



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 tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38 and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

While the tenant attended the hearing by way of conference call, the landlord did not. I waited until 1:40 p.m. to enable the landlord to participate in this scheduled hearing for 1:30 p.m. The tenant was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The tenant provided sworn, undisputed testimony that she had served the landlord with her application for dispute resolution hearing package ("Application") and evidence by way of registered mail on February 15, 2019. The tenant provided a tracking number for this package. In accordance with sections 88, 89, and 90 of the *Act*, I find that the landlord was deemed served with the Application and evidence on February 20, 2019, five days after mailing.

Preliminary Issue—Amendment to Tenant's Application

In the tenant's evidentiary materials, the tenant requested additional monetary compensation for losses that were not indicated in her original application. No amendments were filed by the tenant.

Rule 4.6 states the following:

***As soon as possible**, copies of the Amendment to an Application for Dispute Resolution and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by the applicable Act and these Rules of Procedure.*

The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the Act and these Rules of Procedure.

In any event, a copy of the amended application and supporting evidence must be received by the by the respondent(s) not less than 14 days before the hearing.

As an amendment was not received in accordance with RTB Rule 4.6, and the respondent has the right to review and respond to the amendment and supporting evidence, the tenant's request for a monetary order beyond the original application related to her security deposit and the filing fee will not considered as part of this application.

Issues(s) to be Decided

Is the tenant entitled to the return of her security deposit pursuant to section 38 of the Act?

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

Background and Evidence

The tenant provided the following sworn, undisputed testimony as the landlord did not attend the hearing. This tenancy was to begin on January 13, 2019, with monthly rent set at \$1,350.00. The landlord had collected a security deposit of \$675.00 plus half a

month's rent for January 2019 for a total of \$1,350.00. The tenant testified that the landlord had cancelled this tenancy on the date she was to move in, and returned only \$875.00 to her. The tenant provided confirmation of electronic transfers to the landlord on January 8, 2019, as well as a confirmation of an electronic transfer to the tenant in the amount of \$875.00 from the landlord to her on January 13, 2019. The tenant testified that the online ad for the rental unit was originally set for \$1,200.00, but both parties had agreed to set the monthly rent at \$1,350.00 to allow for additional occupants. The tenant testified that no written tenancy agreement was signed by either party. The tenant provided a forwarding address on January 17, 2019, and requested a return of the remainder of her security deposit.

Analysis

The definition of a "tenancy agreement" is outlined in the following terms in section 1 of the *Act*:

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

Section 16 of the *Act* states the following about when a tenancy agreement takes effect.

Start of rights and obligations under tenancy agreement

16 The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

A tenancy can exist in the absence of a written tenancy agreement. I find that in this case, the tenant provided sufficient evidence to support that she had paid the landlord both a security deposit, and a portion of the monthly rent. I find that these actions imply that a tenancy was agreed upon.

In light of the undisputed facts before me, I find that the both parties had entered into a tenancy agreement that was to begin on January 13, 2019.

Section 44 of the *Act* states how a tenancy may be ended:

How a tenancy ends

- 44** (1) A tenancy ends only if one or more of the following applies:
- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
 - (i) section 45 [*tenant's notice*];
 - (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];
 - (ii) section 46 [*landlord's notice: non-payment of rent*];
 - (iii) section 47 [*landlord's notice: cause*];
 - (iv) section 48 [*landlord's notice: end of employment*];
 - (v) section 49 [*landlord's notice: landlord's use of property*];
 - (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];
 - (vii) section 50 [*tenant may end tenancy early*];
 - (b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
 - (c) the landlord and tenant agree in writing to end the tenancy;
 - (d) the tenant vacates or abandons the rental unit;
 - (e) the tenancy agreement is frustrated;

(f) the director orders that the tenancy is ended;

(g) the tenancy agreement is a sublease agreement.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

I find that both parties had agreed to enter into a tenancy agreement that was to begin on January 13, 2019. Both parties, as stated in Section 16 of the *Act*, were therefore bound by the rights and obligations required by this tenancy agreement and *Act* despite the fact that the tenant was never able to occupy the rental unit. I find that the landlord had unilaterally decided to end this tenancy before the tenant was able to move in. Neither party had signed any Mutual Agreements to end tenancy, nor did the landlord issue any Notices to End Tenancy to the tenant. The landlord did not have an Order of Possession, nor do I find that that the tenant abandoned this tenancy. Based on these facts, I find that the landlord failed to comply with section 44(1) of the *Act* in ending this tenancy.

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "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."

In this case, I find that the landlord had not returned the tenant's security deposit in full within 15 days of receipt of the tenant's forwarding address in writing. There is no record that the landlord applied for dispute resolution to obtain authorization to retain

any portion of the tenant's security deposit. The tenant gave sworn testimony that the landlord had not obtained their written authorization at the end of the tenancy to retain any portion of the tenant's security deposit.

The tenant testified that the landlord had returned \$875.00 to her. As the tenant had paid the landlord \$675.00 for the January 2019 rent, the remaining \$200.00 refund shall be applied to her \$675.00 security deposit. The landlord still has \$475.00 of her security deposit in his possession. In accordance with section 38 of the *Act*, I find that the tenant is therefore entitled to a monetary order set out in the table below. As the tenant has been successful in her application, I find that the tenant is also entitled to recover her filing fee from the landlord.

Item	Amount
Monetary Award for Landlord's Failure to Comply with s. 38 of the <i>Act</i>	\$675.00
Return of remaining portion of security deposit held by landlord (\$200.00 returned to the tenant, as well as the \$675.00 in monthly rent)	475.00
Recovery of Filing Fee	100.00
Total Monetary Order	\$1,250.00

Conclusion

I issue a \$1,250.00 Monetary Order in the tenant's favour as set out in the table below:

Item	Amount
Monetary Award for Landlord's Failure to Comply with s. 38 of the <i>Act</i>	\$675.00
Return of remaining portion of security deposit held by landlord (\$200.00 returned to the tenant, as well as \$675.00 partial rent for January 2019)	475.00
Recovery of Filing Fee	100.00
Total Monetary Order	\$1,250.00

The tenant is provided with this Order in the above terms and the landlord must be served with a copy of 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: June 26, 2019

Residential Tenancy Branch