



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, FF; MNDC, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("Act") for:

- a monetary order for unpaid rent, pursuant to section 67; and
- authorization to recover the filing fee for her application from the tenant, pursuant to section 72.

This hearing also dealt with the tenant's cross-application pursuant to the *Act* for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to obtain a return of double the amount of the security deposit, pursuant to section 38; and
- authorization to recover the filing fee for his application from the landlord, pursuant to section 72.

The landlord did not attend this hearing, which lasted approximately 45 minutes. The tenant and his advocate (collectively "tenant") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The tenant confirmed that his advocate had authority to speak on his behalf at this hearing. The tenant's wife, "witness BGT," testified on behalf of the tenant at this hearing.

The tenant confirmed that the landlord was served with the tenant's application for dispute resolution and written evidence package (collectively "Application"), in two separate packages, by way of registered mail, both on November 6, 2015. The tenant provided copies of two Canada Post receipts and tracking numbers as proof of service. In accordance with sections 89 and 90 of the *Act*, I find that the landlord was deemed served with the tenant's Application on November 11, 2015, five days after its registered mailing.

Preliminary Issue – Dismissal of Landlord's Application

Rule 10.1 of the Rules of Procedure provides as follows:

10.1 Commencement of the dispute resolution proceeding: The dispute resolution proceeding must commence at the scheduled time unless otherwise decided by the Arbitrator. The Arbitrator may conduct the dispute resolution proceeding in the absence of a party and may make a decision or dismiss the application, with or without leave to reapply.

As advised to the tenant, in the absence of the landlord's participation in this hearing, I order the landlord's entire application dismissed without leave to reapply.

Issues to be Decided

Is the tenant entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

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*?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the tenant, his advocate and witness BGT, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claims and my findings are set out below.

The tenant testified that this month-to-month tenancy began on December 12, 2014 and ended on September 21, 2015. Monthly rent in the amount of \$800.00 was payable on the first day of each month. The tenant confirmed that he paid a security deposit of \$400.00 and the landlord continues to retain this deposit. The tenant occupied the basement suite of the landlord's house, while the landlord occupied the main floor.

A copy of the written tenancy agreement was provided for this hearing. The tenant confirmed that the tenancy agreement indicates that \$900.00 was due for rent each month and a \$450.00 security deposit was paid. However, the tenant stated that rent was actually \$800.00 per month and an additional \$100.00 was paid for the landlord to perform cleaning for the tenant each month. The tenant further noted that only a \$400.00 security deposit was paid as per the tenant's copy of his first December 2014 cheque provided for this hearing. The tenant confirmed that he did not sign a copy of the tenancy agreement. Witness BGT confirmed that she signed the tenancy agreement when she was legally separated from the tenant and that she was not a tenant during this tenancy as her and the tenant lived separate and apart. She claimed that she only signed the tenancy agreement because the landlord insisted that she needed the paperwork to prove an income to obtain a mortgage. Witness BGT noted that the amounts for rent and the security deposit were increased because the landlord wanted to obtain the mortgage.

The tenant stated that he provided a written forwarding address by way of a letter to the landlord on September 21, 2015, sent to her by registered mail. The tenant provided a copy of this letter with his Application. The tenant provided a copy of a Canada Post tracking number and printout showing that the mail was refused by the landlord. The tenant also provided a copy of an envelope sent from the landlord to the tenant, with the tenant's forwarding address handwritten by the landlord on the front of the envelope. The tenant provided a Canada Post tracking printout to show that this envelope was mailed to him by the landlord on September 26, 2015 and was received on October 1, 2015. The tenant also provided a copy of the landlord's original application for this hearing which has the tenant's rental unit address removed and replaced by his forwarding address, which was handwritten by the landlord.

The tenant explained that no move-in or move-out condition inspection reports were completed for this tenancy. The tenant confirmed that he did not provide written permission to the landlord to retain any

amount from his security deposit. When the landlord filed her application for this hearing, it was not to retain any amount from the tenant's security deposit, only for unpaid rent and for the application filing fee.

The tenant confirmed that he paid rent of \$800.00 to the landlord for December 2014. The tenant provided a copy of the cashed cheque, dated December 1, 2014, for \$1,200.00, indicating that rent of \$800.00 and a security deposit of \$400.00 were paid to the landlord. The tenant seeks a return of \$283.80 of this rent because the rental unit was not available to move in until December 12, 2014. The tenant stated that he actually moved in on December 14, 2014 but he was given the keys to move into the unit for December 12, 2014. The tenant stated that he prorated the rent amount of \$800.00 by 31 days in December to arrive at \$25.80 per day for a period of 11 days.

The tenant also seeks \$100.00 for an overpayment for a cleaning fee in September 2015. He stated that this amount was paid to the landlord for cleaning for this month but the landlord acknowledged there was no cleaning done and the tenant was entitled to this money back. The tenant provided a copy of a cashed cheque for \$900.00 for September 2015. The tenant provided a copy of the text message from the landlord acknowledging the above information.

The tenant seeks \$500.00 for the landlord's multiple illegal entries into the rental unit, restricting access to the tenant and his visitors at the rental unit, packing the tenant's belongings without permission and keeping the tenant's belongings.

The tenant stated that on July 17, 2015, the landlord left a stick in the sliding door, through which the tenant gains access to the rental unit. The tenant stated that this is the only way he can access his unit, aside from entering through the landlord's unit. He stated that the landlord was worried about break-ins in the unit and that she put the stick there as protection. The tenant stated that the landlord forgot to remove the stick, that she was camping out of town at the time, and that he was unable to gain access to his unit on July 17, 2015. The tenant provided copies of text messages between the landlord and tenant on July 17, 2015 and September 21, 2015, regarding leaving a stick in the door. The tenant explained that he had to sleep on his wife's couch that night because the landlord did not reply to his text message or let him into the unit. Witness BGT confirmed that the tenant slept on her couch on July 17, 2015.

The tenant claimed that the landlord illegally entered his rental unit while he was away, without notice to the tenant and without his permission, three times on September 19, 2015. The tenant stated that he had movers packing and moving his belongings, when the landlord entered his rental unit. The tenant maintained that the landlord asked the people why they were in the unit and told them they were not allowed to clean the unit. The tenant provided copies of text messages between the parties, asking why there were strangers in the house and why the tenant was not there to accompany the movers.

The tenant explained that the landlord packed up his belongings without notice or permission on September 20, 2015, while he was still moving. He stated that the landlord kept his power cords, remote control and a photo of his grandfather and has not returned these items to the tenant.

Analysis

Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to

pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenant to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

The tenant seeks a return of double the value of his security deposit totalling \$800.00. The tenancy ended on September 21, 2015. The tenant provided a forwarding address by sending a letter to the landlord on September 21, 2015. The tenant provided a copy of the letter and the Canada Post tracking number to confirm service. Further, the tenant submitted evidence of the landlord using this forwarding address in her application and to serve a letter to the tenant. Although the landlord refused service of the letter, as noted in the tracking printout, she is deemed served with the letter on September 26, 2015, five days after its registered mailing.

The tenant did not give the landlord written permission to retain any amount from his deposit. The landlord did not return the deposit to the tenant or make an application for dispute resolution to claim against this deposit. The landlord's application was not to retain the security deposit, it was only for unpaid rent and the application filing fee.

Over the period of this tenancy, no interest is payable on the landlord's retention of the deposit. In accordance with section 38(6)(b) of the *Act*, I find that the tenant is entitled to double the value of his security deposit totalling \$800.00.

Damages and Loss

Section 67 of the *Act* states that when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the tenant must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the landlord in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the tenant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Residential Tenancy Policy Guideline 16 states the following with respect to types of damages that may be awarded to parties:

An arbitrator may only award damages as permitted by the Legislation or the Common Law. An arbitrator can award a sum for out of pocket expenditures if proved at the hearing and for the value of a general loss where it is not possible to place an actual value on the loss or injury. An arbitrator may also award "nominal damages", which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right.

Section 28 of the *Act* deals with the tenant's right to quiet enjoyment:

28 *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*
(a) reasonable privacy;

- (b) freedom from unreasonable disturbance;*
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.*

I find that the tenant is entitled to \$100.00 in nominal damages from the landlord. Although the tenant was unable to substantiate the amount of \$500.00, I find that the tenant's legal rights under sections 28, 29 and 30 of the *Act* and sections 24 and 25 of the *Regulation* were violated. I find that the tenant provided undisputed evidence that the landlord entered his rental unit without notice and permission, that the tenant's movers were prevented from cleaning the unit, that the tenant was denied access to the rental unit and had to find alternative accommodation on July 17, 2015, and that the landlord packed up and kept his belongings. The tenant provided documentary evidence in the form of text messages between the parties regarding the above incidents.

I find that the tenant is entitled to \$283.80 for an overpayment in rent for 11 days in December 2014. I find that the tenant provided undisputed evidence that he was not entitled to gain access to the rental unit until December 12, 2014. The tenant provided documentary evidence that he paid December 2014 rent of \$800.00 in full to the landlord.

I find that the tenant is entitled to \$100.00 for overpayment of a cleaning fee in September 2015. I accept the tenant's undisputed evidence that this cleaning was not performed by the landlord. I find that the tenant provided documentary evidence of text messages between the parties where the landlord acknowledged this and confirmed her intention to credit the tenant for \$100.00.

As the tenant was successful in his Application, I find that he is entitled to recover the \$50.00 filing fee from the landlord.

Conclusion

I issue a monetary Order in the tenant's favour in the amount of \$1,333.80 against the landlord under the following terms:

Item	Amount
Return of Double Security Deposit as per section 38 of the <i>Act</i> (\$400.00 x 2 = \$800.00)	\$800.00
Overpayment of Rent for December 2014	283.80
Overpayment of Cleaning Fee for September 2015	100.00
Nominal Damages	100.00
Recovery of Filing Fee for Application	50.00
Total Monetary Order	\$1,333.80

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

The landlord's entire application is dismissed without leave to reapply.

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: November 30, 2015

Residential Tenancy Branch

