



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

<u>MNSD</u>	The Return or Retention of the Security Deposit
<u>MNDC</u>	Money Owed or Compensation for Damage or Loss
<u>FF</u>	Recover the Filing Fee for this Application from the Respondent

Introduction

The hearing was convened to deal with an application by the tenant for the return of double the security deposit under the Act. The tenant had terminated the fixed term agreement early with short notice and was seeking the return of the deposit as well as reimbursement for the \$50.00 fee paid for this application.

This Dispute Resolution hearing was also convened to deal with a cross application by the landlord for a monetary claim of \$1,150.00.00 for rent owed for February 2009, due to the tenant's vacating the unit before the fixed term tenancy agreement expired on May 1, 2009 and the resulting rental losses incurred by the landlord. The landlord was also seeking \$100.00 liquidated damages under the tenancy agreement signed by the parties, \$25.00 NSF fees under the tenancy agreement, \$10.00 bank service charge for an NSF cheque caused by the shortfall, and \$10.00 in extra fees for excess garbage left behind by the tenant. In addition the landlord was seeking reimbursement for the \$50.00 fee paid for this application. Both the landlord and tenant were present and each gave testimony in turn.

Issues to be Decided for the Tenant's Application

The issues to be determined based on the testimony and the evidence are:

- Whether the tenant is entitled to the return of double the security deposit pursuant to section 38 of the Act. This determination is dependant upon the following:
 - Did the tenant pay a security deposit?
 - Did the tenant furnish a forwarding address in writing to the landlord?
 - Did the landlord make an application to retain the deposit within 15 days of the end of the tenancy and provision of the forwarding address?

Issues to be Decided for the Landlord's Application

The landlord was seeking to receive a monetary order for damages and loss of rent for the month of February 2009 due to premature ending of the agreement by the tenant.

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act* for loss of rent and damages. This determination is dependant upon answers to the following questions:
 - Has the landlord submitted proof that the specific amounts being claimed are validly owed by the tenant to this landlord?
 - Has the landlord submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing on a balance of probabilities that:
 - the costs were incurred due to the actions of the tenant
 - there was a violation of the Act or Agreement by the tenant
 - proof that the amount or value being claimed is justified

- a reasonable effort has been made to minimize the damages

The tenant had the burden of proof to establish that the deposit existed and that 15 days had expired from the time that the tenancy ended without the landlord either refunding the deposit or making application to keep it. The landlord had the burden of proof to show that compensation for loss of rent and other damages was warranted.

Background and Evidence

The landlord testified that the tenancy originally began on May 1, 2008 and that the rent was \$1,150.00. A security deposit was paid in the amount of \$575.00. The parties testified that the landlord first received verbal notice that the tenant was vacating and on January 19, 2009 the tenant gave written notice that the tenant was moving out on February 1, 2009. The evidence indicates that shortly thereafter the tenant provided the landlord with a forwarding address. However the landlord did not return the security deposit nor make application to keep the deposit within 15 days as specified in the Act.

The tenant acknowledged ending the tenancy prior to the fixed term, but stated that the landlord could have rented the unit by February 1, 2009. The tenant alleged that the landlord denied the tenant the opportunity to sub-let the unit beginning on February 1, 2009 for the remainder of the fixed term, which expired in May 2009. The tenant submitted a written testimonial from the prospective sub-lessee indicating that she was ready and willing to take over the lease but was told that the landlord wanted to find his own tenant. The tenant testified that the landlord refused to consider this applicant and that the landlord was stalling the re-rental in order to develop the unit into a 3-bedroom suite which he planned to rent to a friend. The tenant's witness supported this allegation. The tenant testified that the landlord did advertise and did show the unit numerous times, beginning in January 2009. However, the landlord had advertised the rental rate of the suite as being \$1,250.00.

The landlord testified that efforts to re-rent were immediately initiated when he found out that the tenant was breaking the lease by moving out before the expiry date. The

landlord denied that he purposely stalled re-renting and stated that this was not financially feasible. The landlord testified that the tenant's sublet candidate was not suitable as she was a smoker. The landlord testified that he re-rented the unit for March 1, 2009 at the rate of \$1,200.00 for a one-year term. The landlord's position is that he tried to minimize the losses created by the tenant's actions by re-renting as quickly as possible but did end up losing one month rent for February in the amount of \$1,150.00

The landlord testified that during the tenancy the one of the tenant's cheques failed to clear the bank. The landlord is claiming \$25.00 pursuant to a term in the tenancy agreement. The landlord testified that he also suffered a loss stemming from the incident in that a cheque written on the account by the landlord failed to clear due to the tenant's cheque being returned. The landlord is claiming \$10.00 for the bank costs.

The landlord's claim for \$10.00 for excess garbage costs is based on the fact that, although the tenancy agreement does include garbage removal, the tenant left additional garbage which was charged at \$2.50 per item. The tenant testified that only one can of garbage was allowed for both units and that this was not sufficient for the tenant's needs during the tenancy.

The landlord's claim for \$100.00 liquidated damages is based on a term in the tenancy agreement stating that if the tenant ends the fixed term tenancy before to cover the administrative costs of re-renting the rental unit. The term specifically preserves the landlord's right to claim damages including lost income due to the tenant's breach.

Analysis: Tenant's Application

The tenant has made application for the return of the security deposit.

Section 38 of the Act deals with the rights and obligations of landlords and tenants in regards to the return of security deposit and pet damage deposit. Section 38(1) states that within 15 days of the end of the tenancy and receiving the tenant's forwarding address a landlord must either:

- repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations; OR
- make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The landlord was in possession of the tenant's security deposit held in trust on behalf of the tenant at the time that the tenancy ended. I find that because the tenancy was ended by the tenant on February 1, 2009 and the forwarding address was given to the landlord a few days later. Under the Act the landlord should either have returned the deposit or made an application for dispute resolution long before March 12, 2009, the date of the landlord's application. I find that the landlord's application for dispute resolution was filed beyond the fifteen days.

Section 38(6) states that if a landlord does not act within the above deadline, 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.

Based on the above, I find that the tenant is entitled to receive double the security deposit of \$1,150.00 plus \$5.77 interest on the original deposit for a total of \$1,155.77.

Analysis: Landlord's Application

In regards to the landlord's claim for damages due to loss of rent for the month of February 2009 an Applicant's right to claim damages from the another party is covered under, Section 7 of the Act which states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party violated the terms of the tenancy agreement

and that this non-compliance resulted in costs or losses to the Applicant. It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to mitigate the damage or losses that were incurred.

I find that the tenant ended the tenancy prior to the end of a fixed term, which would leave the tenant liable to compensate the landlord for losses incurred, with the proviso that the landlord must do whatever is reasonable to minimize the loss.

I find that the unit was advertised and it is evident that the landlord made some effort to mitigate the losses stemming from the tenant's violation of the agreement. I accept that the tenant may have had conversations with the landlord regarding and proposed sub-lessee, but the manner in which this was communicated with the landlord is not clear. No application was filled out and no correspondence changed hands on the subject. In

regards to the landlord's idea of renovating the unit to add a bedroom, I do not accept the tenant's allegation that this plan by the landlord prompted him to stall re-renting the unit. The evidence shows that the landlord started to search for a new tenant without delay. That being said, I find that the landlord must have been aware that, by advertising the unit at a higher rental rate at \$100.00 more than in the current tenancy agreement, it could take longer to rent. Given that there is no way to know whether or not the unit would have been vacant for the month of February had the rental rate been kept at \$1,150.00, the question that must be answered under section 7(2) of the Act is this: Did the landlord "*do whatever is reasonable to minimize the damage or loss*"?

I find that the landlord's action in increasing the rental rate could not be considered a reasonable step towards mitigating potential rental loss and preventing the occurrence of a vacancy. The landlord failed to find a replacement tenant for the month of February, and evidently accepted \$1,200.00 per month starting in March 2009, not the advertised rate of \$1,250.00.

In light of the above, I find that while the tenant did violate the agreement causing a loss, the landlord contributed equally to his own loss. Therefore I set the landlord's entitlement to damages at fifty percent of the total.

I also find that the landlord's actual net loss was \$1,050.00 due to the extra \$50.00 per month that the landlord will receive for March and April 2009. Moreover, I should also point out that, had the current tenant remained in the unit beyond the end of the fixed term, the landlord's right to increase the rent would be restricted to 3.7 percent, amounting to less than the extra \$50.00 per month that the landlord will now be receiving under the new fixed-term tenancy agreement.

I find that compensation to the landlord for lost rent should rightfully be set at \$525.00

I find that the landlord's claim of \$25.00 for the NSF cheque and the \$10.00 bank fees resulting from the returned cheque, meets all elements of the test for damages and that the landlord is entitled to be compensated in the amount of \$35.00.

In regards to the claim for liquidated damages of \$100.00, I find that this is a valid term in the tenancy agreement that was endorsed by both parties. The landlord is entitled to compensation of \$100.00.

In regards to compensation claimed for extra garbage removal expenses, I note that the cost for garbage removal is covered in the tenancy agreement without restriction and that the tenant is disputing that the amount of garbage was excessive. Given the above, I find that I must dismiss this portion of the landlord's application.

Accordingly I find that the landlord is entitled to total compensation of \$660.00.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to be compensated \$1,155.77 and the landlord is entitled to monetary compensation of \$660.00. I hereby set off these two awards and issue a monetary order for the difference which is \$495.77 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.

I find that each party will be responsible for the cost of filing his or her own application.

April 2009

Date of Decision

Dispute Resolution Officer