

DECISION

Dispute Codes MNSD

Introduction

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

Service of the hearing documents, by the Tenant's P.O.A. to the Landlord, was done in accordance with section 89 of the *Act*, sent via registered mail on September 21, 2009. Mail receipt numbers were provided in the Tenant's evidence. The Landlord confirmed receipt of the hearing package.

The Landlord, the Tenant, and the Tenant's P.O.A., appeared, acknowledged receipt of evidence submitted by the other, 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 for the return of her security deposit under sections 38 and 67 of the *Residential Tenancy Act*?

Background and Evidence

The Landlord testified that they are a private care facility that does not require a license to operate in this community. The Landlord confirmed that they provide two levels of care, the first being "Complex Care" and the second is "Assisted Living".

The Complex Care facility is located in a separate building where the Landlord provides medical care, licensed nurses and care aids, distribution of medication, medical facilities, meals, and laundry services for a specific or limited time period while the occupant recovers from their specific illness or injury. Patients in this facility receive care for illnesses or injuries such as broken bones, infections, post operative care, palliative care and so on. As the Complex Care facility is a private care facility the occupants pay a fee based on the level of care required and the anticipated length of stay.

The Assisted Living facility is located across the street from the Complex Care facility and provides independent living facilities to tenants who can then enter into a contract for service to purchase additional services based on their desires and / or needs. The rental unit is self contained with kitchen and washroom facilities. Monthly fees are determined by a base rent and then increased to include the contract for services purchased by each individual. The length of stay is not for a limited amount of time based on the recovery of the occupant and the Tenant enters into a month to month agreement with the assisted living facility requiring one months notice to end the tenancy. While the tenants are able to pay for additional services their occupancy of the rental unit is not dependent on the purchase of additional services.

The Landlord confirmed that they are not governed by any of the following legislation: a) the Community Care and Assisted Living Act; b) the Continuing Care Act; c) the Health Act; nor the d) the Mental Health Act

The Tenant's P.O. A. testified that the Tenant moved into the Complex Care facility on August 21, 2009 and entered into a written agreement with the Landlord to rent room "A" in the Assisted Living Facility upon her recovery from a broken pelvis. The Tenant's agreement was for a month to month tenancy and a security deposit of \$600.00 was paid to the Landlord on August 21, 2009. The Tenant's base rent plus contracted services which included 2 meals per day was payable on the first of each month in the amount of \$1,200.00.

On August 31, 2009, the Tenant's P.O.A. provided the Landlord with 30 days written notice to end the tenancy effective September 30, 2009. September 2009's rent was paid in full and the Tenant's P.O.A.'s address was provided to the Landlord on August 31, 2009 when the Tenant was placed in Complex Care.

The Landlord confirmed that she has not made an application to the *Residential Tenancy Branch* to retain the security deposit that the Landlord does not possess an Order from the *Residential Tenancy Branch*, and the Landlord does not have written permission from the Tenant or her P.O.A. authorizing the Landlord to retain the security deposit.

The Tenant's P.O.A. testified that they received a post dated cheque dated September 15, 2009 in the amount of \$488.00 as partial return of the \$600.00 security deposit. The P.O.A. confirmed that the cheque has been cashed and that it cleared the bank.

Analysis

In determining jurisdiction in this matter I must consider the following:

This living accommodation.....

- a) **is not** a not for profit housing society?
- b) **is not** provided for emergency shelter or transitional housing?
- c) **is not** located in a community care facility governed under the Community Care and Assisted Living Act?
- d) **is not** located in a community care facility governed under the Continuing Care Act?
- e) **is not** located in a public or private hospital governed under the Hospital Act?
- f) **is not** a facility designated under the Mental Health Act?
- g) **is not** in a housing based health facility that provides personal health care?
- h) **is not** made available in the course of providing rehabilitative or therapeutic treatment or services?
- i) **is not** providing care and occupancy for a restricted or limited amount of time such as a specific recovery period?

Based on the above considerations I find that the Landlord's assisted living complex is not exempt from the *Residential Tenancy Act* under section 4 of the Act.

This private organization provides services at the assisted living complex such as meals, supervision and distribution of medication; however this is a "pay as requested" or "contract for service" and does not restrict a tenant from occupying the rental unit on a month to month basis. The Tenant is at liberty to sign up for as many services that they wish and their length of residency is not restricted or limited to a recovery period.

I have carefully reviewed all of the evidence and testimony before me and based on the aforementioned I find that the *Residential Tenancy Act* applies to the Landlord's privately owned assisted living complex and the Landlord took a security deposit from the Tenant based on a month to month tenancy agreement for occupancy at the assisted living complex for unit "A".

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 issued the Tenant a cheque for the return of a portion the security deposit and post dated the cheque to September 15, 2009. The Landlord has admitted that she did not apply for dispute resolution to keep the security deposit and did not have the Tenant's or the Tenant's P.O.A's written consent to retain \$112.00 of the security deposit.

The evidence supports that the Landlord had the Tenant's mailing address by way of the Tenant's P.O.A. on or before August 31, 2009 and again when a registered letter was sent to the Landlord from the Tenant on September 21, 2009 and that the Landlord was deemed to have received this letter five days after it was sent, September 26, 2009, in accordance with section 90 of the Act.

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 in full 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 full security deposit or file for dispute resolution no later than October 5, 2009. The Landlord did not do either, however the Landlord did return a portion of the security deposit on September 15, 2009.

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 owing of the security deposit. I find that the Tenant has succeeded in proving the test for damage or loss as listed above and I hereby approve her claim for the return of double the balance owing of her security deposit and interest.

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

Doubled of balance of Security Deposit 2 x \$112.00 (\$600.00 - \$488.00)	\$224.00
Interest owed on the Security Deposit of \$600.00 from August 21, 2009 to March 2, 2010	<u>0.00</u>
TOTAL AMOUNT DUE TO THE TENANT	\$224.00

I have included in the Landlord's decision a copy of "A Guide for Landlords and Tenants in British Columbia" and I encourage the Landlord to familiarize herself with her obligations as set forth under the *Residential Tenancy Act*.

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 **\$224.00**. 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: March 02, 2010.

Dispute Resolution Officer