

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with the tenants' application pursuant to section 38 of the *Residential Tenancy Act* (the *Act*) for authorization to obtain a return of double their security deposit pursuant to section 38 and for authorization pursuant to section 72 of the *Act* to recover their filing fee for this application from the landlords.

Although the tenants did not indicate in their application for dispute resolution that they were seeking a monetary award for reduced rent for services the landlord committed to provide in their residential tenancy agreement, the tenants requested a monetary award of \$950.00 for the landlords' failure to pay gardening fees during the duration of their tenancy. They calculated this request for a monetary award on the basis of their loss of \$50.00 per month for 19 months. Since their application for dispute resolution clearly indicated their intention to seek this monetary award, I included this issue in my consideration of the tenants' application.

The landlords did not attend this hearing. The tenants attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The tenants testified that they sent the landlords a copy of their application for dispute resolution hearing package by registered mail on June 21, 2010 and June 22, 2010. They entered into written evidence a copy of Canada Post Tracking Numbers to confirm this mailing, as well as the two packages that Canada Post returned to them when the landlords refused to accept these packages. I am satisfied that the tenants have served the application for dispute resolution to the landlords in accordance with the *Act*.

Issues(s) to be Decided

Are the tenants entitled to a monetary Order for return of monies owed as a result of the landlords' failure to return to them all of the tenants' security deposit? Are the tenants

entitled to any further monetary award for the landlords' alleged failure to continue providing gardening services as part of this tenancy agreement? Are the tenants entitled to recover their filing fee for this application from the landlord?

Background and Evidence

The tenants testified that they first occupied the rental premises on November 1, 2008 by way of a one-year fixed term tenancy, subsequently converted to a month-to-month tenancy at the expiration of the one-year term. Monthly rent was set at \$2,850.00, payable on the first of each month. They said that they paid the \$1,425.00 security deposit called for in their residential tenancy agreement on October 29, 2008.

The tenants provided a copy of the landlords' 2 Month Notice to End Tenancy for Landlord's Use of Property issued on March 31, 2010. This notice required the tenants to vacate the premises by May 31, 2010 because the landlords had sold the property and the new purchasers were planning to reside in the rental premises. The tenants testified that they vacated the rental premises on May 31, 2010.

The tenants testified that they gave the landlords written notice of their forwarding address on May 31, 2010. They said that the landlords initially sent a cheque for the return of their security deposit to an incorrect address. When the landlords learned of their error, they cancelled the previous cheque and reissued another cheque. The landlords delivered the new June 14, 2010 cheque to the tenants at their home address on or about June 15, 2010.

The tenants testified that they received the landlords' \$1,033.50 cheque for a return of their security deposit within the required 15 days of providing their forwarding address to the landlord. However, the tenants objected to the landlords' deduction of \$370.00 from their security deposit for the following items:

Item	Amount
Missing Kitchen Blind	\$64.00
Bedroom Curtain Covered in Blood	75.00
½ Cost of Cleaning- to remove blood from walls in family room and bedroom	191.00
Remainder of Gardening Funds	40.00
Total Deduction from Landlords from Tenants' Security Deposit	\$370.00

In this application, the tenants applied for a monetary award of \$3,800.00. This amount included a request for twice the amount of the original \$1,400.00 security deposit identified in their application for dispute resolution (i.e., \$2,800.00). As noted above, the tenants also included in their application an amount of \$950.00 for the loss of the gardening service for the duration of this tenancy. The tenants also asked for recovery of their \$50.00 filing fee from the landlords.

Analysis

Tenants' Application for Return of Security Deposit

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an application for dispute resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord **must** pay the tenant double the amount of the deposit (section 38(6)). Further, if the landlord fails to perform a condition inspection at move-in and move-out the landlord may not make a claim against the deposit.

The residential tenancy agreement submitted into evidence by the tenants required the tenants to pay a security deposit of \$1,425.00 at the commencement of this tenancy. The tenants entered undisputed oral testimony that they paid \$1,425.00 for their security deposit to the landlords on October 29, 2008. The tenants testified that a joint move-in condition inspection was completed on October 29, 2008. They said that they participated in a move-out inspection with the landlords after they vacated the rental

premises at the end of May 2010. They said that the landlords told them that the landlords were happy with the condition of the rental unit. The tenants testified that they received no condition inspection report from the landlords following their joint inspection of the rental unit. The landlords have not submitted any evidence. I accept the tenants' testimony that no move-out condition inspection report was provided to them.

The undisputed evidence shows that the tenants supplied their forwarding address to the landlord on May 31, 2010. On or about June 15, 2010, the landlord returned the sum of \$1,033.50 to the tenants although the tenants did not agree to any deductions from their security deposit. The landlords did not enter into evidence any indication that they applied for dispute resolution to obtain authorization to retain the \$370.00 portion of the tenants' security deposit they withheld.

I am satisfied that the landlords did return the \$1,033.50 portion of the security deposits to the tenants within 15 days of receiving the tenants' forwarding address for doing so. However, I find that the landlord had no legal basis for withholding the remaining \$370.00 of the security deposit. The landlord did not file an application for dispute resolution within 15 days of receiving the tenants' forwarding address in writing, nor did they obtain the tenants' written permission to withhold these funds.

I find that the tenants are entitled to a monetary Order amounting to double the security deposit with interest calculated on that portion of the deposit that was not returned to the tenants in June 2010. This monetary Order is as follows:

Item	Amount
Security Deposit Paid October 29, 2008 Plus Interest to June 14, 2010 ($\$1,400.00 + 3.67 = \$1,403.67$)	\$1,403.67
Less Security Deposit Cheque Returned to Tenants May 2010	-1,033.50
Total Unpaid Security Deposit Owing x 2 ($\\$1,403.67 - \\$1,033.50 = \\$370.17 \times 2 = 740.34$)	\$740.34

I issue a monetary award in the tenant's favour in the sum of \$740.34 for the landlords' lack of full compliance with section 38 of the *Act*.

Tenants' Request for Monetary Award for Loss of Gardening Service during this Tenancy

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must 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 other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

The tenants provided a copy of their residential tenancy agreement. They noted that section 7 of that agreement established that "the landlord will be responsible for property taxes and for gardening fees, but no other expenses."

In their application for dispute resolution, the tenants asked "for \$50.00 for each month that we resided at the premises totaling 950.00 for gardening fees that we paid for..."

The tenants' claim for reduced rent for the entire duration of their tenancy for the landlord's failure to pay gardening fees does not match with the oral evidence they provided at the hearing. At the hearing, the female tenant testified that until "early spring" the landlords paid a gardener who lived across from the property \$50.00 per month to tend to what she described as "a complex garden" on the rental property. She said that for most of the remainder of the tenancy, the tenants had to conduct the gardening on the property themselves. Although they said that they incurred "out of pocket expenses" as a result of the landlord's decision to discontinue paying "gardening fees" for this property, the tenants testified that they did not have any receipts to demonstrate that they paid fees that were supposed to have been included in their

rental agreement. The tenants said that they did not hire anyone to look after the gardening on the premises and had to do this work themselves.

The tenants provided no evidence that they sent anything in writing to the landlords regarding the landlords' decision to discontinue the gardening service that they maintain was part of their tenancy agreement. I do not find that the tenants are entitled to receive any form of monetary award for gardening services and dismiss their claim for this item. I do so because the tenants have not met the burden of proof required under section 67 of the *Act*. They have not demonstrated to the extent necessary that they incurred an actual monetary loss, nor did they notify the landlords during this tenancy that they considered the gardening service to be included in their tenancy agreement.

Tenants' Application for Recovery of Filing Fee for this Application

As the tenants have been partially successful in their application, I allow them to recover their \$50.00 filing fee for this application from the landlord.

Conclusion

I grant the tenants a monetary Order in the amount of \$790.34. This monetary Order includes return of that portion of the tenants' security deposit that is owed to them by the landlord and recovery of the tenants' filing fee. I dismiss the tenant's application for a monetary award for the loss of their gardening service during this tenancy.

The tenants are provided with these Orders in the above terms and the landlord(s) must be served with a copy of these Orders as soon as possible. Should the landlord(s) fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.