

DECISION

Dispute Codes MNR MNDC MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant to obtain a Monetary Order for the cost of emergency repairs, money owed or compensation for damage or loss under the Act, to return all or part of the security deposit, and to recover the cost of the filing fee from the Landlord for this application.

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 April 16, 2009. Mail receipt numbers were provided in the Tenant's documentary evidence. The Landlord was deemed to be served the hearing documents on April 21, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

The Tenant and the Tenant's Advocate appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

The Landlord did not appear despite being served with the notice of dispute resolution in accordance with the *Residential Tenancy Act*.

All of the testimony and documentary evidence was carefully considered.

Issues(s) to be Decided

Is the Tenant entitled to a Monetary Order under Sections 38, 67, and 72 of the *Residential Tenancy Act*?

Preliminary Issues

The Tenant applied for dispute resolution and attended a hearing on October 15, 2008 relating to this tenancy which ended on September 30, 2008 and whereby the Tenant's claims for the cost of emergency repairs and money owed or compensation for damage or loss under the Act were heard and a decision was rendered on October 15, 2008.

Res judicata is a doctrine that prevents rehearing of claims and issues arising from the same cause of action between the same parties after a final judgment was previously issued on the merits of the case.

Section 80(c) of the *Residential Tenancy Act* enables a party to request a review of a decision or order of the Director within 15 days after a copy of the decision or order is received by a party. In this case the Tenant has requested that I review a decision and Order that was rendered six months before her application was filed.

Based on the aforementioned I hereby dismiss the tenant's application for cost of emergency repairs, aggravated damages, and money owed or compensation for damage or loss under the Act, without leave to reapply.

I find that the Tenant has not previously applied for dispute resolution to hear matters pertaining to the return of the Tenant's security deposit and will proceed with today's hearing for the issue of the Tenant's security deposit.

Late Evidence

Residential Tenancy Branch Rules of Procedure 3.5 stated that copies of any documents, photographs, video or audio tape evidence that are not available to be filed with the application, but which the applicant intends to rely upon as evidence at the dispute resolution proceeding, must be received by the Residential Tenancy Branch and must be served on the respondent as soon as possible, and at least (5) days before the

dispute resolution proceeding as those days are defined the “Definitions” part of the Rules of Procedure.

If copies of the applicant’s evidence are not received by the Residential Tenancy Branch or served on the respondent as required, the Dispute Resolution Officer must apply Rule 11.5 [Consideration of evidence not provided to the other party or the Residential Tenancy Branch in advance of the dispute resolution proceeding].

Rule of Procedure 11.5 states that at the dispute resolution proceeding, a party may request that the Dispute Resolution Officer accept any evidence that was not provided to the other party or the Residential Tenancy Branch in advance of the dispute resolution proceeding as required by the Rules of Procedure and must satisfy the Dispute Resolution Officer that the evidence is relevant.

The Dispute Resolution Officer may refuse to accept the evidence if the Dispute Resolution Officer determines that there has been a willful or recurring failure to comply with the Act or the Rules of Procedure, or, if for some other reason, the acceptance of the evidence would prejudice the other party, or result in a breach of the principles of natural justice.

With respect to evidence relating to the Tenant’s request to have her security deposit returned, I find that the Landlord would have received the written request from the Tenant on October 18, 2008 when it was first requested by the Tenant. Based on the aforementioned I accept the late evidence relating to the Tenant’s request to have her security deposit returned and find that this acceptance would not prejudice either party.

Background and Evidence

The month to month tenancy began November 1, 2007 and ended by mutual agreement on September 30, 2008. The Tenant paid a security deposit of \$275.00 on November 1, 2007.

The Tenant testified that she has requested the return of her security deposit on two separate occasions and provided documentary evidence to prove that she provided the Landlord with her forwarding address, in writing, while requesting the return of her security deposit on October 18, 2008.

The Tenant argued that the Landlord did not conduct a move-in or move-out inspection report and that on September 5, 2008 the Landlord paid the Tenant \$3.78 advising the Tenant that this amount was the return of the interest owed on the security deposit for the period of November 1, 2007 to September 30, 2008. The Tenant argued that the Landlord failed to return the security deposit so interest should still be accumulating on the full security deposit of \$275.00.

The Tenant is seeking a monetary order for the return of her security deposit, the balance of interest owed, and to recover the cost of the filing fee from the Landlord.

Analysis

I find that in order to justify payment of damages under sections 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 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 damages from the tenant, 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.

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 deposit to the tenant with interest or make application for dispute resolution claiming against the security deposit.

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

Recovery of the filing fee The Tenant has been primarily successful in her application and I find that she is entitled to recover the cost of the filing fee from the Landlord.

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

Doubled Security Deposit 2 x 275.00	\$550.00
Interest owed on the Security Deposit from November 1, 2007 to July 15, 2009 = \$4.83 less refunded amount of \$3.78	1.05
TOTAL AMOUNT DUE TO THE TENANT	\$551.05

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 \$551.05. The order must be served on the respondent Landlord 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: July 15, 2009.

Dispute Resolution Officer