



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant for a monetary order for compensation for loss under the Act, for the return of the security deposit and to recover the cost of the filing fee from the landlord.

Both parties appeared, gave 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 at the hearing.

On October 3, 2014, this matter was scheduled to proceed, however, after considering the preliminary matters, I found an adjournment was appropriate and on October 7, 2014, and interim decision was made. This interim decision should be read in conjunction with this decision.

The parties confirmed receipt of all evidence submissions and there were no disputes in relation to review of the evidence submissions.

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

Issues to be Decided

Is the tenant entitled to a monetary order for compensation for loss under the Act?
Is the tenant entitled to the return of the security deposit?

Background and Evidence

The tenancy began on February 20, 2007. A security deposit of \$500.00 was paid by the tenant. The tenancy ended on November 30, 2013.

The tenant claims as follows:

a.	Double the return of the security deposit	\$1,000.00
b.	Christmas tree	\$ 387.05
c.	Winter tires	\$ 372.58
d.	Filing fee	\$ 50.00
	Total claimed in the application \$1,500.00	\$1,809.63

Double the return of the security deposit

The tenant testified that she provided the landlord with her forwarding address when she gave notice to end the tenancy. The tenant stated the landlord returned a portion of her security deposit in the amount of \$24.47. The tenant stated she did not cash the cheque and the cheque is no longer cashable.

The tenant testified that she did not give the landlord permission to retain the amount of \$475.35 from her security deposit.

The landlord's agent testified that he gave the tenant 3 opportunities to schedule an inspection. The landlord's agent stated that he did not issue the final notice to schedule an inspection in the approved form as required by the regulations.

The tenant argues that the landlord attended the rental premises on November 29, 2013 and there was no communication in regards to checking out or completing a final inspection.

Christmas tree

The tenant testified that she had permission to store her christmas tree in a room adjacent to the outdoor parking area. The tenant stated that when she went to get the artificial christmas tree it was no longer there. The tenant stated she was told that the landlord had disposed of her tree. The tenant stated she purchased the tree on sale for the amount of \$387.05. Filed in evidence is a receipt for the tree, which the invoice is dated January 3, 2008.

The landlord's agent testified that he started to manage the building in 2013. The agents stated that he found the tree and other items in a room and did not know who owed the belongings. The agent stated that they posted a notice in the building asking the owners of the property to remove their articles from the room as it was not the proper storage area. The agent stated no one came forward to claim the items and because the tree was mouldy, covered in white powder and was in horrible condition they got rid of the article. The agent stated that if the tree was in good shape they would have kept it and used it in the building.

Winter tires

The tenant testified that she had two winter tires stored on a shelf in the storage area. The tenant stated that she was certain they were there just before she gave her notice to end the tenancy. The tenant stated that when she went to retrieve the tires they were gone. The tenant stated that is not sure what happened to the tires but believes the landlord took them.

The landlord's agent testified that he has never seen any tires and certainly did not throw them out or steal them. The agent stated anyone could have taken the tires.

The landlord stated that clause #20 and #28 in the tenancy agreement stated that the landlord is not personally responsible for items left in the storage area and that they should have appropriate insurance for theft or damage items.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- Proof that the damage or loss exists;
- Proof that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement;
- Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- Proof that the Applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails. In this case, the tenant has the burden of proof to prove their claim.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Section 7(1) of the Act states that if a landlord or tenant does not comply with the Act, regulation or tenancy agreement, the non-comply landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the Act provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

Double the return of the security deposit

Under section 17 of the Residential Tenancy Regulations a landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times. If the tenant is not available at a time offered the landlord must propose a second opportunity, different from the first time by providing the tenant with a notice in the approved form.

In the case before me, both parties has provided a different version of events regarding the scheduling of a move-out condition inspection, however, when the landlord alleges extinguishment they must provide evidence of the dates they provided to the tenant and if none of those dated were agreeable they must issue a final notice in the approved form.

The landlord acknowledged that they did not issue a final notice in the approved form. Therefore, I find the landlord has failed to prove that the tenant extinguish their right to the return of the damage deposit.

The parties agreed that the landlord had the tenant's forwarding address prior to the tenancy ending. There was also no evidence to show that the landlord had applied for arbitration, within 15 days of the end of the tenancy to retain a portion of the security deposit, plus interest.

There was no evidence to show that the tenant had agreed, in writing, that the landlord could retain any portion of the security deposit although the landlord retained the amount of \$475.53.

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. Here the landlord 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 or interest.

Section 38(6) provides that if a landlord does not comply with section 38(1), the landlord must pay the tenant double the amount of the security deposit. The legislation does not provide any flexibility on this issue.

Therefore, I must order, pursuant to section 38 and 67 of the Act that the landlord pays the tenant the sum of **\$1,014.06**, comprised of double the security deposit (\$500.00) on the original amount held and interest of \$14.06.

Christmas tree

The landlord's agent acknowledged that they disposed of the tenant's artificial christmas tree as they did not know who the owner of the tree was and that the tree was covered in mould and in poor condition. The evidence of the tenant was the tree was store in its box and off the floor and was in good condition.

In this case the landlord did not provide any photographs of the tree and it would have been reasonable for the landlord to take photographs of an article when dispose of property that the owner is unknown to prove the condition of the article.

Although I find the landlord was neglectful when they disposed of the tenants' personal property regardless of the condition, I must consider the Residential Tenancy Policy Guidelines #16 - Claim for Damages.

If a tenant claims for damages for loss of an article, the normal measure of damages is the "market value" of the lost article. The market value is the price that a seller can expect to receive from a buyer in fair and open negotiations. The price of a similar item must include references to its condition and age.

Although the tenant has provided a receipt for the tree that was purchased on sale in the year 2008, that was the retail value. I find the tenant has not provided sufficient evidence of the market value of a tree that is approximately 7 years old. Therefore, I find it appropriate in this case to grant the tenant a nominal amount for the tree in the amount of **\$50.00**.

Winter tires

Clause #20 Storage - The tenancy agreement indicates that all property of the tenant that is kept in the residential property must be maintained in safe condition in proper storage area and is at the tenant's risk for loss, theft or damage from any cause whatsoever.

Clause #28 Liability and Insurances – the tenant agrees to carry sufficient insurance to cover his property against loss or damage from any cause and for third party liability and the tenant agrees that the landlord will not be responsible for any loss or damage to the tenant's property.

In this case the tenant had two winter tires in the storage area that went missing and believed the tires were taken by the landlord. The landlord denied seeing or taking any tires that belonged to the tenant and stated anyone could have taken them.

In this case, each party has provided a different version of events, as the onus is on the tenant to prove the landlord took her tires, I find without further evidence the tenant has failed to prove this portion of their claim, as it is just as likely the tires were taken by another person. The landlord is not responsible for items in the storage that are stolen. Therefore, I find the tenant has failed to prove a violation of the Act by the landlord.

I find that the tenant has established a total monetary claim of **\$1,114.06** comprised of the above described amounts and the \$50.00 fee paid for this application. The tenant is granted a formal order under section 67 of the Act.

This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Conclusion

The tenant is granted a monetary order in the above amount.

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: December 1, 2014

Residential Tenancy Branch

