



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF; MNSD, OLC

Introduction

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

- a monetary order for unpaid rent, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement 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 her filing fee for this application from the tenant pursuant to section 72.

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

- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38; and
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62.

The tenant's application is in respect of return of double her security deposit for the landlord's failure to comply with section 38 of the Act.

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 was assisted by her advocate.

Service

The tenant served the landlord with the tenant's dispute resolution package by registered mail. The tenant's advocate arranged for this package to be sent and stated that it included all evidence before me. The landlord admitted receipt of the tenant's dispute resolution package. The landlord was unable to locate one page of evidence; however, I find it more likely than not that the landlord was duly served with the entire package and had misplaced the page. On this basis, I find that the landlord was served with the tenant's dispute resolution package pursuant to sections 89 and 90 of the Act.

The landlord served her dispute resolution package to the tenant on or about 26 November 2015 by registered mail. The landlord provided me with a tracking number. The mailing was unclaimed by the tenant. I read the entire contents of the landlord's application to the tenant and her application. The tenant elected to waive the service requirements and proceed with both applications in today's hearing.

Paragraph 71(2)(c) of the Act allows me to order that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this Act.

On the basis of the tenant's waiver and my reading of the contents of the file, I find that, for the purposes of this hearing, the landlord's dispute resolution is sufficiently served pursuant to paragraph 71(2)(c) of the Act.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Is the tenant entitled to a monetary award for the return of a portion of her security deposit? Is the tenant entitled to a monetary award equivalent to the amount of her security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the Act?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced

here. The principal aspects of the both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

On 15 July 2015, the tenant responded to a posted advertisement for the rental unit. The parties met that day. The tenant provided \$375.00 in cash as a security deposit.

I was provided with a copy of the tenant's letter in which she provides her forwarding address to the landlord. The letter is undated. The tenant testified that she sent the letter at some point in October. The landlord admits to receiving the letter at some point in October. The letter makes a demand for return of the tenant's security deposit totalling \$750.00.

I was provided with a copy of the shelter information form filled out by the landlord on 15 August 2015. The shelter information indicates that the tenancy was going to begin 1 August 2015 for monthly rent of \$375.00.

I was provided with a copy of a report from the Ministry of Social Development and Social Innovation (the Ministry). The report sets out that a cheque in the amount of \$375.00 was issued to the landlord on 23 July 2015. The report notes that the cheque was for a deposit amount. The tenant testified that this was issued on a promise to repay by the tenant. The tenant testified that this was mailed to the landlord.

The tenant never occupied the rental unit. There is dispute surrounding the reason the tenant failed to move in to the rental unit. The tenant testified that the landlord refused to provide the keys to the rental unit and she told the landlord that there would be different tenants in the rental unit. The landlord testified that the tenant never asked for the keys to the rental unit.

The tenant testified that she asked multiple times for the keys. The tenant testified that on 1 August 2015 she asked for keys to the rental unit and was told that the previous tenants had not yet vacated. The tenant testified that on 15 August 2015 she was told that someone else was occupying the rental unit. The landlord testified that the tenant stated on 20 August 2015 that she would not begin occupying the rental unit. The landlord's written statement indicates that the tenant conveyed she was not going to move into the rental unit on 1 September 2-15.

The landlord testified that the previous tenants vacated the rental unit in the evening of 1 August 2015. The landlord denies that anyone was living in the rental unit in August.

The landlord testified that she posted the rental unit as available on or about 1 September 2015. The landlord testified that she entered into a new tenancy beginning 15 September 2015. The new tenancy is for two persons at monthly rent of \$750.00.

The tenant submits that the landlord found tenants whom the landlord preferred and decided to rent to them.

The landlord testified that as a result of the tenant's failure to enter into the tenancy, the landlord incurred a rental loss in the amount of \$1,125.00:

Item	Amount
Rent Loss August	\$750.00
Rent Loss September	375.00
Total Monetary Order Sought	\$1,125.00

The tenant claims for \$1,500.00:

Item	Amount
Security Deposit	\$750.00
Subsection 38(6) Compensation	750.00
Total Monetary Order Sought	\$1,500.00

Analysis

Landlord's Claim

The first issue in these applications is whether a tenancy agreement was formed between the parties.

"Tenancy agreement" is defined in the Act to include both oral and written agreements:

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

The sufficiency of an oral tenancy agreement was confirmed by the British Columbia Supreme Court in *Johnson v. Patry*, 2014 BCSC 540.

Shelter information forms are used for the purposes of determining the applicant's entitlement to the shelter portion of an assistance payment; it does not determine the

rights and obligations of a tenant and landlord; however, the shelter information may be used as evidence of the terms of an oral tenancy agreement.

On the basis of the evidence provided to me, I find that the landlord and tenant entered into an oral tenancy agreement on 15 July 2015 for a tenancy beginning 1 August 2015 at monthly rent of \$750.00.

Pursuant to section 16 of the Act, the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit. A person that breaches this agreement is liable to the opposing party for damages.

In accordance with section 44 of the Act, a tenancy ends where:

- the landlord or tenant gives notice,
- the landlord and tenant agree; or
- the tenant abandons the rental unit.

I must now determine why the tenant failed to begin occupying the rental unit. In this case, there is conflicting testimony between the parties as to who breached the tenancy agreement: the landlord testified that the tenant evaded the landlord's attempts to secure rent; the tenant testified that she tried to get access to the rental unit, but the landlord thwarted the attempts. There is limited corroborating evidence for either version of events. In this situation, I am required to make a finding of credibility.

On balance, I prefer the evidence of the landlord. I prefer the evidence of the landlord as I found her evidence accorded better with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable. In particular, it does not seem probable that the landlord would fill out the shelter agreement for direct payment from the Ministry and then change her mind so soon thereafter. Further, I accept the landlord's evidence that she is renting the unit for \$700.00 per month, \$50.00 less than the tenant had agreed to pay. It seems unlikely that the landlord would prefer to rent her unit for less rent. As well, I found the landlord evidence regarding the subsequent tenancy to be truthful. It is unlikely that the landlord would thwart the tenant's tenancy for the purpose of sustaining a rental loss and then renting the unit for less monthly rent. For these reasons, I find that it was the tenant that caused the tenancy's end through her failure to begin occupation. I find that the tenant informed the landlord of this intent on 20 August 2015.

As the tenancy ended pursuant to the tenant's abandonment, the tenant breached her obligation to provide notice to the landlord pursuant to section 45 of the Act.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

I accept that by failing to inform the landlord of her abandonment or provide notice in a timely manner the tenant caused the landlord to incur a rent loss for August and for September. I find that the landlord was reasonable in waiting until 1 September 2015 to repost the rental unit after the tenant confirmed she did not intend to occupy the rental unit. Accordingly, the landlord mitigated her loss. On this basis, I find that the landlord has proven her entitlement to \$750.00 as a rental loss for August and \$375.00 for the first half of September.

As the landlord has been successful in her application, she is entitled to recover her filing fee from the tenant.

The landlord has proven her entitlement to \$1,175.00:

Item	Amount
Rent Loss August	\$750.00
Rent Loss September	375.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Entitlement	\$1,175.00

Tenant's Claim

The landlord and tenant agree that the tenant provided a security deposit in the amount of \$375.00. The tenant testified that the Ministry also sent the landlord a cheque in the amount of \$375.00 as a deposit. The landlord denies receiving this cheque. The tenant has provided me a copy of report from the Ministry indicating that a cheque was issued to the landlord in the amount of \$375.00.

On the basis of the evidence before me, I find that the landlord received \$375.00 in cash from the tenant and a cheque in the amount of \$375.00 from the Ministry on or about 23 July 2015.

“Security deposit” is defined in section 1 of the Act:

“security deposit” means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:

- (a) post-dated cheques for rent;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97 (2) (k) [*regulations in relation to fees*];

On the basis of the definition of “security deposit” set out in section 1 of the Act, I find that the total amount of the security deposit received by the landlord was \$750.00. At the time the cheque was issued it indicated it was for the purpose of a deposit.

Section 38 of the Act requires the landlord to either return all of a tenant’s security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a 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 subsection 38(6) of the Act equivalent to the value of the security deposit. However, pursuant to paragraph 38(4)(a) of the Act, 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.

On the basis of the testimony of the parties, I find that the tenant provided her forwarding address to the landlord no later than 31 October 2015. The landlord did not return the deposit or file her application to retain amounts from the deposit within fifteen days. On this basis, the landlord is liable to return the tenant’s security deposit and pay compensation in the amount of the tenant’s security deposit. The tenant has proven her entitlement to \$1,500.00.

Conclusion

I issue a net monetary order in the tenant's favour in the amount of \$325.00 under the following terms:

Item	Amount
Tenant's Entitlement	\$1,500.00
Less Landlord's Entitlement	-1,175.00
Total Monetary Order	\$325.00

The tenant is provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) 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.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: January 14, 2015

Residential Tenancy Branch

