Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FFT

Introduction

The Tenant seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- A monetary order pursuant to ss. 38 and 67 for double return of her security deposit; and
- Return of her filing fee pursuant to s. 72.

C.G. appeared as the Tenant. S.B. appeared as the Landlord's agent.

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 Tenant advised that her Notice of Dispute Resolution and initial evidence was served via registered mail sent on January 14, 2022 and additional evidence was served via registered mail on June 6, 2022. The Landlord's agent acknowledged receipt of the Tenant's application materials. I find that the Tenant served the Landlord with her application materials in accordance with s. 89 of the *Act*.

The Landlord provided evidence to the Residential Tenancy Branch, including video evidence. At the hearing, the Landlord's agent confirmed that this evidence was not served on the Tenant. Rule 3.15 of the Rules of Procedure requires respondents to serve the evidence they intend to rely upon on each of the named applicants at least 7 days prior to the hearing. That did not occur here as admitted by the Landlord's agent.

I find that the Landlord's evidence was not served and to consider it would be procedurally unfair to the Tenant, who has not had the opportunity to review the

evidence. Accordingly, the evidence provided by the Landlord to the Residential Tenancy Branch shall not be included in the record and shall not be considered by me.

Issues to be Decided

1) Is the Tenant entitled to the return of double her security deposit?
2) Is the Tenant entitled to the return of her 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 January 1, 2019.
- The Landlord obtained vacant possession of the rental unit on November 1, 2021.
- A security deposit of $475.00 was paid to the Landlord and an additional $200.00 deposit was paid as a furniture deposit.

A copy of the tenancy agreement was put into evidence. At the outset of the tenancy, rent was payable in the amount of $950.00 as per the tenancy agreement. The tenancy agreement has an addendum, which includes at clause 6 pre-set cleaning fees. The Tenant confirmed she rented a 1-bedroom suite. Clause 6 sets cleaning fees for 1-bedroom suites at $125.00.

The parties confirmed no written move-in condition inspection report was conducted at the outset of the tenancy.

At the end of the tenancy, the parties confirmed that they conducted an informal inspection of the rental unit at the end of October 2021. The Landlord's agent testified at the hearing that there was no damage to the rental unit but that it had been left in an unclean state. The Landlord's agent further testified that during the informal inspection the Tenant had agreed to cover the cost of cleaning the rental unit.

The Tenant acknowledges the discussion regarding cleaning the rental unit and says that there was an oral agreement to pay for cleaning the rental unit. The Tenant stated

that she discussed it later in the evening with someone else and came to the conclusion that the security deposit could only be applied to damages to the rental unit, not cleaning. It was after this that she requested a formal written inspection take place.

The parties confirmed that second inspection of the rental unit took place on November 1, 2022 and that a written condition inspection report was completed on that date. A copy of the written move-out inspection was put into evidence by the Tenant. The move-out inspection notes various deficiencies by the Landlord's agent. The Tenant wrote into the inspection report that she did not agree that the report fairly represented the condition of the rental unit.

The Tenant advised that she provided the Landlord with her forwarding address on November 1, 2021 in the condition inspection report.

The Landlord's agent testified that the rental unit and mattress required steam cleaning, that the mattress had blood on it, and that it took a staff member for the Landlord 8.5 hours to clean the rental unit.

An email exchange between the parties took place on November 5, 2021, which the Tenant puts into evidence. It includes an estimate of the charges proposed by the Landlord for the deductions. The Tenant explicitly states that she does not agree with any of the deductions and the Landlord's agent responding that "we will move forward".

The Tenant put into evidence a cheque dated November 17, 2021 in which $292.75 was returned to her from the Landlord. The parties confirmed that this was the amount that was returned to the Tenant from the deposits. The Landlord's agent indicates that the amount retained was based on an hourly calculation of the time it took to clean the rental unit. No receipts were put into evidence.

Analysis

The Tenant seeks the return of her security 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.

Policy Guideline #17 is clear that although this is the Tenant's application any deductions permitted under the *Act* may be considered.

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.

Further, s. 23 of the *Act* requires landlords and tenants to inspect the condition of the rental unit on the day the tenant is entitled to take possession or on another date that the parties agree to. Section 23(4) of the *Act* specifies that a landlord must complete a condition inspection report in accordance with the regulations. Section 23(5) provides that the parties are to sign the inspection report and the landlord is to provide a copy to the tenant.

It is undisputed that the Landlord failed to complete the move-in inspection report. Under s. 24(2)(c) of the *Act*, a landlord's right to claim against the security deposit is extinguished if the landlord does not complete an inspection report and give it to the tenant. In other words, the Landlord's failure to complete the move-in inspection report extinguished its ability to claim against the security deposit for damages.

The Landlord in the present circumstances failed to comply with s. 23 of the *Act* thus extinguishing their ability to claim against the security deposit, failed to return the security deposit within 15-days of the being given the Tenant's forwarding address as the cheque for its return is dated November 17, 2021, and improperly retained a portion of the security deposit.

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.

I find that s. 38(6) of the *Act* has been triggered and the Tenant is entitled to double the return of the security deposit, less any deductions permitted under the *Act* and upon consideration of the partial return of the security deposit.

The Tenant argued a distinction between “damages”, which the security deposit could be used for, and “cleaning”, which the security deposit could not be used for. This is a false distinction. Section 37(2) of the *Act* imposes an obligation on tenants at the end of the tenancy to leave the rental unit in a reasonably clean and undamaged state, except for reasonable wear and tear, and to give the landlord all keys in their possession giving access to the rental unit or the residential property. The security deposit is not strictly limited for damage to the rental unit and may be applied for cleaning costs as well.

Presently, the Tenant admitted that at the informal inspection in October 2021 that there was an oral agreement that the Landlord could deduct the cost of cleaning the rental unit. The fact that there was an admitted oral understanding leads me to conclude that the rental unit was, in fact, left in an unclean state. The fact that this was oral rather than written does not matter as it is clear there was an acknowledgement by the Tenant that the rental unit was not sufficiently cleaned at the end of the tenancy. Accordingly, I find that the Tenant breached her obligation under s. 37(2) of the *Act*.

However, the Landlord provides no receipts or calculation on hourly rate justifying the amount that was improperly retained. Further, the amount retained appears to be in clear contravention of the liquidated damages set by clause 6 of the addendum, which sets cleaning costs for a 1-bedroom apartment at $125.00. Clause 6 of the addendum acts as the parties’ clear pre-estimation of cleaning costs. I find the amount retained by the Landlord is improper and breaches clause 6 of the addendum. I find that the amount to be retained as per the tenancy agreement is $125.00 for cleaning the rental unit.

Section 19 of the *Act* prohibits landlords from requiring or accepting either a security deposit or pet damage deposit that is greater than the equivalent of ½ of one month’s rent payable under the tenancy agreement. Policy Guideline #29 provides guidance with respect to security deposits and states the following:

> As a result of the definition of a security deposit in the *Residential Tenancy Act* and the regulations, the following payments by a tenant, or monies received by a landlord, irrespective of any agreement between a landlord or a tenant would be, or form part of, a security deposit:

- The last month's rent;
- A fee for a credit report or to search the records of a credit bureau;
- A deposit for an access device, where it is the only means of access;
- Development fees in respect of a manufactured home site;
- A move-in fee in respect of a manufactured home;
- Carpet cleaning deposit or other monies paid to secure possible future expenses;
- Blank signed cheques provided as security, where the amount could exceed one-half of one month's rent;
- A furniture deposit in respect of furnished premises.

Policy Guideline #29 provides clear guidance that furniture deposits form part of the security deposit. I note that at the outset of the tenancy rent was due in the amount of $950.00, the security deposit was $475.00 and an additional $200.00 was paid as a furniture deposit. The $200.00 furniture deposit is in clear contravention of s. 19 of the *Act* as the combined value of the deposits exceeds ½ a month's rent. I find that the Landlord has breached s. 19 of the *Act* and order that the additional $200.00 taken as a furniture deposit be returned to the Tenant pursuant to s. 67 of the *Act*.

The Landlord is cautioned to change its practices in this regard and that landlords who are found to have contravened s. 19 may be found to have committed an offence under s. 95 of the *Act*, which includes the possibility of a fine being imposed of up to $5,000.00. To be clear, the Tenant is not entitled to claim for the fine under s. 95 as its enforcement rests with the Residential Tenancy Branch's compliance and enforcement unit.

Accordingly, I find that the Tenant is entitled to the return of following amount:

	$950.00	($475.00 security deposit x 2)
	$125.00	(cleaning fee as per liquidated damage clause 6 of the addendum)
-	$292.75	(Amount previously returned)
	$532.25	
+	$200.00	(Return of the deposit taken by the Landlord in breach of s. 19)
	$732.25	

Conclusion

I find that the Tenant is entitled to $732.25, representing the return of the deposit taken by the Landlord in contravention of s. 19 of the *Act* and double the deposit less applicable deductions.

The Tenant was successful in her application. I find that she is entitled to the return of her security deposit. Accordingly, I order pursuant to s. 72(1) of the *Act* that the Landlord pay the Tenant's $100.00 filing fee.

Pursuant to ss. 38, 67, and 72 of the *Act*, I order that the Landlord pay **$832.25** to the Tenant, representing the total of the return of the deposits and the filing fee ($732.25 + $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: August 05, 2022

Residential Tenancy Branch