



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LOUGARVE ENTERPRISES LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNDCT, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenant applied for:

- an order for the landlord to return the security deposit (the deposit), pursuant to section 38;
- a monetary order for compensation for damage or loss under the Act, Residential Tenancy Regulation or tenancy agreement, under section 67; and
- an authorization to recover the filing fee for this application, under section 72.

I left the teleconference connection open until 1:41 P.M. to enable the landlord to call into this teleconference hearing scheduled for 1:30 P.M. The landlord did not attend the hearing. Tenant BK (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. The tenant was assisted by advocate LM (the advocate). 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, her advocate and I were the only ones who had called into this teleconference.

At the outset of the hearing the attending parties affirmed they understand the parties are not allowed to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5,000.00."

The tenant affirmed she mailed the January 05, 2022 notice of hearing and the evidence (the materials) to the landlord's address for service on January 07, 2022. The landlord's address for service and the tracking number are recorded on the cover page of this decision. The landlord's address for service used by the tenant is the address listed on the tenancy agreement submitted into evidence.

The tenant confirmed receipt of the landlord's response evidence on June 29, 2022.

Based on the tenant's testimony, the tracking number and the tenancy agreement, I find the tenant served the materials on January 07, 2022 in accordance with section 89(1)(c) of the Act.

Section 90 of the Act provides that a document served in accordance with Section 89 of the Act is deemed to be received if given or served by mail, on the 5th day after it is mailed. Given the evidence of registered mail the landlord is deemed to have received the materials on January 12, 2022, in accordance with section 90 (a) of the Act.

Rule of Procedure 7.3 allows a hearing to continue in the absence of the respondent.

Preliminary Issue – landlord's request to adjourn the hearing

The landlord's written submission states "This is to advise you that [landlord's representatives] will not be available on this date and therefore request it to be moved to the week of 12th of September 2022."

Rule of Procedure 7.9 states 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.

Rule of Procedure 5.2 states that when the parties do not agree to the request to adjourn, the party must attend the hearing and request the adjournment to the arbitrator.

The tenant did not agree to the landlord's request. The landlord's submission was vague. I find the landlord did not sufficiently explain why they would not be available to attend the hearing.

I denied the landlord's request to adjourn the hearing.

Preliminary Issue – amounts claimed

The tenant's application lists:

Double the security deposit: $\$775 \times 2 = 1,550.00$
½ October rent: \$775 (the security deposit was used to pay the latter half of October's rent)
September rent: \$1,550.00
Filing fee: \$100.00
Punitive damages: \$31,025.00

The tenant stated she is not claiming a monetary order for September's 2021 rent and that the landlord used the \$775.00 deposit without her authorization for half of October's 2021 rent.

Pursuant to my authority under section 64(3)(c) of the Act, I amended the tenant's application to withdraw the claim for a monetary order for September's 2021 rent.

Issues to be Decided

Is the tenant entitled to:

1. an order for the landlord to return the deposit?
2. a monetary order for loss? and
3. an authorization to recover the filing fee?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending party, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below. I explained rule 7.4 to the attending party; it is the tenant's obligation to present the evidence to substantiate the application.

The tenant testified the parties entered into a fixed-term tenancy from June 18, 2021 to October 31, 2021. Monthly rent of \$1,550.00 was due on the first day of the month. The landlord collected and currently holds the deposit in the amount of \$775.00. The tenancy agreement was submitted into evidence.

The tenant served a notice to end tenancy via text message on August 12, 2021 and vacated the rental unit on August 17, 2021, prior to the end of the fixed term.

The advocate worked for the landlord until October 01, 2021. The tenant said the advocate is authorized to represent her since October 03, 2021. The tenant submitted an email dated October 03, 2021 authorizing the advocate to represent her.

The tenant did not serve her forwarding address to the landlord.

The notice of hearing contains the advocate's address for service.

The landlord's written submission states:

The Security deposit was \$775.00 which is what should be requested instead of the rent itself. This amount was returned to the Tenant. It was agreed that instead of returning a cheque for the security deposit to the Tenant who was working out of town, the last month's rent was for half the amount and used the security deposit for the balance of the rent.

The tenant read the landlord's submission above referenced and affirmed that she did not authorize the landlord to retain the deposit, or to use the deposit for October's 2021 rent.

The tenant is claiming for an order for the return of double the deposit.

The tenant is claiming compensation for half of October's 2021 rent in the amount of \$775.00. The tenant stated the landlord collected \$775.00 from her checking account for October's 2021 rent, as the rent payments were pre-authorized debits.

The tenant testified she does not know when the rental unit was re-rented or if the landlord advertised the rental unit.

The advocate said the rental unit was not re-rented until October 01, 2021 and that the landlord did not advertise the rental unit. The advocate affirmed the landlord's representative AC instructed her not to try to re-rent the rental unit until mid-October 2021, as the fixed term tenancy was until October 31, 2021. The advocate stated the landlord rented similar rental units in the same rental building that were not occupied on August 20 and September 30, 2021 and that the landlord could have re-rented the tenant's rental unit earlier.

The tenant is claiming punitive damages in the amount of \$31,025.00, as the tenant suffered stress and financial hardship because she had to pay rent for the rental unit after she moved out in September and October 2021. The tenant had panic attacks,

suffered stress and lost her job because of the stress related to paying rent after she moved out.

Analysis

Section 7 of the Act states:

Liability for not complying with this Act or a tenancy agreement

7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Residential Tenancy Branch (RTB) Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

RTB Rule of procedure 6.6 states that 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.

Deposit

Based on the October 03, 2021 email and the undisputed and convincing testimony offered by the tenant and the advocate, I find that the tenant authorized the advocate to represent her on October 03, 2021.

The January 05, 2022 notice of hearing contains the advocate's address for service of documents. As noted above, I deemed the landlord received the notice of hearing on January 12, 2022.

Per section 71(2)(c) of the Act, I find the tenant sufficiently served her forwarding address with the notice of hearing, as the advocate is authorized to represent the tenant since October 03, 2021 and the tenant served the notice of hearing on January 07, 2022.

I accept the convincing testimony that the tenant did not authorize the landlord to retain the deposit. The landlord did not attend the hearing and did not address the tenant's convincing affirmed testimony.

The landlord has not brought an application for dispute resolution claiming against the deposit and has not returned the deposit.

Section 38(1) of the Act requires the landlord to either return the tenant's deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. Pursuant to section 38(6) of the Act, the landlord must pay a monetary award equivalent to double the value of the deposit:

(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.

[...]

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.

RTB Policy Guideline 17 is clear that the arbitrator will double the value of the deposit when the landlord has not complied with the 15 day deadline; it states:

B. 10. The landlord has 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 return the security deposit plus interest to the tenant, reach written agreement with the tenant to keep some or all of the security deposit, or make an application for dispute resolution claiming against the deposit.

[...]

11. If the landlord does not return or file for dispute resolution to retain the deposit within fifteen days, and does not have the tenant's agreement to keep the deposit, the landlord must pay the tenant double the amount of the deposit.

[...]

Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

- if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;

- if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;

Under these circumstances and in accordance with section 38(6)(b) of the Act, I find the tenant is entitled to a monetary award of \$1,550.00 (\$775.00 x 2).

Over the period of this tenancy, no interest is payable on the landlord's retention of the deposit.

I note that when the tenant submitted this application the tenant's claim for an order for the landlord to return the deposit was premature, as the tenant only served the forwarding address with the notice of hearing. However, the tenant's claim was only heard on July 28, 2022.

October's 2021 rent

I accept the tenant's undisputed and convincing testimony that she served a notice to end tenancy on August 12, 2021 and moved out on August 17, 2021.

Based on the tenancy agreement and the tenant's testimony, I find the tenant was aware the tenancy was for a fixed term from June 18 to October 31, 2021, and the tenant ended the tenancy early on August 17, 2021, contrary to section 45(2)(b) of the Act:

(2)A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
(a)is not earlier than one month after the date the landlord receives the notice,
(b)is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
lis the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(emphasis added)

I find the tenancy ended on August 17, 2021, per section 44(1)(d) of the Act.

Section 26(1) of the Act states the tenant must pay rent when it is due under the tenancy agreement.

I find the landlord breached section 26(1) of the Act by collecting rent from the tenant after the tenancy ended. I find the tenant suffered a loss of \$775.00 due to the landlord's breach of section 26(1) of the Act.

Thus, I award the tenant compensation in the amount of \$775.00.

One breach of the Act does not justify another breach. In this matter, the tenant breached section 45(2)(b) by ending the fixed term tenancy early. However, the landlord had to mitigate his losses by trying to re-rent the rental unit, despite the tenant's previous breach of the Act.

Punitive damages

RTB Policy Guideline 16 states that landlords and tenants may claim compensation for compensation only, "and must not include any punitive element".

The tenant's claim specifically states she is seeking punitive damages.

I dismiss the tenant's claim for punitive damages.

Filing fee and summary

As the tenant's application is successful, I award the tenant the return of the filing fee.

In summary:

ITEM	AMOUNT \$
Section 38(6) – doubling of \$775.00 deposit	1,550.00
October's 2021 rent	755.00
Filing fee	100.00
TOTAL	2,425.00

Conclusion

Pursuant to sections 38, 67 and 72 of the Act, I grant the tenant a monetary order in the amount of \$2,425.00.

The tenant is provided with this order in the above terms and the landlord must be served with this order. 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: July 29, 2022

Residential Tenancy Branch