# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MND, MNDC, MNSD, O, FF

Introduction

This hearing dealt with an application from the landlord for a monetary order and an order to retain the security deposit in partial satisfaction of the claim and a cross-application by the tenant for an order for the return of double his security deposit. Both parties participated in the conference call hearing.

At the hearing, the landlord advised that she had not received notice of the tenant's claim against her. The tenant testified that he sent the application for dispute resolution and notice of hearing to the rental unit, which was not the address for service listed on the landlord's application. As the tenant filed his application after having received the landlord's claim against him, I find that he knew or should have known the landlord's address for service. I dismiss the tenant's claim as I find it was not served on the landlord.

On February 21, the tenant sent a package of evidence to the landlord and to the Residential Tenancy Branch. The package was sent via registered mail to the landlord's address for service. The landlord advised that she had been out of the country and had not yet retrieved her mail, so had not received the evidence. There was some discussion during the hearing as to whether an adjournment should take place in order to allow the landlord opportunity to view the tenant's evidence. However, both parties objected to an adjournment and it became apparent that the key piece of evidence in the package was a copy of an email exchange. The landlord testified that she could not recall the email exchange and indicated that even if she had copies of the emails in front of her, she would have called their authenticity into question as she felt it was very easy to "hack" into an account to produce false messages. The landlord did acknowledge that it was possible that the emails were authentic and stated that as she had over a hundred pages of printed emails, it was possible that she had forgotten the exchange. As the landlord was read the emails in question at the hearing and as she had opportunity to provide her response to the emails, I determined that the emails should be admitted into evidence as I found that having a paper copy in front of her would have produced the same response.

Issues to be Decided

Is the landlord entitled to a monetary order as claimed?
Is the tenant entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began on June 1, 2011 and that it ended on September 1, 2011. They further agreed that the tenant paid a $750.00 security deposit and that he was obligated to pay $1,500.00 in rent each month. On September 6, 2011, the landlord served a Notice of Final Opportunity to Schedule a Condition Inspection on the tenant by giving it to an employee at his former workplace. The tenant stated that he did not receive the Notice. The landlord testified that she could not arrange for an inspection to take place earlier because she was out of town.

The parties agreed that on August 5, the tenant sent the landlord an email advising that he had to end the tenancy. The landlord asked via email when he would be vacating and the tenant replied that he would be in the town until September 6 and would like to stay until that date. The landlord responded to this information with a message that reads in part:

No, you cannot stay in the condo until Sept 6th ... As that denies me the opportunity to rent it for the month of September ... So as it stands right now, your tenancy agreement ends as of 11am September 1st 2011 ... [reproduced as written]

The landlord took the position that the tenancy is a fixed term tenancy and provided a copy of the tenancy agreement which states “Rental period is from June 1st, 2011 – June 1st 2012”. The tenant testified that there were several versions of the tenancy agreement and that although the landlord had given him soft copies by forwarding them as attachments to an email sent to his work address, he was no longer able to access that email account due to a dispute at that place of employment. The tenant stated that because the second page of the tenancy agreement appeared to have been “cut and paste” in that it had odd marks on the photocopy, he believed the first page may have been doctored as well. The landlord repeatedly asked the tenant whether at the time he signed the tenancy agreement, he understood it to be for a one year fixed term. The tenant was evasive and refused to directly answer the question.

The landlord seeks to recover loss of income for the months of September – November inclusive, totalling $4,500.00. She further seeks to recover the $99.00 cost of placing a 3 month advertisement on August 25.

The landlord seeks to recover $181.74 which represents $50.00 for cleaning, $111.44 for items which were missing or damaged at the end of the tenancy, including an iron, cutlery, a saucepan and towels and $20.30 as the cost of paint to cover holes in the wall. The tenant testified that he left towels in the rental unit, although they were wet. He denied having removed any of the missing items from the unit and testified that he thoroughly cleaned the unit at the end of the tenancy. The tenant acknowledged having hung something on the wall, but stated that the holes were small.

Analysis

On its face, the tenancy agreement appears to be a one year lease, expiring on June 1, 2012. Although the tenant called the authenticity of the tenancy agreement into question, he provided no compelling evidence to persuade me that the page of the tenancy agreement which contains the one year term had been altered. When the landlord cross-examined the tenant, asking whether at the time he signed the agreement his intention was to remain in the unit for at least one year, the tenant was evasive and would not answer the question. I find on the balance of probabilities that the tenancy agreement which was submitted into evidence by the landlord is a one year lease agreement and accurately reflects the intention of the parties at the time the agreement was signed. I further accept that the landlord acted reasonably to mitigate her losses, advertising the unit and arranging for it to be shown to prospective tenants by her realtor. I find that the tenant must be held responsible for the landlord's loss of income in the months of September, October and November and I award the landlord $4,500.00.

I find that the tenant should bear the cost of advertising as the cost arose directly from the tenant's breach of the one year term. I award the landlord $99.00.

As for the claim for the cost of repairing damage, replacing allegedly missing items and cleaning, the landlord has the burden of proving on the balance of probabilities that the unit was not left reasonably clean, that damage was beyond what may be characterized as reasonable wear and tear and that the items were in fact missing. The parties did not work together to inspect the unit at the end of the tenancy and generate a report and I hold the landlord responsible for this failure. Despite the fact that the landlord was working out of town at the end of the tenancy, she had the responsibility to ensure that the unit was inspected together with the tenant. She could have appointed an agent to perform this inspection. Although she claims to have served a Notice of Final

Opportunity to Schedule a Condition Inspection, she did not serve this document in accordance with section 88 of the Act as the Act does not permit service at a former place of employment. Pursuant to sections 35(4) and 36(2) of the Act and section 17(2)(b) of the Regulations, I find that the landlord extinguished her right to claim against the security deposit.

As the tenant did not have the opportunity to go through the unit with the landlord and confirm which items were missing, I find that the claim for the cost of replacing missing items must fail. The tenant was entitled to hang pictures on the walls of the unit during his tenancy as long as he did not leave an excessive number of nail holes or unreasonably large holes. The tenant was required to leave the unit reasonably clean, but there is no requirement that the unit be spotlessly clean. In the absence of corroborating evidence such as photographs to prove that the damage to the walls was unreasonable or that the unit was not reasonably clean, I find that these claims must also fail.

I find that as the landlord has been partially successful, it is appropriate to award her $50.00, which is one half of the filing fee paid to bring her application.

Residential Tenancy Policy Guideline #17 provides in part as follows:

> The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
> ▪ a landlord's application to retain all or part of the security deposit, or
> ▪ a tenant's application for the return of the deposit
> unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.
>
> Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:
> ▪ If the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;
> ▪ If the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;

As the landlord expressed uncertainty as to whether or not she had received the tenant's forwarding address in writing and as I find no reason to believe that the emails submitted by the tenant were fabricated, I find that the landlord received the tenant's

forwarding address in writing on August 12, 2011, which is the date in which she replied to the tenant confirming that she had received it. Although the Act does not contemplate service via email, I am prepared to accept that the email is the equivalent of a written message in this case as the landlord responded to it and as the parties have a long history of communicating via email. I note that the landlord accepted the tenant's notice to vacate the unit via email and as this notice is substantially similar, it is consistent to accept that written notice given in this fashion was acceptable to the landlord.

Section 38 of the Act provides that if a landlord does not return or make a claim against the security deposit within 15 days of the later of the date the forwarding address is received and the end of the tenancy, the landlord must pay the tenant double the security deposit. I find that the tenant is entitled to receive $1,500.00 in light of this breach.

The landlord has been awarded a total of $4,649.00. Setting off the tenant's entitlement to $1,500.00 as against the landlord's award leaves a balance of $3,149.00 in favour of the landlord.

Conclusion

I grant the landlord a monetary order under section 67 for $3,149.00. This order may be filed in the Small Claims Division of the Provincial Court and enforced 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*.

ɛd: March 02, 2012

Residential Tenancy Branch