



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

MNSD, FFT

Introduction

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

- return of the security deposit pursuant to section 38 of the *Act*; and
- recovery of the filing fee for this application from the landlord pursuant to section 72 of the *Act*.

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.

Preliminary Issue – Service of Documents

As both parties were present, service of documents was confirmed. The landlord confirmed that he was in receipt of the tenant's application and evidence. The tenant stated that he had not received the landlord's evidence package. The landlord testified that he had sent the package on May 23, 2018 and provided a Canada Post registered mail receipt with tracking number as proof.

With the agreement of both parties, I accessed the Canada Post website and confirmed that the landlord's package had been delivered to the tenant's address on May 28, 2018. The tenant acknowledged that the person who signed for the package was an occupant in his home and perhaps had not passed the package along to him.

Section 90 of the *Act* sets out when documents that are not personally served are considered to have been received. Unless there is evidence to the contrary, a document is considered or 'deemed' received on the fifth day after mailing when it is served by mail (ordinary or registered mail).

Residential Policy Guideline 12. Service Provisions provides guidance on determining deemed receipt, as follows:

Where a document is served by Registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not override the deeming provision. Where the Registered Mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.

In this case, the tenant has not provided any evidence to rebut the deemed receipt presumption, only a speculation that someone else in his residence had forgotten to pass along mail to him. Therefore, I find that the tenant was served with the landlord's evidence on May 28, 2018, the fifth day after mailing, in accordance with section 89 of the *Act*.

As the respondent's evidence was deemed received by the applicant greater than seven days before the hearing, I find that it was served in accordance with Rule 3.15 of the Residential Tenancy Branch Rules of Procedure.

Issue(s) to be Decided

Is the tenant entitled to the return of the security deposit? And if so, is the tenant entitled to any statutory compensation equivalent to the amount of the security deposit for the landlord's failure to comply with the *Act*?

Is the tenant entitled to recover their filing fee for this application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of this matter and my findings are set out below.

Both parties agreed to the following facts. This sublease tenancy agreement began June 1, 2017 and ended on March 30, 2018. By the end of the tenancy, monthly rent was \$1,635.00 with an additional parking fee. The tenant paid a security deposit of \$500.00 at the beginning of the tenancy and this was still held by the landlord.

Both parties agreed that when the tenant took possession of the rental unit, a walk-through of the unit was conducted with the tenant, but that a move-in condition inspection report was never prepared by the landlord for the tenant to sign or given to the tenant. The landlord acknowledged that it was just "never mentioned".

Similarly, at the end of the tenancy, both parties agreed that the landlord's fiancée attended at the rental unit to conduct an inspection, but that no condition inspection report was prepared by the landlord for the tenant to sign or given to the tenant.

Both parties agreed that the tenant provided his forwarding address via email communication. The landlord confirmed that he received the tenant's forwarding address by April 6, 2018 at the latest. The landlord confirmed that he did not return the tenant's security deposit or file an Application for Dispute Resolution with the Residential Tenancy Branch for authorization to retain the tenant's security deposit.

The landlord submitted photographic evidence regarding alleged damages to the rental unit due to the tenant's action or neglect, as well as deficiencies in the cleaning of the unit.

The tenant acknowledged that he had made an offer via email communication with the landlord to allow \$200.00 to be deducted from the security deposit in order to settle the issues raised by the landlord regarding claims for damages and cleaning.

Analysis

In order to determine if the tenant is entitled to the return of the security deposit or a portion of it, I must consider whether or not either party extinguished their rights to the security deposit.

Section 23 of the Act sets out the requirements for a landlord and tenant to undertake a condition inspection report of the rental unit upon the tenant taking possession of the unit, as follows:

- 23(1) 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.
- (2) The landlord and tenant together must inspect the condition of the rental unit on or before the day the tenant starts keeping a pet or on another mutually agreed day, if
 - (a) the landlord permits the tenant to keep a pet on the residential property after the start of a tenancy, and
 - (b) a previous inspection was not completed under subsection (1).
- (3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
- (4) The landlord must complete a condition inspection report in accordance with the regulations.
- (5) Both 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.
- (6) The landlord must make the inspection and complete and sign the report without the tenant if
 - (a) the landlord has complied with subsection (3), and
 - (b) the tenant does not participate on either occasion.

Section 24 of the Act sets out the consequences for not fulfilling the condition inspection report requirements, as follows:

- 24(1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if
 - (a) the landlord has complied with section 23 (3) [2 opportunities for inspection], and
 - (b) the tenant has not participated on either occasion.
- (2) 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
 - (a) does not comply with section 23 (3) [2 opportunities for inspection],
 - (b) having complied with section 23 (3), does not participate on either occasion, or
 - (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

In this case, a move-in condition inspection report was not completed in accordance with the Residential Tenancy Regulations. Therefore, I find that the landlord did not meet the requirements of section 23 of the *Act* for completing a condition inspection report upon the tenant taking possession of the rental unit. As such, pursuant to section 24(2) of the *Act*, I find that the landlord's right to claim against the security deposit for damages was extinguished.

The tenant acknowledged that he had provided consent for the landlord to withhold \$200.00 of the security deposit in order to settle the matter with the landlord regarding the landlord's claim for damages.

Residential Tenancy Policy Guideline 17. Security Deposit and Set Off, section B. Security Deposit, paragraph 7, provides guidance on circumstances where a tenant consents to the landlord retaining the security deposit:

7. The right of a landlord to obtain the tenant's consent to retain or file a claim against a security deposit for damage to the rental unit is extinguished if:
 - the landlord does not offer the tenant at least two opportunities for inspection as required (the landlord must use Notice of Final Opportunity to Schedule a Condition Inspection (form RTB-22) to propose a second opportunity); and/or
 - having made an inspection does not complete the condition inspection report, in the form required by the Regulation, or provide the tenant with a copy of it.

As I have already found that the landlord extinguished his rights to claim against the security deposit pursuant to section 24(2) of the *Act*, I also find that the landlord extinguished his rights

to obtain the tenant's written consent to retain the security deposit or a portion of it, pursuant to section 38(5) of the *Act*.

Regardless of whether or not the landlord agreed that he did or did not have rights to retain the security deposit, he was obligated to abide by section 38 of the *Act*.

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 security deposit in full 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 tenant a monetary award equivalent to the original value of the security deposit pursuant to 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 in writing. In this case, the landlord received the tenant's forwarding address via email on April 6, 2018, by his account.

I note that the tenant provided his forwarding address to the landlord using email, instead of through one of the acceptable methods for providing written notice as set out in section 88 of the *Act* provided below:

- 88 All documents, other than those referred to in section 89 [*special rules for certain documents*], that are required or permitted under this *Act* to be given to or served on a person must be given or served in one of the following ways:
- (a) by leaving a copy with the person;
 - (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
 - (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
 - (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
 - (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
 - (f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
 - (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;

- (h) by transmitting a copy to a fax number provided as an address for service by the person to be served;
- (i) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];
- (j) by any other means of service prescribed in the regulations.

However, section 71(2)(c) of the *Act* allows me to determine if a document not served in accordance with section 88 of the *Act* is “sufficiently given or served for purposes of this *Act*.” Since the landlord replied to the tenant’s email messages and confirmed receipt of the address provided by the tenant, I find that landlord was sufficiently served with the tenant’s forwarding address on April 6, 2018, pursuant to section 71(2)(c) of the *Act*.

The landlord confirmed that he did not return the security deposit or file an Application for Dispute Resolution with the Residential Tenancy Branch within 15 days of receiving the tenant’s forwarding address in writing.

In weighing the testimony and the evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant’s security deposit in full within the required 15 days. Further, I find that the landlord had extinguished his rights to retain the security deposit and therefore had also extinguished his rights to obtain the tenant’s written authorization to withhold any portion of the security deposit.

Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a monetary award equivalent to the value of double the security deposit withheld by the landlord, with any interest calculated on the original amount only. No interest is payable for this period.

Having been successful in this application, I find further that the tenant is entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

I issue a Monetary Order in the amount of \$1,100.00 in favour of the tenant. The breakdown is as follows:

Item	Amount
Return of security deposit withheld by landlord	\$500.00
Monetary award for landlord’s failure to comply with s. 38 of the <i>Act</i> (equivalent to value of security deposit paid)	\$500.00
Recovery of filing fee for this Application	\$100.00
Total Monetary Order in Favour of Tenant	<u>\$1,100.00</u>

The tenant is provided with this 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.

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: June 18, 2018

Residential Tenancy Branch