



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding AMOS REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing was convened as a result of the tenants' application for dispute resolution seeking remedy under the *Residential Tenancy Act* (the "Act"). The tenants applied for the return of their security deposit, for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and the recovery of the cost of the filing fee.

The tenants attended the teleconference hearing. The tenants gave affirmed testimony. During the hearing the tenants presented their evidence. A summary of the evidence is provided below and includes only that which is relevant to the hearing.

As the landlord did not attend the hearing, service of the Notice of a Dispute Resolution Hearing (the "Notice of Hearing"), the Application for Dispute Resolution (the "Application") and documentary evidence were considered. The tenants provided affirmed testimony that the Notice of Hearing, Application and documentary evidence were served on the landlord by registered mail on January 8, 2016 and that the registered mail package was signed for an accepted on January 11, 2016.

The tenants provided a registered mail tracking number and customer receipt in evidence and confirmed that the name and address on the registered mail package matched the name of the landlord and the mailing address for the landlord, the address of which matches the mailing address on the landlord's November 12, 2015 letter to the tenants submitted in evidence. I find the landlord was duly served on January 11, 2016, which is the date the registered mail package was signed for an accepted.

Preliminary and Procedural Matter

At the outset of the hearing, the tenants confirmed that while they did not include the amount of the security deposit in their calculation for the amount claimed in their

Application, they did write in the “Details of Dispute” section of their Application that they were also claiming the return of their security deposit as part of their Application. I am satisfied that the tenants clearly indicated that they were also seeking the recovery of their security deposit as part of their Application and will consider that as part of their claim accordingly.

Issue to be Decided

- Are the tenants entitled to any monetary compensation under the *Act*, and if so, in what amount?

Background and Evidence

The tenants testified that a written tenancy agreement exists; however, it was not submitted with their documentary evidence. The tenants affirmed that a fixed term tenancy began on October 15, 2014 and was scheduled to expire on October 31, 2015 and the parties could negotiate a further term if agreed to between the parties. The monthly rent was \$1,100.00 per month and due on the first day of each month. The tenants stated that they paid a \$550.00 security deposit at the start of the tenancy which is supported by the letter submitted in evidence from the landlord which refers to their security deposit.

The tenants’ monetary claim reads as follows:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. 40% of rent for 8 months (comprised of \$440.00 x 8 months as rent is \$1,100.00 per month)	\$3,520.00
2. Return of security deposit	*Amount not specified in claim
TOTAL	\$3,520.00 + *the return of the tenants’ security deposit

Regarding item 1, the tenants testified that before they signed the tenancy agreement, they said during an interview with the agent for the landlord that the owners had no plans to sell the rental unit. The tenants stated that they advised the agent for the landlord that they wanted a long-term rental and that they would not have moved into the rental unit if they had any indication that the owners might sell the rental unit. The tenants affirmed that they only signed the one year lease based on the information they

were given that there were no plans to sell the rental unit yet four months later in mid-February 2015, the rental unit was listed for sale and there were two to three showings per week for a period of five to six months according to the tenants.

The tenants also testified that that on August 5, 2015 a large hole was dug right next to their above-ground pool as part of the septic inspection resulting from an offer for purchase of the home in July 2015. The tenants stated that there was no consideration to get the grass in the backyard back to its original condition and there was dirt and mud everywhere and they could not use their pool for the remainder of the tenancy as a result.

Also on August 6, 2015, the tenants stated that a potential owner waited until the tenants went for a walk and then illegally entered the rental unit during a second inspection while their son slept in the rental unit. The tenants stated that the landlord agent would be present at all times during the inspection which was not the case. The tenants stated that they considered calling the RCMP about this issue which ultimately they decided not to do.

Although the tenants claim that they never received written notice from the landlord to enter the rental unit for showings, they did receive phone calls and voice messages. The male tenant did not disagree that he consented to that arrangement by allowing the showings of the rental unit.

The tenants testified that they came up with the amount of 40% of the value of the tenancy as their monetary claim as they felt that renting a home versus an apartment cost them 40% more as they wanted the privacy and that they had no privacy for eight months due to the sale of the home.

The tenants stated that they had to deal with constant phone calls to arrange for showings, some of which never happened and that they were advised of cancellations at the last minute after having cleaned the home for the showings. The tenants also stated that they did not plant the garden they were hoping for as they would no longer be in the rental unit for the harvest.

Regarding item 2, the tenants have claimed for the return of their security deposit. The tenants provided a copy of a cheque dated November 12, 2015 in the amount of \$150.00 which the tenants stated they did not cash and mailed back to the landlord as they did not give the landlord permission to retain any portion of their \$550.00 security deposit. The tenants testified that they provided their written forwarding address on the outgoing condition inspection report dated October 31, 2015 and that they did not sign

over any portion of their \$550.00 security deposit. The tenants stated that they are not waiving any rights to the return of double their security deposit if they are so entitled under the *Act*.

The tenants submitted a letter dated November 12, 2015 to the tenants from the landlord indicating that their security deposit was \$500.00 and that the following deductions were being made:

“..Less Deductions for cleaning see invoice #03 attached from Crystal Cleaning	(\$50.00)
Less Deductions for hauling 3 loads of garbage to the dump (8 hour labor)	(\$200.00)
Less Deductions Dump Fees (3 x \$50.00)	<u>(\$150.00)</u>
TOTAL DEDUCTIONS	(\$400.00)
...	
TOTAL AMOUNT TO BE REFUNDED:	<u>\$150.00...</u>

[reproduced as written]

Analysis

Based on the undisputed documentary evidence and the unopposed testimony provided during the hearing, and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;

3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the tenants to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the landlord. Once that has been established, the tenants must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the tenants did what was reasonable to minimize the damage or losses that were incurred.

Item 1 – Even though the tenants’ evidence is unopposed by the landlord, after carefully considering the tenants’ evidence I find that the 40% reimbursement of rent for the period of 8 months is not only unreasonable but is not supported by the evidence presented. Therefore, while I find the tenants did suffer some loss of use of their backyard due to the hole dug next to their pool on August 6, 2015, I don’t find the number of showings to be an unreasonable number. Furthermore, a tenancy survives the sale of a home and there is no evidence that the tenancy ended earlier than the fixed term date agreed to by the parties at the start of the tenancy.

Given that there was some loss of the backyard, I find that the tenants are entitled to the return of 10% of the value of the tenancy for the months of August, September and October of 2015. As the monthly rent was \$1,100.00 per month, I grant the tenants \$110.00 for the months of August, September and October for a total of **\$330.00**. I award no monetary amount for the showings which I find to be reasonable.

Item 2 – Based on the undisputed evidence before me, I find the landlord had no right to retain any portion of the tenants’ security deposit as the landlord failed to receive the written permission of the tenants to retain any portion of their security deposit and did not file an application claiming towards the tenants’ security deposit . Section 38 of the *Act* applies which states:

Return of security deposit and pet damage deposit

- 38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
- (a) the date the tenancy ends, and
 - (b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

[my emphasis added]

In the matter before me, I find that the landlord breached section 38 of the *Act* by failing to return the security deposit in full to the tenants within 15 days of receiving the forwarding address of the tenants in writing on October 31, 2015, which was the date of the outgoing condition inspection when the written forwarding address was provided according to the tenants. I also accept the tenants' undisputed testimony that they did not cash the cheque from the landlord for \$150.00 of their total \$550.00 security deposit. Therefore, I find the tenants are entitled to the return of double the original security deposit of \$550.00 for a total of **\$1,100.00**. I note that the tenants' security deposit accrued \$0.00 in interest since the start of the tenancy.

As the tenants' application had some merit, I grant the tenants the recovery of one-half of the cost of their filing fee in the amount of **\$25.00**.

Monetary Order – I find that the tenants have established a total monetary claim in the amount of **\$1,455.00**, comprised of \$330.00 for item 1, and \$1,100.00 for item 2, plus recovery of \$25.00 of the cost of the filing fee. I grant the tenants monetary order pursuant to section 67 of the *Act* in the amount of \$1,455.00.

Conclusion

A portion of the tenants' application is successful. The tenants have established a total monetary claim of \$1,455.00 as indicated above. The tenants have been granted a monetary order under section 67 of the *Act* in the amount of \$1,455.00. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

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: August 22, 2016

Residential Tenancy Branch