# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MNSD, FFT

Introduction

This hearing convened as a Tenant's Application for Dispute Resolution, wherein the Tenant sought return of double her security deposit and to recover the filing fee.

The hearing was conducted by teleconference at 1:30 p.m. on September 10, 2018. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The Landlord testified that she received Notice of the Tenant's Application in late August 2018. She claimed that at the time the Tenant applied for dispute resolution she was in Mexico.

Documentary evidence submitted by the Tenant confirms that she sent her Application for Dispute Resolution and Notice of Hearing to the Landlord by registered mail sent on February 15, 2018.

*Residential Tenancy Policy Guideline 12—Service Provisions* provides that service cannot be avoided by refusing or failing to retrieve registered mail:

> Where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail, does not override the deemed service provision. Where the registered mail is refused or deliberately not picked up, service continues to be deemed to have occurred on the fifth day after mailing.

Pursuant to section 90 of the *Residential Tenancy Act* documents served this way are deemed served five days later; accordingly, I find the Landlord was duly served as of

February 20, 218 and I proceeded with the hearing despite her assertions she did not receive the Tenant's Application for Dispute Resolution.

No other issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Tenant entitled to return of double her security deposit paid?

2. Should the Tenant recover the filing fee paid for her application?

Background and Evidence

The Tenant testified that the tenancy was to begin on January 1, 2018. The Tenant paid a $550.00 security deposit on December 1, 2017.

The Tenant confirmed that she did not sign a tenancy agreement, although she confirmed they had an oral agreement.

The Tenant stated that she was not able to move into the rental due to the presence of the Landlord's furniture in the rental unit. She further stated that she expected to move into the rental unit and have the Landlord remove the furnishings and when the Landlord refused to move the items she did not move in.

The Tenant alleged that the "rental agreement was broken", and drew my attention to an email from the Landlord dated January 1, 2018.

The Tenant submitted that the tenancy never started, but if it did, it ended by mutual agreement on January 1, 2018.

Introduced in evidence was a copy of a letter from the Tenant to the Landlord dated on January 15, 2018 wherein the Tenant requested return of her security deposit. This

letter was sent by registered mail to the Landlord's address. A copy of the letter, the envelope containing the letter, as well as Canada Post tracking information was included in evidence by the Tenant and which confirmed that this letter was sent to the Landlord by registered mail on January 16, 2018.

The Tenant confirmed that the Landlord did not return her security deposit of $550.00.

In response to the Tenant's submissions the Landlord testified as follows.

She confirmed that she accepted a $550.00 deposit from the Tenant. She further confirmed that she did not return the deposit. She also confirmed that she received the Tenant's forwarding address by registered mail in January of 2018. She also confirmed that she did not make an application for dispute resolution within 15 days, nor has she made such an application.

The Landlord stated that she wrote a letter to the Tenant on January 22, 2018 outlining why she was keeping the funds. She noted that she was not able to re-rent the rental unit until January 15, 2018, which she submitted was equivalent to the Tenant's deposit.

The Landlord stated that she believed that the security deposit was a "rental deposit" and that as the Tenant agreed that she could retain the funds at the outset of the tenancy that she was entitled to retain them.

The Landlord submitted that the deposit was non-refundable and to be kept if the Tenant chose not to undertake the tenancy. In written communication to the Tenant dated January 22, 2018 she confirmed this position as well as her view that the security deposit acted as the rental amount due for the first two weeks of the month.

Analysis

After consideration of the relevant testimony and evidence before me and on a balance of probabilities I find as follows.

Section 1 of the *Residential Tenancy Act* defines a security deposit as follows:

> **"security deposit"** means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:

(a) post-dated cheques for rent;

(b) a pet damage deposit;

(c) a fee prescribed under section 97 (2) (k) *[regulations in relation to fees]*;

Section 7 of the *Residential Tenancy Regulation* provides that a Landlord may charge the following non-refundable fees:

**7** (1) A landlord may charge any of the following non-refundable fees:

(a) direct cost of replacing keys or other access devices;

(b) direct cost of additional keys or other access devices requested by the tenant;

(c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;

(d) subject to subsection (2), an administration fee of not more than $25 for the return of a tenant's cheque by a financial institution or for late payment of rent;

(e) subject to subsection (2), a fee that does not exceed the greater of $15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;

(f) a move-in or move-out fee charged by a strata corporation to the landlord;

(g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

I find that the $525.00 paid by the Tenant is a security deposit and not a permitted non-refundable fee.

Section 20(e) of the *Act* provides that a Landlord may not require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement.

Section 5 of the *Act* also provides that landlords and tenants may not avoid or contract out of the *Act* or the regulations and any attempt to avoid or contract out of this Act or the regulations is of no effect.

The Landlord alleges that the Tenant agreed in writing that she could retain the security deposit.

Section 38 of the *Residential Tenancy Act* provides as follows:

> **Return of security deposit and pet damage deposit**
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> **38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a) the date the tenancy ends, and
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> (b) the date the landlord receives the tenant's forwarding address in writing,
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> the landlord must do one of the following:
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> (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;
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> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.
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> (2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.
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> (3) A landlord may retain from a security deposit or a pet damage deposit an amount that
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> (a) the director has previously ordered the tenant to pay to the landlord, and
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> (b) at the end of the tenancy remains unpaid.
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> (4) A landlord may retain an amount from a security deposit or a pet damage deposit if,
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> (a) 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, or
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> (b) after the end of the tenancy, the director orders that the landlord may retain the amount.
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> (5) 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 section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.
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> (6) If a landlord does not comply with subsection (1), the landlord
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> (a) may not make a claim against the security deposit or any pet damage deposit, and
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> (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

As section 38(4) provides, a tenant must agree in writing, *at the end of the tenancy,* that the landlord may retain the security deposit. Any agreement at the beginning regarding an automatic forfeiture offends section 20(e) and is unenforceable.

The Landlord confirmed she retained the Tenant's $550.00 deposit. She also confirmed she received the Tenant's forwarding address by registered mail in January of 2018.

Sections 38(1) and (6) of the *Act* requires a Landlord to make an application for dispute resolution or return the security deposit within 15 days of the latter of the end of the tenancy or receipt of the Tenant's forwarding address, failing which the deposit is doubled.

In this case the Landlord failed to return the funds and failed to make an application for dispute resolution as required. She confirmed at the hearing, and in documents filed in this case that she felt entitled to retain these funds.

The security deposit is held in trust for the Tenant by the Landlord. The Landlord may only keep all or a portion of the security deposit through the authority of the *Act*. If the Landlord believes she is entitled to monetary compensation from the Tenant, the Landlord must either obtain the Tenant's written consent to such deductions (such consent to be provided *at the end of the tenancy*), or obtain an Order from an Arbitrator authorizing them to retain a portion of the Tenant' security deposit. Here the Landlord did not have any such authority.

The Landlord is at liberty to make her own Application for Dispute Resolution should she feel she is entitled to monetary compensation from the Tenant.

I therefore find the Tenant is entitled to the sum of **$1,200.00** representing double the security deposit paid and recovery of the $100.00 filing fee.

Conclusion

The Tenant's application is granted. The Tenant is awarded a Monetary Order in the amount of **$1,200.00** representing double the security deposit paid and recovery of the filing fee. The Tenant must serve the Monetary Order on the Landlord and may file and enforce it in the B.C. Provincial Court (Small Claims Division).

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: September 10, 2018

Residential Tenancy Branch