

## **DECISION**

Dispute Codes      MNDC, MNSD

### Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to obtain a return of double their security deposit pursuant to section 38.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The landlord confirmed that the tenants sent a copy of their dispute resolution hearing package to the landlords by way of registered mail, likely in early March 2011. I am satisfied that the tenants sent this material to the landlords in accordance with the *Act*.

The tenants provided written evidence consisting of six pages of documents to the landlords who confirmed receiving this material. The landlord's agent testified that the landlord did not provide a copy of his written evidence including photographs and receipts to the tenant because the landlords did not have the tenants' mailing address. During the hearing, the landlord's agent agreed that the landlord did in fact have the tenants' mailing address contained in the tenants' application for dispute resolution. The landlord's agent said the landlord sent faxes of this material to the Residential Tenancy Branch one full business day before this hearing. The Residential Tenancy Branch had no record of receiving this material from the landlord and the landlords' representatives agreed that the material submitted did not address the issues identified in the tenant's claim for a monetary award. If the landlord wishes to make his own claim for a monetary award, he is free to do so and can submit his evidence in support of his own claim at that time. I did not consider the landlord's late evidence, which the landlords failed to provide to the other party and involved issues separate from the tenant's application. No one asked for an adjournment of this hearing.

### Issues(s) to be Decided

Are the tenants entitled to a monetary award for loss arising out of this tenancy? Are the tenants entitled to obtain a monetary award for their security deposit?

### Background and Evidence

This one year fixed term tenancy commencing on February 1, 2010 was scheduled to end on January 31, 2011. Monthly rent was set at \$1,000.00, payable in advance on the first of each month. The landlord continues to hold the tenants' \$500.00 security deposit paid on or about February 1, 2010.

This tenancy ended by written mutual agreement of the parties and the tenants vacated the rental unit on September 15, 2010. The tenants entered written evidence of a September 15, 2010 letter signed by the male tenant and Landlord GT. That letter, attested to the following:

*...We've fully moved out by Sept 15/10 as agreed upon date. Therefor the 1 year lease has ended Sept 15/10 and have paid 500.00 cash Sept 01/10. Due to conversation with Property Manager GT on behalf of BT because of neglect to fix an maintain Rental property (unit # \*\*\*)*

- *garberator*
- *deck door*
- *bath tub plug*

*\*CHEQUES GIVING BACK*

*By Signing this you have agreed to End lease 6 month Early with No Penalty!!*

The parties agreed that Landlord GT gave the tenants the agreed portion of their security deposit cheque of \$460.00 on September 15, 2010 (i.e., \$500.00 - \$40.00 for a previous NSF cheque issued by the tenants). The landlords' representatives at the hearing testified that the landlords cancelled payment on the \$460.00 security deposit cheque when the tenants failed to give them the key to the rental unit and when the landlords learned of the damage to the rental unit. The tenants claimed that they gave the landlords their keys and noted that new tenants moved into the rental unit a few days after they vacated the rental unit.

The tenants applied for a monetary award of \$2,040.00. They claimed that the landlord acted in contravention of their agreement when the landlord cashed a \$1,000.00 cheque they issued to the landlords earlier in the tenancy for September 2010. They maintained that the male tenant gave the landlord \$500.00 in cash on September 1, 2010 to look after the agreed \$500.00 in rent owing from September 1, 2010 until the end of September 2010. They also applied for recovery of double their security deposit because the landlord cancelled payment on the security deposit cheque given to them on September 15, 2010. They also asked for reimbursement of the NSF fee charged to them when the landlord cancelled payment on the security deposit cheque he gave them.

#### Analysis – 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) of the *Act*). If the tenant does not supply his forwarding address in writing within a year, the landlord may retain the deposit. With respect to the return of the security deposit the triggering event is the latter of the provision by the tenant of the forwarding address in writing or the end to the tenancy.

In this case, the parties agreed that the tenancy ended on September 15, 2010. The tenants submitted written evidence that they placed a letter in Landlord GT's mailbox on November 15, 2010. They also submitted a signed statement from one of their family member's attesting to this delivery of their forwarding address to the landlords. The landlords' representatives testified that they never received the tenants' mailing address in writing. Although leaving documents at an address that the landlord used to operate the rental property is an allowed way to serve documents of this type, I am not satisfied that the landlords received the tenants' forwarding address in writing. I find that the tenants did not exercise due caution in ensuring that their forwarding address was received by the landlord given the landlords' decision to cancel the September 15, 2010 security deposit cheque. Under these circumstances, I find that the tenants' failure to ensure that the landlords received their mailing address in writing does not allow me to find that they are entitled to a monetary award of double their security deposit in accordance with section 38(6) of the *Act*.

I find that the tenants are entitled to a monetary award of \$460.00 to obtain a rebate of the agreed upon portion of their security deposit plus interest in accordance with section 38 of the *Act*. No interest is payable over this period.

#### Analysis – Monetary Award

Based on the evidence before and particularly the written evidence of a signed agreement between the male tenant and Landlord GT, I find on a balance of probabilities that the tenants did pay the landlords \$500.00 in cash on September 1, 2010 for rental of these premises from September 1 to 15, 2010. The landlord and his agent asserted that the tenants altered the signed statement, inserting that portion of the statement referring to the cash payment after Landlord GT signed the document. The male tenant confirmed that there was different handwriting on the portion referring to the cash payment than in the remainder of the signed September 15, 2010 document. He explained that he did so because he wanted to ensure that the landlord accepted this payment at the joint move-out condition inspection and waited to insert this portion of the document himself in a space left for doing so at the same time that he and Landlord GT signed the document. He said that the female tenant prepared the remainder of the agreement in advance of his September 15, 2010 meeting with the

landlords. Landlord GT did not attend this hearing. Both of the tenants said that the two landlords who participated in the joint move-out condition inspection on September 15, 2010 refused to accept a copy of the agreement he had prepared.

I am satisfied that the tenants' evidence in this regard is more credible than that provided by the landlords. I find that the male tenant provided a reasonable explanation for the different handwriting in two parts of the signed statement of September 15, 2010. The landlord and his agent did not dispute the tenants' claim they did not want a copy of this document that Landlord GT signed that day. It would have been prudent of the landlords to keep a copy of any document that they signed when the tenants ended their fixed term tenancy prior to the end of this fixed term tenancy. Their failure to do so left them in a difficult position when they testified that the tenants altered the only copy of an agreement signed by both parties. In assessing the motives and credibility of the parties, I also take into account the undisputed evidence that the landlord almost immediately cancelled payment on the security deposit cheque issued to the tenants on September 15, 2010.

I find it more likely than not that the tenants did in fact pay \$500.00 in cash on September 1, 2010, an amount that was intended to look after all of their rent obligations for September 2010. By also cashing the tenants' pre-paid September 2010 rent cheque in apparent contravention of the written agreement signed on September 15, 2010 confirming receipt of the cash payment on September 1, 2010, I find that the landlords acted contrary to the agreement with the tenants.

Under these circumstances, I find that the tenants are entitled to a monetary award in the amount of \$1,000.00, the amount of the September 2010 rent cheque. To this amount, I add a monetary award of \$40.00 for the NSF fee charged the tenants when the landlords cancelled payment on their security deposit cheque to the tenants.

### Conclusion

I issue a monetary Order in the tenants' favour in the following terms which allows them to recover their security deposit, overpaid rent for September 2010, and the NSF fee applied against them.

Item	Amount
September 2010 Rent Cheque	\$1,000.00
Security Deposit Paid on Feb. 1, 2010 Less Agreed Deduction for NSF Cheque	460.00
Tenants' NSF Fee from Security Deposit	40.00
<b>Total Monetary Order</b>	<b>\$1,500.00</b>

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.

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*.