



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNSDB-DR, FFT**

Introduction

This hearing originated as a direct request proceeding. In an Interim Decision dated January 25, 2021, a participatory hearing was ordered. This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 12:08 p.m. in order to enable the landlord to call into this teleconference hearing scheduled for 11:00 a.m. The tenant attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the tenant and I were the only ones who had called into this teleconference.

The tenant was advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. The tenant testified that they are not recording this dispute resolution hearing.

Preliminary Issue- Service

The tenant testified that they uploaded evidence to the residential tenancy branch on January 7, 2021. The Residential tenancy branch dispute management system does not

record an upload of evidence on January 7, 2021. The tenant testified that the evidence that they thought was uploaded on January 7, 2021 (the “January 7, 2021 evidence package”) was sent to the landlord via registered mail on January 7, 2021 along with this direct request application for dispute resolution. The tenant entered into evidence a Canada Post registered mail receipt dated January 7, 2021.

Rule 3.19 of the Residential Tenancy Branch Rules of Procedure states:

No additional evidence may be submitted after the dispute resolution hearing starts, except as directed by the arbitrator. In providing direction, the arbitrator will:

- a) specify the date by which the evidence must be submitted to the Residential Tenancy Branch directly or through a Service BC Office and whether it must be served on the other party; and
- b) provide an opportunity for the other party to respond to the additional evidence, if required. In considering whether to admit documentary or digital evidence after the hearing starts, the arbitrator must give both parties an opportunity to be heard on the question of admitting such evidence.

I accept the tenant’s testimony that the January 7, 2021 evidence package was served on the landlord via registered mail on January 7, 2021. I find that the landlord is not prejudiced by the acceptance of the January 7, 2021 evidence package after the start of the hearing as it was served on the landlord in accordance with section 88 of the *Act*. The landlord therefore had time to review and respond to this evidence. In the hearing I allowed the tenant to upload the January 7, 2021 evidence package.

The tenant entered into evidence an email exchange between the landlord and the tenant dated January 5, 2021 in which the landlord provided the tenant with their address for service. The tenant testified that the landlord was served the January 7, 2021 package at the address provided in the January 5, 2021 email. I find that the landlord was served with the tenant’s direct request application for dispute resolution in accordance with section 89 of the *Act*.

The Interim Decision stated:

Notices of Reconvened Hearing are enclosed with this interim decision. The applicant must serve the Notice of Reconvened Hearing, the interim decision,

and all other required documents, upon the landlord within three (3) days of receiving this decision in accordance with section 89 of the Act.

The tenant testified that the Interim Decision and Notice of Reconvened Hearing were served on the landlord via registered mail on January 28, 2021. A Canada Post registered mail receipt for same was entered into evidence. I find that the landlord was served with the Interim Decision and Notice of Reconvened Hearing in accordance with section 89 of the Act.

Issues to be Decided

1. Is the tenant entitled to a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67 of the Act?
2. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the Act?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the tenant, not all details of the tenant's submissions and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below.

The tenant provided the following undisputed testimony. This tenancy began on September 1, 2014 and ended on November 27, 2020. Monthly rent in the amount of \$2,450.00 was payable on the first day of each month. The tenant paid the landlord a security deposit of \$200.00. Over the course of the tenancy, several tenancy agreements were signed, the last in 2017. The first tenancy agreement and the 2017 tenancy agreement were entered into evidence. The first tenancy agreement states that the tenant paid a security deposit of \$200.00.

The tenant testified that each time a new tenancy agreement was signed, the landlord asked the tenant to pay the first and last months' rent in advance. The tenant testified that the landlord correctly applied the first and last months' rent to those months except for the last tenancy agreement.

The last tenancy agreement was signed on July 5, 2017 for a tenancy starting on September 1, 2017 and ending on August 31, 2019. The rental rate was \$2,350.00 due on the first day of every month. The tenant testified that he provided the landlords with a cheque in the amount of \$4,700.00 for September 2017's rent and for August 2019's rent. The tenant entered into evidence an email from the tenant to the landlord dated September 14, 2017 in which the tenant states in part:

Hi Dear Sir,

I have just deposited the cheque with 4,700 CAD for both (September 2017) (August 2019) in to your [bank account], as you can see the attached file of the cheque. And the rent fee for October, will be sent to you of the first of October by e-transferring to your email account.

[reproduced as written]

In the body of the email is a picture of a cheque from the tenant to the landlord in the amount of \$4,700.00. The cheque notes that the sum is for rent for September of 2017 and August of 2019.

The tenant entered into evidence a responding email from the landlord dated September 14, 2017 which states:

Thank you [tenant]
yes i can check i received the cheque.
you can transfer the monthly rent every month at the beginning of the month to my account or to this E-mail address

[reproduced as written]

The tenant testified that half of the above cheque was applied to September 2017's rent, but that the other half (\$3,350.00) was not applied to August 2019's rent. The tenant testified that he paid August 2019's rent via e-transfer and that the deposit was not applied or returned. The tenant testified that the landlord raised the rent to \$2,450.00 in August of 2018.

The tenant testified that he provided the landlord with his forwarding address via email on December 12, 2020 and that the landlord responded to this email on December 14, 2020. The December 12 and 14, 2020 emails were entered into evidence. In the December 12, 2020 email the tenant provides the landlord with the tenant's forwarding

address and requests the return of the security deposit and deposit for August 2019's rent. In the December 14, 2020 email, the landlord writes:

your one month deposit is 2350, you paid me 4700 on august 2019 once you renew the contract and key deposit is 200 total is 2550.

i can send cheque, i can send E-transfer to this Email.

i am also talking with my lawyer and a real estate to check the unit damaged and miserable situation that you left it.

The tenant testified that the landlord returned \$1,615.00 of the tenant's deposits on December 29, 2020. The tenant testified that this application for dispute resolution was made before the \$1,615.00 was received. The tenant testified that he is seeking the difference between the deposits he paid (\$2,550.00) and the amount returned by the landlord (\$1,615.00). The difference is \$735.00. The tenant's monetary worksheet also states that the tenant is seeking \$735.00

The tenant testified that they did not authorize the landlord to retain any portion of the deposits.

The tenant confirmed the email address on file is the correct address for service of this Decision.

Analysis

The *Act* defines a security deposit as follows:

"security deposit" means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:

- (a) post-dated cheques for rent;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97 (2) (k) [*regulations in relation to fees*];

Based on the tenant's undisputed testimony, the first tenancy agreement and the landlord's December 14, 2020 email, I find that the tenant paid the landlord a security deposit of \$200.00.

Based on the tenant's undisputed testimony, the September 14, 2017 email exchange between the parties and the landlord's December 14, 2020 email, I find that the tenant paid the landlord \$4,700.00 in September of 2017. I find that \$2,350.00 of that cheque was to be applied to August 2019's rent. I find that the landlord did not apply the \$2,350.00 paid by the tenant, to August 2019's rent, and instead held the \$2,350.00 as a security deposit.

I find that the deposit for August 2019's rent is different than a post-dated cheque as it was cashed before August 2019 and was held by the landlord as a security, even after August 2019's rent was paid by the tenant. I find the fact that the landlord made deductions from the August 2019 deposit (only \$1,615.00 of it and the first \$200.00 deposit were returned), supports the finding that the August 2019 deposit was held by the landlord as a security deposit.

Section 38 of the Act requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the Act, equivalent to double the value of the security deposit.

However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenant to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

I find that the landlord received the tenant's forwarding address via email on December 14, 2020, as that is the date the landlord responded to the tenant's email containing the forwarding address. I find that the tenant's forwarding address was sufficiently served on the landlord, for the purposes of this *Act*, pursuant to section 71 of the *Act*.

I accept the tenant's undisputed testimony that the landlord returned \$1,615.00 to the tenant on December 29, 2020, 15 days after receipt of the tenant's forwarding address.

I find that the landlord did not file an application for dispute resolution seeking authority to retain any portion of the tenant's deposits, and did not return all of the deposits within 15 days, so the tenant is entitled to double the return of the security deposit, less the amount already returned by the landlord, pursuant to the following calculation:

$$\begin{aligned} &\$2,550.00 \text{ (security deposit)} \times 2 \text{ (doubling provision)} - \$1,615.00 \text{ (amount} \\ &\text{landlord returned)} = \mathbf{\$3,485.00} \end{aligned}$$

As the tenant was successful in this application for dispute resolution, the tenant is entitled to recover the \$100.00 filing fee from the landlord, pursuant to section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the tenant in the amount of \$3,585.00.

The tenant is provided with this Order in the above terms and the landlord must be served with 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: April 20, 2021

Residential Tenancy Branch