



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with an Application by the Tenant for a monetary order for return of double the security deposit paid to the Landlord and for the return of the filing fee for the Application.

Both parties appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant facts and issues in this decision.

Issue(s) to be Decided

Has there been a breach of Section 38 of the Act by the Landlord?

Background and Evidence

This tenancy began in December of 2010, with the parties entering into a written tenancy agreement, drafted by the Landlord. The monthly rent was \$650.00. The tenancy agreement sets out that the Tenant paid a security deposit of \$325.00

The parties disagree about the amount of the deposit paid by the Tenant. The Landlord testified that the Tenant was having trouble coming up with the entire \$325.00, which the Landlord had already written into the tenancy agreement before it was signed. The Landlord testified that the Tenant paid him \$150.00 up front with the understanding the balance would be paid within three months. The Landlord further testified that the

Tenant was to do some work installing insulation, however, the Landlord testified that the Tenant only paid him a security deposit of \$300.00.

The Tenant disputed this, although he initially testified he did not recall what amount he had paid or when. The Tenant then asserted that the monthly rent was \$650.00 and that the tenancy agreement sets out \$325.00 for the security deposit, so he must have paid \$325.00.

The Tenant vacated the premises on or about March 5, 2013.

The Tenant testified he provided the Landlord with a written notice of the forwarding address to return the security deposit to, by leaving it on a counter for the Landlord on or about March 5, 2013.

I note that the Landlord has submitted in evidence an email dated February 2, 2013, from the Tenant setting out the forwarding address to return the deposit to.

The Tenant did not sign over a portion of the security deposit.

The Tenant testified that the Landlord did not perform incoming or outgoing condition inspection reports.

The Landlord testified he thought it was the Tenant's responsibility to do the condition inspection reports.

The Landlord testified and submitted evidence that he was not satisfied with the repair work the Tenant had done on holes in the wall for a TV bracket. The Landlord further submits that the Tenant was required to get the prior consent of the Landlord before putting holes in the walls.

The Landlord withheld \$280.00 from the security deposit and sent a cheque for \$20.00 to the Tenant's forwarding address, which the Tenant received on or about March 4, 2013. The Tenant testified he had not cashed the Landlord's cheque.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find that the Landlord is in breach of the Act.

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

There was also no evidence to show that the Landlord had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenant, to retain a portion of the security deposit, as required under section 38 of the Act.

By failing to perform incoming or outgoing condition inspection reports in accordance with the Act, the Landlord extinguished the right to claim against the security deposit for damages, pursuant to sections 24(2) and 36(2) of the Act. The Act is clear in that the Landlord is responsible for scheduling and performing the condition inspection reports.

Therefore, I find the Landlord has breached section 38 of the Act. The Landlord is in the business of renting and therefore, has a duty to abide by the laws pertaining to Residential Tenancies.

The security deposit is held in trust for the Tenant by the Landlord. At no time does the Landlord have the ability to simply keep the security deposit because they feel they are entitled to it or are justified to keep it.

The Landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from an Arbitrator, or the written agreement of the Tenant.

Here the Landlord did not apply to keep the security deposit and did not have any authority under the Act to keep any portion of the security deposit. Therefore, I find that the Landlord is not entitled to retain any portion of the security deposit.

I do accept the evidence of the Landlord that the actual security deposit paid by the Tenant was \$300.00, as the Tenant did not recall the circumstances and was unable to refute this evidence.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the Landlord pay the Tenant the sum of **\$650.00**, comprised of double the security deposit (2 x \$300.00) and the \$50.00 fee for filing this Application.

Conclusion

The Tenant is given a formal Order in the above terms and the Landlord must be served with a copy of this Order as soon as possible. Should the Landlord fail to comply with

this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

I have also sent the Landlord a copy of a guidebook for landlords and tenants in the province. I note that some of the clauses in the Landlord's tenancy agreement are contrary to the Act and are therefore void, as it is illegal to contract out of the Act.

For example, the Landlord's tenancy agreement sets out that the security deposit may be repaid 30 days after the end of the tenancy. The Act requires that the Landlord repay or claim against the security deposit within 15 days of the end of the tenancy or receipt of the Tenant's forwarding address, and therefore, the 30 day clause in this tenancy agreement is void as it is contrary to the actual law.

This decision is final and binding on the parties, except as otherwise provided under the Act, and 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: July 29, 2013

Residential Tenancy Branch

