Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNSD, FF

Introduction:

This hearing was convened in response to an Application for Dispute Resolution filed by the Tenant in which the Tenant applied for the return of the security deposit and to recover the fee for filing this Application for Dispute Resolution.

The Tenant stated that sometime in May of 2016 his girlfriend personally served the Landlord with the Application for Dispute Resolution and the Notice of Hearing. The Landlord stated that he received these documents on June 01, 2016.

On June 06, 2016 the Tenant submitted one page of evidence to the Residential Tenancy Branch. The Tenant stated that this document was served to the Landlord with the Application for Dispute Resolution. The Landlord stated that he did not receive this document as evidence for these proceedings. As the Landlord did not acknowledge receipt of this document, it was not accepted as evidence for these proceedings.

As I was unable to conclude if the Tenant was being truthful when he stated that the one page of evidence was served to the Landlord or if the Landlord was being truthful when he stated that the evidence was not received, the Tenant was given the opportunity to request an adjournment if, at any point during the hearing, the Tenant considered it necessary for me to physically view this evidence. The hearing concluded without the Tenant requesting an adjournment.

On November 07, 2016 the Landlord submitted two pages of evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was mailed to the service address provided by the Tenant on the Application for Dispute Resolution, via regular mail, on November 01, 2016. He stated that evidence was returned to him by Canada Post.

The Tenant stated that he moved from the service address he listed on the Application for Dispute Resolution on October 29, 2016 and that he did not receive the evidence the Landlord mailed to that address on November 01, 2016. He stated that he provided the Residential Tenancy Branch with a new mailing address but he did not provide the

Landlord with an updated service address. As the Tenant did not acknowledge receipt of this evidence, it was not accepted as evidence at the beginning of the hearing.

Although the Landlord's evidence was served in accordance with section 88 of the *Act* I did not accept it as evidence because the Tenant has not had an opportunity to view the evidence. The Landlord was given the opportunity to request an adjournment if, at any point during the hearing, the Landlord considered it necessary for me to physically view his evidence. The hearing concluded without the Landlord requesting an adjournment.

In determining that the Landlord's evidence should only be accepted after the Tenant had a chance to consider it I was influenced, in part, by the fact the Landlord did not attempt to serve this evidence to the Tenant until 2 weeks prior to the hearing. Given that the Tenant did not move until approximately two weeks before the hearing I find it reasonable for him to conclude that no evidence would be served to him for these proceedings.

During the hearing the Landlord was given the opportunity to read out a letter dated November 04, 2014, which the Landlord had submitted in evidence. The Tenant was advised that I was in possession of that letter and would adjourn the hearing if the Tenant considered it necessary to physically view the letter. The Tenant stated that he was prepared to allow me to consider the letter that was read aloud and that he did not need to physically view the letter. This letter was, therefore, accepted as evidence.

The Landlord and the Tenant were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Issue(s) to be Decided:

Is the Tenant entitled to the return of his security deposit?

Background and Evidence:

The Landlord and the Tenant agree that:

- the tenancy began in February of 2016;
- the Tenant paid a security deposit of $750.00;
- the Landlord served the Tenant with a One Month Notice to End Tenancy for Cause, which declared that the Tenant must vacate the rental unit by April 30, 2016;
- the Tenant did not dispute the Notice to End Tenancy;
- the Tenant vacated the rental unit on the basis of the Notice to End Tenancy;
- the rental unit was vacated on, or before, April 30, 2016;
- the Tenant did not authorize the Landlord to retain any portion of the security deposit; and
- the Landlord did not file an Application for Dispute Resolution claiming against the security deposit.

The Tenant stated that the Landlord was provided with a forwarding address for the Tenant, in writing, on April 29, 2016. The Landlord stated that he received a forwarding address for the Tenant, in writing, on April 30, 2016.

The Landlord stated that:

- on May 06, 2016 he mailed a cheque, in the amount of $750.00, to the forwarding address provided by the Tenant;
- the cheque represented the return of the Tenant's security deposit;
- this cheque has not been returned by Canada Post;
- this cheque has not been cashed; and
- he cancelled the cheque approximately one week prior to the hearing on November 15, 2016.

The Tenant stated that he did not receive a cheque for $750.00 from the Landlord. He stated that when his girlfriend served the Landlord with the Application for Dispute Resolution the Landlord told her that he had not returned the security deposit and he told her to get off his property.

The Landlord stated that when he was served the Application for Dispute Resolution he expressed concern that the Tenant had not contacted him to find out why the security deposit had not been received before he filed an Application for Dispute Resolution. The Landlord stated that he told the female who served him with the Application to leave the property after she told him the Tenant wanted double the security deposit returned to him.

The Landlord stated that he has always been willing to return the security deposit to the Tenant. At the conclusion of the hearing the Tenant provided the Landlord with a current mailing address.

In the letter dated November 04, 2016 which was submitted in evidence by the Landlord a third party declared that on May 06, 2016 the Landlord asked him to witness him mailing a cheque to his former tenant and that he was asked to witness the mailing because of previous conflicts between those parties.

Analysis:

Section 38(1) of the *Residential Tenancy Act (Act*) stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or file an Application for Dispute Resolution claiming against the deposits.

On the basis of the testimony of the Landlord and the letter submitted in evidence by the Landlord, dated November 04, 2016, I find that on May 06, 2016 the Landlord mailed a cheque to a forwarding address provided by the Tenant. I find that this cheque was

sent to the Tenant in a manner that is authorized by section 88(d) of the *Act.* I find that the Landlord complied with section 38(1) of the *Act* when he mailed this cheque to the Tenant, as it was mailed within fifteen days of the date the tenancy ended and the date the Landlord received the Tenant's forwarding address.

Section 90(a) of the *Act* stipulates that a document that is served by mail is deemed to be received on the fifth day after it is mailed. On the basis of the testimony of the Tenant and in the absence of evidence to the contrary, I find that Tenant did not receive the cheque that was mailed on May 06, 2016. I find that the Tenant's testimony rebuts the deeming provision of section 90(a) of the *Act*.

I find it entirely possible that both parties are being truthful in regards to the security deposit refund. I find it possible that the Landlord mailed the cheque and that the Tenant did not receive the cheque as a result of human error, either on the part of the Landlord, the Tenant, or Canada Post.

As the Tenant has not received the security deposit refund and the Landlord has made no claim against the deposit, I find that the Landlord remains obligated to return the $750.00 security deposit to the Tenant.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act* the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

There is a general legal principle that places the burden of proving a fact on the person who is claiming compensation. In these circumstances the burden of proving the Landlord failed to comply with section 38(1) of the *Act* rests with the Tenant. I find that the Tenant has submitted insufficient evidence to show that the Landlord failed to comply with section 38(1) of the *Act* and I therefore dismiss the Tenant's application for double the security deposit.

In adjudicating this matter I have placed no weight on the Tenant's submission that the Landlord told his girlfriend that he had not returned the security deposit when she served the Landlord with the Application for Dispute Resolution. I placed no weight on this submission because it was presented as hearsay evidence, which is inherently unreliable, and because the Landlord denied the statement.

As there is insufficient evidence to establish that the Tenant did not receive his security deposit refund because the Landlord breached the *Act*, I find that the Landlord is not required to pay for the cost of filing this Application for Dispute Resolution.

Section 7(2) of the *Act* requires a tenant who claims compensation for damage or Loss as a result of 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. I find that the Tenant may not have incurred the costs of filing this Application for Dispute Resolution if he had communicated with the Landlord prior to filing the Application. For

these reasons I dismiss the Tenant's application to recover the fee for filing the Application.

Conclusion:

The Tenant has established that he is entitled to the return of his security deposit and I grant the Tenant a monetary Order for $750.00. In the event that the Landlord does not voluntarily comply with this Order, it may be filed with the Province of British Columbia Small Claims 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: November 16, 2016

Residential Tenancy Branch