# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## Decision

**Dispute Codes**:

MNSD, FF

**Introduction**

This Dispute Resolution hearing was convened to deal with an Application by the tenant for an order for the return of the security deposit retained by the landlord.

A representative of the landlord and the tenant appeared and each gave testimony.

**Issue(s) to be Decided**

The tenant was seeking to receive a monetary order for the return of the security deposit that the tenant considers as having been wrongfully retained by the landlord.

The issues to be determined, based on the testimony and the evidence, is whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act.

The burden of proof is on the applicant tenant to prove that a written forwarding address was received by the landlord. The burden of proof is then on the landlord to prove that the deposit was returned or that the landlord was entitled to retain the deposit.

**Background and Evidence**

The tenant testified that the tenancy ended on December 29, 2010 and that they had left the tenant's forwarding address in writing requesting the return of the security deposit of $492.50. No copy of this communication was in evidence.

The tenant testified that they have since moved from the address given. However, when the refund did not arrive, the tenant made several phone calls to the landlord and received no response. The tenant testified that they then filed a formal application for dispute resolution and served it on the landlord by registered mail sent on September 21, 2011. The tenant provided the Canada Post tracking number for verification.

The landlord's agent testified that, although he was not involved in the tenancy, he was aware that there was no communication received from the tenant containing the forwarding address. The landlord's position is that the tenant did not leave a written forwarding address or it would be shown in the tenant's file. The landlord's agent

testified that there is a possibility that the deposit was already refunded. The landlord's agent testified that he would have no way of confirming this at present and he would have to look into the matter further. The landlord stated that, if he was given more time, he could try to find bank records to find out whether or not the deposit was already refunded to the tenant. The landlord's agent pointed out that the tenant had also since moved from the first address that the tenant had allegedly given to the landlord.

The landlord's agent stated that, despite the fact that the Notice of Hearing and the Application for Dispute Resolution were served on the landlord over two months ago, the landlord has not been given an opportunity to gather and serve evidence to defend against the tenant's claim. According to the landlord's agent, this evidence could not be provided five days ahead of the hearing, as required by the Rules of Procedure, due to special circumstances. The landlord's agent did not provide details about these special circumstances, but testified that the actual landlord who was involved in the tenancy is now out of the country. The landlord's agent requested to be allowed to provide evidence after the hearing concluded and asked that the decision be held in abeyance pending the submission of this additional evidence. This request was denied.

In response to the tenant's argument that the tenant's current service address was supplied to the landlord on the tenant's Application for Dispute Resolution filed in September 2011, the landlord's agent argued that the address on the application should not be considered as the tenant's "written forwarding address" as referred to in section 38 of the Act. The landlord's agent stated that, despite the fact that more than 15 days had passed since the application containing the tenant's current address was received, it would not trigger the tenant's entitlement to double the deposit, because it was not clearly explained on the form and in the hearing material that the address shown on the Application would ever be considered a valid written forwarding address for the tenant under the Act.

## Analysis

I find that, in regard to the return of the security deposit and pet damage deposit, section 38 of the Act clearly states that, 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,** (my emphasis);

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. (my emphasis)

On the subject of whether or not the deposit was refunded, I note that the tenant stated that it was not returned while the landlord's agent stated that it "may have been" mailed back to the tenant. However, the burden of proof is on the landlord to show that the funds being held in trust for the tenant ***had*** been refunded.

I do not accept the landlord's agent's testimony that the security deposit was likely refunded already and that he did not have enough time to prepare for the hearing by submitting the necessary proof that the deposit was already repaid. I find that this evidence should have been easily available to the landlord in records that were totally under the landlord's control. I find that the landlord was not able to provide any reason why the evidence about refunding the deposit could not have been submitted prior to the hearing, as legally required.

Rule 4.1 of the Residential Tenancy Proceedings Rules of Procedure states that if the Respondent intends to dispute an application, the evidence upon which the Respondent intends to rely must be received as soon as possible and at least 5 days before the dispute resolution hearing or if that is not possible, the evidence must be filed with the Residential Tenancy Branch and received by the Respondent at least 2 days prior to the hearing. The "*Definitions*" portion of the Rules of Procedure states that when the number of days is qualified by the term "*at least*" then the first and last days must be excluded. All of the above information was provided to the respondent in the hearing package.

I find that, while the tenant did not provide sufficient proof that a written forwarding address had been provided to the landlord on the last day of the tenancy, the fact is that the landlord did subsequently receive the tenant's application with the tenant's address in September 2011, approximately 2 months ago.

With respect to the landlord's allegation that it was not clarified that the address on the Application was the tenant's forwarding address, I reject this argument based on the fact that, just above the space on the form that contains the applicant tenant's address, the following statement is highlighted:

> *"**Applicant Address** (address for service of documents or notices – where material will be given, faxed, or mailed)"*

I find that it is abundantly clear that the address provided is a valid and legal service address for the Applicant tenant where any documents or correspondence may be sent and this includes any security deposit still owed.

In any case, the landlord has not as of this date made any application to obtain an order to keep the deposit for damages or rent owed. Therefore, I find that there would be no supportable reason for the landlord not to refund the security deposit when the tenant's application was served. In the alternative, if the landlord did not intend to refund the deposit, the landlord could have made a cross application seeking an order to retain it for monies owed.

I find that the landlord failed to take either one of the above actions.

Section 38(6) provides that, if a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit, and must pay the tenant double the amount of the security deposit.

Based on the evidence and the testimony, I find that the Landlord had received the Notice of Hearing containing the tenant's address in writing around the end of September 2011.

I find that within 15 days of receiving this information, the landlord still failed to return the deposit or make application for an order to keep it within the time permitted to do so.

**Conclusion**

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of $1,035.00, which represents $985.00 for double the security deposit and the $50.00 fee paid for this application. Accordingly, I hereby issue a monetary order for $1,035.00 in favour of the tenant. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) 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: December 08, 2011.

Residential Tenancy Branch