



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNSD, MNDC, FF

Introduction

The hearing was convened to deal with an application by the tenant for the return of double the portion of the security deposit wrongfully retained by the landlord.. The tenant was also seeking reimbursement for the \$50.00 fee paid for this application.

This Dispute Resolution hearing was also convened to deal with a cross application by the landlord for a monetary claim of \$2,315.00 for the cost of cleaning, damages, and loss of rent. The landlord was also seeking reimbursement for the \$50.00 fee paid for this application.

Both the landlord and tenant were present and each gave testimony in turn.

Issues to be Decided for the Tenant's Application

The issues to be determined based on the testimony and the evidence are:

- Whether the tenant is entitled to the return of double the security deposit pursuant to section 38 of the Act. This determination is dependant upon the following:
 - Did the tenant furnish a forwarding address in writing to the landlord?
 - Did the landlord make an application to retain the deposit within 15 days of the end of the tenancy and provision of the forwarding address?

Issues to be Decided for the Landlord's Application

The landlord was seeking to receive a monetary order for cleaning, damage and other costs.

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act* for loss and damages. This determination is dependant upon establishing the following questions:
 - the costs were incurred due to the actions of the tenant in violation of the Act or Agreement
 - proof of the amount or value being claimed was provided.
 - proof that a reasonable effort was made to minimize the damages

The tenant had the burden of proof to establish that the deposit existed and that 15 days had expired from the time that the tenancy ended without the landlord either refunding the deposit or making application to keep it. The landlord had the burden of proof to show that compensation for damages and loss was warranted.

Background and Evidence

The tenancy began in June 2009 with rent set at \$1,800.00 per month and a security deposit of \$900.00 was paid. A substantial amount of evidence was submitted, including photos, copies of communications and a copy of the tenancy agreement. No move-in or move-out condition inspection report was included with the evidence. The tenant testified that on the final day of the tenancy the landlord and tenant walked through the unit, after which the landlord immediately returned \$500.00 of the tenant's security deposit and retained \$400.00 pending the final confirmation that the tenant's utility bills were paid in full. The tenant testified that he furnished the requisite proof but on October 27, 2009, the landlord only returned another \$50.00 with a cheque that was

not completed properly and kept \$350.00. the tenant testified that the landlord failed to refund the deposit or make application to keep it within fifteen days after being given a forwarding address for the tenant in writing and, in fact, has not returned \$350.00 of the deposit to date. The tenant was seeking double the portion of deposit retained past 15 days pursuant to the provisions in section 38 of the Act.

The landlord testified that on September 4, 2009 the landlord was verbally advised that the tenant intended to leave by the end of September 2009. The landlord testified that he was sympathetic to the tenant's need to vacate. At that time the tenant was advised by the landlord that the landlord would try to re-rent the unit by October 1, 2009 with the tenant's cooperation. The landlord stated that, however, he made it clear to the tenant that, because a full month notice was not given as required under the Act, the tenant would still be liable for one-month loss if the unit was not rented by October 1, 2009. The landlord testified that the rental was advertised in the local paper on September 5, 2009, and also on Craigslist and Homefinders and the landlord only received 3 inquiries, 2 of whom were not interested and the third was found to be unsuitable as a tenant. The landlord was claiming loss of rent of \$1,800.00.

The tenant testified that they discussed his plans to leave at the end of September over three weeks before the final day, which provided the landlord almost a full month to re-rent the unit. The tenant stated that, during this discussion, at no time was he ever told that he would be held liable for a loss of rent and in fact, had he known that the landlord would be making a claim for lost rent, he would not have left and could have remained long enough to give the full one-month notice. The tenant's position was that the landlord's decision to hold the tenant responsible for the loss of rent was made after the tenant had filed for the return of his security deposit being withheld by the landlord.

The landlord testified that when the tenant vacated the unit was not reasonably clean and was damaged including the following:

- Damaged basement floor costing \$50.00 (claim withdrawn)
- Clean windows inside and out \$90.00

- Remove stain from carpet \$10.00 (claim withdrawn)
- Clean upper range oven \$25.00
- Damaged dining room Fixture \$45.00
- Replace & repair ceiling tile, lower bathroom \$25
- Wash light fixtures \$15.00
- Replace light bulbs, (approximately a dozen) \$10.00
- Replace oven light \$5.00
- Replace globe on bathroom light and Utility room light \$9.00 and \$6.00
- Wash floor under stove and refrigerator \$5.00 (claim withdrawn)
- Replace & Repair lower toilet seat \$25.00 (claim withdrawn)
- Damaged kitchen counter, (claim withdrawn)
- Range lids damaged & replaced with used \$15.00
- Damaged walls at both entry doors \$10.00
- Shed door missing \$35.00
- Exterior wall damaged on locking gate \$20.00
- Driveway damage \$50.00

The landlord submitted photos of the unit in support of the claims but no receipts nor or invoices for any of the above claims.

The tenant agreed that he owed \$30.00 to replace the dining room fixture and \$5.00 for the oven light and a lesser amount than claimed for a few replacement light bulbs. The tenant disputed the remainder of the landlord's claims on the basis that the damage predated the tenancy or was caused by normal aging and wear and tear.

Analysis: Tenant's Application

The tenant has made application for the return of the security deposit.

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.

The landlord was in possession of \$400.00 of the tenant's security deposit held in trust on behalf of the tenant at the time that the tenancy ended. I find that because the tenancy was ended and the forwarding address was given to the landlord by February 17, 2009, under the Act the landlord should either have returned the deposit or made an application for dispute resolution within the following 15 days. However, the landlord's application for dispute resolution was not processed until April 7, 2009 which was beyond the fifteen days.

Section 38(6) If a landlord does not act within the above deadline, the landlord; (a) may not make a claim against the security deposit or any pet damage deposit, and; (b) must pay the tenant double the amount of the security deposit.

Based on the above, I find that the tenant is entitled to receive double the \$400.00 security deposit not refunded totalling \$800.00

Analysis: Landlord's Application

In regards to the landlord's claim for monetary damages, an applicant's right to claim damages from another party is covered under, Section 7 of the Act which states that if a landlord or tenant does not comply with the 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. 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 landlord, 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 mitigate the damage or losses that were incurred.

In regards to the claim for loss of rent, I find that the tenant did violate the Act and there was a loss for the landlord. However, the tenant's testimony that he vacated under the belief that the landlord was in agreement with his giving notice as of September 4 instead of August 31, 2009 was believable, particularly given the fact that the landlord made no mention of any claim for loss of rent in the correspondence to the tenant dated October 27, 2009 when the \$50.00 refund cheque was sent.

While it may be true that the landlord took reasonable measures to minimize the loss, I find that the landlord's verbal testimony that the unit was advertised in several forums is not sufficient to meet the burden of proof to satisfy element 4 of the test for damages in support of the monetary claim for \$1,800.00. Accordingly I find that this portion of the landlord's claim must be dismissed with the exception of \$295.89 representing the pro-

rated rent owed for the four days of late notice beyond August 31, 2009, by which time the tenant should have given notice in compliance with the Act.

The landlord has presented photos clearly showing damage. Provided that the unit was in clean and pristine condition when the tenancy started, there could have been a violation of the Act under section 37 (2)(a) which requires a tenant to ensure that the rental unit was left reasonably clean, and undamaged except for reasonable wear and tear upon vacating and the tenant would be liable for any costs or losses that flowed from the tenant's failure to comply with the Act. However, the evidence to verify the condition at the time this unit was rented was not submitted.

Move-In and Move-Out Inspection reports signed by both parties, are critical pieces of evidence required to prove that element 2 of the test for damages and loss has been met. This is achieved by showing the "before-and-after" picture of the suite as agreed-upon by the landlord and the tenant . In this instance, the move-in and move-out inspection reports were not available because the Act was not followed by the landlord in respect of this requirement.

The parties offered conflicting testimony on the subject of the unit's condition at the start of the tenancy and both submitted photographs purporting to support their testimony about the condition at end of the tenancy.

I must point out that in any dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. The reason that this is true is because one party must carry the added burden of proof. In other words, the applicant, in this case the landlord, has the onus of proving, during these proceedings, that the compensation being claimed is justified under the Act. When the evidence consists of conflicting and disputed verbal testimony, in the absence of independent evidence, then the party who bears the burden of proof is not likely to prevail.

The third-party witness testimony offered in support of the landlord's claims during the proceedings was appreciated. However, this still consisted of verbal testimony which

was refuted by the tenant's witnesses. As such the evidentiary weight of this testimony was not consequential.

In regards to the alleged damage I find that many of the fixtures and finishes under dispute, such as the counter, lights, toilet seat and carpeting were already existing far beyond their useful life expectancy and even if it was proven that the tenant damaged them, their pro-rated value would be nil. I also find that the vintage of the fixtures and finishes would have more likely than not impacted the rentability of the unit.

In addition to the disadvantage of having no condition inspections, the landlord failed to submit any receipts or invoices to verify the monetary amounts that were allocated to the damage that was allegedly caused by the tenant.

In regards to cleaning, the tenant testified that the unit was left reasonably clean. The tenant pointed out that no amount of scrubbing would restore the well-used stove and oven to new condition and I find that this argument has merit. In regards to the soiled surfaces under the stove and refrigerator, I find that under the Act a tenant is not required to move appliances to clean under them unless such appliances: a) are on casters and; b) were moved out for inspection by the tenant at the time the tenant moved in.

I have considered the evidence and testimony and determined that only the damage claims agreed-upon by both parties can be awarded. Accordingly I find that the landlord is entitled to \$30.00 to replace the vintage fixture, \$5.00 for the oven light bulb and \$5.00 for the m=remaining light bulb replacements.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of \$800.00 representing double the portion of the security deposit retained beyond 15 days.

Based on the testimony and evidence presented during these proceedings I find that the landlord is entitled to total monetary compensation of \$335.89 comprised of \$295.89 for late notice to vacate and \$40.00 for the cleaning and repairs.

Pursuant to my authority under section 72 of the Act, I order that the \$800.00 to which the tenant is entitled, be reduced by the \$335.89 compensation for damages and loss owed to the landlord. Accordingly I hereby issue a monetary order in favour of the tenant for the remainder of \$464.11. This 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.

I find that neither party is entitled to compensation for the cost of filing their respective applications. .

March 2010

Date of Decision

Dispute Resolution Officer