenancy agreement is more reliable than the condition inspection report because it represents the amount that the parties agreed was required as a security deposit.

In determining the amount of the security deposit I have placed no weight on the Tenants submission that when they signed the condition inspection report on May 19, 2016 the report indicated that a security deposit of $3,500.00 had been paid and that when they received a copy of that report it had been changed to indicate that a deposit of $1,750.00 had been paid. Even if I accepted their submission that the amount of the deposit has been changed on this report, I would find that it does not establish the amount of the security deposit that was paid.

The entry on the condition inspection report does not establish how much of a security deposit has been paid. Rather, that entry is intended to give the Landlord authority to retain a certain amount from the security deposit. Even if I accepted the Tenants' submission that the amount of the deposit has been changed on this report, I could only conclude that the Tenant initially agreed to forfeit the entire $3,500.00 deposit that had been paid on May 21, 2016. It does not, in my view, establish that the entire $3,500.00 was paid as a security deposit.

Section 15(d) of the *Act* stipulates that a landlord must not charge a person anything for accepting the person as a tenant. On the basis of the testimony of Legal Counsel for the Landlord I find that the Landlord collected $1,750.00 on May 21, 2016, in part at least, to secure the rental unit. I find that the Landlord did not have the right to collect this amount, pursuant to section 15(d) of the *Act*, and that it must be returned to the tenants.

Section 38(4)(a) of the *Act* allows a landlord to retain an amount from a security deposit or a 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.

Section 38(5) of the *Act* stipulates that 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 sections 24 (2) or 36 (2) of the *Act*.

As I have previously concluded, the Landlord's right to claim against the security deposit for damage is extinguished, pursuant to section 24(2)(c) of the *Act.* I therefore find, pursuant to section 38(5) of the *Act*, that the Landlord did not have the right to retain any portion of the security deposit in accordance with section 38(4)(a) of the *Act*.

As the Landlord did not have the right to retain any portion of the security deposit in accordance with section 38(4)(a) of the *Act*, I find that it is not necessary for me to determine whether the Tenants, at the end of the tenancy, gave the Landlord written authority to retain any portion of the security deposit as compensation for damage to the rental unit.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit plus interest or make an application for dispute resolution claiming against the deposits.

In circumstances such as these, where the Landlord's right to claim against the security deposit for damage has been extinguished, the Landlord does not have the right to file an Application for Dispute Resolution claiming against the deposit and the only option remaining open to the Landlord is to return the security deposit within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing. I find that the Landlord did not comply with section 38(1) of the *Act*, as the Landlord has not yet returned the deposit of $1,750.00.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the Landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord

did not comply with section 38(1) of the *Act*, I find that I must order the Landlord to pay double the security deposit to the Tenants.

I note that even though the Landlord's right to claim against the security deposit for damage to the rental unit has been extinguished, the Landlord retains the right to file an Application for Dispute Resolution seeking compensation for damage to the rental unit.

I find that the Tenants' Application for Dispute Resolution has merit and that the Tenants are entitled to recover the fee paid to file this Application.

Conclusion:

The Tenants have established a monetary claim of $5,350.00, which includes double the security deposit of $1,750.00, a return of the $1,750.00 collected on May 21, 2016 to secure the rental unit, and $100.00 as compensation for the cost of filing this Application for Dispute Resolution, and I am issuing a monetary Order in that amount. In the event the Landlord does not voluntarily comply with this Order, it may be filed with the Province of British Columbia Small Claims 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: May 31, 2018

Residential Tenancy Branch