



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **Decision**

### **Dispute Codes:**

MNDC , MNSD,

### **Introduction**

This Dispute Resolution hearing was convened to deal with an Application by the tenant for a monetary order for money owed or compensation for damage or loss under the Act and the return of the security deposit paid.

The applicant and his advocate were present and participated in the hearing. Despite being served with the Notice of Hearing documents by registered mail, sent on June 7, 2013, as confirmed by a copy of the Canada Post Tracking information, the respondent landlord did not appear.

### **Preliminary Matter: Service**

The evidence submitted by the tenant indicated that the tenant had initially tried to serve the Notice of Dispute Resolution to two different addresses that were given for the landlord, without success. The tenant testified that a current service address where the landlord carries on business was confirmed. Proof of this address was submitted in the form of a copy of the landlord's current website page advertising the address where the landlord is to be contacted. The tenant verified that the hearing package was successfully served to the landlord at that address and was signed for by the receptionist who then delivered the package directly to the landlord. I accept that this address is a valid service address for the landlord and find as a fact that the landlord was properly served with the Notice of Hearing.

As the landlord failed to attend, the hearing was conducted in the respondent landlord's absence.

### **Issue(s) to be Decided**

- Is the tenant entitled to receive a monetary order for damages and loss?
- Is the tenant entitled to the return of the security deposit?

## **Background and Evidence**

The tenant testified that the tenancy began on December 12, 2010, the rent was set at \$425.00 per month. The tenant testified that they paid the landlord \$212.50 as a security deposit and this amount is still being held in trust by the landlord on behalf of the tenant.

Submitted into evidence are copies of communications, a written chronology of events, a list of the tenant's lost possessions

The tenant testified that, on July 15, 2011 the landlord issued a letter purporting to be a Notice to end Tenancy effective August 15, 2011. The tenant testified that the landlord's letter was not a valid Notice under the Act. In evidence was a copy of this letter excerpted below:

*"Notice to End Tenancy*

*This hereby is your one month (30) notice to end tenancy....Tenancy ending August 15<sup>th</sup>, 2011...*

*The house is shared rooms so does not follow the same rules and regulations of the tenancy act and therefore 30 days notice is not required however I wanted to give you as much notice as possible..."*

The tenant testified that, after the Notice was served and without obtaining an order of possession and without a writ from Supreme Court, the landlord physically evicted the tenant by locking him out and removing all of his possessions, which were left on the street curb by the landlord on August 24, 2011.

The tenant testified that the landlord had forcibly evicted him in violation of the Residential Tenancy Act. The tenant testified that the landlord did not fulfill the landlord's obligation to keep an inventory of the property, then secure and safely store any property left in the unit by the tenant after a tenancy ends, as required under the Act and Regulations.

The tenant testified that his worldly possessions were not adequately protected and were left on the street for passersby to take. The tenant testified that he suffered a loss of his personal possessions as a result and is claiming compensation in the amount of \$3,374.00, plus the return of the \$212.50 security deposit.

No evidence was submitted by the landlord.

### **Preliminary Matter: Jurisdiction**

The July 15, 2011 letter from the landlord to the tenant purporting to end the tenancy for renovations, informs the tenant that the tenancy is not governed by the Residential Tenancy Act because, "*The house is shared rooms*".

The tenant acknowledged that this tenancy involved the rental of a room to the tenant, along with access to common areas. The tenant pointed out that the use of the kitchen and bathrooms were shared only between the tenants and were not shared with the owner of the property.

I find that section 4(c) of the Residential Tenancy Act states that the Act does not apply to the following:

(c) living accommodation in which the tenant shares bathroom or kitchen facilities with **the owner of that accommodation**, (my emphasis)

Given that this is not the case with the tenancy before me, I find that the tenancy relationship in question does fall under the authority of the Residential Tenancy Act, because the owner did not reside in the building nor did the owner share the kitchen and bathrooms with the tenant. Moreover, I find that, in the letter to the tenant, this landlord provided incorrect and misleading information to the tenant with respect to the tenant's rights and legal position under the Act.

Based on the evidence, I find as a fact that this tenancy agreement is governed by the Residential Tenancy Act and must comply with the legislation governing tenancies. I find that I do have statutory jurisdiction, as Arbitrator, to hear and determine this dispute.

### **Analysis**

#### **Ending the Tenancy**

The Act requires that, before a landlord can validly end a tenancy for Landlord's Use or other reason, the landlord must first:

1. Issue and serve the tenant with a Notice to End Tenancy based on one of the valid reasons listed under sections 44 to 53 of the Act.
2. If the tenant does not vacate the rental unit pursuant to the Notice, an application for dispute resolution must be made and the landlord is required to obtain an Order of Possession pursuant to section 55 of the Act.

3. Following this, and before proceeding with the eviction process, the landlord must serve the Order of Possession on the Tenant in a manner prescribed by the Act.
4. Should the tenant persist in not complying with the Order of Possession, and continue to remain in possession of the rental unit after service of the Order of Possession, the landlord would still not be authorized to take physical possession of the rental unit. The landlord would first be required to make application to the B.C. Supreme Court and obtain a Writ of Possession issued under The Supreme Court Civil Rules, pursuant to section 57(2) of the Act.
5. Subsequent to following the above course of action, in order to enforce the legal Writ of Possession, the landlord must utilize the services of a registered bailiff to change the locks and remove the tenant's belongings which must be catalogued and securely stored.
6. With respect to a tenant's personal belongings, the landlord would be required to allow the tenant access to retrieve their possessions and, in the meantime, practice due diligence by safely storing the abandoned belongings in a secure place. A landlord is never permitted to confiscate or dispose of the tenant's property, except in accordance with Part 5 of the Residential Tenancy Regulation.

In this instance I find the landlord failed to follow any of the above statutory provisions contained in the Act or the Regulations. I find that the Notice to End Tenancy for Landlord's Use was not compliant with, nor enforceable under, the Act.

I further find that no application was made for Dispute Resolution by the landlord, no Order of Possession was ever legally obtained by the landlord and no Writ of Possession was received from the Supreme Court authorizing the landlord to physically take possession of the unit and evict the tenant against his will.

Given the above, I find that the ending of this tenancy for landlord's use and all of the subsequent actions by this landlord were not perpetrated in accordance with the provisions of the Act.

#### Care of "Abandoned" Property

I find as a fact that the tenant had a right to remain in the rental unit at the time the landlord chose to remove the contents of the rental unit. Given the evidence before me, it is clear that the tenant did not willingly abandon the unit, nor did he abandon

his personal property located in the unit on August 23, 2011. I find that the landlord had no authority under the Act to take charge of the tenant's property.

I find that section 26(3) of the Act also states that a landlord must not: (a) seize any personal property of the tenant, or; (b) prevent or interfere with the tenant's access to the tenant's personal property.

I find that the tenant still had legal possession of the unit, and the tenant's belongings were wrongfully removed by the landlord in contravention of the Act. In this respect, I find that under section 7 of the Act, the landlord would therefore be liable for any damage or loss that resulted from the landlord's violation of the Act.

In any case, section 25 of the Residential Tenancy Regulations, states that, even if it is found that a tenant had wilfully abandoned their property, which is not the case here, the landlord must still securely store the tenant's personal property in a safe place and manner for a period of not less than 60 days, following the date of removal and is also obligated to keep a written inventory of the property.

Section 30 of the Regulation states, the landlord owes a duty of care when dealing with a tenant's personal property and must exercise due diligence as required by the nature of the items to ensure that the property is not damaged, lost or stolen.

By removing and discarding the tenant's property, I find that the landlord violated the duty of care obligations specified in the Regulations and would therefore be liable for loss or damage that results.

### Monetary Claim for Damages and Loss

In regard to an Applicant's right to claim damages from another party, Section 7 of the Act states that, if a party does not comply with this Act, the regulations or their tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and order payment under these circumstances.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the Applicant must satisfy each component of the test below:

#### Test For Damage and Loss Claims

1. Proof that the damage or loss exists,

2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage, and
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

I find that the tenant's monetary claims for compensation must successfully meet all elements of the test for damages.

I find that the tenant has provided a detailed inventory of the lost items, along with their associated values, to support the amount of damages being claimed.

I find that this evidence was not disputed by the respondent landlord, nor did the respondent provide an alternate inventory list, despite the fact that the Act requires that this be done with respect to any items taken, stored or disposed of.

I find that the records provided by the tenant in support of the claim satisfy element 3 of the test for damages, particularly due to the fact that the manner in which the landlord chose to effect the illegal eviction effectively impeded the tenant's ability to access key documentation and personal records and even prevented the tenant from taking photos of their belongings, prior to the loss.

Based on the evidence, I find that the tenant's claim has fully met all elements of the test for damages.

Accordingly, I find that the \$3,374.00 value estimated by the tenant as the value of the damaged property is warranted and the tenant is entitled to be reimbursed this amount.

#### Compensation Under Section 51 of the Act

I find that the Act provides that a tenancy remains in effect until such time it is properly ended under section 44 of the Act. I find that the landlord issued a letter purporting to terminate the tenancy for landlord's use.

Section 49 does allow a landlord to terminate a tenancy for landlord's use and a Notice under this section must end the tenancy on a date that is not earlier than 2 months after the date the notice is received, and must be effective the day before the day in the month that rent is payable under the tenancy agreement.

Section 51(1) of the Act states that a tenant who receives a notice to end a tenancy under section 49 [*landlord's use of property*] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement. The Act also states that a tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent. For the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

In this instance, I find that, under section 51(1) of the Act, the tenant would be entitled to receive or withhold the equivalent of one month rent, or \$425.00. I find that the tenant did not pay any rent for August 2011. However, the landlord terminated the tenancy effective August 23, 2011, thereby depriving the tenant of 8 days during August 2011, valued at \$111.78. Therefore, I find that, the tenant is entitled to receive compensation under section 51 of the Act in the amount of \$111.78, in addition to the amount owed for property loss.

#### Security Deposit

With respect to the return of the tenant's security deposit, I find that the Act states that the landlord can only retain a deposit if the tenant agrees to this in writing at the end of the tenancy. If the permission is not in written form and signed by the tenant, then the landlord has no right to keep the deposit.

However, a landlord may be able to keep the deposit to satisfy a liability or obligation of the tenant if, after the end of the tenancy, the landlord makes an application for dispute resolution and successfully obtains a monetary order to retain the amount from the deposit to compensate the landlord for proven damages or losses caused by the tenant.

Under the Act, the landlord must either make the application or refund the security deposit within 15 days after the tenancy had ended and the receipt of a written forwarding address.

Section 38(6) provides that if a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit, and must pay the tenant double the amount of the security deposit.

I find that the landlord received the tenant's written forwarding address in October 2011. I find that the landlord failed to refund the tenant's \$212.50 security deposit within the required 15 days and did not make a successful application to keep the security deposit within 15 days.

Accordingly I find that the tenant is entitled to receive a refund of \$425.00, representing double the security deposit.

The total compensation to which the tenant is entitled is \$3,910.28, comprised of \$3,374.00 for loss of property, \$111.78 for the equivalent of 8 days accommodation or compensation for August under section 51 of the Act and \$425.00 for double the tenant's \$212.50 security deposit held in trust.

I hereby grant the tenant a monetary order in the amount of \$3,910.28. This order must be served on the respondent and may be enforced through Small Claims Court as an order of that Court if necessary.

### **Conclusion**

The tenant is successful in the application and is granted a monetary order for damages, compensation under section 51 of the Act and a refund of double the security deposit.

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: September 11, 2013

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Residential Tenancy Branch



