



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution wherein she sought an Order for return of double her security deposit pursuant to section 38 of the Act as well as for compensation for money owed or compensation for loss under the Act, regulation or tenancy agreement pursuant to section 67.

This hearing occupied two days. On the first day of the hearing, June 23, 2015, the Tenant was assisted by Y.B., a legal advocate, and M.B. who acted as her translator. M.B. confirmed she was also the Tenant's sister, and that she also occupied the rental unit for a period of time. On the second day of the hearing, September 4, 2015, the Tenant was assisted by M.B. as well as J.C. The legal advocated, Y.B., was not in attendance. At both hearings the Landlord appeared on his own behalf.

During both days of hearing, the hearing process was explained and the participants were asked if they had any questions. Both parties provided 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 to me.

After the June 23, 2015 hearing, I made an Interim Decision wherein I directed both parties to resubmit their evidence. This Decision must be read in conjunction with that Decision

At the September 4, 2015 hearing the Tenant testified that she resubmitted all of her evidence at the Branch on June 24, 2015. She also testified that she sent her evidence package to the Landlord after the June 23, 2015 hearing. The Landlord confirmed he received the Tenant's evidence approximately two weeks after the first hearing, in early July 2015.

The Landlord testified that he submitted his evidence to the Branch, the day before the hearing, on September 3, 2015. Unsurprisingly, the Landlord's evidence was not before me. When I asked him why he did not comply with my June 23, 2015 direction, he stated that he was "ill". I advised the Landlord that I would not be considering the evidence he claimed to have filed on September 3, 2015.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure and my Interim Decision of June 23, 2015. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Tenant entitled to monetary compensation from the Landlord?
2. Is the Tenant entitled to return of double the security deposit paid?

Background and Evidence

Tenant's Evidence in Support of Her Claim for a Monetary Order

The Tenant testified that the tenancy began on October 1, 2013 for a six month fixed term. She stated that originally her portion of the rent was payable in the amount of \$750.00 as the total rent of \$1,500.00 was shared between herself and her sister M.B. She further testified that the Landlord then asked her to increase the rent to \$850.00 when M.B. and her boyfriend moved from the rental unit on December 31, 2013. This increased amount was incorporated in the tenancy agreement submitted in evidence. The Tenant testified that she never understood what the Landlord wanted in terms of rent as the new tenancy agreement provided that rent was payable in the amount of \$850.00 but the Landlord continued to ask her to pay only \$750.00. Also introduced in evidence were copies of receipts for payment of rent in the amount of \$750.00.

The Tenant submitted in evidence a copy of a receipt of payment of the security deposit in the amount of \$375.00 (half of the original monthly rent of \$750.00.) The tenancy agreement filed in evidence noted the security deposit as being \$425.00 (half of the monthly amount when M.B. moved from the rental unit).

On October 14, 2014 the Tenant provided the Landlord with written notice of her forwarding address and her request for return of her \$375.00 "damage deposit". Introduced in evidence was a copy of this letter. The Tenant confirmed that the Landlord has failed, or refused to return the security deposit or make an application for its retention as required. Accordingly, she sought return of double the security deposit pursuant to section 38 in the amount of \$750.00.

The Tenant also sought a monetary order pursuant to section 67 for the sum of \$3,289.43 in compensation for the electricity bill which was rendered to her in relation to the rental unit. Exhibit 2 of the Tenant's evidence was a copy of the May 7, 2014 electricity invoice indicating this amount. The Tenant testified that she received a previous bill for the October 18, 2013 to February 7, 2014 time period which indicated the outstanding amount as \$2,431.34. While that account was not in evidence, the Tenant confirmed that the \$2,431.34 were for *current* not outstanding charges such that the amounts relate to the rental period and not any time before the tenancy began.

The tenancy agreement introduced in evidence provided that electricity was not included in the cost of rent.

The Tenant testified that when she moved in, the rental unit was without electricity as a result of a fire which occurred. She stated that the electricity was then turned on, and she did not know whose name the electricity account was under.

The Tenant testified that after she moved in she discovered that the Landlord was also living in the rental property and using the electricity. Apparently the rental home had suffered a fire as a result of a previous renter's deliberate actions and the Landlord lived on the property to attend to its security and repair. The Tenant testified that she believed that approximately 25% of the home was damaged by fire and therefore not rentable. The Tenant also testified that the Landlord was initially living in the garage and his office, and later moved into the part of the home which was burned but that in any case he used the electricity.

The Tenant testified that the Landlord's friend was also living in an RV on the property and was connected to the electricity by way of an electrical cord from the rental unit to the RV. The Tenant testified that this friend was hired to assist with the renovations to the property and that as a consequence the Landlord and his friend were using power tools which she believed used more electricity than she and her family.

The Tenant testified that approximately three months after she moved into the rental property someone from the electricity company came to the rental unit and told her that if the bill wasn't paid it was going to be disconnected. She testified that as she has 2 children, she was forced, at that time, to put the account in her name or be without electricity.

The Tenant conceded that she agreed to pay the electricity when she signed the tenancy agreement, but at no time did she agree to pay for the Landlord's or his friend's use of electricity. She stated that had she known he was going to live at the rental property and also have his friend live there in such a manner that she would not have agreed to pay the electricity.

In all the circumstances she submitted that she should not be responsible for paying the \$3,289.43 and requested an Order that the Landlord compensate her for this amount.

Landlord's Reply to the Tenant's Monetary Claim

Initially the Landlord testified that the Tenant did not pay a security deposit. He stated that the receipts submitted by the Tenant were written by two different people; namely, he claimed exhibits #3 and #4 were written by him and that exhibit #1 was in the Tenants writing. He submitted that the receipt submitted in evidence purporting to be confirmation of payment for the security deposit was in fact written by the Tenant, but was not signed as she didn't have the funds.

Later in his testimony, the Landlord testified that the Tenant paid a \$250.00 security deposit in cash. He confirmed he did not return those funds to the Tenant. He also denied receiving the Tenant's forwarding address.

The Landlord stated that the rental unit was damaged by fire because of the deliberate acts of the previous renter. He further stated that Tenant, and M.B., wished to move into the rental before the occupancy permit was issued and that he agreed they, including the Tenant's two children, could stay in a tent on the property "for a couple of weeks in September 2013" until such time as occupancy was permitted.

The Landlord testified that initially the Tenant's portion of the rent was \$750.00 as the rent was \$1,500.00 for the entire rental unit and that the rent increased to \$850.00 when M.B. vacated the rental unit. Later in his testimony he stated the rent was \$1,500.00 for the duration of the tenancy even when M.B. moved out, yet the Tenant only paid \$750.00.

The Landlord further confirmed that there was only one electrical meter at the rental unit, despite the fact he had an office in the building and used the garage for his own purposes. Landlord submitted that the Tenant should be responsible for paying the entirety of the electricity as that was a term of the tenancy agreement that electricity was not included.

The Landlord testified that he did not live at the rental unit, either in his office or the garage as alleged by the Tenant. When I asked where he lived, he paused, and then responded that he lived with his girlfriend.

The Landlord further stated that the person living in the RV on the property was in fact a friend of the Tenant's and that this person had made a private arrangement with the Tenant whereby he would pay her \$20.00 per month for the use of electricity. The Landlord denied that this person was hired to do any work on the property and stated that he was not able to do any repairs as the fire was still under investigation.

The Landlord testified that after the Tenant vacated the rental unit, that he put the electricity in his name. He stated that the cost of his electricity was \$30.85 for a 10 day period in May of 2014, such that he believes the Tenant was responsible for the electricity consumption. When asked to comment on electricity consumption in the late fall and winter months as opposed to May, the Landlord conceded that the 10 day period for which he was the sole occupant was much warmer than during the rental period.

In reply the Tenant's confirmed that the man living in the RV was a friend of the Landlord's and that they had never met him. The Tenant reiterated that this third party was hired by the Landlord to work on the part of the rental home which was damaged by the fire.

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.

I accept the Tenant's evidence that she paid a security deposit in the amount of \$375.00. I prefer the evidence of the Tenant's over that of the Landlord for the following reasons.

1. The parties agreed that the Tenant's portion of the rent was initially \$750.00; as security deposits are generally half that amount, \$375.00 would be the expected amount.
2. The Tenant submitted a receipt which confirmed this payment was made. As she also submitted receipts for payment of rent which were in her handwriting, I find that she and the Landlord shared the responsibility for preparing these receipts.
3. The Landlord initially denied receiving any security deposit at all, and accused the Tenant of fabricating the receipt.
4. Despite the Landlord's bold allegation that the Tenant did not pay a security deposit and was fabricating evidence, later in his testimony the Landlord stated the Tenant paid a \$250.00 security deposit in cash. It is his responsibility to issue cash receipts and no such receipt for \$250.00 was entered in evidence. I do not accept his evidence that only \$250.00 was paid.

In all the circumstances I prefer the Tenant's evidence and find that a security deposit of \$375.00 was paid to the Landlord.

There was no evidence to show that the Tenant had agreed, in writing, that the Landlord could retain any portion of the security deposit. There was also no evidence to show that the Landlord had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenant, to retain a portion of the security deposit, as required under section 38.

There was also no evidence the Landlord performed Condition Inspection Reports as required by the Act. By failing to perform incoming or outgoing condition inspection reports in accordance with the Act, the Landlord extinguished the right to claim against the security deposit for damages, pursuant to sections 24(2) and 36(2) of the Act.

The security deposit is held in trust for the Tenants 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. If the Landlord and the Tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the Landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later. It is not enough that the Landlord feel they are entitled to keep the deposit, based on unproven claims.

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, or with the written agreement of the Tenant. 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.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the Landlord pay the Tenants the sum of **\$750.00**, comprised of double the security deposit (2 x \$375.00).

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.

The Tenant sought compensation for the electricity bill rendered in her name on March 28, 2014 in the amount of \$3,289.43. She argued that although she agreed to pay for electricity, she would not have agreed to this had she known the Landlord and his friend would be residing on the property. She submitted that it was unconscionable that the Landlord require her to put the electricity bill in her name when he and his friend were also using that electricity.

Section 5 of the Act provides that the Act cannot be avoided and reads as follows:

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 6 of the Act provides that unconscionable terms are not enforceable and reads as follows:

Enforcing rights and obligations of landlords and tenants

- 6 (1) The rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant under a tenancy agreement.
- (2) A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58
- (1) *[determining disputes]*.
- (3) A term of a tenancy agreement is not enforceable if
- (a) the term is inconsistent with this Act or the regulations,
 - (b) the term is unconscionable, or
 - (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

An unconscionable bargain is one where a stronger party takes an unfair advantage of a weaker party and enters into a contract that is unfair to the weaker party. In such a situation, the stronger party has used their power over the weaker party in an unconscionable manner. The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered.

I find that there was an inequality of bargaining power between the parties such that the Landlord was the stronger party. I also find that the Landlord, as the stronger party in this transaction, took unfair advantage of the Tenant and attempted to contract out of the Act contrary to section 5.

At the time the parties entered into the agreement, the Tenant agreed to pay the electricity. I accept the Tenant's evidence that the Landlord resided on the property, not with his girlfriend as he testified. I found his answer to my question as to where he was living to be evasive and not believable; the manner in which he answered leads me to conclude he was not being truthful.

I also prefer the Tenant's evidence over that of the Landlord's with respect to the relationship and identity of the third party who was living in an RV on the property. I found the Tenant's responses to my questions to be more forthright and credible than that of the Landlord's. I accept the Tenant's evidence that this third party was either a friend of the Landlord's, or a person hired by the Landlord to assist in repairing the property.

I accept the Tenant's evidence that she was not aware the Landlord and this third party intended to live on the property. I find that it is unconscionable for a Landlord to require a Tenant to be responsible for the electricity and to require her to put the electricity in her name when he, and another person, used the electricity.

Although the Landlord testified that the electricity bill was much less once the tenancy ended, the 10 days from which this information allegedly originated were during warmer spring months. As such, I find the Landlord's oral evidence in this regard to be unpersuasive. There was no

evidence to support a finding of what the electricity bill would have been had the Landlord and the individual in the RV not been on the property.

Neither party submitted a floor plan, or provided compelling evidence with respect to the portion of the home which was occupied by the Tenant. The Landlord confirmed that a portion of the home was damaged by fire and therefore not rentable. He also confirmed that he used a portion of the home for his office, as well as using the garage.

It was the Landlord's responsibility to ensure that the tenancy agreement complied with the Act and that any provisions with respect to the payment of utilities were conscionable. The onus was on the Landlord to make a fair arrangement in this regard.

In consideration of the above, I find the Landlord is responsible for two thirds (\$2,192.93) of the total cost of the electricity bill and the Tenant is responsible for one third (\$1,096.48). Accordingly, I order the Landlord to compensate the Tenant \$2,192.93 for his share of the electricity bill.

In total, I grant the Tenant's application for a Monetary Order in the amount of **\$2,942.95** for the following:

Double the security deposit of \$375.00	\$750.00
Landlord's 2/3 share of the \$3,289.43 electricity bill	\$2,192.93
TOTAL AWARDED	\$2,942.95

Conclusion

The Tenant is granted a Monetary Order in the amount of \$2,942.95. This Order may be filed and enforced in the B.C. Provincial Court (Small Claims Division) as an Order 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: September 28, 2015

Residential Tenancy Branch

