



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDCT, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenants filed under the *Residential Tenancy Act* (the “*Act*”) for the recovery of their security deposit, for a monetary order for compensation for monetary loss or other money owed, and for the return of their filing fee. The matter was set for a conference call.

One of the Tenant’s, the Tenant’s mother and the Tenant’s advocate (the “Tenant”), the Landlord and two of the Landlord’s agents (the “Landlord”) attended the conference call hearing and were affirmed to be truthful in their testimony. Both parties were provided with the opportunity to present their evidence orally and in written and documentary form and to make submissions at the hearing. The Tenant and the Landlord confirmed that they had received each other’s documentary evidence.

I have reviewed all evidence and testimony 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

- Has there been a breach of Section 38 of the *Act* by the Landlord?
- Are the Tenants entitled to the return of their security deposit?
- Are the Tenants entitled to monetary compensation for damages under the *Act*?
- Are the Tenants entitled to the return of their filing fee for this application?

Background and Evidence

While I have turned my mind to all of the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here.

The parties testified agreed that this tenancy began on July 19, 2019, as a month-to-month tenancy. Rent in the amount of \$1,100.00 was to be paid by the first day of each month, and the Landlord collected a \$550.00 security deposit for this tenancy. The Tenant submitted a copy of the tenancy agreement into documentary evidence.

The parties agreed that the tenancy on November 30, 2020, in accordance with the Act.

Both parties agreed that the Tenant provided the Landlord with their forwarding address on December 1, 2020, by email, and that at no time had the Landlord been given written permission to keep any portion of the deposit.

The Tenant testified that they received a cheque from the Landlord, in the amount of \$375.00, in a partial return of the security deposit. The Tenants are requesting the return of the rest of the security deposit, in the amount of \$175.00, plus \$550.00 in the doubling provision pursuant to section 38 of the *Act*.

The Landlord testified that they had kept \$175.00 of the security deposit for this tenancy due to their cost to have the rental unit cleaned at the end of the tenancy. The Landlord testified that as of the date of this hearing, they had not filed an Application for Dispute Resolution claiming against the deposit.

The Tenant testified that the Landlord had charged them ten \$35.00 late fees during their tenancy for the months of August 2019, September 2019, October 2019, November 2019, December 2019, January 2020, February 2020, March 2020, April 2020, and May 2020.

The Tenant testified that they are requesting the return of all ten of the charged late fees, in the amount of \$350.00, as the Landlord had not included the requirement to pay late fees in their tenancy agreement and due to the fact that the Landlord charged a late fee over the prescribed allowable amount set out in the *Act*.

The Landlord testified that they did charge the Tenants the late fees as testified to by the Tenants and that they agreed the requirement to pay late fees had not been

included in the tenancy agreement. The Landlord testified that they had entered into a verbal agreement with the Tenants for the Tenants to pay late fees for the late payment of rent between August 2019 to May 2020, in exchange for the Landlord excepting the late payment of rent and taking no action to end this Tenant's tenancy during a period of financial hardship. The Landlord testified that they accepted the Tenant's repeated late payment of rent without issuing notices to end the tenancy for non-payment of rent or repeated late payment of rent due to their agreement with the Tenants to pay these late fees.

The Landlord acknowledged that they had charged over the legally allowable amount for a late fee and agreed that they owed the Tenants the overpayment in the amount of \$100.00.

Analysis

Based on the testimony, the documentary evidence before me, and on a balance of probabilities, I find as follows:

Section 38(1) of the *Act* gives the landlord 15 days from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to file an Application for Dispute Resolution claiming against the deposits or repay the security deposit and pet damage deposit to the tenant.

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.

I accept the agreed-upon testimony of these parties and find that this tenancy ended on November 30, 2020, the date the Tenants moved out of the rental unit and that the Landlord was in receipt of the Tenants' forward address on December 1, 2020

I also accept the agreed-upon testimony of these parties that the Tenants had not given the Landlord written permission to retain their security deposit.

Accordingly, I find that the Landlord had until December 16, 2020, to comply with section 38(1) of the *Act* by either repaying the deposit in full to the Tenants or submitting an Application for Dispute resolution to claim against the deposits. However, in this case, the Landlord returned \$375.00 of the \$550.00 security deposit for this tenancy to the Tenants on December 9, 2020.

At no time does a landlord have the right to simply keep any portion of the security deposit because they feel they are entitled to it or are justified to keep it. If the landlord and the tenant are unable to agree, in writing, to the repayment of the security deposit or that deductions be made, the landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later. It is not enough that the landlord thinks they are entitled to keep even a small portion of the deposit based on unproven claims.

I find that the Landlord breached section 38 (1) of the *Act* by not returning the Tenant's full deposit or filing a claim against the portion of the deposit they wished to retain within the statutory timeline.

Section 38 (6) of the *Act* goes on to state that if the landlord does not comply with the requirement to return or apply to retain the deposit within the 15 days, the landlord must pay the tenant double the security deposit.

Return of security deposit and pet damage deposit

- 38 (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.*

As the Landlord only returned a portion of the deposit for this tenancy, I find that the Landlord was in breach of section 38 of the *Act*, when they retain \$175.00 of the deposit for this tenancy without the written consent of the Tenants or without filling a claim again

the deposit within the legislated timeline. Therefore, I find that pursuant to section 38(6) of the *Act* the Tenants have successfully proven that they are entitled to the return of double their deposit. I find for the Tenant, in the amount of \$1,100.00, for the return of double the security deposit for this tenancy.

As the Landlord only returned a portion of the deposit for this tenancy, I find that the Landlord was in breach of section 38 of the *Act* when they retain \$175.00 of the deposit for this tenancy without the written consent of the Tenants or without filing a claim against the deposit within the legislated timeline. Therefore, I find that pursuant to section 38(6) of the *Act*, the Tenants have successfully proven that they are entitled to the return of double their deposit. I find for the Tenant, in the amount of \$1,100.00, for the return of double the security deposit for this tenancy.

As for the Tenants' claim for the recovery of all of the late fees paid for this tenancy. Section 7 of the Residential Tenancy Regulations (the "Regulations") states the following regarding late fee:

Non-refundable fees charged by landlord

7 (1) A landlord may charge any of the following non-refundable fees:

- (a) direct cost of replacing keys or other access devices;*
- (b) direct cost of additional keys or other access devices requested by the tenant;*
- (c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;*
- (d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;*
- (e) subject to subsection (2), a fee that does not exceed the greater of \$15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;*
- (f) a move-in or move-out fee charged by a strata corporation to the landlord;*
- (g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.*

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

I have reviewed the signed Tenancy agreement for this tenancy, noting that there is no requirement in this document for these Tenants to pay late fees during their tenancy. However, I have also reviewed all of the testimony and documentary evidence before me in regard to this portion of the Tenants' claim, and I find that on a balance of probabilities, that these parties did enter into a verbal agreement to amend the tenancy agreement to include a provision for the collection of rent payment late fees in exchange for the Landlord agreement to not seek legal action to end this tenancy for the Tenants 10 concurrent occurrence of late payment of rent during this tenancy.

I find that these parties mutually agreed to the payment of \$35.00 per occurrence of late payment of rent during this tenancy and that ten such occurrences were charged to these Tenants during this tenancy, in the amount of \$350.00.

However, Pursuant to section 7(1d) for the Regulation, I find that the maximum late fee that could have been contracted to in this tenancy agreement was \$25.00 per occurrence of late payment of rent.

Consequently, I find that the Tenants were over charged \$10.00 for each of the ten times they were charged a late fee for this tenancy. Therefore, I award the Tenants \$100.00 in the recovery of their overpayment in late fee charges for this tenancy.

Additionally, section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Tenants have have been successful in their application, I find that the Tenants are entitled to recover the \$100.00 filing fee paid for this application.

Overall, I find that the Tenants have established an entitlement to a monetary order in the amount of \$925.00; consisting of \$1,100.00 in the recovery of their doubled security deposit, \$100.00 in the recovery of overpaid late fees, \$100.00 to recover the filing fee for this hearing, less \$375.00 in the portion of the security deposit that has already been returned to the Tenants for this tenancy.

Conclusion

I find that the Landlord breached section 38 of the *Act* when they failed to repay or make a claim against the security deposit and pet damage deposit as required by the *Act*.

I find that the Landlord breached section 7 of the *Regulation* when they charge more than the allowable amount in a late fee for this tenancy.

I find for the Tenants pursuant to sections 38, 67 and 72 of the *Act*. I grant the Tenants a **Monetary Order** in the amount of **\$925.00**. The Tenants are 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: May 21, 2021

Residential Tenancy Branch