# Dispute Resolution Services



Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Cherish at Central Park
and [tenant name suppressed to protect privacy]

## DECISION

MNSDB-DR, FFT

Dispute Codes

Introduction

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

- an order for the landlord to return the security deposit, pursuant to section 38 of the Act; and
- an authorization to recover the filing fee for this application, pursuant to section 72 of the Act.

Both parties attended the hearing. The tenant was represented by advocates NM and DM. The landlord was represented by representative MA. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant affirmed she served the notice of hearing and evidence to the landlord by registered mail on June 16, 2020. On July 08, 2020 a second evidence package with the interim decision was served by registered mail, as well as a third evidence package sent on October 05, 2020. The tracking number for the three packages are listed on the cover page of this decision.

The landlord confirmed receipt of the package served on June 16, 2020. The landlord affirmed the second and third packages were delivered but she did not receive them from the owner of the rental building.

I find the landlord was sufficiently served the notice of hearing, interim decision and evidence in accordance with section 71(2)(b) of the Act.

The tenant confirmed receipt of the landlord's evidence package on October 09, 2020. I find the landlord was served in accordance with section 89(1)(c) of the Act.

The landlord stated she served a second evidence package on the hearing date. This evidence package is not accepted into evidence, per Rule of Procedure 3.15.

Issues to be Decided

Is the tenant entitled to:

01. an order for the landlord to return the security deposit?
02. an authorization to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted evidence and the testimony of the attending parties, 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 parties; it is their obligation to present the evidence to substantiate the application.

Both parties agreed the tenancy started in December 2017 and ended on April 30, 2020. Monthly rent was $3,193.00 due on the first day of the month. At the outset of the tenancy a security deposit of $1,550.00, a pet damage deposit of $500.00 and a pendant necklace alarm deposit of $175.00 were collected. The landlord holds the three deposits in the total amount of $2,225.00. The tenancy agreement was submitted into evidence:

6. ASSISTANCE WITH PERSONAL CARE

Personal Care medical services may be an·anged by the Resident(s) directly with the [ANONYMIZED] or another approved Home Care pl and physical condition of the Resident(s). Central Park will observe the Resident's physical and mental health and will assist in obtaining non-emergency assistance on behalf of the Resident, if required. In the event of an emergency either the Resident or Central Park will dial 911 for assistance. The Resident may also request emergency assistance from Central Park staff and Central Park staff will assist in such manner as they deem appropdate and.within their capabilities, or may in their sole discretion decline to talce action. In either event, the Resident agrees that there shall be no liability against Central Park or its staff resulting from such actions or inactions and the Resident shall not be entitled to malce any claim against the Central Park or its staff for any resulting damages or injury to the Resident.

**13.ACCEPTANCE OF RISKS**

The Resident aclmowledges that Central Park does not offer constant supervision or observation of the Resident while on or offsite. The Resident understands that while living at Central Park under the terms of this Agreement the Resident is responsible for their own safety and aclmowledges that the Resident may place themselves at risk. The Resident acknowledges and accepts the risks associated with the residential nature of independent living, and his or her choice of lifestyle at Central Park.

Emergency pendants and cell phones do not reliably receive or send signals in the parkade level of the building, including the workshop and parking areas. The Resident hereby fully accepts all responsibility and risks associated with using the basement at Central Park.

Both parties agreed the rental unit had weekly housekeeping service, laundry service, a 24-hour nurse-line (if a tenant needs assistance a button can be pushed and the landlord will assist the tenant), four meals were provided daily (lunch, dinner, and two snacks), utilities and leisure activities were included in the rental rate, the rental unit had a private bathroom and kitchenette (with a microwave, a sink and a fridge). The tenant could eat the meals in the restaurant located in the rental building, pay an extra fee to have the meals served to her rental unit or cook her own meals.

The tenant affirmed the pendant necklace alarm service was offered by another company, the rental unit was the tenant's primary and only residence and the tenancy agreement is regulated by the Act. The rental unit was not occupied for any business purposes.

The landlord stated the Act does not apply to the tenancy agreement, as other services were provided to the occupants of the rental building and the living accommodation was occupied for business purposes. The services offered by the landlord were above and beyond a tenancy agreement.

The landlord submitted a letter from her counsel dated September 24, 2020 stating that the rental building operates under a "P1-Neighbourhood Institutional Zone" rather than as a multiple residential zone.

Both parties also agreed the tenant's forwarding address was provided in writing on April 28, 2020. A copy of the email containing the forwarding address was submitted into evidence. The tenant did not authorize the landlord to withhold the deposits and the landlord did not submit an application for dispute resolution.

The landlord said the deposits were not returned because the tenant caused damages to the rental unit.

Analysis

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.

Jurisdiction

The Act defines tenancy agreement as: "an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities."

Based on the parties undisputed testimony, I find there is a tenancy agreement between applicant and respondent.

Section 2(1) of the Act states: "Despite any other enactment but subject to section 4 [what this Act does not apply to], this Act applies to tenancy agreements, rental units and other residential property."

Section 4(d) of the Act states:

> This Act does not apply to:
> […]
> (d) living accommodation included with premises that

(i)are primarily occupied for business purposes, and
(ii)are rented under a single agreement,

Residential Tenancy Branch Policy Guideline 9 states:

> Under a tenancy agreement, the tenant has exclusive possession of the site or rental unit for a term, which may be on a monthly or other periodic basis. Unless there are circumstances that suggest otherwise, there is a presumption that a tenancy has been created if:
> **• the tenant gains exclusive possession of the rental unit or site, subject to the landlord's right to access the site, for a term; and**
> **• the tenant pays a fixed amount for rent**.
>
> […]
>
> In Powell v. British Columbia (Residential Tenancy Branch), 2016 BCSC 1835, the Court held that municipal zoning may be relevant in that could inform the nature of the legal relationship between an owner and occupier. **While zoning may inform this question, it is the actual use and nature of the agreement between the owner and occupier that determines whether there is a tenancy agreement or licence to occupy**.
>
> **The fact that the landlord is not in compliance with local bylaws does not invalidate a tenancy agreement**. An arbitrator may find that a tenancy agreement exists under the MHPTA, even if the property the rental pad is on is not zoned for use as a manufactured home park. As the Court pointed out in Wiebe v Olsen, 2019 BCSC 1740, "there is no statutory requirement that a landlord's property meet zoning requirements of a manufactured home park in order to fall within the purview of the MHPTA."
>
> (emphasis added)

Based on both parties testimony, I find the tenant resided in the rental unit, the rental unit was her primary and only residence and the tenant paid monthly rent in accordance with the tenancy agreement. I find the rental building zoning is not enough for the Act not to govern this tenancy.

Residential Tenancy Branch Policy Guideline 14 states:

> To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the "predominant purpose" of the use of the premises is.

> Some factors used in that consideration are: relative square footage of the business use compared to the residential use, employee and client presence at the premises, and visible evidence of the business use being carried on at the premises

The fact that the tenant used services offered by the landlord in the rental building is not sufficient to consider this tenancy commercial. I find the predominant purpose of the premises was to use the rental unit as the primary and only residency of the tenant. Thus, section 4(d) of the Act does not apply.

Section 4(g) of the Act states:

> This Act does not apply to:
> […]
> (g) living accommodation
> (v) in a housing based health facility that provides hospitality support services **and** personal health care
>
> (emphasis added)

Section 6 of the tenancy agreement indicates the tenant should arrange her personal health care services with third parties, as the landlord is not responsible for these services. The landlord may " assist in such a manner as they deem appropriate and within their capabilities, or may in their sole discretion decline action". Further to that, section 13 of the tenancy agreement states the resident is responsible for her own safety while at the rental building.

The Act makes it clear that providing hospitality support service alone is not sufficient to make it exempt from the Act. The landlord must provide both hospitality support services and personal health care services. In this case, based on the tenancy agreement (sections 6 and 13) and the undisputed testimony, I find the landlord provided hospitality services, but not personal health care services.

Further to that, there is no evidence the rental building is governed by: a) the community care and assisted living Act, b) the continuing care Act or c) the mental health Act.

Thus, based on the above considerations, I find the tenancy agreement between the parties is not exempt from the Act and the Act governs this tenancy agreement, per section 2(1).

Security deposit

Section 38 of the *Act* requires the landlord to either return the tenant's security 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.

Based on the landlord's testimony, I find the landlord has not brought an application for dispute resolution claiming against the security deposit pursuant to section 38(1)(d) of the Act.

Pursuant to section 38 of the Act, the landlord must pay a monetary award equivalent to double the value of the security 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.

Residential Tenancy Branch Policy Guideline 17 states:

> 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;

Under these circumstances and in accordance with section 38(6) of the Act and Policy Guideline 17, I find that the tenant is entitled to a monetary award of $4,450.00. Over the period of this tenancy, no interest is payable on the landlord's retention of the security deposit.

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

In summary:

| ITEM | AMOUNT $ |
|---|---|
| Section 38(6) - doubling of $2,225.00 deposits | 4,450.00 |
| Section 72 - Reimbursement of filing fee | 100.00 |
| **TOTAL** | **4,550.00** |

Conclusion

Pursuant to sections 38, 67 and 72 of the Act, I grant the tenant a monetary order in the amount of $4,550.00.

This order must be served on the landlord by the tenant. If the landlord fails to comply with this order the tenants may file the order in the Provincial Court (Small Claims) to be 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 03, 2020

Residential Tenancy Branch