



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WITMAR HOLDINGS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL MNDL-S

Introduction

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

- a monetary order for damages pursuant to section 67 of the *Act*;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 67 of the *Act*; and
- recovery of the filing fee from the tenant pursuant to section 72 of the *Act*.

The tenant appeared at the date and time set for the hearing of this matter. The landlord, who was the applicant in this matter, did not attend this hearing, although I left the teleconference hearing connection open until 1:46 p.m. in order to enable the landlord to call into this teleconference hearing scheduled for 1:30 p.m. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the tenant and I were the only ones who had called into this teleconference.

Rule 7.3 of the 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.

Further to this, as the landlord did not attend the hearing to present their evidence, the tenant was denied the opportunity to ask questions to rebut the landlord's submitted

evidence. Therefore, I applied Rule 7.4 to address the landlord's written submissions and evidence. Rule 7.4 requires:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

I find that in accordance with the principles of natural justice and Rule 7.4, I will not consider the landlord's submissions uploaded into evidence as the landlord not did present the evidence for cross-examination by the other party.

Accordingly, in the absence of any evidence or submissions from the landlord who was the applicant in this matter, I order the landlord's application, in its entirety, dismissed without liberty to reapply.

Issue(s) to be Decided

How should the security deposit be addressed?

Background and Evidence

The tenant testified that the landlord had been ordered through a prior arbitration decision (file number referenced on the cover sheet of this decision) to pay the tenant a monetary award for compensation owed, as well as to address the \$600.00 security deposit in accordance with the *Act*. The tenant had previously failed to provide the landlord with her forwarding address, and as such, the landlord was provided with an opportunity to either return the security deposit to the tenant in full, obtain written consent to deduct a portion or keep the deposit, or make an application for dispute resolution to retain a portion or all of it.

I note that in the landlord's application for dispute resolution for the matter before me, the landlord had requested to retain all of the security deposit in partial satisfaction of claims for damages owed by the tenant, which is an option for addressing the security deposit under the *Act*. However, as the landlord's application has now been dismissed without leave to reapply, I must make a determination at this hearing on the how the security deposit should be addressed.

As the landlord failed to attend the hearing, the tenant provided unchallenged testimony that she had participated in the move in condition inspection and that she had made herself available to participate in the move out condition inspection. The tenant testified that landlord failed to attend the move out condition inspection and therefore the landlord extinguished their rights to claim against the security deposit.

The tenant further testified that the landlord has still not paid her the compensation she is owed as ordered in the prior arbitration decision.

Analysis

The *Act* contains comprehensive provisions on dealing with security deposits. Under section 38 of the *Act*, the landlord is required to handle the security deposit as follows:

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

- (a) the date the tenancy ends, and
- (b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

- (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
- (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

...

(6) If a landlord does not comply with subsection (1), the landlord

- (a) may not make a claim against the security deposit or any pet damage deposit, and
- (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

In this matter, the landlord's application to retain the security deposit in satisfaction of damages has been dismissed without leave to reapply. However, the security deposit must still be addressed. Residential Tenancy Policy Guideline #17 Security Deposit and Set Off, provides the following direction:

C. RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH DISPUTE RESOLUTION

1. *The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:*
 - *a landlord's application to retain all or part of the security deposit; or*
 - *a tenant's application for the return of the deposit.*

unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.

As such, regardless of the fact that the tenant has not applied for dispute resolution for the return of the security deposit, based on the landlord's application, I must order the return of the security deposit to the tenant, unless it is determined that the tenant's right to the return of the security deposit has been extinguished under the *Act*.

Section 35 of the *Act* requires that both the landlord and the tenant participate in a condition inspection of the rental unit at move out.

Section 36 of the *Act* explains the consequences of extinguishment to the right to the security deposit if either party fails to participate in the condition inspection, as follows:

- 36(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 complied with section 35 (2) [*2 opportunities for inspection*], and
 - (b) the tenant has not participated on either occasion.
- (2) Unless the tenant has abandoned the rental unit, the right of the 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 35 (2) [*2 opportunities for inspection*],
 - (b) having complied with section 35 (2), does not participate on either occasion, or
 - (c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

In this matter, the tenant stated that she made herself available to participate in the move out condition inspection, however the landlord failed to attend.

Based on the unchallenged testimony of the tenant, and on a balance of the probabilities, I find that the tenant has not extinguished her right to the return of her security deposit.

Therefore, I find that the tenant is entitled to the return of her \$600.00 security deposit.

Conclusion

As noted above, I dismiss the landlord's application in its entirety, without leave to reapply.

I issue a Monetary Order in the amount of \$600.00 in the tenant's favour for the return of the security deposit currently held by the landlord.

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: August 14, 2018

Residential Tenancy Branch