

DECISION

Dispute Codes MNDC MNSD FF

Introduction

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

Service of the hearing documents was done in accordance with section 89 of the *Act*, served personally to the Landlord by the Tenant on January 12, 2010, at the rental unit in the presence of a witness.

The Tenant appeared, gave affirmed testimony, was provided the opportunity to present his evidence orally, in writing, and in documentary form. The Landlord did not appear despite being served notice of today's hearing in accordance with the *Act*.

The Tenant confirmed that he did not provide copies of his documentary evidence to the Landlord prior to today's hearing.

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 Tenant testified that he saw the rental unit posted on the bulletin board at his temporary residence and called the Landlord to make arrangements to see the rental unit on November 7, 2009. The Tenant stated that the terms of the tenancy included the following:

- rent would be payable on the first of each month in the amount of \$550.00 per person for part of the basement suite; and
- the Landlord was requesting \$1,250.00 as a deposit; and
- the Landlord would provide a second bed into the furnished room; and
- the Tenants would have one private bedroom and access to the kitchenette, bathroom, laundry room, and back yard; and

- the Tenant would share the room with his friend who entered into the verbal tenancy agreement with him; and
- the Landlord resided on the main floor of the rental unit.

The Tenant stated that after seeing the room they decided to enter into the agreement and told the Landlord that they could only access \$550.00 for the deposit that day. The Landlord took the deposit and provided the Tenant a written receipt dated November 7, 2009, and agreed the Tenants would take occupancy on November 9, 2009.

The Tenant argued that on November 9, 2009, they attempted to contact the Landlord from approximately 4:30 p.m. onward and were not able to reach him to gain access to the rental unit. The Tenant advised that when they were not able to reach the Landlord on November 10, 2010 he attended the rental unit at approximately 5:30 p.m. and a female who resides at the rental house allowed the Tenant access to the basement suite and told him that the Landlord was expected home later that evening. The Tenant testified when he went into his rental room he found the room had not been emptied, was not cleaned, and did not have the second bed moved in. The Tenant stated that he waited for the Landlord to return and at approximately 7:00 p.m. he approached the Landlord, along with his roommate, to discuss their agreement. The Tenant stated that it was during this discussion that they ended the tenancy and requested the return of their damage deposit which the Landlord refused.

The Tenant advised that he requested the return of his deposit two additional times before contacting the *Residential Tenancy Branch*. The Tenant testified he put his request in writing, listing his forwarding address, and personally served the letter to the Landlord on November 17, 2009 at the rental unit.

The Tenant provided his testimony and read the contents of the November 17, 2009 letter and confirmed that he did not provide a copy of this letter to the *Residential Tenancy Branch*. I requested the Tenant fax me a copy of the November 17, 2009 letter, immediately following the hearing. Then Tenant also read the contents of the following documents:

- a copy of the letter written May 15, 2010, written by the co-tenant; and
- a copy of the letter dated May 23, 2010, written by the Tenant's witness; and
- a copy of the receipt written by the Landlord 11/7/09.

The Tenant confirmed he is seeking the return of double his security deposit and to recover the cost of his filing fee.

Analysis

The evidence supports that the Tenant did not provide the Landlord with copies of his evidence in advance of today's hearing which is in contravention of section 3.1 of the *Residential Tenancy Branch Rules of Procedure*. Considering evidence that has not been served on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore as the Respondent Landlord has not received copies of the Tenant's documentary evidence I find that the Tenant's documents cannot be considered in my decision. I did however consider the Tenant's testimony which included the Tenant reading the contents of each document. As transcripts are not available from this hearing I have attached a copy of each document read by the Tenant during the hearing to the end of this decision.

Given the evidence before me, in the absence of any evidence from the Landlord, who did not appear despite being properly served with notice of this proceeding, I accept the version of events as discussed by the Tenant and corroborated by their testimony.

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 evidence supports the Tenant and Landlord entered into a verbal tenancy agreement and a deposit of \$550.00 was paid to the Landlord on November 7, 2009. A receipt was issued by the Landlord which included "non-refundable if not move in" Section 20(e) of the *Act* provides a landlord must not require, or include as a term of a tenancy agreement that the landlord automatically keeps all or part of the security deposit at the end of the tenancy agreement; therefore the statement that the security deposit is "non-refundable if not move in" is of no force or effect.

The evidence supports the tenancy ended on November 10, 2009 and that the Tenant provided the Landlord with his forwarding address, in writing, on November 17, 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 December 2, 2009. There is no evidence to support the Landlord did either.

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. As per the aforementioned, I find that the Tenant has succeeded in proving the test for damage or loss as listed above and I approve his claim for the return of double the security deposit plus interest.

I find that the Tenant has succeeded with his application therefore I award recovery of the \$50.00 filing fee.

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

Double Security Deposit 2 x \$550.00	\$1,100.00
Interest owed on the Security Deposit of \$550.00 from November 7, 2009 to June 23, 2010	0.00
Filing Fee	<u>50.00</u>
TOTAL AMOUNT DUE TO THE TENANT	\$1,150.00

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 **\$1,150.00**. 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: June 23, 2010.

Dispute Resolution Officer