



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 tenants' 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 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. The landlord's agent K.M. attended on behalf of the landlord. Tenant S.M. attended and spoke on behalf of the tenants.

As both parties were present, service of documents was confirmed. The tenant testified that the landlord was served with her application for dispute resolution by registered mail on January 23, 2018 and provided a Canada Post registered mail tracking number as proof of service. The landlord's agent confirmed receipt of the tenants' application for dispute resolution. Therefore, I find that the tenants' application was served in accordance with section 89 of the *Act* and the Residential Tenancy Branch Rules of Procedure.

Although the tenant submitted evidence to the Residential Tenancy Branch dispute website, the tenant acknowledged that she failed to serve any of her submitted evidence to the landlord. As such, I advised the parties that the tenants' evidence would be excluded from my consideration as it had not been served to the landlord as required by Rule 3.5 of the Residential Tenancy Branch Rules of Procedure.

The landlord's agent testified that the tenants were served with the landlord's evidence by email, but also by Canada Post Xpresspost mail on August 16, 2018, and provided a tracking number as proof of service. The landlord further stated that the tracking report indicated that the package was received and signed for by the tenant on August 17, 2018. During the hearing, I accessed the Canada Post website to confirm this information, which was acknowledged by the tenant.

Rule 3.15 requires that the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing. In this case, the landlord's evidence was received by the tenants exactly seven days before hearing. As the tenant acknowledged she had received the landlord's evidence and had time to review it, I find that the landlord's delay in providing evidence to the tenants has not prejudiced the tenants in this application. Therefore, I have considered the landlord's evidence in this matter and find that it has been served in accordance with section 89 of the *Act*, even if not served in full accordance with the Residential Tenancy Branch Rules of Procedure.

Issue(s) to be Decided

Are the tenants entitled to the return of all or a portion of the security deposit? And if so, are the tenants entitled to any statutory compensation equivalent to the amount of the security deposit for the landlord's failure to comply with the *Act*?

Are the tenants entitled to recover their filing fee for this application?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

Both parties agreed to the following information about their written tenancy agreement:

- The tenancy began on February 1, 2015 as a six-month fixed term tenancy agreement. At the end of this term, the tenancy continued to be renewed as consecutive fixed term agreements until the tenancy ended on October 4, 2017, when the tenants vacated the rental unit and returned the keys to the landlord.
- At the beginning of the tenancy, the tenants paid the landlord a security deposit of \$1,100.00, which the landlord continues to hold.

- A condition inspection of the rental unit was completed by the landlord and tenants at the beginning of the tenancy and a written report of this inspection was provided to the tenants.
- On October 4, 2017, upon move-out, a condition inspection of the rental unit was completed by the landlord and one of the tenants, however, the two parties were not in agreement with the written documentation of the condition inspection, and as such, the tenant would not sign the report and a written copy of the report was never provided to the tenants.
- The tenants provided their forwarding address in writing on the condition inspection report, therefore the landlord had the tenants' forwarding address as of October 4, 2017.

The tenants claimed that they provided authorization to the landlord, via text message exchange, to withhold only \$320.00 of their security deposit as payment of the rent owed by them for occupation of the rental unit from October 1 to 4, 2017. Therefore, the tenants claimed that they are owed \$780.00 by the landlord for the return of the remainder of their security deposit.

The landlord's agent stated that there were damages for which the landlord is seeking compensation and therefore the security deposit was not returned as the landlord was attempting to negotiate a settlement with the tenants. The parties were not able to come to an agreement, and as such the tenants applied for dispute resolution.

The landlord's agent confirmed that the landlord did not file an application for dispute resolution to retain the security deposit.

I explained to the parties that the only matter before me for decision at this hearing was to make a determination on the tenants' application for the return of the security deposit, and that any testimony in relation to the alleged damages was not relevant for making a determination in this matter. I informed both parties that they were both at liberty to make claims for damages in relation to the tenancy in accordance with the time limits provided by the *Act*.

Although the tenants' application only requested the return of the security deposit, the *Act* contains statutory provisions which can require that in certain circumstances a landlord must repay a tenant double the security deposit. If a tenant is entitled to doubling of the deposit, I must award the tenant double the deposit unless the tenant expressly waives entitlement. Accordingly, I have considered whether the tenants are entitled to the return of double the amount of their deposit in making this 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.

...

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

- (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
- (b) after the end of the tenancy, the director orders that the landlord may retain the amount.

...

(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.

At no time does the landlord have the ability to simply keep the security deposit because they feel they are entitled to it due to damages caused by the tenant. If the landlord and the tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the landlord must file an Application for Dispute

Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

In this matter, the landlord had not applied for arbitration within 15 days of the end of the tenancy or receipt of the forwarding address of the tenants, to retain a portion of the security deposit, as required under section 38 of the *Act*.

It was confirmed by both parties that the tenants agreed, via text messages, that the landlord could retain \$320.00 of the security deposit in satisfaction of rent owed for the tenants' occupation of the rental unit from October 1 to 4, 2017.

Although the *Act* specifies the tenant's agreement to a deduction to be "in writing", in this matter, it was clear that both parties conducted their communication through email and text messages, and that the exchanges were confirmed by both parties. Therefore, I find that the tenants provided their agreement to a deduction from the security deposit in the amount of \$320.00 as fulfillment of their rent obligations from October 1 to 4, 2017.

I further note that the landlord extinguished the right to claim against the security deposit by failing to provide a written condition inspection report at the end of the tenancy. This extinguishment is explained in section 36(2) of the *Act*, as follows:

- 36 (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.

The landlord may only keep all or a portion of the security deposit through the authority of the *Act*, such as an order from an Arbitrator, or with the written agreement of the tenant. In this matter, I find that the landlord did not have any authority under the *Act* to keep all of the security deposit, and only had agreement from the tenants to keep \$320.00 of the security deposit.

I note that the landlord's agent provided verbal testimony about the condition of the rental unit after the tenants left; however, the landlord is unable to make a monetary claim through the tenants' Application.

The landlord may still file his own Application for compensation for the alleged damages caused by the tenants; however, the issue of the security deposit has now been conclusively dealt with in this hearing.

Based on the above legislative provisions and the testimony and evidence of both parties, on a balance of probabilities, I find that the landlord failed to address the security deposit in compliance with the *Act*. As such, in accordance with section 38(6) of the *Act*, I find that the tenants are entitled to a monetary award equivalent to the value of double the amount of the security deposit withheld by the landlord without their agreement, with any interest calculated on the original amount only. No interest is payable for this period.

The amount of compensation owed to the tenants is calculated as follows:

Original security deposit paid = \$1,100.00

Amount tenants agreed that landlord could withhold for rent = \$320.00

Amount of security deposit withheld by landlord without tenant's agreement = \$780.00

Doubling provision applied to \$780.00 = \$1,560.00

Therefore, the tenants are entitled to a monetary award of \$1,560.00 as compensation for the landlord's failure to address the security deposit in accordance with section 38 of the *Act*.

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

Having made the above findings, I order that the landlord pay the tenants the sum of **\$1,660.00** in full satisfaction of the security deposit and recovery of the filing fee paid by the tenants for this application.

Conclusion

I issue a Monetary Order in the tenants' favour in the amount of \$1,660.00 pursuant to sections 38, 67 and 72 of the *Act*.

The tenants are 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: September 17, 2018

Residential Tenancy Branch