



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FFT

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution, made on October 7, 2020 (the "Application"). The Tenant applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- an order that the Landlord return all or part of the security deposit and/or pet damage deposit; and
- an order granting recovery of the filing fee.

The Tenant and the Landlord's Agent S.W. attended the hearing at the appointed date and time. At the start of the hearing, the Tenant stated that he served the Landlord with his Application and documentary evidence by registered mail on October 15, 2020. The Tenant provided the registered mail receipt in support. The Tenant stated that he sent the registered mail to the Landlord's address for service which was provided in the tenancy agreement.

S.W. stated that the Landlord did not receive the Tenant's Application or documentary evidence package as the Landlord has moved out of Country. S.W. stated that the Landlord provided their updated address for service to the Tenant, however, did not provide evidence of this in preparation for the hearing. The Tenant stated that the Landlord has not updated his address for service.

Preliminary Matters

S.W. requested an adjournment as the Landlord has not had sufficient time to provide a response to the Tenant's Application. The Tenant did not consent to the adjournment.

7.9 Criteria for granting an adjournment

Without restricting the authority of the arbitrator to consider other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

I find that the Landlord was aware of the hearing, as the Landlord's Agent S.W. was in attendance at the hearing. Furthermore, I find that the Landlord submitted a large amount of documentary evidence to the Residential Tenancy Branch 7 days prior to the hearing. In light of the above, I declined to adjourn the hearing on the basis that the Landlord requires more time before proceeding with the hearing.

Based on the oral and written submissions of the Applicant, and in accordance with sections 89 and 90 of the *Act*, I find that the Landlord is deemed to have been served with the Application and documentary evidence on October 20, 2020, the fifth day after their registered mailing.

S.W. stated that the Landlord served the Tenant with their documentary evidence via email on January 19, 2021. The Tenant stated that he received the Landlord's evidence on January 24, 2020, just two days before the hearing.

Section 88 of the *Act* stipulates that documents such as evidence must be given or served in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;

- (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
- (f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
- (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
- (h) by transmitting a copy to a fax number provided as an address for service by the person to be served; or
- (i) as ordered by an Arbitrator

S.W. stated that the Landlord served the Tenant by email. I find this method of service is not acceptable according to Section 88 of the *Act*.

According to the Residential Tenancy Rules of Procedure (the "Rules of Procedure")
3.15 Respondent's evidence provided in single package;

Where possible, copies of all of the respondent's available evidence should be submitted to the Residential Tenancy Branch online through the Dispute Access Site or directly to the Residential Tenancy Branch Office or through a Service BC Office. The respondent's evidence should be served on the other party in a single complete package. The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Except for evidence related to an expedited hearing (see Rule 10), and subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

According Rules of Procedure 3.16 Respondent's proof of service indicates; at the hearing, the respondent must be prepared to demonstrate to the satisfaction of the arbitrator that each applicant was served with all their evidence as required by the *Act* and these Rules of Procedure.

Rules of Procedure 3.17 indicates that evidence not provided to the other party in accordance with the *Act*, may or may not be considered during the hearing. I accept that the Tenant receive the Landlord's documentary evidence via email on January 24, 2021. As such, I find that the Landlord's evidence will not be considered. The only evidence I will consider from the Landlord is their Agent's oral testimony during the hearing.

The parties were given an opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Tenant entitled to an order that the Landlord return all or part of the security deposit and/or pet damage deposit, pursuant to section 38 of the *Act*?
2. Is the Tenant entitled to an order granting recovery of the filing fee, pursuant to section 72 of the *Act*?

Background and Evidence

The parties testified and agreed that the tenancy began on March 24, 2020. During the tenancy, the Tenant was required to pay rent in the amount of \$1,050.00 to the Landlord on the first day of each month. The Tenant paid a security deposit in the amount of \$500.00 and a pet damage deposit in the amount of \$200.00. The tenancy ended on August 31, 2020.

The Tenant stated that the Landlord returned \$350.00 of the \$700.00 deposit to the Tenant via e-transfer on September 8, 2020. The Tenant stated that he expected the full return of his deposit. The Tenant stated that he served the Landlord with his forwarding address in writing via Registered Mail on September 16, 2020 requesting the return of the remaining \$350.00. The Tenant stated that he did not consent to the Landlord retaining any amount of his deposits and that the Landlord has not yet returned the remaining \$350.00.

S.W. responded and acknowledged that the Landlord received the Tenant's forwarding address via registered mail, however, could not confirm which date it was received by the Landlord. S.W. stated that the parties had a conversation on "we chat" where the Tenant had agreed to the Landlord retaining \$350.00.

The Tenant stated that the parties were only discussing details surrounding the return of the deposit but that no agreement was reached. Furthermore, the Tenant stated that no consent was given in writing.

Analysis

Based on the documentary evidence before me for consideration and oral testimony provided during the hearing, and on a balance of probabilities, I find:

Return of security deposit and pet damage deposit

According to Section 38 (1) of the Act; 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.

(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, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(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.

(7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.

(8) For the purposes of subsection (1) (c), the landlord must repay a deposit
(a) in the same way as a document may be served under section 88 (c), (d) or (f) *[service of documents]*,
(b) by giving the deposit personally to the tenant, or
(c) by using any form of electronic
(i) payment to the tenant, or
(ii) transfer of funds to the tenant.

Order for return of security and pet damage deposit

38.1 (1) of the Act states; A tenant, by making an application under Part 5 *[Resolving Disputes]* for dispute resolution, may request an order for the return of an amount that is double the portion of the security deposit or pet damage deposit or both to which all of the following apply:

- (a) the landlord has not applied to the director within the time set out in section 38 (1) claiming against that portion;
- (b) there is no order referred to in section 38 (3) or (4) (b) applicable to that portion;
- (c) there is no agreement under section 38 (4) (a) applicable to that portion.

(2) In the circumstances described in subsection (1), the director, without any further dispute resolution process, may grant an order for the return of the amount referred to in subsection (1) and interest on that amount in accordance with section 38 (1) (c).

In this case, the parties agreed that the Landlord returned \$350.00 to the Tenant on September 8, 2020. S.W. stated the Tenant consented to the Landlord retaining the remaining \$350.00. S.W. referred to a “we chat” conversation in which the Tenant discussed the Landlord retaining \$350.00. The Tenant denied that the parties agreed to the Landlord retaining this amount. Furthermore, the Tenant stated that this discussion was not in writing.

I accept that the Tenant provided his forwarding address to the Landlord in writing via registered mail on September 16, 2020. S.W. confirmed receipt, however, could not recall on which date. Based on the oral and written submissions of the Tenant, and in accordance with section 90 of the *Act*, I find that the Landlord is deemed to have been served with the Tenant’s forwarding address on September 21, 2020, the fifth day after their registered mailing.

Section 38(1) of the *Act* requires a landlord to repay deposits or make a claim against them by filing an application for dispute resolution within 15 days after receiving a tenant’s forwarding address in writing or the end of the tenancy, whichever is later.

I find that the Landlord has provided insufficient evidence to demonstrate that the Tenant consented in writing to the Landlord retaining \$350.00 from the Tenant’s deposits. I further find that the Landlord, after receiving the Tenant’s forwarding address, requesting the remaining portion of the Tenant’s deposits, would have been aware that the Tenant did not consent to the Landlord retaining \$350.00. As such, I find that the Landlord had until October 5, 2020 to either return the remaining portion of the Tenant’s deposit, or make an application to retain some or all of the remaining \$350.00. The Landlord did neither.

In light of the above, and pursuant to section 38(6) of the *Act*, I find the Tenant is entitled to an award of double the amount of the remaining portion of the security deposit ($\$350.00 \times 2 = \textbf{\$700.00}$).

Having been successful, I also find the Tenant is entitled to recover the **\$100.00** filing fee paid to make the Application. Pursuant to section 67 of the *Act*, I find the Tenant is entitled to a monetary order in the amount of **\$800.00**.

Conclusion

The Landlords breached Section 38 of the *Act*. The Tenant is granted a monetary order in the amount of \$800.00. The order may be filed in and enforced as an order of the Provincial Court of BC (Small Claims).

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 27, 2021

Residential Tenancy Branch