



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 \$1,325.00 security deposit under the Act. The tenant had terminated the fixed term agreement early with over a month's notice and was claiming reimbursement for half a month's rent as the notice was effective mid-month and the tenant had paid for the entire month of January 2009. The tenant was also seeking 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 \$2,650.00 for rent owed for February 2009, due to the tenant's vacating the unit in mid-January before the fixed term tenancy agreement expired on February 28, 2009 and. The landlord was also 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 tenant provide written consent to the landlord permitting the landlord to retain the security deposit at the end of the tenancy?
 - 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 the 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?
- has the landlord proven that the amount or value being claimed is justified and
- has the landlord made reasonable effort 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 was warranted.

Background and Evidence

The landlord testified that the tenancy originally began on February 16, 2006 and that the current rent was \$2,650.00. A security deposit was paid in the amount of \$1,325.00.00. The parties testified that the landlord received a written notice that the tenant intended to vacate the unit effective January 15, 2009, along with a forwarding address delivered on January 16, 2009. A substantial amount of evidence was included by both parties. The landlord testified that the tenant did not pay rent for the month of January and issued a stop payment of the rent cheque. However both parties testified that rent for the full month of January 2009 was eventually paid in full for January.

The tenant testified that attempts were made to discuss the early end of the tenancy with the landlord in the hope that a mutual agreement could be reached but that these efforts were not successful. The tenant stated that the landlord had acted in a threatening manner.

The parties testified that the landlord then commenced action to re-rent the unit for the remainder of the month of January 2009. A new tenant was found for February 15, 2009. The landlord testified that a loss of one-half a month's rent was incurred for the period from February 15, 2009 to February 28, 2009, which was the expiry date for the

lease and the landlord's position was that the tenant was not entitled to a refund of the security deposit because the tenant violated the agreement resulting in damages. Both parties acknowledged that the landlord sent the tenant a cheque for \$45.79 representing the interest on the deposit. To date, the tenant has not cashed this cheque.

The tenant's position was that the tenant had tried to get an agreement to terminate the lease early and when this did not succeed, had then given the landlord substantial notice to vacate, even paying rent for a two-week period in January, during which the tenant was no longer residing in the unit. The tenant testified that she was therefore entitled to be reimbursed this amount in addition to a refund for double the security deposit.

Analysis: Tenant's Application

The tenant has made application for the return of the security deposit and return of the portion of rent paid for the latter half of January 2009.

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 January 15, 2009 and the forwarding address was given to the

landlord by January 16, 2009, under the Act the landlord should either have returned the deposit or made an application for dispute resolution before February 1, 2009. However, I find that the landlord's application for dispute resolution was not filed until February 6, 2009 which was beyond the fifteen days.

Section 38(6) 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 paid. I find that the tenant has already received payment for the interest owed on the original amount.

In regards to the tenant's claim for compensation for a portion of rent paid for the month January, section 45(2) of the Act states that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In this instance, the tenancy agreement specifies that rent is due and payable on the first day of each month. Therefore, a notice to end the tenancy would need to be effective on the last day of the month. In addition, there was no provision in the agreement or under the Act permitting a tenant to pro-rate rent for a partial month of occupancy. I find that this portion of the tenant's claim is not supported and must be dismissed.

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 and therefore met the landlord's obligation to take steps to reduce the loss. I find that each of the four elements of the test for damages have been satisfied. Therefore I find that the landlord is entitled to be reimbursed by the tenant for the loss of one-half a month's rent in February 2009 in the amount of \$1,325.00.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord is entitled to total monetary compensation of \$1,325.00 and I find that the tenant is entitled to receive double the security deposit in the amount of \$2,650.00.

Pursuant to my authority under section 72 of the Act, I order that the security deposit refund of \$2,650.00 to which the tenant is entitled, be reduced by the \$1,325.00 compensation for damages and loss owed to the landlord. Accordingly I hereby issue a monetary order in favour of the tenant for the remainder of \$1,325.00. 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 neither party is entitled to compensation for the cost of filing the application. I order that the remainder of the claims in both applications be dismissed without leave to reapply.

April, 2009

Date of Decision

Dispute Resolution Officer