



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Second Review Hearing Decision

Dispute Codes:

MNSD Monetary Order for the Return of the Security Deposit

Introduction

This Dispute Resolution hearing was originally convened on February 24, 2009 to deal with an Application by the tenant against two parties named as landlord, RS and FK, seeking an order for the return of the security deposit retained by the landlord. The tenant did not attend and the application was dismissed. The tenant applied for Review Consideration on the basis that the tenant could not attend due to circumstances that could not be anticipated and were beyond the tenant's control. In a review consideration decision dated March 17, 2009 the tenant/applicant's request for a review hearing was granted.

The review hearing was held on May 8, 2009. One of the tenants and one of the two parties named as landlord, RS, participated in the hearing by telephone. Both parties gave testimony. The outcome of the hearing was in the tenant's favour and a monetary order for double the return of the security deposit was issued against both landlords, RS and FK who had both been named as respondents.

On December 1, 2009 an application for Review Consideration of the May 8, 2009 decision was submitted by one of the purported landlords, FK, on the basis that he was incorrectly named on the tenant's application as being the landlord when, in fact, he was not the landlord nor an agent of the landlord. FK's application for review consideration indicated that he was never properly served with the Notice of Hearing, the Decision nor the Order of May 8, 2009.

On December 4, 2009 the Request for Review was granted and the monetary order issued in favour of the tenant on May 8, 2009 was suspended. A re-hearing was scheduled for January 18, 2010.

Preliminary Matter: Respondents Named

The tenant's original application for monetary compensation had named two individuals as landlord, RS and FK. As the application for a review hearing filed by FK was successful based on the allegation that he was wrongfully named as landlord and that the monetary order was incorrectly issued against him a determination had to be made as to whether or not RK was wrongfully identified as a landlord.

In section 1 of the Act, the definition of landlord includes the following:

- (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,*
 - (i) permits occupation of the rental unit under a tenancy agreement, or*
 - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;*
- (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);*
- (c) a person, other than a tenant occupying the rental unit, who*
 - (i) is entitled to possession of the rental unit, and*
 - (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;*
- (d) a former landlord, when the context requires this;*

I find that the tenancy agreement indicated that the contract was between the tenants and RS. I find that the signatures on the agreement were only those of the tenants and RS. Although the contract included the name of FK as an apparent contact for maintenance on behalf of the landlord, I find that he was not a party to the agreement. The parties testified that FK did some chores and picked up the landlord's mail to forward it to the landlord but did not collect rent nor issue notices. Accordingly, I find that FK does not fulfill any of the duties as defined in the Act to be considered as the landlord.

Furthermore, I find that the tenants had served RS and FK at the address given for service to RS, the landlord. It was established that FK's address was completely

different than the service address given for RS. Given the above, I find that RK was never served nor given any opportunity to answer to the claim against him. I find that the landlord is RS and that FK is neither the landlord nor an agent of the landlord. Accordingly, FK must be removed as respondent in this application.

Issue(s) to be Decided

The tenant was seeking to receive a monetary order for the return of the security deposit that the tenant considers as having been wrongfully retained by the landlord.

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?
 - 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 or any portion of the deposit at the end of the tenancy?
 - Did the landlord make application to retain the security deposit for damages or loss within 15 days of the end of the tenancy or the receipt of the forwarding address?

The burden of proof regarding the right to retain the security deposit is on the respondent.

Background and Evidence

The tenancy began on March 13, 2008 as a fixed term that would end on October 31, 2008, with rent set at \$850.00 per month due on the 15th day of each month. A security deposit of \$425.00 was paid. A copy of the tenancy Agreement between the two tenants and the landlord, RS, was in evidence. The tenant testified that the tenancy

ended on October 1, 2008. The tenant submitted into evidence a copy of a letter dated August 31, 2008 advising the landlord that the tenant would be vacating as of October 31, 2008 and the tenant provided a forwarding address for the return of the security deposit sometime in September 2008. The tenant testified that the security deposit was never refunded to them by the landlord.

The land lord testified that he had made a claim of rent owed, damages and losses against the tenant. Evidently this application was submitted recently and is to be heard at a future date.

Analysis : Claim for Return of Security Deposit

In regards to the return of the security deposit and pet damage deposit, I find that section 38 of the Act is clear on this issue. The Act states that the landlord can retain a security deposit if the tenant give written permission at the end of the tenancy. If the permission is not in written form and signed by the tenant, then the landlord's right to merely keep the deposit does not exist.

However, a landlord could be able to retain the deposit to satisfy a liability or obligation of the tenant only if, after the end of the tenancy, the landlord has made an application for dispute resolution and successfully obtains an order retain the amount. However, in order to make a claim against the deposit , the landlord's application for dispute resolution must be filed within 15 days after the end of the tenancy and the date that the forwarding address was received, which ever is later. Based on the evidence and the testimony, 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 within the time permitted to do so.

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, and must pay the tenant double the amount of the security deposit.

In regards to the landlord's own claim for damages, rent owed and violation of the fixed term, I was not able to hear nor consider the landlord's claim against the tenant during these proceeding. This hearing was convened to deal with the *tenant's* application

under section 38 of the Act. The landlord's cross application is not part of the proceedings before me and will be heard on the date scheduled.

I find that under section 38, the tenant is entitled to be paid double the portion of the security deposit or \$425.00 that was wrongfully retained by the landlord, in the amount of \$850.00 plus interest of \$5.33.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of \$855.33 and hereby issue a monetary order for this amount in favour of the tenant. I hereby permanently cancel my decision dated May 8, 2009 and the monetary order for \$855.12 issued on May 8, 2009 and replace the decision and the order with this decision and monetary order dated January 18, 2010. The 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.

January 2010

Date of Decision

Dispute Resolution Officer