# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MND MNR MNSD MNDC FF
MNR MNSD FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed seeking a Monetary Order for unpaid utilities, damage to the unit, to keep the security deposit, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Tenants.

The Tenants filed seeking a Monetary Order for the cost of emergency repairs, the return of their security deposit, and to recover the cost of the filing fee from the Landlord.

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 March 17, 2011. The Canada Post tracking number was provided in the Tenants' testimony. The Landlord is deemed to have received the hearing documents on March 22, 2011, five days after they were mailed, pursuant to section 90 of the Act. Based on the aforementioned I find that the Landlord has been served with the Dispute Resolution Proceeding documents in accordance with the *Residential Tenancy Act*.

The Tenants appeared at the teleconference hearing, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form. No one appeared on behalf of the Landlord despite his being served notice of the Tenants' application and hearing documents and despite him filing his own application for dispute resolution which was scheduled for a hearing at the same date and time.

Issue(s) to be Decided

1. Has the Tenants' documentary evidence been served to the Landlord in accordance with the Act?
2. Have the Tenants met the requirements set forth by the Act for the return of their security deposit?
3. Have the Tenants met the burden of prove to obtain a Monetary Order for the reimbursement of emergency repairs?

Background and Evidence

The Tenants testified that they sent the Landlord their evidence package via overnight delivery with Canada Post on Tuesday June 14, 2011 and the postal workers were locked out by their employer on June 15, 2011. They checked the Canada Post website which indicates there has been a service interruption. No other efforts were made to serve the Landlord with their evidence prior to today's hearing.

The Tenants confirmed receipt of the Landlord's dispute resolution hearing package and evidence.

They stated their tenancy began on September 16, 2007 and ended on February 28, 2011. They had paid a security deposit of $1,700.00 on September 16, 2007. They attended a move out inspection walk through of the rental unit with the Landlord as scheduled on February 28, 2011 at 1:00 p.m.

The Tenants advised they have attended five previous dispute resolution hearings pertaining to this tenancy on October 15, 2009, June 9, 2010, September 13, 2010, November 29, 2010, and January 14, 2011.

Today they are seeking reimbursement for emergency repairs of $125.99 for when they had to have the furnace serviced on November 2, 2009. This claim was made in their previous application that was heard on June 09, 2010 and was dismissed with leave to reapply because the Landlord attended the hearing and testified that he had applied for judicial review on the October 20, 2009 decision that was written for the October 15, 2009 hearing. The Landlord testified that he was granted a rehearing by the Supreme Court. As of the June 9, 2010 hearing the Landlord had not served the Supreme Court decision to the *Residential Tenancy Branch* and the Dispute Resolution officer determined the matters needed to be heard together so dismissed the Tenants' application with leave to reapply.

The Tenants advised that although the furnace was operating the tradesperson who was attending to the hot water tank pointed out that based on the sticker on the furnace the furnace had not been serviced since 2002 and was very dirty. The Tenants stated that because the furnace was so dirty they could not tell if all the parts were solid and not cracked or leaking so they paid to have the tradesperson service the furnace. After it was cleaned they were able to determine that there were no cracks and it was working okay.

The remainder of their claim today is for the return of their security deposit. They confirm they attended a move out walk through inspection with the Landlord on February 28, 2011 at 1:00 p.m. The Landlord did not have a move out inspection form with him during the walk through however the Tenants did. They completed the form and requested the Landlord sign the document however the Landlord refused to sign their move out form. They provided their forwarding address to the Landlord on their move out form and again via e-mail. To be on the safe side they also delivered a letter to the Landlord March 3, 2011 listing their forwarding address as supported by the copy of their letter that was provided in the Landlord's evidence.

Analysis

The Tenants sent their evidence to the Landlord via overnight delivery service with Canada Post on June 14, 2011. Canada Post was involved in a labour dispute as of June 15, 2011 therefore the Tenants cannot ascertain if their evidence was actually delivered to the Landlord within the required timeframes as set forth in the *Residential Tenancy Branch Rules of Procedure.* No other method of service was enacted to ensure the Landlord received copies of the Tenants' evidence.

Based on the aforementioned I find there to be insufficient evidence to prove the Landlord received copies of the Tenants' evidence as required under sections 3.1 & 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 Landlord 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 Tenants' testimony and the evidence submitted by the Landlord.

I have carefully considered the aforementioned and the Landlord's documentary evidence which included among other things, copies of decisions from previous dispute resolution hearings; the letter issued by the Tenants dated March 3, 2011 providing their

forwarding address; a written statement from the Landlord that indicates the move out inspection was conducted on February 28, 2011.

**Landlord's application**

Section 61 of the *Residential Tenancy Act* states that upon accepting an application for dispute resolution, the director must set the matter down for a hearing and that the Director must determine if the hearing is to be oral or in writing. In this case, the hearing was scheduled for an oral teleconference hearing.

In the absence of the applicant Landlord and the presence of the respondent Tenants, the telephone line remained open while the phone system was monitored for ten minutes and no one on behalf of the applicant Landlord called into the hearing during this time. Based on the aforementioned I find that the Landlord has failed to present the merits of his application and the application is dismissed, without leave to reapply.

**Tenant's application**

October 15, 2009 the parties attended a dispute resolution hearing pertaining to the Landlord's application. The Landlord's application was dismissed without leave to reapply.

June 09, 2010 the parties attended a dispute resolution hearing pertaining to the Tenants' application. The Landlord appeared and testified that the decision from the October 15, 2009 hearing was disputed through judicial review (JR) and the Supreme Court ordered a new hearing be conducted. The parties were advised that the matters must be heard together as they are significantly linked, and that the JR decision must be served upon the *Residential Tenancy Branch* in order to set up the new hearing. The Tenants' application was dismissed with leave to reapply.

November 29, 2010 the parties attended a dispute resolution hearing pertaining to a new application filed by the Landlord. The Landlord still had not served the *Residential Tenancy Branch* with copies of the alleged JR decision from the October 15, 2009, decision. The Dispute Resolution Officer found the Landlord's application was an abuse of the process and dismissed the Landlord's application in its entirety.

January 14, 2011 the parties attended a dispute resolution hearing pertaining to yet another new application filed by the Landlord. An agreement was reached to end the tenancy as of February 28, 2011 and the Landlord's application for lost rental revenue was dismissed without leave to reapply.

As of today's hearing of June 23, 2011 , the Landlord has still not served the *Residential Tenancy Branch* with a copy of the alleged JR decision pertaining to the October 15, 2009 hearing.

Preventing the Tenants from making this application based on the Landlord's failure to serve a copy of an alleged JR decision that he was instructed to serve to the *Residential Tenancy Branch* twelve months ago would prejudice the Tenants and breach the principles of natural justice. Therefore, after careful consideration of the aforementioned I find the Tenants were at liberty to make this application for the return of their security deposit and reimbursement for the cost of emergency repairs.

I find that in order to justify payment under section 67 of the *Act*, the Applicant Tenants would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7.

I accept the Tenants' testimony that on November 2, 2009, they paid to have the furnace serviced. There is no evidence before me to support the furnace was operating poorly or the service was required in an emergency. I note that a service is preventative maintenance not a repair. There is no evidence the Tenants informed the Landlord the furnace required servicing or that they had the Landlord's permission to have the furnace serviced. Therefore there is insufficient evidence to meet the burden of proof that the Tenants paid to have emergency repairs completed and their claim of $125.99 is dismissed without leave to reapply.

The evidence supports the tenancy ended February 28, 2011 and the Landlord was provided with the Tenants' forwarding address in writing on March 3, 2011.

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 March 18, 2011. The Landlord made application for dispute resolution on March 14, 2011.

Based on the above, I find that the Landlord has not failed to comply with Section 38(1) of the *Act* and that the Landlord is not 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.

The Landlord has complied with section 38(1) of the Act by making application to retain the security deposit and therefore he has gained relief from section 38(6). That being said, I have found above that the Landlord has failed to present the merits of his application and therefore has not met the burden of proof required to retain the security deposit.

Based on the aforementioned I find in favour of the Tenants' application for return of their deposit and award them the amount of **$1733.10** ($1,700.00 + $33.10 interest).

The Tenants have been primarily successful with their application; therefore I award recovery of their **$50.00** filing fee.

Conclusion

The Tenants' decision will be accompanied by a Monetary Order in the amount of **$1,783.10** ($1733.10 + 50.00)**.** This Order must be served upon the Landlord.

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 24, 2011.

Residential Tenancy Branch