

DECISION

Dispute Codes MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant for a Monetary Order for the return of double her security deposit and to recover the cost of the filing fee from the Landlord for this application.

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 and the Tenant's evidence.

The Landlord and the Tenant appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

The Landlord testified that he sent the Tenant and the Residential Tenancy Branch evidence on April 21, 2010. The Tenant confirmed receipt of the Landlord's evidence on April 23, 2010.

Issues(s) to be Decided

Is the Tenant entitled to a Monetary Order under sections 38, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

The Landlord argued that the Residential Tenancy Branch does not have jurisdiction in this matter as the tenancy agreement was for a vacation rental and is exempt under section 4 of the *Act*.

The Tenant testified and confirmed the rental of the house was not for vacation purposes. The Tenant argued that all of the occupants had been in the town six to eight months prior to renting this house; they were all employed in the town where they sought the residential accommodations; none of the occupants were on vacation; and the tenancy agreement was a six month fixed term residential tenancy agreement.

The undisputed testimony was the fixed term tenancy began when the Tenants occupied the rental unit on May 5, 2009 and was set to expire on October 31, 2009 at which time the Tenants had to vacate the rental unit. Rent was payable on the first of each month in the amount of \$6,850.00 and the Tenants paid a security deposit of

\$3,425.00 on April 21, 2009. The Landlord did not complete a move-in inspection form and did not complete a move-out inspection form. The Tenant provided the Landlord with her forwarding address, in writing, on November 3, 2009 during the move out inspection meeting held at the rental unit.

The Landlord testified a written tenancy agreement was entered into between a male tenant and a Limited Company which the Landlord was previously an officer of. The Landlord argued that he previously stepped down as an officer of the Company and that there was no written agreement between this applicant Tenant and himself nor his Company.

The Tenant stated that there were six occupants of the rental unit from the onset of the tenancy and the Landlord knew this. Only one of the male tenants was available to meet with the Landlord to sign the rental agreement. The Tenant argued that she was not made aware that the Landlord was the Limited Company and not the person himself, and that she always dealt personally with the Landlord and made the rent deposits to a bank account to the credit the Landlord and not the Company. After reviewing the tenancy agreement and hearing the Landlord's testimony the Tenant confirmed that she wanted to add the Company's name as an additional respondent to her application.

The Landlord confirmed that he began to deal directly with the applicant Tenant in relation to tenancy matters on approximately June 24, 2009, that the Tenant paid rent by direct deposit into a bank account issued in the name of the Landlord and not the Company name, and the Landlord confirmed that the Tenant communicated with him via e-mail, through an e-mail account set up with the Town and Company name. The Landlord stated that he was under the impression the male tenant who signed the tenancy agreement had vacated the rental unit.

The Landlord testified that he did not apply for dispute resolution to keep the security deposit; the security deposit was collected in the event there were damages to the unit, that he does not possess an Order authorizing him to keep the security deposit, and that he does not have the Tenants' written permission to keep the security deposit. The Landlord argued the security deposit was put to the Tenants' account balance to cover the balance due on October 2009 rent as the Tenants short paid their final month's rent. The Landlord confirmed the Tenants did not cause damage to the rental unit and there were no other claims against the security deposit. The Landlord argued the Tenants paid part of the October 2009 rent to the owners of the property and not to him as their Landlord, and therefore the Tenants should be seeking the return of money they paid directly to the owner of the property and not from him.

Analysis

All of the testimony and documentary evidence was carefully considered.

In determining jurisdiction under the *Residential Tenancy Act* I have taken into consideration the following:

- The Landlord collected a security deposit
- The participants entered into a fixed term tenancy of approximately six months in length
- The Tenants were granted exclusive possession of the rental unit for the fixed term period
- All six Tenants were residents of the town a minimum of six months prior to entering in to the rental agreement
- The Tenants were employed in the town and rented the unit for residential purposes, not for a vacation.

After careful consideration of the above listed evidence, I find the tenancy in question to fall under the jurisdiction of the *Residential Tenancy Act*. Having found jurisdiction of the tenancy I also find the Landlord's written tenancy agreement to be an attempt to contract out of the Act in violation of section 5 of the Act.

In the circumstances before me, I find the version of events surrounding how the Landlord represented himself, provided by the Tenant, to be highly probable given the conditions that existed at the time. I am required to consider the Landlord's evidence not on the basis of whether his testimony "carried the conviction of the truth", but rather to assess his evidence against its consistency with the probabilities that surround the preponderance of the conditions before me.

A "**tenancy agreement**" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

The evidence supports the Landlord entered into a written tenancy agreement with one of the male Tenants which lists beside "NAME" the Landlord's personal name and then in brackets (referred to in this agreement as Owner") and that the Landlord's address is listed as "**c/o**" (meaning care of) and then lists the Landlord's Limited Company's name. The evidence also supports the Landlord later entered into a verbal tenancy agreement with the applicant Tenant having dealt directly with her on issues relating to the tenancy and collecting rent payments from her.

In addition, the documentary evidence supports that the Landlord sent the Tenant an e-mail stating the tenancy agreement was with the Company, that the Company is registered in the UK (there is no mention of the Company being registered in Canada),

and the bank account information used for the rent deposits is a bank account established in the Landlord's personal name and not the Company's name. Based on the aforementioned I find Landlord, as named in the application for dispute resolution, and the Company, purported to be owned by the Landlord, to be jointly and severely liable for all matters relating to this tenancy agreement. Therefore, I approve the Tenant's request to add the Limited Company as a respondent to her application, in accordance with section 64(c) of the *Act*.

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.

The Landlord has confirmed that he did not apply for dispute resolution to keep the security deposit, he does not have an Order allowing him to keep the security deposit, and he does not have the Tenants' written consent to retain \$ the security deposit.

The evidence supports that the Tenant provided the Landlord with her forwarding address on November 3, 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 in full or file for dispute resolution no later than November 18, 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 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 security deposit. I find that the Tenant has succeeded in proving the test for damage or loss as listed above and I approve her claim for the return of double the security deposit plus interest.

I find that the Tenant has succeeded with her application therefore I award recovery of the \$100.00 filing fee.

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

Doubled Security Deposit 2 x \$3,425.00	\$6,850.00
Interest owed on the Security Deposit of \$3,425.00 from April 21, 2009 to May 3, 2010	0.00
Filing Fee	100.00
TOTAL AMOUNT DUE TO THE TENANT	\$6,950.00

I do not accept the Landlords' argument that the Landlords' violation was somehow excused due to the Tenants' alleged failure to comply with the Act or agreement by paying part of the October 2009 rent to the Owners of the property. Even if the Tenants were found to be in violation of the Act, there is no provision in the Act that extends immunity for a reciprocal breach on the part of a Landlord.

In regards to the Landlord's claims relating to loss that he may have suffered, I am not able to neither hear nor consider the Landlord's claim during these proceedings as this hearing was convened solely to deal with the Tenant's application. That being said, I must point out that the Landlord is at liberty to make an application for dispute resolution.

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 **\$6,950.00**. The order must be served on the respondent Landlord(s) 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: May 03, 2010.

Dispute Resolution Officer