



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes          FFT, MNSD

### Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant on September 17, 2019 (the “Application”). The Tenant applied for return of the security deposit as well as reimbursement for the filing fee.

The Tenant and Landlord appeared at the hearing. I explained the hearing process to the parties. The parties provided affirmed testimony.

The Tenant advised that she is seeking double the security deposit back if I find the Landlord failed to comply with the *Residential Tenancy Act* (the “Act”).

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the documentary evidence and all 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 reimbursement for the filing fee?

### Background and Evidence

The Tenant submitted two written tenancy agreements between the parties. The first states it was for a term from October 01, 2007 to November 30, 2017. However, the agreement was signed September 17, 2017. Rent was \$550.00 due on the first day of each month. The Tenant was required to pay a \$275.00 security deposit. The agreement is signed by the Tenant and co-landlord.

The second tenancy agreement was for a term from January 2019 to June 30, 2019. Rent was \$570.00 due on the first day of each month. No security deposit was required. The agreement states:

This tenancy agreement is for a single furnished room rental; kitchen, sitting area, utilities, laundry, entrance and...etc. are share with the landlord and other student; therefore, not under Residential Tenancy Act or Regulation.

The parties agreed the written tenancy agreements are accurate.

I asked the parties what occurred between 2017 and 2019.

The Tenant testified as follows. She stayed in the rental unit and continued to pay rent monthly. She signed the new tenancy agreement with the landlords in 2019. The tenancy was a month-to-month tenancy between the two agreements. She vacated the rental unit August 15, 2019 pursuant to a Two Month Notice.

The Landlord testified as follows. At the end of the first tenancy agreement, the landlords let the Tenant stay in the rental unit for a further two months based on a verbal agreement. The landlords then asked the Tenant to sign the new agreement and the Tenant agreed. The tenancy was not a month-to-month tenancy between the two agreements because the landlords just allowed the Tenant to stay out of sympathy given her personal situation. The Tenant was paying rent monthly during this time. The tenancy ended pursuant to a Two Month Notice. The Tenant vacated August 15, 2019.

The parties disagreed about whether the Tenant paid a security deposit. The Tenant pointed to the first tenancy agreement to show she did pay a security deposit in 2017. She also pointed to a receipt for this payment. The Tenant testified that she never got the security deposit paid in 2017 back.

The Landlord testified that the Tenant used the security deposit towards January rent when she signed the new tenancy agreement.

The Tenant pointed to a receipt in evidence for January rent. She testified that she paid rent in cash.

The Landlord acknowledged the January rent receipt does not note that the security deposit was used towards January rent. I asked the Landlord why this was not noted. The Landlord said because he is an honourable person. The Landlord could not point to any evidence to support his verbal testimony that the security deposit was used towards January rent, other than an email dated August 20, 2019. This email is from the landlords stating that the Tenant used the security deposit for January rent in response to the Tenant asking for return of the security deposit.

During the hearing, the Landlord referred to the rental unit as a room. I asked the parties about this further. The Tenant confirmed the rental unit was in a separate suite from the landlords.

The Landlord testified as follows. The basement is a separate suite with two rooms. The basement suite has a kitchen and bathroom. The Tenant rented one of the rooms. Another student rented the second room. The landlords had their own bathroom and kitchen in the upstairs suite.

The Landlord seemed to suggest that he also used the bathroom and kitchen in the basement suite. I questioned the Landlord about this further. The Landlord said he would sometimes use the bathroom and kitchen when he was inspecting the basement suite.

The parties agreed the Tenant provided the Landlord her forwarding address in writing August 15, 2019.

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 Tenant did not agree in writing at the end of the tenancy that the Landlord could keep some or all of the security deposit. The Landlord did not apply to the RTB to keep the security deposit.

The Landlord testified that the parties did a move-in inspection. The Tenant denied that the parties did a move-in inspection and testified that she was not offered two opportunities to do one.

The Landlord testified that the parties did a move-out inspection. The Tenant agreed the parties walked around but denied that any paperwork was done.

### Analysis

The Landlord did not submit that the RTB does not have jurisdiction in this matter. However, I will address this given the comments in the second tenancy agreement and the Landlord's suggestion that the parties shared bathroom and kitchen facilities.

Section 4 of the *Residential Tenancy Act* (the "*Act*") states:

4 This Act does not apply to

(c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation...

The second tenancy agreement states that the kitchen, sitting area, utilities, laundry and entrance are shared with the landlords and other students and therefore the *Act* does not apply. I do not accept that this is the case. I find based on the testimony of both parties that the Tenant rented a room in a basement suite. I find based on the testimony of both parties that the basement suite was a separate suite from the landlords' suite. I find based on the testimony of the Landlord that the basement suite had its own kitchen and bathroom. I also find based on the testimony of the Landlord that the landlords had their own kitchen and bathroom in their suite.

It does not accord with common sense that the landlords would go downstairs to use the kitchen and bathroom in the basement suite when they had their own kitchen and bathroom in their suite. I would expect to see some compelling evidence to support that this occurred if it in fact did. The Landlord did not point to such evidence.

Further, when questioned about his comments, the Landlord said he sometimes used the bathroom or kitchen when he was inspecting the basement suite. This may be true. However, this does not mean the RTB does not have jurisdiction as using facilities when you happen to be inspecting the rental unit is not the equivalent of sharing facilities. Whether the Tenant shared utilities or laundry with the landlords is irrelevant. This does not preclude jurisdiction of the RTB. Further, it is not relevant that the Tenant shared space with another tenant. This does not preclude jurisdiction of the RTB.

Given the above, I do not accept that section 4 of the *Act* applies and I find the RTB does have jurisdiction in this matter.

The Landlord seemed to suggest that there was no tenancy between the first tenancy agreement and second tenancy agreement and that the landlords simply let the tenant stay in the rental unit. I do not accept this position. Given the testimony of both parties, I find the Tenant stayed in the rental unit and continued to pay rent monthly between the two agreements and therefore find that the tenancy did not end but continued through to August 15, 2019 when the Tenant vacated the rental unit.

Based on the first tenancy agreement and receipt submitted, I find the Tenant paid a \$275.00 security deposit September 17, 2017.

I do not accept that the Tenant used the security deposit towards January rent. The Tenant submitted the January rent receipt in the amount of \$570.00. It does not state that the security deposit was used towards this amount. The Landlord could not point to documentary evidence from January of 2019 showing the security deposit was used towards January rent. I would expect a landlord to note down on a rent receipt that the security deposit was used towards the amount shown on the receipt, or to have some documentation showing this occurred, given the importance of security deposits and paying rent in a tenancy. The Landlord pointed to an email dated August 20, 2019 about this. This email is not sufficient. It is simply the landlords stating their position that the security deposit was used for January rent seven months after this allegedly occurred. This is not compelling evidence that the security deposit was in fact used towards January rent.

In the circumstances, I am satisfied the security deposit was not used towards January rent. I am satisfied the landlords never returned the security deposit paid in 2017 as the Landlord did not claim they did. I am satisfied the Landlord still holds the security deposit. I am satisfied the security deposit was held for the duration of this tenancy which started in 2017 and did not end until August of 2019.

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*.

Given the testimony of the parties, I accept the tenancy ended August 15, 2019.

Given the testimony of the parties, I accept the Tenant provided the Landlord her forwarding address in writing August 15, 2019.

August 15, 2019 is the relevant date for the purposes of section 38(1) of the *Act*. The Landlord had 15 days from August 15, 2019 to repay the deposit or file a claim with the RTB against it.

Given the testimony of the parties, I find the Landlord did not repay the deposit or file a claim against it. I find the Landlord failed to comply with section 38(1) of the *Act*.

Sections 38(2) to 38(4) of the *Act* state:

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) [tenant fails to participate in start of tenancy inspection] or 36 (1) [tenant fails to participate in end of tenancy inspection].

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(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...

There is no basis to find the Tenant extinguished her right to the security deposit under sections 24 or 36 of the *Act* given the testimony of the parties about the move-in and move-out inspections. Section 38(2) of the *Act* does not apply.

Given the testimony of the parties, I find the Landlord did not have an outstanding monetary order against the Tenant at the end of the tenancy. Section 38(3) of the *Act* does not apply.

Given the testimony of the parties, I find the Tenant did not agree in writing at the end of the tenancy that the Landlord could keep some or all of the security deposit. Section 38(4) of the *Act* does not apply.

Given the above, I find the Landlord failed to comply with section 38(1) of the *Act* in relation to the security deposit and that none of the exceptions outlined in sections 38(2) to 38(4) of the *Act* apply. Therefore, the Landlord is not permitted to claim against the security deposit and must return double the deposit to the Tenant pursuant to section 38(6) of the *Act*. The Landlord must return \$550.00 to the Tenant. There is no interest owed on the security deposit as the amount of interest owed has been 0% since 2009.

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 \$650.00. I issue the Tenant a Monetary Order for this amount.

### Conclusion

The Tenant is entitled to \$650.00 and I issue 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 the 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: January 17, 2020

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Residential Tenancy Branch