

## **DECISION**

Dispute Codes      MNSD FF

### Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant to obtain a Monetary Order for the return of the security and pet deposits, refund partial months rent, return of one months' rent that was allegedly taken as a double payment of rent, and to recover the cost of the filing fee from the landlord.

Service of the hearing documents, by the tenant to the landlord, was done in accordance with section 89 of the *Act*, sent via registered mail on March 19, 2009. Mail receipt numbers were provided in the tenant's evidence. The landlord was deemed to be served the hearing documents on March 24, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

Both the landlord and tenant appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other.

All of the testimony and documentary evidence was carefully considered.

### Issues(s) to be Decided

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

- Whether the tenant is entitled to a Monetary Order under section 67 of the *Act* for the return of double the pet and security deposit, a refund of rent paid for a period the tenant did not occupy the rental unit, return of rent taken not in accordance with the tenancy agreement, and to recover the cost of the filing fee from the landlord.

### Background and Evidence

The tenancy began January 15, 2007 with rent payable in the amount of \$395.00 per month. The tenants paid a pet deposit of \$197.50 and a security deposit of \$197.50 on

January 9, 2007. The tenancy ended on January 21, 2008 when the tenants were deemed to have been served an Order of Possession issued by the *Residential Tenancy Branch*.

The landlord advised that her upstairs tenant, who is not an employee and who does not conduct business on behalf of the landlords, e-mailed the landlords January 28, 2009 to advise the landlords that the tenant had given the upstairs tenant the keys to the rental unit.

The landlord testified that the Order of Possession was sent to the tenants via registered mail on January 14, 2008. The tenants were deemed to have been served the Order of Possession on January 19, 2008, 5 days after they were mailed, pursuant to Section 90 of the *Act*.

The tenant testified that he vacated the rental unit on approximately January 18, 2008 and is submitting a monetary claim in the amount of \$156.00 which represents 13 days at \$12.00 per day, for a rent refund as he did not occupy the rental unit for the full month of January 2008.

The tenant has submitted a claim of \$395.00 for a refund of an extra months rent that the tenant claims the landlord has wrongly taken. The tenant testified that the landlords told the tenant and his wife that they had ran out of post dated cheques and requested that the tenants deposit the rent payments into the landlord's bank account directly. The tenant stated that they deposited the January 2008 rent directly in to the landlord's account and then the tenant noticed that the landlord cashed a cheque. The tenant stated that he had spent most of a day at the bank trying to figure out where the money had gone and that it was not until the bank showed him a copy of the cheque did the tenant realize that the landlord still had a post dated cheque that he cashed after the tenant had already paid the rent.

The landlord disputed the tenant's testimony and testified that the payment they received for January 2008 rent had bounced and it was then that they requested the

tenant to deposit another rent payment. The landlord submitted a copy of a previous Dispute Resolution Decision dated 2008-01-08 where the Dispute Resolution Officer notes that "rent for January is outstanding, as the rent cheque did not clear."

The tenant has requested the return of his security and pet deposit. The tenant provided documentary evidence which states that the tenant provided the landlord with a forwarding address in a voice mail message left for the landlord on the landlord's telephone. The tenant advised that he did not receive the landlord's address until he moved to Nanaimo and received the Landlord's address from his ex-wife in March 2008. The tenant testified that he sent the landlords a letter in June 2008 and December 2008, requesting the return of his deposits. The tenant stated that he sent a registered letter to the landlord on January 6, 2009 with another letter requesting the return of his deposits and that the letter included his forwarding address.

The landlord testified that she never received a voice mail message from either tenant advising them of the forwarding address and that the landlord did not receive the letters sent in regular mail in June and December 2008 as stated in the tenant's testimony. The landlord confirmed receipt of the registered mail letter from the tenant in January 2009.

The landlord testified that it was her practise to have tenants deposit rent payments into her bank account if they ran out of post dated cheques and she confirmed that the tenant had testified to the correct bank for which payments were deposited. The landlord stated that she would provide tenants with the name, transit and bank account numbers for where they were to deposit the rent payments.

The landlord stated that she could not answer specific questions with respect to the rent payments as she was not sitting at her computer. The landlord testified that the properties are in her husband's name and that she does the banking and paperwork for the tenancies. The landlord said that she could not answer questions with regards to if the tenants had run out of post dated cheques as this was handled by her husband.

The landlord testified that she had nothing documented about any issues with the tenants in December 2007 and that she could not recall any issues with the tenants prior to the landlord's request to end the tenancy early.

The landlord stated that her husband ran his own real estate investment business and that he could not be reached via telephone to testify as he was in a meeting. The landlord stated that she could not answer questions about whether her husband attempted to reschedule his meeting to be able to attend today's hearing.

The landlord testified that a move-in inspection report was not required as the rental unit had been completely renovated just prior to the tenants taking occupancy. The landlord later testified that she had found a move-in inspection report that was completed in her and her husband's absence, that it was conducted by the upstairs tenant then the landlord stated that it was conducted by their previous property manager and that the move-in inspection report was signed by the landlord's husband.

The landlord testified that a move-out inspection report was not conducted given the circumstances that occurred to end the tenancy and that the landlords did not pursue applying for a monetary claim against the tenant. The landlord stated that the upstairs tenant reported to the landlord on the condition that the tenants left the rental unit in.

The landlord later testified that the upstairs tenant does act as an agent for the landlords as she does assist with carrying out business for the landlords as the landlords reside in a different city.

The landlord testified that they did not try to locate the tenants after the rental unit was vacated.

The tenant's witness testified that she was never asked by the landlord for a forwarding address for herself or her former partner. The witness stated that she never gave the landlord a forwarding address either in writing or in a voice mail message.

The witness testified that she had vacated the rental unit prior to the issuance of the Order of Possession and that she was aware of the landlord's request to deposit the rent payments into the landlord's bank account. The witness testified that she was told by the tenant about an incident whereby the tenant claimed that the landlord took the rent payment the tenant deposited directly and then cashed a post dated cheque as a second payment for the month of January, doubling the payment made by the tenant for rent. The witness stated that she was the one who deposited the January 2008 \$400.00 rent payment into the landlord's bank account so she was surprised when the tenant told her about this double payment shortly after it occurred.

The landlord testified that she still had a copy of the returned NSF cheque but that she never thought to submit a copy of the returned cheque into evidence in her defence.

The tenant stated that he was not able to submit copies of his bank records into evidence as the bank he dealt with at the time of the tenancy, would not agree to mail the tenant the records and that the tenant would have to make arrangements to pick up the bank records for which the tenant could not do at this time as he does not have the money to arrange to return to that city.

The witness testified that she was not served with documents in relation to this application and that she would like her name removed from the application. The witness stated that she does not want her name listed on any monetary claims or orders and that if the tenant is awarded anything as a result of this application, it should just go to the tenant.

The landlord testified that while they did not follow the *Act* in returning or keeping the tenant's security and pet deposits the landlords have suffered a huge loss in damages to repair the rental unit before another tenant could occupy the unit.

Both the tenant and the landlord confirmed their mailing addresses.

### Analysis

I find that in order to justify payment of damage or loss under section 67 of the *Act*, the Applicant tenant 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 tenant 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, in this case the tenant, bears the burden of proof and the evidence furnished by the Applicant tenant 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 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 regards to the tenant's right to claim losses from the landlord, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, 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.

Reimbursement of 12 days rent The tenant claimed that he paid the full month of January 2008 rent and was forced to vacate the rental unit before the end of the month. I find that the tenancy ended on January 21, 2008, (five days after the Order of Possession was sent registered mail plus 48 hours for the Order to take effect upon service) and that this tenancy ended as a result of a fundamental breach to the tenancy caused by the tenant. Based on the aforementioned, I find that the tenant has failed to prove the test for damage or loss as listed above and I hereby dismiss the tenant's claim for rent reimbursement without leave to reapply.

Refund one month rent for January 2008 The tenant and witness both testified to an allegation that the landlord took two months rent for January 2008. The landlord testified that the tenant's cheque was returned NSF however the landlord did not have an answer as to why she did not submit a copy of the NSF cheque into evidence in her defense. When asked direct questions about this issue the landlord responded by stating that it was her husband who dealt with the issue and yet her husband was not available to attend the hearing.

The landlord contradicted her own testimony throughout the hearing and when confronted about the contradictions her response was either that her husband dealt with the issue or that she did not understand the question or statement.

The landlord testified that she received the tenant's application and evidence which clearly states that the tenant was claiming that the landlord took two rent payments for the month of January 2008. The landlord took the time to submit evidence in response to the tenant's claim and yet did not supply a copy of the alleged returned cheque in her own defense.

In support of the tenant's claim the witness testified that she was made aware of the double payment of rent taken shortly after the tenant stated that it had happened. The witness stated that she remembers the tenant being upset about the landlord cashing a post dated cheque for which the landlord claimed to have run out of, and that the witness remembered depositing the \$400.00 payment in to the landlord's bank account.

A significant factor in my considerations is assessing the credibility of the testimony for which I am guided by the following:

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

*The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject*

*his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

In the circumstances before me, I find the version of events provided by the Tenant to be highly probable given the conditions that existed at the time. Considered in its totality, I favor the evidence of the Tenant over the Landlord.

As the tenant bears the burden of proof for this claim, I find that while I favor the tenant's testimony, I cannot rule in the tenant's favor in the absence of documentary evidence, such as a bank report or statement in support of his claim, and hereby dismiss the tenant's claim to refund one months rent for January 2008, with leave to reapply.

Refund Pet and Security Deposit The tenant has requested the return of his \$197.50 pet deposit and \$197.50 security deposit. The tenant contends that he requested the return of the deposit in writing, sent to the landlords via regular mail, in June and December 2008, and then again via registered mail on January 6, 2009. The tenant included his forwarding address in the registered letter as evident by the documentary evidence and the testimony provided by both the tenant and landlord. Based on the aforementioned the landlord was deemed to have received the tenant's forwarding address on January 11, 2009, five days after it was mailed and less than 12 months after the tenancy ended on January 21, 2008.

The landlord has admitted to not returning the pet deposit, security deposit and interest as the landlord states that they suffered a much larger loss in getting the rental unit repaired. The landlord confirmed that she did not apply for dispute resolution to retain the security and pet deposits and that she has not applied for a monetary order against the tenant to recover the losses she suffered.

In regards to the landlord's claims and evidence relating to the condition of the rental unit at the end of the tenancy, I am not able to neither hear nor consider the landlord's

claim during these proceedings as this hearing was convened solely to deal with the tenant's application. That being said, I must point out that the landlord is at liberty to make their claims, in a separate application and to resubmit their evidence, if the landlord wants to pursue requesting a Monetary Order.

The landlord submitted documentary evidence in the form of the tenancy agreement whereby section 7 of the landlord's tenancy agreement is underlined and states "TENANT(S) agrees that the damage deposit will form partial recover of the LANDLORDS costs to repair any damages or excessive wear and tear caused to the property". This clause is in direct violation of Section 20 (e) of the *Act* which stipulates that a landlord must not require or include as a term of a tenancy agreement, the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement and by including this clause the landlord has contracted out of the *Residential Tenancy Act* which is prohibited under Section 5 of the *Act*.

I do not accept the landlord's argument that the landlord's violation was somehow excused due to the tenants' alleged failure to comply with the *Act* or agreement. Even if the tenant was found to be in violation of the *Act*, there is no provision in the *Act* that extends immunity for a reciprocal breach on the part of a landlord.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security and pet deposit to the tenant with interest or make application for dispute resolution claiming against the security deposit or pet damage.

Based on the above, I find that the landlord has failed to comply with Section 38(1) of the *Act* and that the landlord is subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the

security and pet deposit and the landlord must pay the tenant double the amount of the security and pet deposit. I find that the tenant has succeeded in proving the test for damage or loss as listed above and approve their claim for the return of double the security and pet deposits.

Recovery of the filing fee The tenant has applied to recover the cost of the filing fee from the landlord however the tenant has been granted a filing fee waiver. In the absence of payment of the filing fee I hereby dismiss the tenant's claim to recover the cost of the filing fee.

**Monetary Order** – I find that the tenant is entitled to a monetary claim:

Doubled Pet Deposit and Security Deposit 2 x (\$197.50 + \$197.50)	790.00
Interest owed on the Security and Pet Deposit of \$395.00 from January 09, 2007	11.81
<b>TOTAL AMOUNT DUE TO THE TENANT</b>	<b>\$801.81</b>

### Conclusion

I HEREBY FIND in favor of the tenant's monetary claim. A copy of the tenant's decision will be accompanied by a Monetary Order for \$801.81. The order must be served on the respondent landlords and is enforceable through the Provincial Court 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: June 03, 2009.

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Dispute Resolution Officer