



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: MND, MNSD, FF
 Tenant: MNSD

Introduction

This hearing dealt with Cross Applications for Dispute Resolution.

The landlord applied for a monetary order for damage to the unit, to keep all or part of the security deposit and to recover the cost of the filing fee from the tenant.

The tenant applied for a return of all or part of the security deposit.

The tenant appeared as did the landlord's representative, who made clear she was not the landlord's agent.

Preliminary Issues:

The landlord made a written request for an adjournment prior to the dispute resolution hearing, dated August 10, 2011. The tenant stated that he had not received a copy of this request or any evidence supplied by the landlord.

The request of the landlord stated that the factors leading to the request for an adjournment were twofold, namely, that not all repairs had been completed and that his employment had him going to a remote island off the coast of BC for 3.5 weeks, starting August 24, 2011, with no access to a telephone.

Upon query at the hearing, the landlord's representative stated that the landlord was unable to attend as he was going to be on a plane somewhere in northern BC, perhaps Prince George. The representative was not sure when the landlord would be on the plane, suggesting perhaps 10:30 a.m.

When asked details about the landlord's employment, the representative stated that he was a self-employed realtor and that perhaps he was going to show a parcel of land. The representative stated that the showing was most likely arranged prior to the hearing, but she was not sure.

Upon query, the representative stated she had no knowledge of the application or the tenant's application and that she would not stay in the hearing if it proceeded.

In considering the landlord's request for an adjournment, I am guided by Residential Tenancy Branch Rules of Procedure 6 which provides that a dispute resolution hearing may be adjourned three days prior to the scheduled hearing if the consent of the other party is given. In the event that the other party does not consent to an adjournment, a party may request an adjournment by disclosing the circumstances beyond their control necessitating the adjournment.

In assessing whether an adjournment request should be granted the following criteria can be considered pursuant to rule 6.4:

- whether the purpose for which the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1 [objective and purpose];
- whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether a party had sufficient notice of the dispute resolution proceeding;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and
- the possible prejudice to each party.

I have denied the landlord's request for an adjournment of this hearing. I find that the need for the adjournment rises due to the landlord's failure to diligently pursue his claim by making timely alleged repairs to the rental unit. The written request provided by the landlord lacked veracity and consistency when compared to the statements provided by his representative at the hearing.

I find it questionable that the landlord would be on a remote island for 3.5 weeks without telephone access due to employment reasons, yet his representative stated he was on a plane in some unspecified region in northern BC showing real estate. I find it questionable that the landlord had a previously set appointment which would have predated this hearing which was scheduled for this date on May 19, 2011, and if so, the landlord should have made his request at the time of the scheduling, not the month of the hearing.

The landlord's failure to diligently pursue his application and failure to provide a credible reason for an adjournment are highly prejudicial to the tenant and fly in the face of natural justice or administrative fairness.

Therefore, I denied the landlord's request for an adjournment. I proceeded with this hearing solely on the testimony and evidence of the tenant as the landlord's representative exited the conference after the ruling.

As the landlord failed to attend the hearing to support his application and failed to submit any evidence, I find the landlord's claim fails and I **dismiss** his claim for damages to the rental unit, to retain the security deposit and for recovery of the filing fee, **without leave to reapply**.

Issue(s) to be Decided

Is the tenant entitled to a Monetary Order under sections 38, 67 and 72 of the *Residential Tenancy Act (the "Act")*?

Background and Evidence

Although no tenancy agreement was entered into evidence by either party, the tenant testified that this one year, fixed term tenancy started on November 1, 2010, ended on May 1, 2011, monthly rent was \$5,600.00 and the tenant paid a security deposit of \$4,200.00 at the start of the tenancy.

The tenant testified that the landlord was provided the tenant's forwarding address on May 4, 2011, but the tenant was not certain of this date and was not sure the forwarding address was in writing.

The tenant testified that the landlord returned to the tenant a portion of the security deposit, the amount of \$1,400.00, but that the cheque was returned due to NSF. The landlord has not attempted further payment and to date, the tenant has not received any portion of his security deposit.

The tenant testified that he understood the amount the landlord offered to pay was the amount the landlord illegally overcharged for a security deposit at the beginning of the tenancy.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

Only the evidence and testimony relevant to the issues and findings in this matter are described in this Decision.

In the absence of the landlord, the tenant's testimony is the preferred evidence.

In regard to the tenant's claim for a return of his security deposit, I allow his Application and grant a monetary order against the landlord.

The security deposit is held in trust for the tenant by the landlord. The landlord may only keep all or a portion of the security deposit through the authority of the Act. Here the landlord did not have authority under the Act to keep any portion of the security deposit.

There was no evidence to show that the tenant had agreed, in writing, that the landlord could retain any portion of the security deposit.

Although I find the landlord complied with section 38(1) of the Act by making an application to retain the security deposit within 15 days of learning of the tenant's forwarding address, I find that the landlord is not entitled to retain any portion of the security deposit and must return the security deposit to the tenant.

I find the landlord was in violation of section 19 of the Act by overcharging on the security deposit; therefore, although the tenant did not apply for recovery of the filing fee, I award the filing fee to be reimbursed to him.

I find that the tenant has established a total monetary claim of **\$4,250.00** comprised of \$4,200.00 for the security deposit and the \$50.00 fee paid for this application. There is no interest assessed to this security deposit.

The landlord is directed to return the tenant's security deposit forthwith, along with the filing fee.

I grant the tenant a Monetary Order in the amount of \$4,250.00.

I am enclosing a Monetary Order for \$4,250.00 with the tenant's Decision. This Order is a **final, legally binding Order**, and may be filed in the Provincial Court of British Columbia (Small Claims) should the landlord fail to comply with this Monetary Order.

Conclusion

The landlord's claim is dismissed without leave to reapply due to his failure to attend the hearing and submit any evidence or testimony in support of his application.

The tenant is granted a Monetary Order in the amount of \$4,250.00.

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: August 30, 2011.

Residential Tenancy Branch