



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNR RR MNDC MNSD FF

Introduction:

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) A monetary order pursuant to Sections 46 and 67 for unpaid rent;
- b) An Order to retain the security deposit pursuant to Section 38; and
- c) An order to recover the filing fee pursuant to Section 72.

This hearing also dealt with an application by the tenant pursuant to the Residential Tenancy Act (the Act) for orders as follows:

- d) A monetary order and rent rebate as compensation for the landlord failing to protect his peaceful enjoyment and for not protecting his furniture;
- e) To recover a refund of twice his security deposit; and
- f) To recover the filing fee for this application.

SERVICE

Both parties attended the hearing and each confirmed receipt of each other's Application for Dispute Resolution. I find the documents were legally served pursuant to sections 88 and 89 of the Act for the purposes of this hearing.

Issue(s) to be Decided:

Has the landlord proved on the balance of probabilities that rent is owed and they are entitled to a monetary order for rental arrears and to recover the filing fee for this application?

Has the tenant proved on the balance of probabilities that due to act or neglect of the landlord he lost furniture, his peaceful enjoyment was not protected and his security deposit was not returned in accordance with section 38 of the Act? Is he entitled to recover filing fees for the application?

Background and Evidence:

Both parties, a witness and their lawyers attended the hearing and were given opportunity to be heard, to present evidence and to make submissions. This was a lengthy hearing, many of the documents were in Chinese and almost all of the statements were disputed through statements made by the lawyers as English was difficult for the parties. Some evidence was provided late but the lawyers said they had had an opportunity to review it so it was considered in the hearing. The landlord and her witness plus a statutory declaration from another tenant assert that the tenancy commenced in November 2012, rent was \$350 a month and a security deposit of \$175 was paid. The tenant asserts the tenancy commenced in July 2013 and he provided some shelter information and deposits from the Ministry showing a different address to support his statements. According to documents filed, the owners live upstairs in the home and basement rooms are rented to tenants who share a bathroom and kitchen.

The landlord claims \$350 in outstanding rent for August 2013. It is undisputed that there was an incident on or about August 7, 2013 when the Police arrested the tenant and he states he did not return to the home after that. The landlord and her witness said that the tenant returned with two peace officers on August 16th to retrieve some personal items (stated also in his lawyer's letter of Sept. 4), he then changed the lock to his one bedroom unit, the landlord had no key and his goods remained in the unit until his daughter hired a moving truck and removed his possessions on August 31, 2013. The tenant claims twice his security deposit refunded, \$300 compensation for a two year old table left behind, \$300 for two chairs (two years old) left behind and \$350 for a TV Stand bought in March 2013. The landlord said all the tenant's items were removed on August 31st, her witness said he viewed the room to do repairs the next day and all the tenant's belongings were gone. The landlord's lawyer pointed out that the allegedly missing items were never mentioned in the demand letters for the refund of the security deposit dated September 4, 2013 and sent by his lawyer. He further noted that the daughter's letter indicates that the items she removed were unloaded and her father had an opportunity to inspect them and this was prior to September 4, 2013.

The tenant claims additional compensation for lack of peaceful enjoyment contrary to section 28 of the Act. He claims the garage was rented to another party as a machine room, the continuous noise disrupted him, the washroom was not maintained, there was intrusion on his privacy, and the landlord refused to return his security deposit. The landlord's witness, the statutory declaration of another witness and the lawyer asserted the garage was only used by the household for normal tasks, the washroom was maintained and receipts for rent payments were always provided by the landlord. The witness said he had lived in the home from April 2012 to January 2013 and he did many renovations in it after that. He said he witnessed all that happened and everything was done to protect the tenant's peaceful enjoyment. He said that some kitchen cupboards

were installed in April and it was scheduled when the tenant was on a trip so he would not be disturbed.

The landlord said she had not understood the provisions regarding the security deposit and she concedes she owes the tenant double the deposit or \$350 pursuant to section 38 of the Act.

In evidence are statements and submissions from the parties and lawyers, Bylaw information on legal suites, Shelter Information and many copies of Deposits of the Ministry to the tenant, numerous receipts from both parties, two statutory declarations, and photographs.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

Analysis

The onus is on each applicant to prove on a balance of probabilities their claim. The landlord has the onus of proving that the tenant owes rent for August 2013. I find she has satisfied that onus. Although the tenant maintains he paid rent for August and the landlord refused a receipt, I find the landlord's evidence more credible on this point as it is well supported by the evidence provided by two of the other tenants who shared the basement. I find the evidence of other regular receipts provided as part of a statutory declaration to be persuasive; although the tenant's lawyer submitted that they "were all on one sheet" so unreliable, I find that they appear to be individual receipts photocopied to be on one sheet and the signatures and date notations are sufficiently variable to persuade me that these receipts were written on separate occasions for the tenant. I find therefore, the landlord entitled to \$350 rent for the month of August plus recovery of her filing fee.

The tenant's lawyer argued rent is not owing due to frustration of contract based on the arrest of the tenant on August 7, 2013. However, I find the tenant was in exclusive possession of the unit until August 31, 2013, he accessed the unit on August 16th with peace officers to retrieve personal items, changed the locks and did not provide a key to the landlord and did not arrange for the removal of his goods until August 31, 2013. I find this is not frustration of contract as the contract was still being performed.

I find the date of the commencement of the tenancy is not relevant to the claims of the parties; however, I note that it is inconsistent for the tenant to claim for loss of peaceful enjoyment in the Spring months when cupboards were replaced and also to assert he was not a tenant then.

On the tenant's application, the landlord has conceded that she owes him twice the security deposit or \$350 so the issue will not be further considered in this decision.

The onus is on the tenant to prove on the balance of probabilities that he is entitled to compensation for furniture and that it was lost due to act or neglect of the landlord to protect it in accordance with the Act and Regulations. The Act provides:

S. 7(1): If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

This test must be satisfied:

1. Proof the loss exists
2. Proof the loss occurred solely because of the actions or neglect of the Respondent in violation of the tenancy agreement or the Act
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking reasonable steps to minimize the damage or loss.

I find the tenant has provided insufficient evidence to satisfy the onus. I find two photographs of a table and two chairs insufficient evidence that these were lost, especially since these are large items and the landlord and her witness both assert that no items of the tenants were left after his daughter left with the moving truck and other truck on August 31, 2013. Furthermore, insufficient evidence is provided that these items if they were lost were lost due to act or neglect of the landlord; also no receipts were provided as proof of value. I dismiss this portion of the tenant's claim.

I find insufficient evidence to support the tenant's claim that his peaceful enjoyment was compromised by the landlord's act or neglect. I prefer the evidence of the landlord that the garage was not rented as a machine shop but used for household tasks that did not make loud noise, that she cleaned the washroom regularly and did not intrude on his privacy. I find her evidence more credible as it is well supported by the statutory declarations and verbal testimony of some of the other basement tenants. I dismiss this portion of the tenant's claim.

In respect to the other submissions of the tenant's lawyer, I decline to comment on the legality of the units as the legality of housing under municipal by-laws is not within my jurisdiction. Although the tenant also submitted that a condition inspection report was not done and a tenancy agreement not entered into, I find that the condition inspection report is now irrelevant as the security deposit is being refunded and under section 1 of the Act, a tenancy agreement can exist whether it is written, oral or implied. I find there was a tenancy agreement in this case; whether it was from November or July is irrelevant to the issues and claims. Some of the other evidence such as receipts and deposits from the Ministry I also find to be irrelevant as the length of the tenancy is irrelevant to the issues claimed.

Conclusion:

I find the landlord entitled to recover the outstanding rent for August 2013 in the amount of \$350 and to recover filing fees for the application. The award to the tenant is used to offset the amount owing.

I find the tenant entitled to recover double his security deposit for a total of \$350 and also his filing fee for this application. Since there is a zero balance after calculation of the amount owing and amount awarded, no order is issued to either party.

Calculation of Monetary Award:

Landlord –outstanding rent	350.00
Filing fee	50.00
Less double security deposit	-350.00
Less tenant filing fee	-50.00
Total monetary order to each party	0.0

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: January 07, 2014

Residential Tenancy Branch

