



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

<u>MNSD</u>	The Return 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

This Dispute Resolution hearing was convened to deal with an application by the tenant for a monetary order for money owed or compensation for damage or loss under the Act for partial rent refund for the month of March 2009 and the return of the tenant's portion of the security deposit.

Both the landlord and tenant were present and each gave affirmed testimony in turn.

Issues to be Decided

The tenant was seeking to receive a monetary order for the return of the security deposit retained by the landlord and monetary compensation for loss of value to the tenancy during the month of March 2009 due to the landlord changing the lock and not giving the tenant a key.

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

- Whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act. This determination is dependant upon the following:
 - Did the tenant pay a security deposit and pet damage deposit?

- Did the tenant furnish a forwarding address in writing to the landlord?
- Did the tenant provide written consent at the end of the tenancy permitting the landlord to retain the security deposit or any portion thereof?
- Was any order issued to the landlord permitting the landlord to retain the deposit?
- Has the tenant submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing that the losses were incurred due to the actions of the landlord in violation of the Act or tenancy agreement?
 - Has the tenant proven that the landlord was in violation of the Act?
 - Has the tenant proven that the landlord's violation of the Act resulted in damage or loss for which the tenant is entitled to be compensated?
 - Has the tenant proven that the tenant made reasonable effort to minimize the damages?

The tenant has the burden of proof to establish that the deposit existed. The landlord has the burden of proof to show why the landlord had a legal right to retain the security deposit. In regards to the monetary claim for damages, the burden of proof is on the tenant/claimant.

Background and Evidence

The tenant testified that the fixed term tenancy began in February 2009 and was to end on January 31, 2009. The tenant testified that the tenancy agreement included the tenant and a male co-tenant. No copy of the agreement was in evidence. The tenant

testified that both co-tenants occupied the unit and jointly paid the security deposit of 397.50 with each contributing half in the amount of \$198.75 and that they also split the rent of \$795.00 between them. The tenant testified that, shortly after the tenancy commenced, the tenant found it necessary to leave the unit and go to a transition house. The tenant testified that, while she was away, she discovered that her co-tenant had requested that the landlord change the locks on the unit and the landlord complied with the request. The tenant stated that this change was done without notifying her. The tenant stated that during more than one phone conversation with the landlord the tenant made a request that the landlord give her a key and the landlord refused. The tenant testified that the landlord told her to get the key from her co-tenant. The tenant testified that she had paid rent her portion of the month for March to her co-tenant but was denied access by the landlord. The tenant is requesting the return of her portion of the rent paid for March of \$379.50 because the tenancy was devalued by the landlord's refusal to grant access to the unit. In April 2009, the tenant discovered that her co-tenant did not pay the rent and the landlord issued a Notice to End Tenancy. The tenant testified that the landlord finally offered her a key, but it was too late as she had since located other accommodation. The tenant testified that the landlord has not returned her half of the security deposit and she is requesting reimbursement of \$198.75.

The landlord testified that both tenants were on the tenancy agreement and this was considered to be a joint tenancy. The landlord acknowledged that the locks were changed at the male tenant's request and the landlord complied. However, the landlord stated that he did not deny the applicant a key. The landlord testified that he advised the tenant during a telephone conversation that if she came to the complex, a key would be issued to her. However the tenant did not contact the landlord personally until April 2009. The landlord testified that no rent was received for the month of April and the tenant was issued a Ten-Day Notice to End Tenancy for Unpaid Rent. The co-tenant vacated the unit thereafter leaving no forwarding address. The landlord testified that the security deposit was not returned and the landlord's intention was to keep the deposit

for damages as the tenants owed rent. The landlord did not receive any forwarding address from the tenant, except with this application.

.Analysis

Security Deposit Claim by Tenant

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.

I find that the landlord retained the tenant's security deposit held in trust on behalf of the tenant and that the landlord did not make an application to retain the deposit or portion thereof. However, I find that the landlord was never provided with the forwarding address of the tenant until now. The tenant's claim for return of the security deposit is permitted, but the landlord has 15 days after being provided with a forwarding address to refund or apply to keep the deposit. I am not able to issue a monetary order at this point. Therefore, I find that as of the date of this hearing, the landlord now has been provided with the tenant's current address and the 15-day deadline to return the security deposit of \$397.50 or in the alternative, to make an application for dispute resolution to keep it, will commence now and will expire on May 20, 2009.

As this portion of the tenant's application was submitted prior to furnishing the forwarding address to the landlord, I find that the claim was premature and as such, is dismissed with leave to reapply.

Analysis: Damages and Compensation

In regards to the tenant's claim for damages, based on the fact that she paid rent for March 2009 but did not receive a key to access the unit, contrary to the Act, and warranting a rent abatement of \$397.50, I find that to support this claim, the tenant would need to establish that the landlord was at fault for the loss by contravening the Act.

Section 7 of the Act 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.

Therefore in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

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 tenant, to prove the existence of the damage/loss and that it stemmed directly from a violation of the Act on the part of the respondent

Section 31 of the Act states that a landlord must not change locks or other means that give access to residential property unless the landlord provides each tenant with new keys or other means that give access to the residential property.

A landlord must not change locks or other means of access to a rental unit unless:

(a) the tenant agrees to the change, and; (b) the landlord provides the tenant with new keys or other means of access to the rental unit.

I find that the landlord did provide one of the joint tenants with a key and that the applicant/tenant was not available on site to receive a key. The tenant acknowledged that the tenant was not available and landlord did not have her contact information.

The oral testimony of the tenant that the landlord verbally refused to issue her a key was the only submission and this was disputed by the respondent. It is important to note that in a dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. The reason that this is true is because one party must carry the added burden of proof. In other words, the applicant, in this case the tenant, has the onus of proving during these proceedings, that the landlord denied the key and that the damages and compensation being claimed is justified under the Act. However, when the evidence merely consists of conflicting and disputed verbal testimony, in the absence of independent evidence, then the party who bears the burden of proof is not likely to prevail.

I find that the tenant's verbal, disputed, testimony does not constitute sufficient proof to establish the tenant's claim that the landlord violated the Act by withholding a the key. I therefore find that the tenant has not succeeded in satisfying all elements of the test for damages and this portion of the tenant's application is dismissed.

Conclusion

Based on the testimony and evidence presented during these proceedings, I dismiss the tenant's application for the return of the security deposit with leave to reapply in future, should the deposit not be returned within 15 days of the hearing. In regards to the tenant's monetary claim for damages related to the failure of the landlord to provide a key for the changed lock, I dismiss this portion of the tenant's application without leave to reapply.

May 2009

Date of Decision

Dispute Resolution Officer