

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 his security deposit and to recover the cost of the filing fee from the Landlords for this application.

Service of the hearing documents, by the Tenant to the Landlords, was done in accordance with section 89 of the *Act*, served personally to the Landlord on March 11, 2010 in the presence of a witness. The Landlord confirmed receipt of the hearing package.

The Landlord, the Tenant, and the Tenant's Witness appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form. The Landlord confirmed that he submitted his evidence to the Residential Tenancy Branch yesterday and he did not serve a copy of his evidence to the Tenant.

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's Witness testified that he was with the Tenant when the Tenant called the Landlord on two separate occasions to request a time to set up a move-out inspection and on both occasions the Landlord refused to set a time with the Tenant. The Witness argued that he then accompanied the Tenant to the Landlord's residence, after the Tenant vacated the unit, to request he attend the unit to do a walk through and sign the move-out inspection forms the Tenant had in his possession; however the Landlord still refused to do the inspection and refused to sign off the move-out inspection form. The Witness confirmed that he had been in the rental unit on several occasions throughout the tenancy and there was no visible damage other than normal wear and tear.

Both parties confirmed the tenancy agreement and rent payments were issued to the Limited Company, who is listed as the Landlord on the tenancy agreement, and that the

Landlord named in this proceeding is an Agent for the Landlord. The Tenant requested his application for dispute resolution be amended to include the Landlord's Limited Company Name. The Resident Manager (Landlord) was in agreement to this amendment.

The undisputed testimony was the month to month tenancy for unit # 306 began on January 13, 2006 however the Tenant occupied another unit in this building from October 1, 2005. The Tenant paid a security deposit for the previous unit on October 1, 2005 of \$350.00 and this amount, without interest, was transferred to unit #306 by the Landlord. The Tenant's rent was payable on the first of each month in the amount of \$720.00.

The Tenant testified and referred to his documentary evidence which included a copy of the tenancy agreement for unit # 306; a copy of the letter issued by the Tenant to the Landlord on November 30, 2009 providing the Tenant's notice to end the tenancy effective December 31, 2009 which is signed received by the Landlord on November 30, 2009; and a copy of a letter dated January 3, 2010, providing the Landlord with the Tenant's forwarding address which was served to the Landlord in person in the presence of a witness.

The Tenant confirmed he is seeking the return of double his security deposit plus the \$50.00 filing fee for a total claim of \$750.00.

The Landlord testified that he received the Tenant's notice to end tenancy on November 30, 2009, that he received the Tenant's forwarding address on January 3, 2010, and he has not returned the Tenant's security deposit. The Landlord confirmed that they did not apply for dispute resolution to obtain an Order allowing them to retain the security deposit; they do not possess an Order authorizing the Landlords to retain the security deposit, and the Landlords do not have the Tenant's permission, in writing, to keep a portion of the security deposit. The Landlord argued that there was damage to the unit and he withheld the security deposit to cover the costs to repair the damage.

Analysis

The Landlord confirmed that they did not provide the Tenant with copies of their evidence in contravention of section 4.1 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 applicant Tenant has not received copies of the Landlords' evidence I find that

the Landlords' evidence cannot be considered in my decision. I did however consider the Landlords' 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 that the Landlords have not applied for dispute resolution to keep the security deposit, do not have an Order allowing them to keep the security deposit, and they do not have the Tenant's written consent to retain the security deposit.

The evidence supports that the tenancy ended December 31, 2009 and the Tenant provided the Landlords with his forwarding address on January 3, 2010.

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 Landlords were required to return the Tenant's security deposit in full or file for dispute resolution no later than January 18, 2010.

Based on the above, I find that the Landlords have failed to comply with Section 38(1) of the *Act* and that the Landlords are 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 and pet 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 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 the Security Deposit 2 x \$350.00	\$700.00
Interest owed on the Security Deposit of \$350.00 from October 1, 2005 to July 6, 2010	12.38
Filing Fee	<u>50.00</u>
TOTAL AMOUNT DUE TO THE TENANT	\$762.38

I do not accept the Landlords' argument that the Landlords' violation of not returning the security deposit was somehow excused due to damage to the unit. Even if the Tenant was 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 Landlords' claim relating to loss that they may have suffered, I am not able to neither hear nor consider the Landlords' 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 Landlords are at liberty to make a separate application for dispute resolution and to resubmit their evidence.

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 **\$762.38**. The order must be served on the respondent Landlords 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: July 06, 2010.

Dispute Resolution Officer