Dispute Resolution Services

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:

- authorization to obtain a return of double their security and pet damage deposits (the deposits) pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The tenant testified that they have had difficulty locating a mailing address for the landlord after this tenancy ended on October 1, 2017. The tenant gave sworn testimony and written evidence that they attempted to obtain a forwarding address for the landlord from the landlord's former property manager, ML, who attended this hearing. The tenant maintained that ML refused to provide the landlord's out of province mailing address as he was no longer working for the landlord after the expiration of this tenancy. The tenant eventually located a mailing address for the landlord on the mutual end to tenancy agreement ML had prepared for the tenant's signature on September 12, 2017. The tenant provided sworn testimony and written evidence that they sent a copy of the tenant's dispute resolution hearing package and the tenant's original written evidence package to the landlord at the address shown on the mutual agreement to end tenancy document on June 1, 2018. The tenant provided written evidence of the Canada Post Online Tracking System and the Customer Receipt to confirm the registered mailing of June 1, 2018 and the June 6, 2018, successful delivery of the above documents to the landlord. The tenant provided written evidence that one of their

friends posted additional photographic evidence on the landlord's door on July 9, 2018, and followed this up with a phone call to the landlord to let the landlord know about this hearing and the material posted on the landlord's door.

The landlord testified that they received registered mail from the tenant on June 6, 2018, but the package did not include the dispute resolution hearing package or written evidence. The landlord maintained that they called the Residential Tenancy Branch (the RTB) to find out the participant code and call-in details for this hearing. The landlord maintained that they had called the landlord's former property manager, but the property manager did not have the call-in details and would have to be called to provide sworn testimony at the hearing. The landlord provided no explanation as to why they had not provided their former property manager, ML, with the call-in information prior to this hearing. The landlord had clearly spoken with ML in advance of this hearing and informed him that they would be calling ML as a witness.

I have given the landlord's assertion that they were not provided with the dispute resolution hearing information and initial set of written evidence, and did not know what the tenant was applying for careful consideration. On a balance of probabilities, I find it more likely than not that the tenant who had been having considerable difficulty locating the landlord included the dispute resolution hearing package and written evidence in the package of information sent by the tenant on June 1, 2018, and received by the landlord on June 6, 2018. For these reasons, I find that the landlord was deemed served with these materials in accordance with sections 88, 89 and 90 of the *Act* on June 6, 2018, the fifth day after this registered mailing. As the landlord acknowledged receipt of the additional written evidence posted on her door on July 9, 2018, I find that this information was served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Is the tenant entitled to a monetary award equivalent to double the value of their deposits as a result of the landlord’s failure to comply with the provisions of section 38 of the *Act*? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This tenancy began on April 27, 2017, the date when the tenant and two other tenants signed the Residential Tenancy Agreement (the Agreement) with the landlord. The

tenant maintained that this was a month-to-month tenancy, which was confirmed in the copy of the Agreement entered into written evidence by the tenant. The landlord and ML claimed that this was a one-year fixed term tenancy. The landlord maintained that the copy of the Agreement entered into written evidence by the tenant must have been forged.

The parties agreed that monthly rent was set at $2,195.00, payable in advance on the first of each month. The Agreement entered into written evidence by the tenant confirmed the tenant`s sworn testimony and written evidence that the landlord or ML charged the tenant a $2,195.00 security deposit and a $2,195.00 pet damage deposit, the latter of which the Agreement indicated was ``non-refundable.'' When I noted that the maximum charge for a security and pet deposit under the *Act* was one-half month's rent, the landlord said that the tenants were only charged one-half's month rent for each of these deposits. The landlord did confirm that the Agreement stated that the pet damage deposit was "non-refundable," a provision it the Agreement, which I noted was in contravention of the *Act*.

At the hearing, I noted that the copy of the Agreement entered into written evidence by the tenant had no address for the landlord or her representative included in that document, had no address for the rental unit listed there, and showed that the Pet Damage deposit was "non-refundable." Although the landlord knew about this hearing for at least two weeks before this hearing, the landlord did not supply any written evidence of her own. At the hearing, ML stated that he did not have copies of any of the documents associated with this tenancy before him, and was relying only on his recollections of what had happened many months ago.

The tenant maintained that she provided the landlord with her forwarding mailing address on October 5, 2017 and April 7, 2018. The landlord confirmed that she received the tenant's mailing address on or about April 17, 2018.

The landlord confirmed that she did not return any portion of the security or pet damage deposits for this tenancy to the tenants to the rental unit, and the tenants ended their fixed term tenancy before the scheduled date for the end of this tenancy. The tenant supplied copies of emails of some of the issues that the landlord had raised through ML at the end of this tenancy. The landlord asserted that there was no need to return any of the deposits because the tenants had signed a fixed term Agreement that was to last until April 2018 and the pet damage deposit was non-refundable, because the tenants' Agreement included this provision.

The tenant's application for a monetary award of $8,780.00 included the following items:

Item	Amount
Return of Pet Damage & Security Deposits ($2,195.00 + $2,195.00= $4,390.00)	$4,390.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the *Act*	4,390.00
Total of Above Items	**$8,780.00**

The tenant also applied to recover their $100.00 filing fee from the landlord.

Analysis

I find that the landlord has included a number of provisions in the Agreement that contravene the *Act.*

Section 5 of the *Act* prevents landlords and tenants from contracting out of the provisions of the *Act*. This prevents the attempt by the landlord to bind the tenant to the provision, which the landlord confirmed was in the Agreement, that the pet damage deposit was non-refundable. Section 5(2) of the *Act* establishes that "Any attempt to avoid or contract out of this *Act* or the regulation is of no effect." Thus, I find that the provision that the pet damage is non-refundable is illegal and of no force or effect.

Similarly, I find on a balance of probabilities that the landlord has charged deposits that exceed the provision in section 19 of the *Act*, which limits each of these deposits to one-half of the monthly rent. These are the figures identified on the copy of the Agreement entered into written evidence by the tenant, and also contains the notation that the pet damage deposit was non-refundable. Thus, I find that the landlord overcharged the tenants these deposits in contravention of section 19 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 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 tenant 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 landlord has not returned the tenant's security deposit in full within 15 days of receipt of the tenant's forwarding address, which the landlord admitted they received in April 2018. The landlord also confirmed that they did not apply to the RTB for dispute resolution to obtain authorization to retain any portion of the security deposit for this tenancy. The tenant gave undisputed sworn testimony that the landlord has not obtained written authorization at the end of the tenancy to retain any portion of these deposits.

The following provisions of Policy Guideline 17 of the RTB's Policy Guidelines would seem to be of relevance to the consideration of this application:

Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

- *If the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;*
- *If the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*
- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process;*
- *If the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;*
- *whether or not the landlord may have a valid monetary claim.*

This Policy Guideline emphasizes that a landlord cannot arbitrarily retain deposits because the landlord alleges that damage occurred during a tenancy or that amounts remain owing.

In accordance with section 38 of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the original security and pet damage deposits

charged by the landlord with interest calculated on the original amount only. No interest is payable over this period.

As the tenant has been successful in this application, I also allow the tenant to recover the $100.00 filing fee from the landlord.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms which allows the tenant to recover the original deposits charged by the landlord plus a monetary award equivalent to the value of these deposits as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*:

Item	**Amount**
Return of Pet Damage & Security Deposits ($2,195.00 + $2,195.00= $4,390.00)	$4,390.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the *Act*	4,390.00
Filing Fee	100.00
Total Monetary Order	**$8,880.00**

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: July 26, 2018

Residential Tenancy Branch