



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFT MNDCT MNSD**

Introduction

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- - An order for the landlord to return the security deposit pursuant to section 38;
 - An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

Tenant AH attended for the tenants ("the tenant"). The landlord attended. The hearing process was explained, and the parties were given an opportunity to ask questions. Each party had the opportunity to call witnesses and present affirmed testimony and written evidence.

Preliminary Issue

The tenant provided affirmed testimony that the tenant served the landlord with the Notice of Hearing and Application for Dispute Resolution by registered mail sent on September 7, 2019 and deemed received by the landlord under section 90 of the *Act* five days later, that is, on September 12, 2019.

The tenant provided the Canada Post Tracking Number in support of service to which I refer on the cover page. The tenant testified that the address to which he sent the materials was the address for the unit which is where the landlord resided; this was the only residential address the tenant had for the landlord.

The landlord acknowledged that she lived in the unit at the time of mailing but denied receipt of the registered mail. the landlord had no explanation for her failure to receive the registered mail, saying she “had no idea” why.

The landlord stated that she received a reminder email about the hearing from the RTB which is the only notice she had of the hearing. She said she telephoned the RTB and learned how to attend the hearing.

Section 90 of the *Act* sets out when documents that are not personally served are considered to have been received. Unless there is evidence to the contrary, a document is considered or ‘deemed’ received on the fifth day after mailing if it is served by mail (ordinary or registered mail).

Residential Policy Guideline 12. Service Provisions provides guidance on determining deemed receipt, as follows:

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.

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. It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

The decision whether to make an order that a document has been sufficiently served in accordance with the Legislation or that a document not served in accordance with the Legislation is sufficiently given or served for the purposes of the Legislation is a decision for the arbitrator to make based on all the evidence before them.

In considering the evidence and testimony, I find the tenant has not rebutted the deemed receipt presumption. I find the tenant’s testimony (“I have no idea”) did not provide a plausible explanation for the failure of the tenant to have received the materials. The tenant acknowledged that the address of the tenant to which the evidence was mailed, was correct. As the tenant attended the hearing, there is no dispute that the tenant was made aware of the time and date of the hearing, as well as the teleconference access codes and process for submitting evident.

Section 71(1) of the *Act* authorizes the RTB Director to make any of the following orders:

- (a) that a document must be served in a manner the director considers necessary, despite sections 88 [*how to give or serve documents generally*] and 89 [*special rules for certain documents*];
- (b) that a document has been sufficiently served for the purposes of this *Act* on a date the director specifies;
- (c) that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this *Act*.

Therefore, pursuant to my authority under section 71(1)(b) of the *Act*, and considering the evidence and testimony of the parties, I find that the tenant was sufficiently served with the evidence on September 12, 2019, 5 days after mailing.

Preliminary Issue – Doubling

I informed the parties of the provisions of section 38 of the *Act* which require that the security deposit is doubled if the landlord does not return the security deposit to the tenant within 15 days of the later of the end of the tenancy or the provision of the tenant's forwarding address in writing.

Issue(s) to be Decided

Is the tenant entitled to the following:

- A monetary award equivalent to double the value of the security deposit because of the landlord's failure to comply with the provisions of section 38 of the *Act*?
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

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Background and Evidence

The parties agreed the tenancy started on July 1, 2019 and ended when the tenant vacated on August 1, 2019. Rent was \$2,400.00 monthly payable on the first of the month. At the beginning of the tenancy, the tenant provided a security deposit of \$1,200.00 which the landlord holds.

The tenant testified they posted a notice to the door of the unit on the day they vacated including their forwarding address; the tenant submitted a copy of the photograph of the posted notice. The tenant also testified they sent an email to the landlord at the email customarily used by the landlord on August 6, 2019, providing the address for a second time.

The landlord denied receipt of the posted notice although she acknowledged that the unit was her home and that she moved back in to the unit shortly after the tenant vacated; she had no explanation for her failure to receive the posted notice.

The landlord acknowledged that the email address to which the forwarding address was sent on August 6, 2019 was her email address; the landlord had no explanation for the failure of the landlord to receive the email. During the hearing, the landlord provided the same address to the arbitrator for the receipt of the Decision in this case.

The parties agreed the tenant has not provided consent to the landlord to retain any portion of the security deposit.

The parties agreed that the landlord promised to reimburse the tenant for \$149.10 for cleaning costs incurred at the time of move in.

The landlord agreed that the tenant had provided \$125.00 to the landlord as a deposit on keys.

The parties agreed the landlord has not filed an application for dispute resolution; the landlord stated she retained the security deposit for alleged damages to the unit and "because the tenant got me evicted".

The tenant claims reimbursement of double the security deposit as the landlord did not return the security deposit within 15 days of the later of the end of the tenancy or the provision of the forwarding address in writing. The tenant claimed as follows:

ITEM	AMOUNT
Security deposit	\$1,200.00
Double the Security Deposit	\$1,200.00
Reimbursement cleaning fee	\$149.10
Reimbursement fob deposit	\$125.00
Reimbursement of the Filing Fee	\$100.00
TOTAL CLAIM	\$2,774.10

Analysis

I have reviewed all evidence and testimony before me and will refer only to the relevant facts and issues meeting the admissibility requirements of the rules of procedure.

The *Act* contains comprehensive provisions regarding security and pet damage deposits.

As stated in section 38 of the *Act*, the landlord is required to either return the tenants' security deposit in full or file for dispute resolution for authorization to retain the deposit, 15 days after the later of the end of a tenancy and receipt of the tenant's forwarding address in writing.

Section 38 states 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.

If that does not occur, the landlord must pay a monetary award equivalent to double the value of the security deposit.

Section 38(6) states as follows:

*(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*

However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the security deposit pursuant to section 38(4)(a).

I find the landlord has not brought proceedings for compensation or an application for dispute resolution claiming against the security deposit for any outstanding rent or damage to the rental unit pursuant to section 38(1)(d) of the *Act*.

I find the tenant provided their forwarding address in writing pursuant to section 38(1)(b) at the end of the tenancy by posting a notice containing the address to the landlord's door and by sending the address to the landlord subsequently by email on August 6, 2019. I acknowledge that the landlord claimed not to have received either notice.

However, I prefer the tenant's version of events which I find credible and in keeping with the submitted evidence. I do not give much weight to the landlord's evidence which I find is less likely to be true and consists primarily of self-serving denial.

I find the tenant did not provide consent to the landlord to keep any portion of the security deposit pursuant to section 38(4)(a).

Based on the above, the testimony and evidence, and on a balance of probabilities, I find the landlord is in breach of the *Act* by failing to return the security deposit or applying for dispute resolution as required.

I also accept the tenant's evidence, as confirmed by the landlord, that the tenant incurred a cleaning expense and paid a fob deposit for which the landlord agreed to reimburse the tenant. I find that the only reason for the landlord not compensating the tenant is that she was upset at alleged actions of the tenant and had an unsupported claim for unproven damages to the unit.

I find the tenant is entitled to a doubling of the security deposit.

Accordingly, I grant the tenant a monetary award in the amount as claimed.

As the tenant was successful in their application, I further grant the tenant reimbursement of the filing fee.

My award to the tenant is summarized as follows:

ITEM	AMOUNT
Security deposit	\$1,200.00
Double the Security Deposit	\$1,200.00
Reimbursement cleaning fee	\$149.10
Reimbursement fob deposit	\$125.00
Reimbursement of the Filing Fee	\$100.00
TOTAL MONETARY ORDER TENANT	\$2,774.10

The landlord may still file an application for alleged damages and outstanding utilities. However, the landlord is unable to make a monetary claim through the tenant's application pursuant to Rules of Procedures 2.1 which states as follows:

2.1 Starting an Application for Dispute Resolution

To make a claim, a person must complete and submit an Application for Dispute Resolution.

Therefore, the landlord must file their own application to keep the deposit within the 15 days of certain events, as explained above.

However, the issue of the security deposit has now been conclusively dealt with in this hearing.

Conclusion

I order the landlord pay to the tenant the sum of **\$2,774.10**.

The landlord must be served with a copy of this order as soon as possible. Should the landlord fail 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 *Residential Tenancy Act*.

Dated: January 02, 2020

Residential Tenancy Branch