



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSDS-DR, FFT

Introduction

The Tenant applies for the return of his double of his security deposit pursuant to ss. 38 and 67 of the *Residential Tenancy Act* (the “*Act*”). The Tenant also seeks the return of his filing fee pursuant to s. 72 of the *Act*

The Tenant had originally filed his application as a direct request but was adjourned to a participatory hearing following the adjudicator’s decision dated November 16, 2021.

P.P. appeared as the Tenant and was joined by J.O, his Advocate. D.W. appeared as the Landlord.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Advocate advised that the Tenant’s application and evidence were served on the Landlord by way of registered mail. The Landlord acknowledged receipt of the Tenant’s application materials and indicated it had been served within the appropriate timeframe. I find that the Tenant’s application materials were served in accordance with s. 89 of the *Act* as acknowledged by the Landlord at the hearing.

The Landlord advised that he served his responding evidence to the Tenant via registered mail, though says that it was not retrieved. The Tenant indicated that he has mobility issues and was unable to retrieve the registered mail package from the post office. The Landlord further indicated that he took steps to deliver his evidence to the Advocate. The Advocate acknowledged receipt of the Landlord’s evidence and raised

no objections with respect to the Landlord serving him rather than the Tenant. I find that pursuant to s. 71(2) of the *Act* the Tenant was sufficiently served with the Landlord's evidence by way of service on his advocate, which was acknowledged at the hearing.

Preliminary Issue - Jurisdiction

The adjudicator's decision of November 16, 2021 indicates that it was adjourned to a participatory hearing on the basis that they were unable to make a finding of jurisdiction.

By way of some context, the Landlord in this matter lets out his rental unit to hospital patients on a short-term basis. The parties in this matter signed a tenancy agreement, rent was paid monthly, and a move-in inspection report was completed in the Residential Tenancy Branch's standard form. A security deposit was paid.

At the outset of the hearing, I asked the Landlord whether there was a question of jurisdiction. The Landlord advised of his view that the *Act* applied. Though the parties did not dispute that jurisdiction applies, whether the *Act* applies or not is a question of mixed fact and law and must be established by me if I am to adjudicate this matter.

Policy Guideline #9 and #27 provides guidance with respect to tenancy agreement, licences to occupy, and jurisdiction. Policy Guideline #9 in particular states the following:

Under a tenancy agreement, the tenant has exclusive possession of the site or rental unit for a term, which may be on a monthly or other periodic basis. Unless there are circumstances that suggest otherwise, there is a presumption that a tenancy has been created if:

- the tenant gains exclusive possession of the rental unit or site, subject to the landlord's right to access the site, for a term; and
- the tenant pays a fixed amount for rent.

I find that there is a tenancy under the present circumstances since the Tenant had exclusive possession of the rental unit, a security deposit was paid to the Landlord, rent was paid in a fixed amount, and rent was paid on a monthly basis. The presumption of tenancy is triggered and has not been displaced based on the parties' submissions.

Further, the tenancy was to last two months as per the tenancy agreement, though this was an approximation. Though this was a "short-term" rental for hospital patients, there

is no provision under the *Act* makes no distinction between tenancies that last for years, months, or weeks.

The Landlord has made the personal decision to cater his rental to a specific type of tenant, being those who are receiving medical procedures over an extended period of time and their caregivers. The rental was advertised privately over online marketplaces. He is a private actor and can choose to cater his business as he so chooses. The fact that the paperwork indicates “patient” is not relevant to the analysis on whether the Tenant had exclusive possession of the rental unit over a specified period after paying a fixed amount of rent, which is what occurred here.

I find that I have jurisdiction to determine this dispute.

Issues to be Decided

- 1) Is the Tenant entitled to the return of double his security deposit?
- 2) Is the Tenant entitled to the return of his filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant took occupancy of the rental unit on June 21, 2021.
- The Landlord obtained vacant possession of the rental unit on September 17, 2021.
- Rent of \$2,500.00 was paid on the 20th day of each month.
- A security deposit of \$1,000.00 was paid by the Tenant.

A copy of the written tenancy agreement was put into evidence. I was further advised of a \$200.00 move-in fee that the Landlord charges.

The Advocate advised that the nature of the rental was such that Tenant provided his forwarding address at the outset of the tenancy on the application form as he would be returning to home after his hospital procedure. The Landlord did not dispute this.

A move-in condition inspection report was completed by the parties on June 21, 2021. It is signed by the parties and is in the standard form provided by the Residential Tenancy Branch.

The Landlord provided a copy of a move-out condition inspection report, which indicates it was completed on September 17, 2021. It is not signed by either party and notes that \$957.00 would be deducted from the security deposit.

I am told by the Advocate that the Landlord did not conduct the move-out inspection with the Tenant. The Landlord provides copies of his text message with the Tenant's caregiver. In a text message from September 16, 2021, the caregiver notifies the Landlord that the Tenant would be leaving the next day.

It appears that the Landlord was unable to attend the rental unit prior to the Tenant's departure. The Landlord advised that he conducted the move-out inspection some two hours after the Tenant had left. The Landlord further indicate at the hearing that he did not provide written offers for times to conduct the move-out inspection. The Landlord did indicate there were conversations with respect to moving out, though was unable provide specific information on whether he attempted to arrange a time for the move-out inspection.

The parties confirmed that the Landlord returned \$43.00 to the Tenant on September 28, 2022. The Landlord admitted that he did not have the Tenant's consent to withhold \$957.00 from the security deposit.

I was told by the Landlord that the rental unit was generally unclean, that there were two chips on the flooring he says were caused by the Tenant, and that one of the FOBs to access the building had been lost. The Landlord provides photographs of the rental unit to show its state of cleanliness and the chips to the floor.

The Landlord provides no receipts with respect to the amounts withheld. He estimates the cleaning cost at being \$325.00 based on 4.5 hours of his time and 4 hours of his daughter's time. He further advised that he charged \$250.00 per floor chip. The Landlord further indicates that the cost of the FOB replacement cost \$50.00, which was charged by the property's strata.

The Landlord further advised that it took additional time to clean the rental unit such that the next occupant for the rental unit was unable to begin until one day later. The

Landlord withheld \$82.00 from the security deposit for the loss of 1 day of rent from the incoming tenant.

The Advocate emphasized that the rental unit had been cleaned before the Tenant left and that there was never a second FOB despite what the move-in condition inspection report stated.

The Landlord admitted he filed no application to claim against the security deposit for damages to the rental unit with the Residential Tenancy Branch.

Analysis

The Tenant applies for double of his security deposit.

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the Residential Tenancy Branch. A landlord may not claim against the security deposit if the application is made outside of the 15-day window established by s. 38.

Under s. 38(6) of the *Act*, when a landlord fails to either repay or claim against the security deposit within the 15-day window, the landlord may not claim against the security deposit and must pay the tenant double their deposit

Policy Guideline #17 states the following with respect to the retention or the return of the security deposit through dispute resolution:

1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
 - a landlord's application to retain all or part of the security deposit; or
 - a tenant's application for the return of the deposit.

Unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.

In other words, despite this being the Tenant's application, I may consider whether any deductions are permissible under the *Act*.

I find that the Tenant provided his forwarding address at the outset of the tenancy as it was commonly understood by the parties that he would be returning to his home after his hospital procedure. The 15-day claim or return window imposed by s. 38(1) of the *Act* was triggered upon the end of the tenancy, which in this case was on September 17, 2021 as confirmed by the parties. The deadline under s. 38(1) is, therefore, October 2, 2021.

I have considered the circumstances of the move-out inspection. Section 35(1) sets out that a landlord and tenant must inspect the condition of the rental unit before a new tenant occupies the rental unit. The inspection may take place on or after the day the tenant ceases to occupy the rental unit or on another mutually agreeable date. Section 35(3) requires a landlord to complete a move-out condition inspection report in accordance with the regulations. Finally, under s. 35(5), a landlord may conduct the inspection without the tenant if the landlord has offered the tenant at least two opportunities to conduct the inspection and the tenant does not participate on either occasion or the tenant has abandoned the rental unit.

Under s. 36(1) of the *Act*, the tenant's right for the return of the security deposit is extinguished if after being provided with two opportunities by the landlord to conduct a move-out inspection of the rental unit and the tenant refuses to participate on both occasions. Section 36(2) of the *Act* extinguishes a landlord's right to claim against the security deposit for damages if a landlord fails to provide the tenant two opportunities to conduct a move-out inspection, having provided two opportunities to conduct a move-out inspection, the landlord does not participate on either occasion; or having completed a move-out inspection, the landlord does not provide the tenant with a copy of the inspection report within 15 days of either the inspection being conducted or the tenant providing their forwarding address, whichever is later.

Policy Guideline #17 provides guidance that when both the tenant and landlord's right to the security deposit is extinguished, the party whose right was extinguished first bears the consequences.

In this instance, the Landlord completed the move-out condition report without the Tenant and withheld \$957.00 from the security deposit unilaterally. The Landlord was unable to direct me to any correspondence in which he offered the Tenant an opportunity to conduct the move-out inspection. I have reviewed the text messages over the relevant period and the move-out inspection is simply not discussed. The Landlord

vaguely indicated at the hearing that he had discussions with the Tenant about moving out, though could not provide specific information that he attempted to set a time for the move-out inspection with the Tenant at all.

I find that the Landlord failed to attempt to arrange a mutual time to conduct the move-out inspection in direct contravention of his obligation to do so under s. 35(2) of the *Act*. I further find that his right to claim against the security deposit was extinguished by virtue of s. 36(2)(a) of the *Act*.

I would further note that the Landlord admitted at the hearing that he never claimed against the security deposit and did not have the Tenant's consent to withhold any amount from the security deposit. Section 38 of the *Act* sets a clear procedure for the return of the security deposit. A landlord is not permitted to unilaterally withhold the security deposit based on estimates they believe to be fair. Section 38 requires a landlord to either return the security deposit or claim against it.

In this instance, the Landlord neither claimed against the security deposit nor did he return it. He did not have the Tenants consent to withhold any amount and such consent would have been invalid by virtue of s. 38(5) due to the Landlord's extinguished right to the security deposit. None of his purported deductions were permitted under the *Act*. His only option was to return the security deposit in full under the circumstances. Rather than do this, the Landlord returned \$43.00 on September 28, 2021.

I find that the Landlord breached his obligations under s. 38(1) of the *Act*, thus triggering s. 38(6). I find that the Tenant is entitled to double the amount of the security deposit. Taking into account the amount that was returned, I order that the Landlord pay the Tenant \$1,957.00 (\$1,000.00 x 2 - \$43.00).

I note that the Landlord requested a \$200.00 move-in/move-out fee, which the parties confirmed the Tenant had paid. Rule 2.2 of the Rules of Procedure limits a claim to what is stated in the application. In this instance, the Tenant did not claim for the return of the \$200.00 fee. I make no findings with respect to this amount and the Tenant is at liberty to apply for it if he so chooses.

Conclusion

The Landlord failed to return the security deposit in full as required under s. 38(1) of the *Act*. Pursuant to s. 38(6) of the *Act*, I find that the Tenant is entitled double of his

security deposit. Taking into account the amount that has been returned, the Tenant is entitled to \$1,957.00 under s. 38(6).

The Tenant was successful in his application. I find that he is entitled to the return of his filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay the Tenant's \$100.00 filing fee.

Pursuant to ss. 38, 72, and 67 of the *Act*, I make a total monetary order that the Landlord pay **\$2,057.00** to the Tenant (\$1,957.00 + \$100.00).

It is the Tenant's obligation to serve the monetary order on the Landlord. If the Landlord does not comply with the monetary order, it may be filed by the Tenant with 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: June 17, 2022

Residential Tenancy Branch