



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, FF, MNDC

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for damage to the rental unit pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

In the Details of the Dispute section of the landlord's application, the landlord also requested the recovery of unpaid rent owing from this tenancy. The tenant applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of double the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant testified that the tenant sent a copy of the tenant's dispute resolution hearing package to the landlord's sister, one of the landlord's agents, by registered mail on March 4, 2014. The tenant provided a copy of the Canada Post Customer Receipt including the Tracking Number to confirm this registered mailing. The tenant also testified that she handed a copy of the tenant's hearing package to the landlord's agent on March 5, 2014. I am satisfied that the tenant served her hearing package to the landlord in accordance with the *Act*.

The tenant said that she served the landlord with her written evidence by email because the landlord had not given her a proper mailing address for the service of documents. To support this testimony, the tenant provided copies of multiple Residential Tenancy

Agreements (the Agreements) signed by the parties for this tenancy. None of these Agreements revealed a mailing address for the landlord. Given that the landlord has not complied with the requirement under the *Act* to provide the tenant with a mailing address where the landlord can be served with documents, I find that the tenant's attempt to serve her written evidence to the landlord by email was warranted. The agent attending the hearing on the landlord's behalf was uncertain as to whether the landlord or her sister had received the tenant's written evidence. I am satisfied that the tenant served her written evidence to the landlord and her agent to the extent possible, given the landlord's failure to abide by the terms of the *Act* with respect to the provision of a mailing address to the tenant.

Although it was unclear how or when this occurred, the tenant did not dispute having received a copy of the landlord's dispute resolution hearing package. However, the tenant denied having received any written evidence from the landlord or any of the landlord's agents. The agent who represented the landlord at this hearing (the agent) testified that he sent a copy of the landlord's written evidence to the tenant by first class overnight delivery mail three days before this hearing. As the tenant testified that she had not received this very late evidence from the landlord and the agent did not have specific details on his mailing of this material to the tenant, I have not considered the landlord's 11 pages of written evidence

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and for damage arising out of this tenancy? Which of the parties is entitled to the tenant's security deposit? Is the tenant entitled to a monetary award equivalent to double the value of his security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*? Are either of the parties entitled to recover the filing fee for their applications from one another?

Background and Evidence

The parties signed a series of one-year fixed term tenancy agreements commencing on August 28, 2010. All of these Agreements were entered into written evidence by the tenant. The original monthly rent was set at \$1,700.00, payable in advance on the 28th of each month. By the end of this tenancy, monthly rent had increased to \$1,750.00. The final fixed term tenancy Agreement, signed on August 27, 2013, called for this tenancy to run from August 28, 2013 until August 27, 2014. The landlord continues to hold the tenant's \$850.00 security deposit paid on August 10, 2010.

The tenant gave sworn testimony that she called the landlord's sister on or about December 17, 2013, to advise the landlord that she was intending to vacate the rental

unit by February 1, 2014. The tenant said that she could not provide anything in writing to the landlord as the landlord refused to provide the tenant with her mailing address. Although the agent confirmed that the tenant gave this oral notice to end her tenancy, the agent testified that this occurred on or about December 28, 2013. In the Details of the Dispute section of the landlord's application for dispute resolution, the landlord referred to an agreement that the parties had whereby the tenant could vacate the rental unit on two-month's notice. There is no reference to such a provision in the most recent Agreement for this tenancy.

The tenant vacated the rental unit on February 1, 2014, returning her keys the following day. The landlord cashed the tenant's postdated monthly rent cheque of January 28, 2014 rent.

While the parties (or their agent) participated in a joint move-in condition inspection on August 10, 2010, the landlord did not prepare a joint move-in condition inspection report. The landlord did not schedule a joint move-out condition inspection, did not conduct her own inspection, and did not prepare a move-out condition inspection report.

The tenant testified that she sent the landlord her forwarding address by email on February 12, 2014. The agent said that he was uncertain as to when the landlord received the tenant's forwarding address, as he was only provided with the landlord's responses to the tenant's request for the return of her security deposit. He said that both emails were in the Korean language. He said that the only full email exchange he had was dated June 17, 2014.

The tenant applied for a monetary award of \$3,450.00. This amount included a return of double her security deposit totalling \$1,700.00. This was for the landlord's alleged failure to return her security deposit within 15 days of ending her tenancy. The tenant also requested the recovery of \$1,750.00 in rent from the period from January 28, 2014, until February 27, 2014. The tenant asked for the recovery of this month's rent because she said that she vacated the rental unit on February 1, 2014, and the landlord had a new tenant moved into the rental unit on or about February 15, 2014.

The landlord applied for a monetary award of \$2,078.41. This amount included a request for one-month's rent that she maintained was owing because of the tenant's premature end to this fixed term tenancy. She also asked for \$328.41 in damage to the rental unit for such items as:

- marks on the carpet and walls;
- a failure to shampoo, clean and paint the rental unit;

- the breakage of a sink garbage disposal unit; and
- broken light fixtures.

Analysis

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. I find that the tenant was in breach of her fixed term tenancy agreement because she vacated the rental premises prior to the August 27, 2014 date specified in that Agreement. As such, the landlord is entitled to compensation for losses she incurred as a result of the tenant's failure to comply with the terms of the Agreement and the *Act*.

There is undisputed evidence that the tenant's last rent payment covered the period from January 28, 2014, until February 27, 2014. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize the tenant's exposure to that loss.

In this case, the agent testified that the landlord or her agents started advertising the availability of the rental unit in local magazines and through a real estate agent promptly. He testified that the premises were re-rented by the end of February 2014, for a monthly rent of \$1,700.00. After reviewing his records, the agent said that the new tenant may have taken occupancy of the rental unit on February 21, 2014.

Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable to re-rent the premises and was able to obtain a new tenant by February 21, 2014. As such, I am satisfied that the landlord has discharged the duty under section 7(2) of the *Act* to minimize the tenant's exposure to the landlord's loss of rent.

By cashing, the tenant's January 28, 2014 rent cheque and securing a new tenant who I find took possession by at least February 21, 2014, the landlord has recovered more than the amount that would normally have been paid by the tenant for the period from January 28, 2014 until February 27, 2014. For this reason, I find that the tenant is entitled to recover the pro-rated amount of rent she paid for the period from February 22, 2014 until February 27, 2014. This results in a monetary award in the tenant's favour of \$338.71 ($\$1,750.00 \times 6/31 = \338.71) for overpaid rent for this time period in late February 2014.

For the remaining six months of the final one year fixed term Agreement the tenant signed, the landlord will be receiving \$1,700.00 per month instead of the \$1,750.00 payment that would have been made by the tenant. Since the landlord has demonstrated a loss of \$50.00 per month for each of the remaining six months of this Agreement due to the tenant's premature ending of this tenancy, I find that the landlord is entitled to a monetary award of \$300.00 (6 months @ \$50.00 per month = \$300.00).

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

In considering the landlord's claim for a monetary award of \$328.41 for damage arising out of this tenancy, I note that the landlord has not provided any written evidence that I can consider with respect her application, other than the information in her application for dispute resolution. Although a joint move-in condition inspection occurred when this tenancy began, the landlord has not created a report of that inspection and has not complied with any of the provisions of sections 35 and 36 of the *Act* with respect to the move-out condition inspection process. A failure to create a joint move-in condition inspection report or to follow any of the requirements regarding the move-out condition inspection process can extinguish a landlord's right to claim to retain a tenant's security deposit for damage arising out of a tenancy. Separate from the provisions of the *Act* requiring joint move-in and move-out condition inspections, the reports of these inspections are very helpful in determining the extent to which any damage claimed by a landlord at the end of a tenancy truly occurred during the course of that tenancy.

Since the landlord has not adhered to the requirements of the *Act* with respect to the move-in and move-out condition inspection process and has not provided sufficient other written or photographic evidence that I can consider, I dismiss the landlord's claim for damage arising out of this tenancy without leave to reapply.

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the security deposit in full or file an Application for Dispute Resolution

seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address.

Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security deposit 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." As there is no evidence that the tenant has given the landlord written authorization at the end of this tenancy to retain any portion of his security deposit, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit.

The provision in section 38 of the *Act* to provide a forwarding address in writing is usually interpreted by Arbitrators to exclude addresses provided by email. However, in this case, the landlord has not provided any evidence to dispute the tenant's claim that the landlord steadfastly ignored her requests to provide the tenant with a mailing address where she could contact the landlord. From the first tenancy Agreement signed by the landlord, this absentee landlord ignored the requirement to provide a forwarding address where she could be reached. The only methods by which the tenant could contact the landlord were through email or by telephone. Given the landlord's repeated omission to provide the tenant with a proper forwarding address, I accept the tenant's undisputed claim that she sent the landlord her forwarding address by email on February 12, 2014, which generated an email response from the landlord on February 13, 2014.

Under these unique circumstances, I find that the tenant's email of February 12, 2014 constituted a provision of her forwarding address in writing to the landlord. The landlord had 15 days after being deemed to have received the tenant's forwarding address in writing on February 17, 2014, to either return the tenant's security deposit in full or to file an application to obtain authorization to keep any portion of that deposit. The landlord applied for authorization to keep the tenant's security deposit on May 9, 2014, over two months after the expiration of the 15 day-time period for doing so.

Based on the evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant's security deposit in full within the required 15 days. The tenant has not waived her right to obtain a payment pursuant to section 38 of the *Act* owing as a result of the landlord's failure to abide by the provisions of that section of

the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the value of her \$850.00 security deposit with interest calculated on the original amount only. No interest is payable over this period.

As the tenant has been chiefly successful in her applications, I allow her to recover her filing fee from the landlord. The landlord bears responsibility for her filing fee.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the tenant to recover double her security deposit and her filing fee, subject to the rental losses and gains outlined above:

Item	Amount
Return of Double Security Deposit as per section 38 of the <i>Act</i> (\$850.00 x 2 = \$1,700.00)	\$1,700.00
Plus Overpaid Portion of Rent (February 22 – 27, 2014)	338.71
Less Landlord's Entitlement to Loss of Income (\$50.00 per month from February 28, 2014 to August 27, 2014 = \$300.00)	-300.00
Tenant's Recovery of Filing Fee	50.00
Total Monetary Order	\$1,788.71

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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*.

Dated: June 24, 2014

Residential Tenancy Branch

