



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenants to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, for the return of all or part of their security deposit, and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents, by the Tenants to the Landlord, was done in accordance with section 89 of the *Act*, sent via registered mail on October 25, 2010. Mail receipt numbers were provided in the Tenant's verbal testimony. The Landlord is deemed to be served the hearing documents on October 30, 2010, the fifth day after they were mailed as per section 90(a) of the *Act*. The Landlord acknowledged receipt of the Notice of Dispute Resolution and a copy of the Tenants' Application for Dispute Resolution.

The parties appeared at the teleconference hearing, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

1. Has the Landlord breached the *Residential Tenancy Act*, regulation or tenancy agreement?
2. If so, have the Tenants met the burden of proof to obtain a monetary order as a result of that breach.

Background and Evidence

The Tenant testified that he sent the Landlord copies of all of his evidence along with the hearing documents all in one envelope via registered mail. They entered into a written fixed term tenancy agreement effective July 1, 2007 that switched to a month to month tenancy after July 12, 2008. Rent was payable in the amount of \$1,250.00 and

on June 12, 2007 they paid \$625.00 as the security deposit. No move-in inspection report was completed and no move-out inspection report was completed.

The Tenant stated the tenancy ended because the Landlord's circumstances had changed and she wanted to reside in the rental unit. The Landlord did not serve the Tenants a 2 Month Notice to End Tenancy for Landlord's Use and did not provide the Tenants with compensation. They had made arrangements to meet with the Landlord on September 27, 2010 to conduct the inspection however the Landlord would not allow the Tenants to participate in the inspection and told them that she would require about half a day to conduct her own inspection. He stated that they could not convince the Landlord to conduct the inspection with them, even after several attempts, so they handed her the keys, fob and their forwarding address that was hand written on a piece of paper. The Landlord agreed to send their security deposit and forward any mail that came in for them to their new address.

They requested the return of their deposit again on October 20, 2010 when the Landlord stated their cheque had been mailed the previous week. When no cheque arrived they made their application for dispute resolution on October 22, 2010. Then on November 3, 2010 they received an envelope from the Landlord that was post marked October 22, 2010 which included a cheque in the amount of \$600.00 as the return of a portion of their deposit.

At this point the Landlord interrupted the hearing by dialling into the conference 14 minutes after the start of the hearing. I asked the Landlord why she was signing in so late and she stated that the last time she had to attend one of these hearings they called her, so she was waiting for a call. I asked how she new to call now and she stated she read the Notice of Dispute Letter and noticed she was to call in so she did that. I brought the Landlord up to speed on the Tenant's testimony to this point. The Landlord stated she did not receive any evidence from the Tenants and she only received a copy of their application for dispute resolution and the Notice of Dispute Resolution Hearing letter. She questioned how we could proceed if she did not receive a copy of the Tenants' evidence. I informed the Landlord I would speak to the issue surrounding evidence in my written decision.

The Landlord confirmed the terms of the tenancy as provided in the Tenant's testimony. She advised she had an Agent who dealt with the onset of the tenancy so she could not provide testimony pertaining to if a move-in inspection was completed. She confirmed her Agent provided her a copy of the tenancy agreement but she did not know if there was a move-in inspection form. The Landlord denied telling the Tenants they could not participate in the move-out inspection and she pointed out some things to the Tenants

such as the bathroom fan that was not working and the cut security wire. She advised them she would have to run the appliances such as washer and dishwasher through one cycle to ensure there was no damage and check to ensure the drains were not plugged. She confirmed the rental unit was left in a "very clean state" however it was the Tenants who did not want to stay for that length of time and they told her they would be back with the carpet cleaner. She confirmed no move-out report was completed.

The Landlord spoke about the Tenant's second point of not having money by October 22, 2010 at which point I asked her how she knew this was their second point if she did not have copies of their evidence. She stated that she was getting this information from their Application for Dispute Resolution. She argued that she was not provided the Tenants forwarding address and she had to send them several e-mails before she received it. I asked why she did not submit evidence in defence of the Tenants' claim and she stated she did not know she was supposed to submit evidence. I pointed out the last paragraph on the Notice of Hearing letter which clearly states "Before the hearing date, both the Applicant and Respondent must give each other, and the Residential Tenancy Branch, a copy of all their evidence. The deadlines for evidence are in the attached hearing package." She asked how she would know what to submit into evidence if she did not receive copies of the Tenant's evidence. I explained that the Tenants' application clearly states details of their dispute so she could have submitted evidence in response to their claim.

Throughout the conversation the Landlord had been searching for a date when she stated she sent an e-mail requesting the Tenants' forwarding address. When she found it she began to read the entire contents of the e-mail at which point I interrupted and requested she provide me with the date of the e-mail and to read only the section which pertained to her requesting their address. She advised the first time she requested their forwarding address was September 26, 2010 and the second e-mail was dated October 7, 2010.

She confirmed she sent the Tenants a cheque in the amount of \$600.00. She argued that she could have deducted much more than \$25.00 from the deposit because there were stains on the carpet and a cut cable to her security system. She states she wrote the cheque on October 11, 2010 but did not know the exact date when she mailed it; however she believes it was later during the week following October 11, 2010.

The Landlord testified she did not have an Order from the *Residential Tenancy Branch*, authorizing her to retain any portion of the security deposit, she did not make an application for dispute resolution to keep the security deposit, and she does not have the Tenants' written permission to keep the security deposit. She confirmed the tenancy

ended after she provided the Tenants three months written notice via e-mail that she would be moving back into the unit. She did not issue the Tenants a 2 Month Notice to End Tenancy for Landlord's Use.

In closing the Tenant restated that on September 27, 2010 the Landlord was provided the keys, fob, and their forwarding address in writing, and there was no opportunity for them to attend a move-out inspection.

Analysis

I heard opposing testimony pertaining to the service of the Tenants' evidence to the Landlord. The Tenants provided the *Residential Tenancy Branch* evidence which included a written statement outlining a chronological list of events, a copy of their tenancy agreement, and photographs of the rental unit which were taken September 27, 2010.

Not providing the Respondent with copies of their evidence is a 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 states she has not received copies of the Tenants' evidence I find that the Tenants' evidence cannot be considered in my decision. I did however consider the evidence which was provided by both parties' 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.

A significant factor in my considerations is the credibility of the Landlord's testimony. I am required to consider the Landlord's evidence not on the basis of whether her testimony "carried the conviction of the truth", but rather to assess her evidence against its consistency with the probabilities that surround the preponderance of the conditions before me. I do not accept the Landlord's testimony that she could not provide evidence in response to the Tenants' claim. She confirmed receipt of the hearing documents and a copy of the Tenants' application for dispute resolution which clearly states the details of their dispute so she could have provided evidence in response to the details of their claim.

I accept the Tenant's testimony that the tenancy ended September 27, 2010 and they provided their forwarding address to the Landlord when they handed her the keys and fob on September 27, 2010. The Tenants received an envelope post marked October 22, 2010 from the Landlord which contained a partial refund of their security deposit in the amount of \$600.00.

Section 44(1)(d) of the Act provides that a tenancy ends when the tenant vacates or abandons the rental unit. Therefore this tenancy ended September 27, 2010.

The Landlord confirmed she did not apply for dispute resolution to keep the security deposit, does not have an Order allowing her to keep any portion of the security deposit, and she does not have the Tenants' written consent to retain any portion of the security deposit.

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 Tenants' security deposit in full or file for dispute resolution no later than October 12, 2010.

The Landlord made no application for dispute resolution. Based on the Landlord's testimony she mailed the partial refund sometime later in the week of October 11, 2010, while the Tenant testified the envelope was post marked October 22, 2010. Regardless of which testimony I accept the evidence supports the Landlord did not mail the partial refund within the required timeframe of October 12, 2010.

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.

Based on the aforementioned I find that the Tenants have succeeded in meeting the burden of proof and I approve their claim for the return of double their security deposit plus interest.

The Tenants have succeeded with their application therefore I award recovery of the \$50.00 filing fee.

Monetary Order – I find that the Tenants are entitled to a monetary claim as follows:

Double the Security Deposit 2 x \$625.00	\$1,250.00
Interest owed on the Security Deposit of \$625.00 from June 12, 2007 to February 28, 2011	14.67
Filing Fee	50.00
SUBTOTAL DUE TO THE TENANT	\$1,314.67
Less partial payment received by the Tenants November 3, 2010	-600.00
TOTAL AMOUNT DUE TO THE TENANT	\$714.67

Conclusion

A copy of the Tenants' decision will be accompanied by a Monetary Order for **\$714.67**. 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: February 28, 2011.

Residential Tenancy Branch