



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant's application: MNSD, FF

Landlords' application: MND, MNR, MNSD, MNDC, FF

Introduction

This was a hearing with respect to applications by the tenant and by the landlords. The hearings were conducted by conference call. The named landlord and the tenant called in and participated in the hearing. The tenant applied for the return of his security deposit, including double the amount. The landlords applied for a monetary award and an order to retain the deposit.

Issue(s) to be Decided

Is the tenant entitled to the return of his deposit, including double the amount?
Are the landlords entitled to a monetary award and if so, in what amount?
Are the landlords entitled to retain all or part of the security deposit?

Background and Evidence

The rental unit is a residence on rural property. The tenancy began on June 10, 2015 for a fixed term ending June 30, 2016. The monthly rent was \$1,695.00 and the tenant paid a security deposit of 84750 and a pet deposit of \$847.50 on June 7, 2015. The tenant said that the property, a small three bedroom unit was not suitable, primarily because there was a serious mould problem in the unit. The tenant said that there was no inspection on move-in he said there was no running water and it took a month before it was fixed. The tenant said he was unable to use one of the bedrooms due to a leak around the toilet in the on-suite bathroom. The tenant said that he gave notice on August 30th that he would move out as soon as possible. The tenant testified that he sought new tenants to occupy the rental unit and placed advertisements on the internet. He forwarded applications from two prospective tenants but the landlord turned down

both applicants. The tenant said that the landlord found new occupants and he moved out on October 4th, the same day that new tenants moved in.

The tenant said that he requested the return of his deposits and return of post-dated cheques. He received an e-mail transfer of his pet deposit and his post-dated cheques were returned, but received no response to his requests for the return of his deposit. He filed his application for dispute resolution on November 20, 2015. The tenant submitted a reproduction of a letter dated October 10, 2015 requesting the return of his deposits and cheques.

The landlords did not file their application until June 1, 2016. The landlords claimed payment of the sum of \$1,099. According to the monetary order worksheet the landlords are seeking payment of the following:

• Lost rent for October:	\$300.00
• Cleaning house and property, labour & supplies:	\$420.00
• Garbage, recycling removal:	\$275.00
• Disposal household material, transfer station:	\$104.00
Total:	\$1,099.00

The landlord submitted that he was authorized to keep the tenant's security deposit pursuant to a provision in the tenancy agreement. The clause provided that:

(p) The tenant agrees to forfeit the/all security/pet deposit(s) in favour of the landlord to cover the cost of loss or damage in the event that the tenant does not pay all monthly lease payments as per the agreement between the parties.

The landlord said that the tenant left belongings and garbage at the rental property and he had to pay for its removal as well as for dump fees.

The tenant denied that he left the property in need of cleaning or that there was garbage to be disposed of. The tenant said that the items removed by the landlord were things left on the property that were there when the tenant moved in. The tenant said there was no condition inspection performed at the start of the tenancy and the document submitted by the landlord was not prepared with the tenant and was not signed by him.

The landlord's position is that the tenant moved out on October 4th without paying rent for October. The landlord said he lost rental income for part of October and incurred other expenses. The landlord returned the tenant pet deposit, but his position is that the tenancy agreement authorizes him to keep the security deposit.

The landlord claimed that the prospective tenants selected by the tenant were unsuitable. He said that he found replacement tenants but claimed that he lost rent for three days because the tenant did not move out until October 4th. The landlord submitted a ledger wherein he set out that the incoming tenant was given a \$300.00 rent rebate for October and paid \$1,495.00 instead of the regular monthly rate of \$1,795.00.

Analysis

Section 20 (e) of the *Residential Tenancy Act* provides that a landlord must not:

(e) require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement.

The landlord may not rely on the provision in the tenancy agreement as the basis for retaining the tenant's security deposit at the end of the tenancy because the term amounts to a pre-authorization to keep the security deposit before the tenancy has ended, contrary to the quoted provision of the *Act*.

The landlord has the burden to prove, on a balance of probabilities that he has suffered loss and damage due to the actions or neglect or breach of the tenancy agreement by the tenant. The landlord claimed that the tenant left the rental property without properly cleaning it and that he left garbage and cast-off behind that had to be disposed of. The tenant disputed these claims. The landlord did not provide photographs to show the condition of the rental property upon move –out and I find that the landlord has not provided evidence to establish on a balance of probabilities that he is entitled to an award in any amount for cleaning or garbage removal.

With respect to the claim for loss of rental income for October, the tenant was in breach of the fixed term tenancy agreement and did not move out of the unit at the end of September as expected, not having paid rent for October. I find that the landlord acted properly in mitigating his loss or rental income for October by renting it at a reduced rate. I find that the landlord is entitled to recover the sum of \$300.00 as lost rental income for October as claimed.

Turning to the tenant's claim, section 38 of the *Residential Tenancy Act* provides that when a tenancy ends, the landlord may only keep a security deposit if the tenant has consented in writing, or the landlord has an order for payment which has not been paid. Otherwise, the landlord must return the deposit, with interest if payable, or make a claim in the form of an Application for Dispute Resolution. Those steps must be taken within fifteen days of the end of the tenancy, or the date the tenant provides a forwarding

address in writing, whichever is later. Section 38(6) provides that a landlord who does not comply with this provision may not make a claim against the deposit and must pay the tenants double the amount of the security deposit and pet deposit. I have found that the landlord may not rely on the provision in the tenancy agreement as a basis for keeping the deposit, because it is an illegal term and therefore unenforceable.

I am satisfied that the tenant provided the landlord with his forwarding address in writing, and I find that the tenant served the landlord with documents notifying the landlord of this application as required by the *Act*.

The tenant's security deposit was not refunded within 15 days as required by section 38(1) of the *Residential Tenancy Act*, the landlord did not make his claim to keep the deposit until June 1, 2016 and the doubling provision of section 38(6) therefore applies. I grant the tenant's application and award him the sum of \$1,695.00, being double the amount of his \$847.50 security deposit. The tenant is entitled to recover the \$50.00 filing fee for this application for a total claim of \$1,745.00.

Conclusion

The landlord was partially successful in his application; he was awarded the sum of \$300.00. I award the landlord \$50.00 of the \$100.00 filing fee paid for his application, for a total award of \$350.00. Pursuant to section 72 of the *Act*, I set off the award to the landlord against the amount awarded to the tenant, leaving a balance due to the tenant of \$1,395.00 and I grant the tenant a monetary order against the landlord in the said amount. This order may be registered in the Small Claims 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: July 22, 2016

Residential Tenancy Branch

