



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNSD, FFT**

Introduction

On October 27, 2020, an arbitrator with delegated authority under section 9.1(9) of the *Residential Tenancy Act* (the “Act”) ordered the tenant’s security deposit and pet damage deposit be returned (doubled) to the tenant. On November 16, 2020, another arbitrator with the same authority found that the landlord had new and relevant evidence not available at the original hearing and ordered the original decision be suspended until a new hearing take place.

This new hearing dealt with the tenant’s application pursuant to the *Act* for:

- an order returning a security deposit or pet damage deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The both the landlord and the tenant attended the hearing. The landlord was represented by his counsel, AS. As both parties were present, service of documents was confirmed. The landlord acknowledged service of the tenant’s Application for Dispute Resolution and evidence; the tenant acknowledged service of the landlord’s evidence. Both parties stated they had no concerns with timely service of documents.

Issue(s) to be Decided

Did the tenant agree that the landlord could retain his security deposit on the condition inspection report?

Background and Evidence

At the commencement of the hearing, pursuant to rules 3.6 and 7.4, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony. In accordance with rule 7.14, I exercised my authority to determine the relevance, necessity and appropriateness of each party’s evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

A copy of the tenancy agreement was provided as evidence. The tenancy began on January 1, 2020 for a fixed term to end on April 15, 2020. Rent was set at \$4,995.00 per month, payable on the first day of each month. Included in the rent is monthly cleaning. At the commencement of the tenancy, the landlord collected a security deposit of \$2,497.50 and a pet damage deposit in the same amount. The landlord continues to hold the deposits. Both parties agree a move-in condition inspection report was completed at the commencement of the tenancy.

The tenant gave the following testimony. He is an American who was working temporarily in Canada and had to return to the United States due to the Covid-19 pandemic. He fulfilled the commitment to pay rent until April 15th, however he vacated the rental unit on March 16th. The tenant testified that he was in Portland on March 13th when he found out he had to return to the US due to the covid-19 pandemic. He texted his landlord and his landlord scheduled the cleaner to clean the unit. While cleaning, the cleaner took photos of scratched surfaces and other alleged damages and sent them to the landlord. On March 15th, the tenant was shown a storage unit the landlord offered to rent to him since he could not bring all his belongings back to the US. At this time, the landlord never mentioned the photos sent to him by the cleaner.

A condition inspection was scheduled for 11:00 a.m. on March 16th. The tenant had his mother with him during the inspection. The tenant testified that the landlord pressured him to quickly conduct the condition inspection with him, reminding him that the borders would soon close due to the pandemic. The tenant testified that the landlord started pointing out "damages" to the unit that were negligible to the tenant, however he was willing to make small concessions to move things along. During the condition inspection, tempers flared. The tenant went to the balcony with his mother and after speaking with her, he went in and signed the condition inspection report on line 4. The tenant testified he signed it because he wanted to ensure the landlord acknowledged the return of the keys and key fobs. The tenant testified that he purposely refused to sign at line 2 where the landlord wanted him to agree to retain the entire security deposit and pet damage deposit totalling \$4,995.00. The tenant testified that at this point, he didn't trust the landlord and to safeguard his deposits, he took a photograph of

the condition inspection report to show he refused to sign line 2. The tenant notes that the photograph of the condition inspection report was taken at 11:45 a.m.

The tenant testified that he was never given a copy of the condition inspection report by the landlord and that he was not given the original. The tenant points to a text message the landlord sent him on March 23, 2020 whereby the landlord states, in reference to the condition inspection report, *"I also provided you photocopies at the beginning and end of tenancy as per as per our conversation"* (as written). The tenant surmises that the landlord produced a photocopy of the condition inspection report for this hearing so the landlord could practice forging the tenant's signature as frequently as he wanted on a copy, not altering the original. The tenant submits that the landlord forged his signature on the line where the tenant is alleged to have agreed to the landlord retaining both of his deposits.

Immediately after receiving a text from the landlord thanking him for allowing him to retain the deposits, the tenant got his business manager and a lawyer in the United States involved in getting the security deposit back. The tenant points to the consistency of his communication with his business associates as evidence that he never waived his right to the return of his deposits.

The landlord provided the following submissions. When the cleaner went in to clean the tenant's unit on March 14th, the cleaner noticed damage she hadn't previously seen. The cleaner sent photos of the damage to the landlord by text. Based on the photos, the landlord called contractors to get an estimate of the cost to repair the damage he saw in the photos.

During the condition inspection on March 16th, the landlord noted the damage to the unit, specifically the damage pointed out by the cleaner. The damage included: scratches on cabinets, carpets soiled with dog urine, chips on countertops, damage to patio membrane due to smoking. During the condition inspection, the tenant and his mother went outside because the conversation became 'heated'. When they came back, the landlord made a 'secret' recording without the tenant's knowledge. Audio of the recording was provided as evidence. In the recording, the tenant's mother is heard saying *"we are willing to settle for 5"* and the tenant says *"cool, let me sign"*. The landlord submits that the recording and the transcript made of it are conclusive proof that the tenant signed the condition inspection report. The landlord testified he made the recording because he felt his safety was at risk and he ended it when he no longer felt unsafe. I note here that the tenant disputes the content of the audio recording, stating that it has been edited, ending before the remainder of the conversation ended.

The landlord submits that the tenant signed his signature on the condition inspection report, indicating he agrees that the landlord may retain his security deposit and pet damage deposit, totalling just under five thousand dollars. The landlord also submits that he made a copy of the condition inspection report to give to the tenant on March 16th and called his witness, JC to verify this submission. JC provided a statement dated November 3, 2020 and verified that she spoke to the landlord in the lobby while he was photocopying documents which the landlord told her was the condition inspection report. On cross exam, the witness acknowledges she did not see the landlord give any papers to the tenant.

The landlord submits that he must have made an error and given the tenant the original condition inspection report and kept a copy for himself. This is the reason why he submitted a copy of it as evidence for this hearing. He vehemently denies the tenant's signature on the condition inspection report is a forgery. The landlord notes that there is damage noted on the condition inspection report, both his and the photograph of the 'incomplete' condition inspection report submitted by the tenant. The landlord submits that if the tenant didn't agree to the alleged damage, he wouldn't have signed on line 4.

The landlord submits that the reason he wanted agreement from the tenant to forsake his deposits is because he knew that it would be difficult to pursue collection of a debt from a non-Canadian resident. The landlord alleges that the damage done to the unit is close to \$30,000.00 however acknowledges this hearing is not meant to determine that.

The parties agree that the tenant provided the landlord with his forwarding address in writing when it was sent to him on March 24, 2020. The landlord acknowledges receiving it in early April 2020. The landlord submits that he never filed an Application for Dispute Resolution with the Residential Tenancy Branch to retain the security deposit because he had the tenant's written permission to keep it.

Analysis

Section 38(1) and 38(4) of the *Act* state:

Return of security deposit and pet damage deposit

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.

...

(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.

There is no dispute between the parties that the tenant ended the fixed term tenancy and the tenant vacated the rental unit on March 16, 2020. The tenant paid rent until the end of the fixed term, until April 15, 2020. It is also undisputed that the parties conducted a condition inspection report at the beginning and end of the tenancy and that the tenant provided his forwarding address to the landlord.

The issue to be decided is whether the landlord had the tenant's written permission to retain the deposits on the condition inspection report. At the beginning of the hearing, I advised the parties of rule 6.6 of the Residential Tenancy Branch Rules of Procedure, which states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

The parties have diametrically opposite versions of the signing of the condition inspection report. While the tenant holds that he resolutely refused the sign on the line agreeing to give up the deposits, the landlord submits that the tenant put his signature on that line. Given the opposing stances, I must turn to the mindset of the parties to determine whether it was signed or not.

The parties both agree that tensions were high during the condition inspection. It is apparent to me that the tenant didn't feel responsible for the damages as alleged by the landlord and the landlord didn't want to be burdened with fixing the damages without compensation from the tenant. I accept both parties' testimony that the tenant stepped outside to discuss with issues with his mother and that he came back to sign on line 4.

Line 4 simply acknowledges the parties' participation in the condition inspection, not whether the tenant agrees to any deduction to his security deposit or pet damage deposit.

The landlord relies heavily on the 'secret' audio recording made after the tenant and his mother returned from the balcony. In the recording, the tenant's mother is heard saying *"we are willing to settle for 5"* and the tenant says *"cool, let me sign"* which, in the context of the conversation could only mean agreeing to giving up the deposits, according to the landlord. Despite this, the tenant refutes the audio saying that more was said just after the landlord's audio recording cuts out.

The landlord testified that he ended the recording because he no longer felt unsafe. Here is where I find myself questioning the landlord's justification for his actions. The dialogue between the parties appears to be ongoing when the audio suddenly ends. While the landlord may have felt his safety was not jeopardized, it appears to me that the issue of the deposits was still contentious. When the security deposit is mentioned by the landlord at the end of the audio, the landlord discontinues the recording. I find it convenient for the landlord's position that the recording ends there. While it assists the landlord in his version of the events, ending the recording still raises suspicion for the tenant which I cannot help but share in. Given this, I find that the audio recording, while helpful, is incomplete in providing me with a full understanding of the most crucial aspects of the signing of the condition inspection report.

I then look to the remainder of the evidence. The landlord testified he most likely gave the tenant the original condition inspection report while the tenant denies this, indicating his only copy was the photo he took. The landlord's witness testified that she saw the landlord making copies and I fully accept the witness's testimony. However, that same witness testified she never saw the landlord give a copy to the tenant. Her testimony and statements don't assist me in making a determination of who has the original. I turn to the only verifiable evidence I have, the text messages sent between the parties subsequent to the tenant vacating the rental unit. In the text messages, the landlord never once mentions that he gave the tenant the original condition inspection report. In fact, the landlord points out multiple times that the tenant took photos of it and even states, *"plus you have the photocopy of the condition inspection report at the start and completion"*. Based on this evidence, I find the tenant has satisfied me that he was not given the original condition inspection report.

The tenant submits that the photo of the condition inspection report, shown without any agreement to allow the landlord to keep the deposits, is accurate. Once again, I turn to

the mindset of the parties during the condition inspection. The tenant and his mother are obviously agitated enough to take a break, out on the balcony, before coming back in to sign. When the tenant says, “Cool, let me sign”, he could have been referring to line 4, acknowledging his presence at the condition inspection. It simply does not seem reasonable to me that after a lengthy argument with the landlord where the landlord felt concerned for his safety – that the tenant would suddenly change his position and agree to forfeit almost \$5,000.00 in deposits.

The tenant argues that his purported signature on the condition inspection report is a forgery. As the landlord’s counsel rightly points out, I do not have the expertise to determine whether the signature is a forgery and I do not propose to do so. I can, however, make a determination on whether I believe the tenant actually signed it. Based on the attitude of the tenant at the time, the context of the events leading up to the signing and the photographic evidence provided by the tenant, I find the tenant did not sign it. I find that the landlord did not have the tenant’s agreement in writing that the landlord may retain the deposits.

The tenancy ended on March 16, 2020. The landlord acknowledges receiving the tenant’s forwarding address in early April 2020. The landlord did not return the tenant’s security deposit or pet damage deposit within 15 days or make an application for dispute resolution claiming against the deposits as required by section 38(1) of the *Act*. Section 38(6) is clear and unequivocal, if the landlord does not comply with section 38(1), the landlord must pay the tenant double the amount of the security deposit and pet damage deposit. In this case, each of the \$2,497.50 deposits is doubled to \$4,995.00. The tenant is entitled to a monetary order in the amount of \$9,990.00 pursuant to sections 38 and 67 of the *Act*.

As the tenant’s application was successful, the tenant is also entitled to recovery of the \$100.00 filing fee for the cost of this application.

Conclusion

I issue a monetary order in the landlord’s favour in the amount of **\$10,090.00**.

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: February 09, 2021