



Dispute Resolution Services

Page: 1

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.

As both parties were present, service of documents was confirmed. The tenants testified that the landlord was served with the application for dispute resolution and evidence by Canada Post registered mail on April 14, 2018, which was confirmed by the landlord. The landlord testified that she served the tenants with evidence by Canada Post registered mail on September 17, 2018, which was confirmed by the tenants. Therefore, I find that all the hearing documents for this matter were served in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is the tenant entitled to the return of all or a portion of the security deposit? And if so, is the tenant entitled to any statutory compensation as a result of the landlord's failure to comply with the security deposit requirements of the *Act*?

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

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.

A written tenancy agreement was submitted into documentary evidence and both parties confirmed the following information about the tenancy:

- This one-year fixed term tenancy began on February 15, 2017 and ended on January 18, 2018 when the tenants returned vacant possession of the rental unit to the landlord.
- At the beginning of the tenancy, the tenants paid the landlord a security deposit of \$900.00.

Both parties agreed that a condition inspection walk-through of the rental unit was completed by the landlord and tenants at the beginning of the tenancy, and the landlord provided a written report of this inspection to the tenants.

Both parties agreed that a condition inspection walk-through of the rental unit was completed by the landlord and the tenants at the end of the tenancy.

The landlord submitted into evidence a condition inspection report, upon which it is written by the landlord that the tenants agreed to the following deduction from the security deposit at the end of the tenancy:

Up to the full \$900 deposit for the cost of removal of smoke damage of entire unit

The tenants testified that they signed the move-out condition inspection report, but never received a copy of the written report, until they received it in the landlord's evidence submitted for this hearing. The tenants claim that the condition inspection report they signed did not have the above-noted sentence written on the form as they would not have signed agreeing to such a deduction.

The landlord acknowledged that the tenants never agreed in writing to any specific amount to be deducted from the security deposit, but the landlord claimed that the notation regarding the deduction of up to the full amount of the security deposit was written on the condition inspection report before it was signed by the tenants.

Both parties agreed that the tenants provided their forwarding address to the landlord. The tenants testified that it was provided verbally to the landlord during the move-out condition inspection walk-through, and that the landlord wrote it down. The landlord testified that she received that tenants' forwarding address via text message communication. Although both parties recollected the specifics of this event differently, both parties concurred that the landlord was in receipt of the tenants' forwarding address by the end of January 2018.

The landlord testified that she returned \$216.70 to the tenants on February 14, 2018 via e-transfer as partial payment of the security deposit, which was confirmed received by the tenants.

The landlord confirmed that she was not granted a monetary order through a prior arbitration hearing to retain any portion of the tenants' security deposit.

The landlord submitted documentary evidence pertaining to damage and cleaning deficiencies related to smoking in the rental unit discovered at the end of the tenancy. The landlord testified that she retained a portion of the security deposit in satisfaction of these costs.

The landlord confirmed that she did not file an application for dispute resolution to retain any portion of 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 and cleaning deficiencies 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*.

I further explained that 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 tenant is entitled to the doubling provision 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 all or a portion of 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 tenancy ended on January 18, 2018, and the parties agreed that the landlord was in receipt of the tenants' forwarding address by the end of January, i.e. January 31, 2018.

I note that section 38(1)(b) of the *Act* states that the tenant provide the forwarding address in writing. In this matter, the tenants provided their forwarding address verbally and via text message. However, given that the landlord acknowledged receiving the tenants' forwarding address by the end of January 2018 via text message, I find that the tenants' forwarding address was sufficiently served pursuant to the sufficient service provisions set out in section 71(2)(c) of the *Act*.

Therefore, the landlord had 15 days from January 31, 2018, which is the later date, to address the security deposit in accordance with the *Act*.

The landlord confirmed that she did not apply for arbitration within 15 days of the receipt of the forwarding address of the tenants, to retain a portion of the security deposit, as required under section 38 of the *Act*.

The tenants' testified that they never received a copy of the move-out condition inspection report until it was provided in the landlord's evidence for this hearing. The landlord testified that she thought she had sent it to the tenants by email, however the landlord provided no evidence to support her testimony, which was disputed by the tenants. Therefore, based on the landlord's lack of evidence to the contrary, I find that the landlord extinguished the right to claim against the security deposit by failing to provide a written condition inspection report to the tenants 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.

Further to this, the tenants disputed that they had signed in agreement to any deductions to the security deposit, up to the full amount of the security deposit. The landlord confirmed that the tenants did not agree in writing to a specific amount to be deducted from the security deposit.

Section 38(4)(a) states, in part, as follows:

- 38(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

[My emphasis added]

The *Act* very explicitly references that “**an amount**” may be retained, and that “**the amount**” is agreed to in writing by the tenant.

In this case, I find that the tenants did not agree in writing to “**an amount**” that could be retained by the landlord from the security deposit. The landlord’s notation on the condition inspection report instead referenced costs “up to the full \$900 deposit” without specifying an amount that could be retained. As such, I find that the landlord was not authorized by the tenants in writing to retain the security deposit or any portion of it.

The landlord confirmed that she did not have authority through the *Act*, such as an order from an Arbitrator through a prior arbitration hearing monetary award, to keep any portion of the security deposit.

During the hearing, the landlord testified that she returned \$216.70 to the tenants, however, I note that in the tenants’ Application they stated that \$218.70 was returned to them by the landlord. I have used the amount provided by the tenants in their Application, \$218.70, as the amount returned by the landlord, since the tenants are responsible for preparing their claim based on accurate amounts.

I note that the landlord provided verbal testimony and documentary evidence about the issue of damages and cleaning deficiencies left by the tenants; however, the landlord is unable to make a monetary claim through the tenants' Application.

The landlord may still file her own Application for compensation for the alleged damages and cleaning deficiencies 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, less the amount of the security deposit already returned to the tenants, with any interest calculated on the original amount only. No interest is payable for this period.

I find that the amount of compensation owed to the tenants is calculated as follows:

Original security deposit paid by tenants = \$900.00
Doubling provision applied pursuant to section 38(6) of the *Act* = \$1,800.00
Amount of security deposit returned by landlord = \$218.70
Amount of monetary award owed to tenants = \$1,800.00 - \$218.70 = \$1,581.30

Therefore, the tenants are entitled to a monetary award of \$1,581.30 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 **\$1,681.30** 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 \$1,681.30 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: October 23, 2018

Residential Tenancy Branch