



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD

Introduction

This hearing was convened on the tenants' application of November 20, 2012 seeking a Monetary Order for return of a portion of her security deposit in double on the claim that the landlord retained without the landlord having made application for dispute resolution to claim against it.

Issue(s) to be Decided

Is the tenant entitled to a Monetary Order for return of her security deposit or portion retained without authorization and whether the amount should the amount must be doubled as required by section 38(6) of the *Act*.

Background and Evidence

This tenancy began on March 1, 2012 under a fixed term rental agreement set to end on February 28, 2013. Rent was \$1,400 per month and the landlord held a security deposit of \$700 paid at the beginning of the tenancy. The rental agreement included a clause in which the parties agreed that the tenant would pay \$495 plus HST in liquidated damages if the tenant ended the tenancy prior to the end date set by the agreement.

The tenant submitted into evidence a copy of an email she sent to the landlord on October 1, 2012 advising that she would be vacating the rental unit on October 31, 2012.

The email notice also stated, "I understand we will lose some of our damage deposit."

The parties concur that the tenant assisted in finding a new tenant and there was no claim for loss of rent.

Subsequently, after deducting the liquidated damages and HST, the landlord mailed the tenant the balance of the security deposit, \$145.60, sent within 15 days of the end of the tenancy.

Analysis

Section 38(1) of the *Act* allows a landlord 15 days from the latter of the end of the tenancy or receipt of the tenant's forwarding address to return security and pet damage deposits or file for dispute resolution to make claim against them.

Section 38(6) of the *Act* states that, if a landlord does not comply with section 38(1) of the *Act*, the landlord must pay the tenant double the amount of the deposits.

Section 38(4)(a) removes the obligation if, "... at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant..."

In the present matter, I find that both parties breached the legislation or rental agreement.

The tenant breached the fixed term agreement by leaving the tenancy early.

The landlord breached by failing to make application to claim against the deposit; however he did so based on the tenant's email of October 1, 2012 expressing her understanding that the deposit would not be returned in full.

While the email was not at the end of the tenancy and while it was non-specific as to the amount of the deposit, I find that, as the landlord claimed no damage to the rental unit or loss of rent, it was reasonable for him to interpret the tenant's consent to have meant the liquidated damages to which the tenant agreed in signing the rental agreement.

I find that while the tenant's consent was vague, the rental agreement was specific as to the amount, and the onus fell to the tenant to inform the landlord if she anticipated that amount would be varied.

As the landlord's failure to comply with section 38(1) of the *Act* was a consequence of the ambiguity of the tenant's consent, I must dismiss the application without leave to reapply.

Conclusion

I find that the applicant tenant has failed to prove her claim under section 38(6) of the *Act* and the application is dismissed without leave to reapply.

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, 2013

Residential Tenancy Branch

