Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT, MNDCT, MNSD

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant on November 05, 2018 (the "Application"). The Tenant applied for compensation for monetary loss or other money owed, return of double the security deposit and reimbursement for the filing fee.

The Tenant filed an Amendment increasing the amount claimed (the "Amendment").

This matter came before me for a hearing February 28, 2019 and an Interim Decision was issued on that date. This decision should be read with the Interim Decision.

The Tenant appeared at the hearing with the Advocate and Witness. The Landlord appeared at the hearing with the Co-landlord. I explained the hearing process to the parties. The parties provided affirmed testimony.

Both parties had submitted evidence prior to the original hearing date. I addressed service of the hearing package and evidence at the original hearing.

The Landlord testified that she had not received the hearing package. She said she was able to call into the hearing because of an email sent to her by the RTB. She said she called the RTB and was given the hearing date and time. She said she did receive the Amendment with 36 pages of evidence.

The Tenant testified that she served the hearing package on the Landlord. She had submitted a Canada Post customer receipt and the tracking history for the package as evidence. The customer receipt includes Tracking Number 1 as noted on the front page of this decision. The Landlord confirmed the address on the customer receipt is her address. The tracking history shows the package was sent November 06, 2018. It

shows a notice card was left November 07, 2018 and November 13, 2018. It shows the package was unclaimed and returned to the sender December 16, 2018.

The Tenant testified that both packages sent to the Landlord contained evidence.

The Landlord did not provide any evidence showing she did not, or could not, have received the notice cards. The Landlord said she received the email from the RTB January 29, 2019 and called the RTB February 04, 2019. She said the RTB did not tell her what the Application was about.

The Tenant had not received the Landlord's evidence. The Landlord said she was not aware she had to serve her evidence on the Tenant. The Tenant said she was fine with all the Landlord's evidence being admitted other than the photos as she had not seen them. I heard from the parties on whether the photos should be admitted or excluded.

Based on the customer receipt and tracking history submitted, I accept the hearing package and evidence were sent to the Landlord by registered mail on November 06, 2018. From the tracking history submitted, I accept two notice cards were left for the Landlord indicating the package was available for pick-up. Based on the tracking history submitted, I accept the package was unclaimed and returned to the Tenant.

Based on the evidence provided, I find the Tenant served the Landlord with the hearing package and evidence in accordance with sections 88(c) and 89(1)(c) of the *Residential Tenancy Act* (the "*Act*"). Pursuant to section 90(a) of the *Act*, the Landlord is deemed to have received the package November 11, 2018, five days after it was mailed.

I acknowledge that the Landlord did not in fact receive the hearing package and evidence. I also acknowledge that section 90 of the *Act* sets out a rebuttable presumption. Policy Guideline 12 deals with service and states in part:

> Where a document is served by Registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not override the deeming provision. Where the Registered Mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.
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> In the event of disagreement between the parties about the date a document was served and the date it was received, an arbitrator may hear evidence from both parties and make a finding of when service was effected.

> The Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done…
>
> A party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received. For example, if a party claimed to be away on vacation at the time of service, the arbitrator would expect to see evidence to prove that claim, such as airplane tickets, accommodation receipts or a travel itinerary. It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

Here, I am satisfied the Tenant served the Landlord in accordance with the *Act*. I am satisfied the Landlord was provided notice cards indicating the package was available for pick-up. The Landlord has provided no evidence that this did not occur or that she could not have received the notice cards. The Landlord has provided no basis for overriding the deeming provision in section 90 of the *Act*. Therefore, the deeming provision applies, and I find the Landlord was properly served with the hearing package and Tenant's evidence.

I also note the Landlord received the Amendment and further evidence which would have alerted her to the Application. Further, the Amendment sets out the Tenant's monetary claims and therefore the Landlord would have been aware of these prior to the hearing. As well, the Landlord must have had time to prepare for the hearing and submit evidence as she did so February 19, 2019, nine days before the hearing.

The Landlord did not serve her evidence on the Tenant as required by the Rules of Procedure. I exclude the photos given this. I accept that admitting them would be unfair to the Tenant when she was not made aware that the Landlord would rely on them at the hearing. I also note the photos are irrelevant to the issues before me as they simply show the state of the rental unit upon move-out.

The first hearing was adjourned after I heard from the parties on the security deposit issue. At the second hearing, the Landlord confirmed she received the hearing package and evidence from the Tenant after the first hearing. The Tenant confirmed she received the Landlord's evidence. The Tenant tried to change her position about agreeing to the admissibility of the Landlord's evidence, other than the photos. I told the Tenant she was not permitted to now change her position about admissibility of the Landlord's evidence.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered all admissible documentary evidence and oral testimony of the parties. I have only referred to the evidence I find relevant in this decision.

Issues to be Decided

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

2. Is the Tenant entitled to compensation for monetary loss or other money owed?

3. Is the Tenant entitled to reimbursement for the filing fee?

Background and Evidence

The Tenant sought the following compensation:

1	Compensation for false information	$4,000.00
2	Electricity bill	$30.00
3	Last month of rent	$875.00
4	12 months of rent	$10,500.00
5	Double the security deposit	$876.00
	TOTAL	**$16,281.00**

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. The tenancy started April 07, 2017 and was a fixed term tenancy ending August 01, 2017. The tenancy then became a month-to-month tenancy. Rent was $875.00 per month due on the first day of each month. The Tenant paid a $438.00 security deposit.

Compensation for false information

The Tenant sought the $4,000.00 as a fine for falsifying information. In the Amendment, the Tenant refers to the *Manufactured Home Park Tenancy Act*. The remainder of the explanation for this request is unclear. At the hearing, the Tenant clarified she is seeking to have an administrative penalty imposed on the Landlord. I told the Tenant that an administrative penalty is not compensation and there is a separate process for this. I told her to call the RTB and speak to an Information Officer if she has questions about the process. I told the parties I would not deal with this request at this hearing.

Double the security deposit

The parties agreed the tenancy ended July 31, 2018. Both parties agreed the Tenant provided the Landlord with her forwarding address in writing on the Condition Inspection Report on August 03, 2018.

The parties agreed on the following. The Landlord did not have an outstanding monetary order against the Tenant at the end of the tenancy. The Landlord did not apply to the RTB to keep the security deposit.

The Landlord took the position that the Tenant signed the Condition Inspection Report and therefore agreed to the deductions noted. The Tenant said she did not agree in writing that the Landlord could keep some or all the security deposit and pointed out that the relevant section on the Condition Inspection Report is blank.

A copy of a cheque from the Landlord to the Tenant dated August 15, 2018 for $293.00 for “return damage deposit plus $30.00 for electricity” was submitted as evidence. The Landlord testified that she sent this cheque to the Tenant August 15, 2018. She said she assumed the cheque had never been cashed. The Tenant testified that she received the cheque August 26, 2018. She said she returned the cheque with a letter by registered mail. She said the mail was unclaimed and returned to her. She said she has not cashed the cheque.

Both parties agreed move-in and move-out inspections were done.

At the second hearing, the Co-landlord said he and the Landlord had now reviewed the rules and agree it is fair to return the security deposit to the Tenant. He took the position that it is not fair for the Landlord to have to return double.

Electricity bill

The Landlord agreed she owes the Tenant $30.00 for an electricity bill.

Last month of rent

At the second hearing, the Co-landlord agreed the Landlord owes the Tenant $875.00 as one month of free rent pursuant to the Two Month Notice to End Tenancy for Landlord's Use of Property issued to the Tenant.

12 months of rent

A copy of the Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice") was submitted as evidence. It is addressed to the Tenant. It is dated May 28, 2018 with an effective date of August 01, 2018. The grounds for the Notice are that the rental unit will be occupied by the Landlord or the Landlord's close family member.

There was no issue that the Notice was served on the Tenant May 30, 2018.

The Tenant testified as follows. The Landlord did not follow through with the stated purpose of the Notice. She received a text from a neighbour of the rental unit saying someone else had moved in who is not related to the Landlord and the rental unit is on a rental website. The Tenant had submitted the text messages which are from September 11, 2018. The Tenant also submitted a signed statement from this individual.

The Tenant further testified as follows. She and the Witness went to the rental unit and confirmed with the current resident that they had been renting the unit since September of 2018. On February 04th, she and the Advocate visited the former neighbour of the rental unit who said that the Landlord's son did not reside in the rental unit and that another tenant had moved in.

The Tenant called the Witness who testified as follows. On January 29, 2019, she visited the rental unit and met the tenants who confirmed they are not family members of the Landlord and had been renting the unit since September of 2018. The Tenant had also submitted a signed witness statement from the Witness.

The Co-landlord asked the Witness questions that related to privacy issues and whether she had permission to go to the rental unit or be on the property. I do not find the questions or answers relevant to the issues before me and will not outline them here.

The Co-landlord testified as follows. The Notice was issued with the intent that his brother, the son of the Landlord, would move into the rental unit. His brother did live in the rental unit for August. It was his brother's intention to get work with a company in the same city as the rental unit. He was going to live in the rental unit long term. However, his brother's company started giving him jobs in other cities and areas. It no longer made sense for his brother to stay in the rental unit. The circumstances were out of the Landlord's control.

The Co-landlord further testified as follows. His brother was supposed to renovate a garage in the back of the property. There was a tenant in the garage who did not vacate as expected and so his brother could not work on the project. This was out of the Landlord's control. The Landlord could not afford to leave the rental unit empty.

The Landlord testified that she fully intended for her son to stay in the rental unit. She said there was no ill intent. She testified that her son lived in the rental unit from August 01, 2018 to the end of August. She said she then posted the rental unit for rent and rented it to someone else, who was not a family member, for September 01, 2018.

The Landlord had submitted a copy of the tenancy agreement between her, the Co-landlord and her son.

In reply, the Tenant pointed out that the move-out inspection was done August 03, 2018 yet the Landlord is stating her son moved into the rental unit August 01, 2018.

In reply, the Landlord confirmed her son moved in August 01, 2018. She submitted that it is relevant that she was helpful to the Tenant during and at the end of the tenancy and that she was a good landlord to the Tenant.

Analysis

Security Deposit

Section 38 of the *Act* sets out the obligations of a landlord in relation to a security deposit held at the end of a tenancy.

Section 38(1) requires a landlord to return the security deposit or claim against it within 15 days of the later of the end of the tenancy or the date the landlord receives the tenant's forwarding address in writing. There are exceptions to this outlined in sections 38(2) to 38(4) of the *Act*.

There was no issue that move-in and move-out inspections were done and therefore the Tenant did not extinguish her rights in relation to the security deposit under sections 24 or 36 of the *Act*.

There was no issue the tenancy ended July 31, 2018 and the Tenant provided her forwarding address in writing to the Landlord August 03, 2018. Therefore, August 03, 2018 is the relevant date for the purposes of section 38(1) of the *Act*. The Landlord had 15 days from August 03, 2018 to repay the security deposit or claim against it.

There is no issue the Landlord did not claim against the security deposit.

There is no issue the Landlord returned $263.00 of the security deposit to the Tenant on August 15, 2018. This was not sufficient. The only options open to the Landlord were to return the entire security deposit or file a claim against the security deposit by August 18, 2018. The Landlord did neither. Therefore, the Landlord failed to comply with section 38(1) of the *Act*.

Based on my finding that the Tenant did not extinguish her rights in relation to the security deposit, section 38(2) of the *Act* does not apply.

There is no issue that the Landlord did not have an outstanding monetary order against the Tenant at the end of the tenancy and therefore section 38(3) of the *Act* does not apply.

The Landlord took the position that the Tenant agreed to the Landlord keeping some of the security deposit by signing the move-out Condition Inspection Report. I do not agree. The relevant portion of the Condition Inspection Report which states "I [Tenant's

name] agree to the following deductions from my security and/or pet damage deposit" is not signed by the Tenant. The Tenant was required to sign point four on page three, this is not an agreement that the Landlord can keep some of the security deposit. I do not accept that the Tenant agreed in writing that the Landlord could keep some of the security deposit and find section 38(4) does not apply.

Given the Landlord failed to comply with section 38(1) of the *Act*, and that none of the exceptions apply, the Landlord is not permitted to claim against the security deposit and must return double the security deposit to the Tenant pursuant to section 38(6) of the *Act*.

I note that the state of the rental unit is irrelevant to the issues before me. If the Landlord thought the rental unit was left dirty or damaged, she was required to file a claim against the security deposit with the RTB within 15 days of August 03, 2018 to keep some of the security deposit. The Landlord did not do so as required.

Policy Guideline 17 deals with security deposits and doubling and sets out the following on page three:

> The following examples illustrate the different ways in which a security deposit may be doubled when an amount has previously been deducted from the deposit:
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> > Example A: A tenant paid $400 as a security deposit. At the end of the tenancy, the landlord held back $125 without the tenant's written permission and without an order from the Residential Tenancy Branch. The tenant applied for a monetary order and a hearing was held.
> >
> > The arbitrator doubles the amount paid as a security deposit ($400 x 2 = $800), then deducts the amount already returned to the tenant, to determine the amount of the monetary order. In this example, the amount of the monetary order is $525.00 ($800 - $275 = $525).

This example applies here. The Tenant paid a $438.00 security deposit. The Landlord held back $175.00 without the Tenant's written permission and without an order from the RTB permitting this. The $438.00 is therefore doubled and the Landlord must return $876.00 to the Tenant. I would usually deduct the $263.00 already returned to the Tenant. However, the Tenant said she never cashed the cheque and the Landlord did not dispute this. I anticipate that the cheque is no longer valid given it was issued more than eight months ago. Therefore, I award the Tenant the full $876.00. The Tenant of

course cannot now cash the cheque. If the Tenant does cash the cheque, only the remaining $613.00 can be sought through the Monetary Order.

12 months of rent

The Notice was issued May 28, 2018 and served May 30, 2018. Therefore, the new legislation that came into force May 17, 2018 applies.

Section 51 of the *Act* states:

> (2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if
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> > (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
> >
> > **(b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.**
>
> (3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from
>
> > (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
> >
> > (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.
>
> [emphasis added]

There is no issue that the rental unit was not occupied by the Landlord or a close family member for at least six months after the effective date of the Notice as the Landlord

acknowledged re-renting the unit to a non-family member September 01, 2018, only one month after the effective date of the Notice.

The only issue is whether the Landlord should be excused under section 51(3) of the *Act* from paying the Tenant the 12 months rent compensation due to extenuating circumstances that prevented the Landlord from using the rental unit for the stated purpose for at least six months.

It is the Landlord who has the onus to prove extenuating circumstances. The Landlord has failed to do so. The Landlord submitted no evidence from her son, such as a witness statement, and did not call her son as a witness. The Landlord submitted no evidence in relation to her son's work. The Landlord submitted no evidence in relation to the garage issue or the tenant in the garage failing to vacate as planned. The only relevant evidence submitted by the Landlord is the tenancy agreement with her son. This may show that her son moved into the rental unit August 01, 2018, although I am not deciding that I am satisfied he did. However, the tenancy agreement is irrelevant to the extenuating circumstances claimed.

I acknowledge that, in the Interim Decision, I did not permit the parties to submit further evidence or call witnesses that were not being called at the first hearing. This is standard as an adjournment is not an opportunity for parties to bolster their case. The parties should come to the first hearing prepared to deal with all issues raised.

I also acknowledge that the Landlord did not receive a copy of the hearing package prior to the first hearing. However, I have found the Tenant complied with the *Act* and deemed the hearing package and evidence received and therefore this is not a valid reason for failing to submit relevant evidence prior to the hearing or call relevant witnesses at the hearing.

Further, the Landlord received the Amendment which clearly states the Tenant is seeking "last month of rent" and "12 months of rent". The Landlord knew the Tenant was issued the Notice and should have been aware of the compensation requirements in relation to this. As well, the Landlord must have understood from the Amendment, evidence or call to the RTB that the Tenant was seeking compensation for the Landlord not following through with the stated purpose of the Notice as she submitted the tenancy agreement she had with her son. I do not see how this could be relevant in the absence of the Tenant's claim for 12 months of compensation under section 51 of the *Act*.

Given the lack of evidence to support the position of the Landlord, I am not satisfied the extenuating circumstances claimed existed.

The Landlord and Co-landlord sought to make submissions about the Landlord being a good landlord. I do not find these submissions relevant. The Landlord being a good landlord does not make it more likely that the extenuating circumstances claimed existed or were in fact extenuating circumstances. These are the issues before me.

Further, I do not find the submission that the Landlord had good intentions when issuing the Notice helpful to the Landlord in these circumstances. This would have been an issue if the Tenant had disputed the Notice. But that is not what we are now dealing with. The Landlord must show that extenuating circumstances caused her to be unable to follow through with the stated purpose of the Notice for at least six months. The Landlord has failed to show the extenuating circumstances claimed existed. I do not find her intent at the time the Notice was issued to change this analysis.

Given the above, I decline to excuse the Landlord from the compensation requirement under section 51(2) of the *Act*. The Landlord must compensate the Tenant $10,500.00.

In summary, the Tenant is entitled to the following compensation:

2	Electricity bill	$30.00 (by agreement)
3	Last month of rent	$875.00 (by agreement)
4	12 months of rent	$10,500.00
5	Double the security deposit	$876.00
	TOTAL	**$12,281.00**

As the Tenant was successful in this application, I award her reimbursement for the $100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, the Tenant is entitled to a Monetary Order in the amount of $12,381.00.

Conclusion

The Tenant is entitled to a Monetary Order in the amount of $12,381.00 and I grant the Tenant a Monetary Order in this amount. This Order must be served on the Landlord as soon as possible. If the Landlord fails to comply with this Order, the 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 *Act*.

Dated: May 09, 2019

Residential Tenancy Branch