



# 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 the tenant's claim for the return of double the \$400.00 the security deposit that was withheld by the landlord. The tenant was also seeking a monetary order for compensation for damage or loss under the Act for the cost of repairs completed by the tenant during the tenancy. The total amount of the damages being claimed was \$850.00. The tenant is claiming reimbursement by the landlord for the \$50.00 fee paid by the tenant for this application. Both the landlord and tenant were present and each gave 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, damages and moving costs.

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?
- Did the landlord make application for a hearing and obtain an order 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 expenses were due to a violation of the Act by the landlord?
  - Has the tenant proven the amount being claimed?
  - 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 parties testified that the tenancy began on December 1, 2008. The landlord testified that it was fixed-term tenancy for 6 months ending in June 2009. The tenant stated that no tenancy agreement was ever signed. In any case no copy

of the purported agreement was submitted into evidence by the respondent. However the parties did agree that the tenant had paid a security deposit of \$400.00 and that this deposit was not returned.

The tenant testified that, after moving in, he found it necessary to replace the lock because it was not working. The tenant testified that he gave a key to the landlord's spouse at the time along with a receipt for the purchase, and kept one key for his own use. The tenant testified that in February 2009 he gave verbal notice to the landlord that he planned to vacate the unit in March 2009. The tenant testified that he paid rent for the month of March. According to the tenant, in mid March he rented a truck and removed all of his belongings then personally delivered the second key to the landlord. The tenant testified that at that time he told the landlord that he had moved and that his written forwarding address was left on the counter. The tenant testified that his forwarding address was also on the post-dated cheques as he only resided in the unit on weekends and the landlord was aware of this. The tenant stated that the landlord did not return his deposit and when he asked about it, the landlord told him that the deposit was being retained for loss of rent due to the tenant moving without proper notice.

The tenant testified that the other damages being sought stem from the costs he incurred in fixing the lock, the fact that the thermostat was broken and all of the access problems getting into the suite due to snow. The tenant stated that he did not provide the receipt for the lock because it was given to the landlord.

The landlord testified that in December 2008 the tenant entered into a 6-month fixed-term tenancy that was to continue until June, 2009. The landlord testified that the tenancy agreement was breached by the tenant. The landlord testified that she was not aware of the tenant's plans to vacate until after-the-fact when she discovered that his April rent cheque had been stopped. The landlord testified that, although the landlord lived in the same building, she did not notice that the tenant had vacated. The landlord testified that this resulted in a monetary loss for which the landlord felt entitled to keep the deposit. The landlord acknowledged that the tenant did deliver a key to her door in mid March but she

believed that the key was merely being given to the landlord for the new lock and lot signifying a move-out..

According to the landlord, no discussion occurred at that time about the tenant having vacated the suite and nothing was said about a forwarding address being left on the counter. The landlord's position was that the tenant did not provide a written forwarding address to the landlord. In answer to why the landlord did not return the deposit after the tenant's application was served showing the tenant's written address, the landlord testified that she was not aware of any provision in the Residential Tenancy Act that requires a landlord to return the deposit or make an application and obtain an order before keeping the deposit.

In regards to the tenant's claim for damages and loss, the landlord disputed the allegations made by the tenant.

### **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 a portion of 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.

The landlord had testified that the tenancy agreement signed by the parties was violated by the tenant. Regardless of what damages the landlord has tallied, I find that under the Act, the landlord was not entitled to merely retain the deposit. The Act states that the landlord can unilaterally retain a deposit if at the very end of the tenancy the tenant has agreed in writing that the landlord can keep the deposit to satisfy a liability or obligation of the tenant. Failing that, the landlord must return the deposit or make an application for disputer resolution to obtain an enforceable order to keep it.

I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make application for an order to keep the deposit.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit.

I find that the tenant's security deposit was wrongfully retained by the landlord in violation of the Act and that the tenant is entitled to double the deposit in the amount of \$800.00.

#### Analysis: Damages and Compensation

In regards to the tenant's claim for damages, 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.

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 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 address the situation and to mitigate the damage or losses that were incurred

In this instance, although the landlord was obligated to provide a working lock under section 32 of the Act, the landlord would not be in violation of the Act unless, and until, the landlord was given notice and provided with an opportunity to do the required repairs and still failed to do so. The tenant did not provide sufficient evidence proving that the landlord knew about and refused to fix the problem, and therefore element 2 of the test for damages has not been satisfied. I accept that the matter was urgent and could qualify as an emergency repair, which under section 33 the Act, is one of the circumstances in which a tenant taking matters into his own hands would be entitled to reimbursement. That

being said, the claim still does not meet element 3 of the test in that proof of the amount is not in evidence. Accordingly, I find that the portion of the tenant's application pertaining to damages and reimbursement for the cost of the lock must be dismissed.

In regards to the landlord's own claim of damages and rent owed, I am not able to hear nor consider a monetary claim by the landlord during these proceedings as the matter before me was convened to deal with the *tenant's* application under section 38 of the Act, and was not an application filed by the landlord. However, I must point out that the landlord is at liberty to make a separate application if the landlord has decided to initiate a formal claim for compensation for damages and loss pursuant to section 67 of the Act.

In the matter before me, however, I find that under section 38, the tenant is entitled to be paid double the security deposit in the amount of \$800.00 I also find that the tenant is entitled to be reimbursed for the \$50.00 fee paid to file this application.

### **Conclusion**

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to total monetary compensation of \$850.00, comprised of \$800.00 for double the security deposit wrongfully retained and the \$50.00 fee paid by the tenant to file this application. I hereby grant a monetary order in the amount of \$850.00 in favour of the tenant. This order must be served on the respondent and if unpaid may be enforced in Small Claims Court if necessary.

The remainder of the tenant's application is dismissed without leave.

September 2009

Date of Decision

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Dispute Resolution Officer