



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing convened as a result of cross applications. In the Tenants' application for Dispute Resolution they sought a Monetary Order for return of double the security deposit, and for compensation for loss under the Act and the tenancy agreement and to recover the filing fee for the claim.

The Landlord sought an a Monetary Order to retain the security deposit as well as a Monetary Order for compensation for damage under the Act and the tenancy agreement and to recover the filing fee.

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.

Despite filing her application on January 14, 2015, the Landlord filed 31 pages of evidence in addition to 17 photos on July 21, 2015 in support of her application. The Tenant, F.R., confirmed that he received this evidence on July 24, 2015 and took issue with its introduction given the late delivery.

F.R. also testified that he was not served with the Landlord's Application for Dispute Resolution and that he only became aware of the her application when he filed the Tenants' Application on January 21, 2015.

The Landlord confirmed she had not served the Tenants with her application stating that she did not believe she had to as she believed the Branch would do so for her. As such, she did not give the Tenants notice of her application.

Section 89 of the *Act*, mandates that an Application for Dispute Resolution *must* be served and provides as follows:

Special rules for certain documents

89 (1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
- (e) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*].

(2) An application by a landlord under section 55 [*order of possession for the landlord*], 56 [*application for order ending tenancy early*] or 56.1 [*order of possession: tenancy frustrated*] must be given to the tenant in one of the following ways:

- (a) by leaving a copy with the tenant;
- (b) by sending a copy by registered mail to the address at which the tenant resides;
- (c) by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;
- (d) by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;
- (e) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*].

(3) A notice under section 94.21 [*notice of administrative penalty*] must be given in a manner referred to in subsection (1).

To consider the Landlord's Application would be contrary to the *Act*, and would violate the principles of natural justice, which provide that a party to a proceeding, and in particular a party against whom an order is sought, has the right to know the case against them. In this case, while the Tenant may have been made aware of the Landlord's application when he filed his own but he was not properly served by the Landlord.

As the Landlord failed to serve her application, I dismiss her application with leave to reapply. Similarly, as the evidence filed on July 21, 2015 was filed in support of her application, I decline to consider it.

The Landlord is cautioned to follow section 89, in addition to Rule 3.1 of the *Residential Tenancy Branch Rules of Procedure* which provide:

Residential Tenancy Branch Rules of Procedure provide as follows:

3.1 Documents that must be served

The applicant must, within 3 days of the hearing package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

- a) the application for dispute resolution;
- b) the notice of dispute resolution proceeding letter provided to the applicant by the Residential Tenancy Branch;
- c) the dispute resolution proceeding information package provided by the Residential Tenancy Branch;
- d) a detailed calculation of any monetary claim being made;
- e) a copy of the Notice to End Tenancy, if the applicant seeks an order of possession or to cancel a Notice to End Tenancy; and
- f) any other evidence, including evidence submitted to the Residential Tenancy Branch with the application for dispute resolution, in accordance with Rule 2.5 [*Documents that must be submitted with an application for dispute resolution*].

As the Landlord's application is dismissed with leave to reapply, the only issues before me are those raised in the Tenants' Application.

Issues to be Decided

1. Are the Tenants entitled to a Monetary Order for return of double the security deposit?
2. Are the Tenants entitled to monetary compensation from the Landlord for losses they say they incurred when the refrigerator and fireplace ceased working?
3. Should the Tenants recover the fee paid to file their application?

Background and Evidence

The tenancy began on September 1, 2013. Tenants paid a security deposit of \$750.00 on September 1, 2013. The Tenants vacated the premises on December 31, 2014. When completing the move out condition inspection report, the Tenants provided the Landlord with written notice of the forwarding address to return the security deposit to, and did not sign over a portion of the security deposit.

The Tenants claim that their refrigerator ceased working during the tenancy and that as a consequence they suffered a loss of \$200.00 in food they had to dispose. F.R. testified that the fridge stopped working twice and that the first time the Landlord made a claim and was able to pay them the \$200.00. The Tenants did not submit any evidence in support of this claim.

The Landlord testified that at one point in time during the tenancy the refrigerator in the rental unit stopped working and that as it was a result of a malfunction and she was able to provide the Tenants \$200.00 in compensation directly from the company from which she purchased the refrigerator. She stated that she believes this is why the Tenants are attempted to recover a further \$200.00. She further stated that the Tenants did not ask for compensation for the alleged second incident and that the first she was aware they wanted her to pay them \$200.00 was when she received their application.

The Tenants also sought the sum of \$500.00 claiming that they were not able to live in the rental unit due to a malfunctioning fire place. He stated that he and his family moved in with friends for two weeks. The Tenants failed to provide any evidence in support of their claim for \$500.00 or any details as to how they came up with this figure.

The Landlord stated that each bedroom has baseboard heating which provide the majority of heat in the rental unit. She also further stated that the Tenants F.R. contacted her on November 15, 2014 to report that the fire place would not start. She attended the rental unit and the "ignition apparatus" fell apart in her hand. She believes that this was a result of the Tenant damaging the ignition. In any case, she further testified that she told F.R. that she could have someone come and fix the fireplace over the weekend, to which F.R. told her not to incur the additional cost of a weekend repair. She also stated that it was an exceptionally warm November, and that while she was at the rental unit she was comfortably warm. The Landlord stated that on November 20, 2015, 5 days after the Tenant reported the fireplace to her, it was fixed. She stated that later, on December 19, 2014, the Tenant called her to report that the fireplace was again not working. She stated that on December 23 the technician repaired the fireplace and confirmed that the compression ring had fallen off. In total, the Landlord stated that the fireplace did not work for five days in November and four days in December.

In reply F.R. agreed that the fireplace was not operational for 9 days. F.R. also agreed that he told the Landlord not to pay for an emergency weekend repair, but believed it would be fixed the following Monday, not 3-4 days later.

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 Tenants had agreed, in writing, that the Landlord could retain any portion of the security deposit. Although the Landlord applied for Arbitration within 15 days of the end of the tenancy or receipt of the

forwarding address of the Tenants she failed to serve the Tenants and as such failed to “make an application for dispute resolution” as required by section 38 of the *Act*.

Section 38(6) provides that if a landlord does not comply with section 38(1), the Landlord must pay the Tenants double the amount of the security deposit. The legislation does not provide any flexibility on this issue. Accordingly, I Order that the Landlord repay **\$1,500.00** which is double the \$750.00 security deposit paid.

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 responding party 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 Tenants have the burden of proof to prove their claim for \$200.00 for lost food and \$500.00 for compensation for the malfunctioning fireplace.

I find that the Tenants have failed to prove their claim for compensation for these alleged losses. They failed to provide any supporting evidence, or proof of the actual amount of the loss of food in the amount of \$200.00 such as photos or receipts.

Further, I accept the Landlord’s evidence that the fireplace was not working for a total of nine days. I further accept the Landlord’s evidence that she offered to attend to repair sooner, but that F.R. told her not to incur the additional cost. Additionally, the Tenants failed to provide any rationale for the \$500.00 claimed, or any evidence which would support a finding that \$500.00 would compensate them for their alleged loss.

As the Tenants’ application had merit, and they were substantially successful, I award them \$50.00 for recovery of the fee paid to file their application.

In total I award the Tenants **\$1,550.00** including double the security deposit and recovery of the filing fee.

The Tenants are given a formal Monetary Order for \$1,550.0 and must serve the Landlord 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.

Conclusion

The Landlord failed to serve the Tenants with her Application for Dispute Resolution. Her application is dismissed with leave to reapply.

The Tenants are entitled to double the security deposit and recovery of the filing fee for a total Monetary Order in the amount of \$1,550.00. The Tenants claim for \$200.00 for lost food and \$500.00 for compensation for time spent without a fireplace is dismissed for insufficient evidence.

This decision is final and binding on the parties, unless 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 31, 2015

Residential Tenancy Branch

