



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNSDS-DR, FFT / MNDCL-S, FFL

Introduction

This reconvened hearing took place following applications for dispute resolution (Applications) from both parties under the *Residential Tenancy Act* (the Act), which were crossed to be heard simultaneously.

The Tenant seeks:

- A Monetary Order for the return of all or a portion of their security deposit under sections 38 and 67 of the Act; and
- To recover the cost of the filing fee for this Application from the Landlord under section 72 of the Act.

The Landlord seeks:

- a Monetary Order for money owed or compensation for damage or loss under the Act, *Residential Tenancy Regulation* (Regulation) or tenancy agreement under section 67 of the Act;
- authorization to retain all or a portion of the Tenant's security deposit in partial satisfaction of the Monetary Order requested under section 38 of the Act; and
- authorization to recover the filing fee for this Application from the Tenant under section 72 of the Act.

The first hearing took place on August 29, 2023 and was adjourned because, owing to an administrative error on the part of the Residential Tenancy Branch, the Landlord had not been provided with a Notice of Dispute Resolution Proceeding for their Application. This Decision should be read in conjunction with the Interim Decision dated August 29, 2023.

The Tenant attended the second hearing. Although I waited until 2:00 PM to enable the Landlord to connect with this teleconference hearing scheduled for 1:30 PM, the Landlord did not attend.

I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Dispute Resolution Proceeding. During the hearing, I also confirmed from the online teleconference system that the Tenant and I were the only parties who had called into this teleconference.

Rule 7.1 of the *Rules of Procedure* states that a hearing will commence at the scheduled time, unless otherwise set by the Arbitrator.

Rule 7.3 of the *Rules of Procedure* states that if a party or their agent fails to attend the hearing, the arbitrator may conduct the hearing in the absence of that party or dismiss the application with or without leave to reapply.

Accordingly, the hearing proceeded in the absence of the Landlord or their Agent.

The Tenant testified they served the Notice of Dispute Resolution Proceeding Package (Materials) on the Landlord and their Agent, JC, on January 13, 2023 via registered mail. Copies of the postage labels and tracking numbers were entered into evidence by the Tenant.

A search of the tracking numbers on the Canada Post website confirms the packages were received and signed for by a person with the same name and initial as the Landlord's Agent, JC, on January 16, 2023. Given the above, I find on a balance of probabilities that the Tenant's Materials were sufficiently served to the Landlord in accordance with section 71(2)(c) of the Act and were received on January 16, 2023.

The Tenant testified they had not received any documents of any kind from the Landlord regarding the Landlord's Application. Given the Tenant's undisputed testimony, I find the Landlord did not serve their Materials onto the Tenant. In light of this, and the absence of the Landlord at the hearing, I dismiss their Application with leave to reapply.

Issues to be Decided

1. Is the Tenant entitled to the return of the security deposit?
2. Is the Tenant entitled to recover the filing fee from the Landlord?

Background and Evidence

The attending party was 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 Tenant confirmed the following regarding the tenancy:

- The tenancy began on August 1, 2022 for a fixed term until July 31, 2023 and continuing on a month-to-month basis thereafter.
- Rent was \$2,400.00 per month due on the first day of the month.
- A security deposit of \$2,400.00 was paid by the Tenant which the Landlord still holds.
- There is a written tenancy agreement which was entered into evidence.
- The Tenant vacated the rental unit on September 2, 2022.

The Tenant provided the following undisputed testimony. They paid the rent for the first month of the tenancy due on August 1, 2022, though did not take occupancy of the rental unit until mid-August 2022. They rented a room in the upper portion of the residential property, a house, which also had two suites in the basement. The Tenant only dealt with JC regarding the tenancy and did not have any contact with the Landlord.

There had been two other rooms in the house when they signed the tenancy agreement, though since then the living room had also been converted into an additional bedroom. The other rooms in the house were occupied by other students. One of the basement suites was occupied by tenants and the other was occupied by the JC's grandmother. The Tenant had their own bathroom and shared the kitchen with their house mates.

The Tenant paid the rent due September 1, 2022 but had noticed JC had been visiting the rental property unannounced from time to time. Also, when the Tenant and other tenants of the house were staying up in the kitchen talking one night, a man they did not know appeared. The Tenant asked JC about this incident and JC said they kept one room in the house for their friends to stay in and they could come and go as they pleased. JC said if the Tenant had an issue with this, they could leave. The Tenant said

to JC that they did not like this arrangement and JC asked for the Tenant's keys to be left on the counter by 1:00 PM on September 2, 2022.

JC was also asking for rent in payment via cash only, would not provide a receipt and was wanting to charge a fee for guests to stay. The Tenant also found out after the tenancy started that the Landlord was not allowed to charge a security deposit over half a month's rent.

The Tenant vacated the rental unit on September 2, 2022. An inspection of their room was done with JC and a brief note was signed, confirming no damage had been done. The Tenant provided their forwarding address via text message to JC on September 3, 2022 and then in writing in person to JC on September 29, 2022. A copy of a Tenant's Notice of Forwarding Address (RTB-47) form and a witnesses Proof of Service (RTB-41) form were entered into evidence by the Tenant.

The Tenant has not received the security deposit back and does not waive their right to double the deposit in return.

Analysis

Section 38(1) of the Act requires a landlord to either repay the security deposit to the tenant or make an application for dispute resolution claiming against the security deposit within 15 days of the tenancy ending and receiving the tenant's forwarding address in writing, whichever is later.

A landlord may also retain the security deposit if they either have authority from an arbitrator, or written agreement from the tenant to do so as set out in sections 38(3) and 38(4) of the Act.

Section 36 of the Act also states that a tenant may also extinguish their right to the return of a security deposit if they fail to attend an inspection of the rental unit at either the start or end of the tenancy after being given two opportunities to do so, unless the tenant has abandoned the rental unit.

Section 38(6) of the Act states that if a landlord does not take either of the courses of action set out in section 38(1) of the Act, the landlord may not make a claim against the security deposit and must pay the tenant double the amount of the security deposit.

I find the tenancy was for a fixed term ending July 31, 2022. Policy Guideline 30 – Fixed Term Tenancies confirms during the fixed term neither the landlord nor the tenant may end the tenancy unless certain circumstances apply. One of these circumstances is where there is agreement of both parties to end the tenancy during the fixed-term.

Based on the evidence before me and the undisputed testimony of the Tenant, I find the parties mutually agreed to end the tenancy on September 2, 2022. I also find the Tenant provided their forwarding address in writing to the Landlord on September 29, 2022.

This means the Landlord would have had to either return the security deposit to the Tenant or make an application for dispute resolution claiming against the security deposit by October 14, 2022.

I find the Landlord has not returned the security deposit to the Tenant based on the undisputed testimony of the Tenant. The Landlord filed their Application with the Residential Tenancy Branch claiming against the security deposit on November 29, 2022, outside of the 15 day period set out in section 38(1) of the Act. As discussed earlier in this Decision, their Application was dismissed with leave to reapply as I find they did not serve their Application Materials to the Tenant or attend the hearing.

I find no evidence that indicates to me the Landlord was entitled to retain the security deposit under either section 38(3) or 38(4) of the Act as the Landlord did not have an outstanding Monetary Order against the Tenant, or have written permission from the Tenant to retain the security deposit. Additionally, I find there is no evidence that the Tenant had extinguished their right to the return of the security deposit per section 38(2) of the Act as I find the Tenant attended the only inspection of the rental unit that took place.

Given the above, I find the Landlord has failed to comply with section 38(1) of the Act and I grant the Tenant's Application. Therefore, the Landlord is not permitted to claim against the security deposit and I order the Landlord to return double the security deposit to the Tenant per section 38(6) of the Act.

Per section 4 of the Regulation, interest on security deposits is calculated at 4.5% below the prime lending rate. The amount of interest owing on the security deposit was calculated using the Residential Tenancy Branch interest calculator using today's date. The interest applies only to the original deposit and is not doubled.

As the Tenant's Application was successful, I find they are entitled to recover the cost of the filing fee of \$100.00 from the Landlord under section 72 of the Act.

Conclusion

The Landlord's Application is dismissed with leave to reapply.

The Tenant's Application is granted.

The Tenant is issued a Monetary Order. A copy of the Monetary Order is attached to this Decision and must be served on the Landlord. It is the Tenant's obligation to serve the Monetary Order on the Landlord. The Monetary Order is enforceable in the Provincial Court of British Columbia (Small Claims Court). The Order is summarized below.

Item	Amount
Return of security deposit	\$2,400.00
Double security deposit	\$2,400.00
Interest on security deposit	\$35.48
Filing fee	\$100.00
Total	\$4,935.48

This Decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: October 03, 2023

Residential Tenancy Branch