Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding T & M HOLDINGS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: MNSD FF

Introduction

This hearing dealt with an application by the tenant pursuant to the Residential Tenancy Act (the Act) for orders as follows:

a) An Order to return double the security deposit pursuant to Section 38; and
b) To recover the filing fee for this application.

SERVICE

Both parties attended the hearing and the tenant provided evidence that she had served the landlord with the Application for Dispute Resolution by email per a substitutionary service order issued on June 23, 2014 and sent her forwarding address to the landlord on March 21, 2014. The landlord agreed he had received them as stated. I find the documents were served pursuant to sections 88 and 89 of the Act for the purposes of this hearing.

Issue(s) to be Decided:

Has the tenant proved on the balance of probabilities that she is entitled to the return of double the security deposit according to section 38 of the Act?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to present evidence and make submissions. It is undisputed that the tenant paid a security deposit of $550 in March 2013, rent was $1100 a month and the tenant paid her rent until the end of the fixed term lease on May 31, 2014 although she vacated in April 2014. The tenant provided his forwarding address in writing on March 21, 2014. The landlord agreed these facts were correct. The tenant's deposit has never been returned and she gave no permission to retain any of it.

On May 6, 2013, after doing a condition inspection report, the landlord's agent returned $443.61 of the deposit but the tenant returned the cheque for she did not want to compromise her position that she should have the entire deposit returned.

The parties submitted legal arguments concerning the condition inspection report not being done at the beginning of the tenancy. The landlord said he left the form in the tenant's mailbox, she said it got wet, she did not know what it was and asked the landlord by email to give her another; they did not. She contended that section 23 requires the landlord to do the inspection with the tenant. She received later emails from the landlord either asking her to do the inspection and return the form or return the form but she refused as it was already late into the tenancy and she felt that it would be meaningless as it was not done at move-in.

The landlord said that he and his wife are experienced in investing and property management and they have a system to do things according to the Act. He said that they had left the condition inspection form in the tenant's mailbox when she moved in but she had not returned it. His wife emailed the tenant on May 6, 2013 (just a month after the tenancy began) and requested the tenant to return it but she got no response. On January 15, 2014, his wife asked if the tenant had not done the form that they do a walk through and condition inspection report now and again in March 3, 2014, they made the request. The tenant refused as she said it should have been done before on move-in. The landlord said they provided 4 opportunities to do an inspection on move-out but the tenant refused. He pointed out that the legislation only specifies the landlord must provide two opportunities for inspection but does not specify whether they must be move-in or move-out. He contends the right to the return of the security deposit has been extinguished due to her failure to participate in the inspections.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

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Analysis:

The *Residential Tenancy Act* provides:

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.
(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or
(b) after the end of the tenancy, the director orders that the landlord may retain the amount.
(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.

In most situations, section 38(1) of the Act requires a landlord, within 15 days of the later of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an application to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must pay the tenant double the amount of the security deposit (section 38(6)).

I find the evidence of the tenant credible that she paid $550 security deposit in March 2013, served the landlord her forwarding address in writing on March 21, 2014, vacated on April 30, 2014 but paid rent until the end of her fixed term lease which was May 31, 2014. I find she gave no permission for the landlord to retain the deposit. I find the tenancy did not end until May 31, 2014 and section 38(1)(a) applies; therefore, the landlord had 15 days from May 31, 2014 to either return the deposit or make an Application to claim against it. I find he did return $443.61 of it on May 6, 2014; although the tenant returned the cheque, I find the doubling provision of section 38 does not apply to that amount as the landlord made a good effort to return and it would be unfair to double monies that were returned before or within the 15 days permitted in the legislation.

Although the parties argued the applicable portions of the legislation very well, I find section 23 of the Act puts the onus on the landlord to do the condition inspection report, whether or not the tenant complies. Section 23 (4) makes this mandatory. Although the landlord argued the numerous opportunities they provided for the tenant to do the report herself and send it, I find the tenant's argument more persuasive as she pointed out section 23(1) where it states the landlord and tenant "**together must inspect** the condition of the rental unit **on the day the tenant is entitled to possession** of the rental unit or **on another mutually agreeable day**" **(**words relevant to legal argument by the parties are in bold). I find insufficient evidence that the landlord satisfied the onus placed on them by section 23 or tried at the outset of the tenancy to establish a mutually agreed date to inspect the premises together. I find it reasonable that the tenant stated that a meeting after many months for a move-in or move-out report would be

meaningless as the initial condition was not agreed upon at the beginning. I reject the landlord's argument that it does not matter when the opportunities for inspection are provided as section 23 contradicts this. I find the tenant's rights to the return of her security deposit are not extinguished under section 24(1)(a) as the landlord had not offered her the two inspections at move-in as contemplated by section 23 (quoted above)

Although the tenant has the right to the return of her security deposit, as discussed in the hearing, the landlord retains the right to file an Application to claim within the legislated timelines for any monies owed and damages.

I find the tenant entitled to recover double the balance of her security deposit plus the amount originally offered by cheque and refused by the tenant.

Conclusion:

I find the tenant entitled to a monetary order as calculated below and to recover the filing fee for this application.

Security deposit (no interest 2013-14)	550.00
Less amount returned within s. 38 time limit	-443.61
Balance not returned	106.39
Double balance not returned within limit	106.39
Plus amount returned to landlord	443.61
Filing fee	50.00
Total Monetary Order to Tenant	706.39

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: September 11, 2014

Residential Tenancy Branch