



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNSD FFT MNR MNDC FFL

Introduction

Both parties had filed Applications and attended the hearing and gave sworn testimony. Both provided evidence that they had served each other with their Application for Dispute Resolution by registered mail and both acknowledged receipt. The tenant said he personally gave his forwarding address to the landlord with the keys on March 31 or April 1st or 2nd, 2017. The landlord agreed he had received them as stated. I find the documents were served pursuant to sections 88 and 89 of the Act for the purposes of this hearing. The tenant applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) An Order to return double the security deposit pursuant to Section 38; and
- b) To recover the filing fee for this application.

The landlord applies pursuant to section 46 of the Act for a monetary order for unpaid utilities and to recover the filing fee.

Issue(s) to be Decided:

Has the tenant proved on the balance of probabilities that he is entitled to the return of double the security deposit according to section 38 of the Act?

Has the landlord proved on the balance of probabilities that he is entitled to compensation for utilities as claimed?

Preliminary Issue:

The tenant vacated on March 31, 2017 and filed his Application on March 28, 2019 which is just within the 2 year limitation period provided in the Act. The landlord filed his Application on May 8, 2019 which is beyond the two year limitation period and would not be considered except in certain circumstances. Residential Tenancy Policy Guideline 16 comments on this circumstance as follows:

the limitation period for filing an application for dispute resolution is two years from the date the tenancy ends or is assigned unless the Act sets specifies a different limitation period for the type of claim in question. Additionally, a party to a claim can file a counterclaim outside of the limitation period, as long as they do so before the dispute resolution hearing takes place

I find since the landlord filed a counterclaim to the tenant's Application, the limitation period is extended for his counterclaim since he filed it before the tenant's Application was heard. Therefore I heard both claims.

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to present evidence and make submissions. The landlord said he had a hearing problem so his nephew assisted him with both hearing and understanding the issues. The tenant said he had paid a security deposit of \$700 and agreed to rent the unit for \$1400 a month. The tenant vacated the unit on March 31, 2017 and provided his forwarding address in writing on April 1st or 2nd, 2017, together with the keys. The landlord agreed these facts were correct. The tenant's deposit has never been returned and he gave no permission to retain any of it. He requests a refund of double the amount (\$1400) in accordance with section 38 of the Act.

The landlord said he retained the deposit for unpaid utilities. He said the tenant owed \$4211.64 for water bills from the city and \$4789.87 for a special levy. He did not file an Application to claim against the deposit until May 8, 2017. The landlord pointed to clause 4 and 7 of the lease. Clause 4 states the security deposit is to apply against damage...unpaid rent, unpaid utilities and cleaning. Clause 7 states the tenant must apply under their own name for connections to BC Hydro and for any other utilities they require. The tenant is responsible for these bills. The landlord also said the tenant left the place dirty and "ran away".

The tenant said this was his first rental, he did not expect to have to pay for water utility as it is a city utility included with tax forms and it would not be possible to put it in his name. Furthermore, in the 7 years and 6 months he lived in the rental unit, the landlord never presented him with a water bill. He had the other utilities like BC Hydro and TV connected in his name in accordance with clause 7 of his lease. Although the landlord said he left the place dirty, that is untrue for he hired professional cleaners to do it and took a video as evidence of its condition on move out. He said he did not "run away", the landlord in fact gave him an email notice to end his tenancy for he had sold the place. The landlord confirmed this was true.

When questioned, the landlord said the tenant is an educated man and he depended on him for his own English is not good. He was a nice tenant and he was not concerned about the water utility cost then but now the tenant is not nice and is claiming his security deposit back so now he wants the cost of the water utility. The landlord submitted the bills from the City showing utility levies. Separate water utility bills were not provided so it is unclear if the "utility levy" is actually the cost for the water and not a

separate bill; the landlord has claimed two separate amounts; \$4211.64 for water utility and \$4789.87 for the utility levy.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

Analysis:

In regard to the tenant's claim, I find on the weight of the relevant evidence for this matter; **Section 38(1)** of the Act provides as follows (**emphasis mine**)

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

38(1) (a) the date the tenancy ends, and

38(1) (b) the date the landlord receives the tenant's forwarding address in writing,

the landlord **must** do one of the following:

38(1)(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;

38(1) (d) file an application for dispute resolution to make a claim against the security deposit or pet damage deposit.

I find the landlord failed to repay the security deposit, or to make an application for dispute resolution within 15 days of receiving the tenant's forwarding address in writing on April 1st or 2nd, 2017/014 and is therefore liable under Section 38(6) which provides:

38(6) If a landlord does not comply with subsection (1), the landlord

38(6) (a) may not make a claim against the security deposit or any pet damage deposit, and

38(6) (b) **must** pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I find the evidence of the tenant credible that he paid \$700 security deposit on November 14, 2004, served the landlord personally with his forwarding address in writing on October 1, 2019 and vacated on March 31, 2017. I find he gave no permission for the landlord to retain the deposit and has not received the refund of his security deposit. I find the landlord agreed with these facts. The landlord stated she has not filed an Application to claim against the deposit. I find the tenant entitled to recover double his security deposit or \$1400. Although the landlord relied on clause 4 of his lease which he states gave him permission to keep the deposit, I find section 20 (e) of the Act states:

*20 A landlord must not do any of the following:
(e) 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.*

Furthermore, section 5 of the Act states

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Therefore, I find clause 4 of the tenancy agreement is of no force and effect and the tenant is entitled to the refund as stated and to recover his filing fee.

Regarding the landlord's claim for the utility of water, I find his evidence unclear and inconsistent. It is clear that his water utility is billed by the City and included in taxes. I find clause 7 of the lease is unclear as it specifies the tenant must put utilities such as BC Hydro and other connections in his name. I find insufficient evidence that it would be possible for a tenant to have the City put a bill for a water utility from the City tax department in his name.

Furthermore, as the landlord pointed out, utilities can be classified as unpaid rent. I find section 46 of the Act states:

46 (6) If..

(a) a tenancy agreement requires the tenant to pay utility charges to the landlord, and

(b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,

the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

I find insufficient evidence that the tenant was ever given a written demand to pay the water utility bill during the over 7 years of his tenancy. In fact, the landlord said he never asked him to pay it for “he was nice” until he decided to claim the refund of his security deposit. It appears from the weight of the evidence that the landlord retaliated by filing this claim after the tenant filed the application against him.

I find insufficient evidence that there was an agreement by the tenant to pay a utility water bill from the City which is billed to the landlord on tax notices or that the landlord complied with the Act and ever demanded in writing that such a bill be paid. I dismiss the claim of the landlord in its entirety without leave to reapply.

Conclusion:

The landlord’s application is dismissed in its entirety with no recovery of the filing fee due to lack of success.

The tenant’s application is granted. I find the tenant entitled to a monetary order as calculated below and to recover the filing fee for this application.

Original security deposit (no interest 2009-2017)	700.00
Double security deposit	700.00
Filing fee	100.00
Total Monetary Order to Tenant	1500.00

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: May 30, 2019

Residential Tenancy Branch