

DECISION

Dispute Codes MNSD

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant for a Monetary Order for the return of double the security deposit.

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. The Landlord confirmed receipt of the hearing package.

The Landlord, Landlord's Agent, the Tenant's P.O.A. (Tenant), and the Tenant's Agent appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

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

Background and Evidence

The month to month tenancy began on February 8, 2008 and ended when the Tenant vacated the rental unit on July 13, 2009 after being issued a 1 Month Notice to End Tenancy on June 11, 2009 with an effective date listed as July 12, 2009 and later amended to July 31, 2009. Rent was payable on the first of each month in the amount of \$1,550.00 and a security deposit of \$775.00 was paid on February 8, 2008.

There was no testimony or evidence in relation to move-in and move-out inspection reports.

The Tenant's P.O.A. testified that she had verbally requested to have the security deposit returned, on several occasions, and on August 20, 2009 sent a fax requesting the security deposit which also confirmed her mailing address, the Tenant's legal forwarding address based on the P.O.A. and her telephone numbers.

The Landlord testified that the Tenant failed to pay July 2009 rent and stated that she was advised by the Owners to keep the Tenant's security deposit.

The Landlord and the Landlord's Agent confirmed that the Landlord did not apply for dispute resolution to keep the security deposit, the Landlord does not have a decision or Order allowing the Landlord to keep the security deposit, and the Landlord does not have the Tenant's or his P.O.A.'s written permission to keep the security deposit.

The Landlord's Agent referred to section 6 of their "occupancy agreement" which states "failure to provide the appropriate notice will result in the forfeiture of the tenant's security/damage deposit".

Analysis

All of the testimony and documentary evidence was carefully considered.

I find that in order to justify payment of 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 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.

In this case the Landlord has admitted that they did not apply for dispute resolution to keep the security deposit and did not have the Tenant's written consent to retain the security deposit. I do not accept the Landlord's argument that the Tenant forfeited their security deposit by not providing the Landlord thirty days written notice to end the Tenancy for two reasons, one the tenancy ended due to the Landlord's notice not the

Tenant's, and I find the clause to be in contravention of sections 5 and 20 of the Act. Section 5 of the Act provides that a Landlord cannot contract out of the Act while section 20(e) of the Act provides that a landlord must not include as a term of a tenancy agreement that the landlord automatically keeps all or part of the security deposit at the end of a tenancy.

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

I find that the Tenant's P.O.A. has proven that she provided the Landlord with written notification of the forwarding address in the faxed letter sent to the Landlord on August 20, 2009.

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. In this case the Landlord was required to return the Tenant's security deposit or file for dispute resolution no later than September 4, 2009. The Landlord did neither.

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 now 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 I approve their claim for the return of double the security deposit and interest.

Monetary Order – I find that the Tenant's P.O.A. is entitled to a monetary claim as follows:

Doubled Security Deposit 2 x \$775.00	\$1,550.00
Interest owed on the Security Deposit of \$775.00 from February 8, 2008 to February 24, 2010	10.42
TOTAL AMOUNT DUE TO THE TENANT'S P.O.A.	\$1,560.42

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 **\$1,560.42**. 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: February 24, 2010.

Dispute Resolution Officer