

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FF MND MNSD MNDC O

Introduction

This hearing was convened in response to applications by each of the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The tenant requested:

- authorization to recover his filing fee for this application from the landlord pursuant to section 72;
- a Monetary Order for loss pursuant to section 67 of the *Act*; and
- a return of the security deposit pursuant to section 38 of the *Act*.

The landlord requested:

- authorization to retain the security deposit pursuant to section 72 of the *Act*;
- a Monetary Order for damage to the unit pursuant to section 67 of the *Act*; and
- authorization to recover their filing fee for this application from the tenant pursuant to section 72 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.

Both parties served the other with their application for dispute resolutions and their monetary orders by way of Canada Post Registered Mail. Canada Post tracking numbers were provided to the hearing by both parties. Pursuant to section 89 of the *Act* I find that both parties were served in accordance with the *Act*.

At the outset of the hearing both parties stated that they wished to amend their Monetary Orders. The landlord stated that she wished to reduce her application from \$2,100.00 to \$1,050.00 to reflect the amount of security deposit held by the landlord, and the tenant stated that he wished to reduce his application from \$2,311.61 to \$2,201.61. Pursuant to section 64(3)(c) of the *Act*, I have amended the applications of the parties with these new amounts.

Issue(s) to be Decided

Is the tenant entitled to a Monetary Order for loss of enjoyment of the rental unit?

Is the landlord entitled to a Monetary Order for damage to the rental unit?

Is the tenant entitled to a return of his security deposit? If not, may the landlord retain it?

Background and Evidence

Testimony was provided by both parties that this tenancy began on January 1, 2017. Rent was set at \$2,100.00 per month and a security deposit of \$1,050.00 continues to be held by the landlord. This was meant to be a fixed term tenancy that was to conclude on April 30, 2017. Both parties agreed that the tenant vacated the property on January 14, 2017.

The landlord is seeking an Order to retain the security deposit of \$1,050.00. This amount reflects the sourcing fee that the landlord had to pay a real estate agent to locate a new tenant on short notice. The landlord was successful in this and was able to find a tenant to occupy the rental unit for February 1, 2017.

The tenant is seeking a Monetary Order of \$2,201.61. This amount reflects a return of his security deposit as well a refund of rent paid for the 14 days that the tenant occupied the rental unit. The tenant alleged that the agent for landlord misrepresented the apartment and he entered into a rental agreement with the landlord under these false pretenses. Specifically, the tenant stated that he was interested in the rental unit because it contained a gym, a pool and other “5 star amenities.” Upon taking possession of the unit, the tenant was informed that in fact the amenities he had expected the apartment to contain were not in operation or available.

Analysis – Security Deposit

Section 38 of the *Act* provides direction on when a security deposit must be returned to a tenant and the steps that must be taken by a landlord should they wish to retain it. Section 38(1) notes that a landlord must either repay the security deposit or apply to retain it 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.

Evidentiary documents in the form of emails exchanged between the landlord and the tenant demonstrate that the landlord and tenant met to perform a move out inspection on January 17, 2017. A forwarding address was provided by the tenant to the landlord on this date. On February 1, 2017 the landlord filed their application for dispute resolution and on February 8, 2017 the tenant was sent a copy of the landlord's application for dispute resolution by Canada Post Registered Mail.

While the landlord submitted an application to withhold the tenant's security deposit within 15 days of the tenancy ending and receiving the forwarding address, the landlord has no grounds to withhold the deposit.

There are very specific grounds under which a landlord may retain a security deposit. These are contained in sections 38(3) & (4) of the *Act*. They note;

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

The landlord testified that she was withholding the security deposit due to the sourcing fee that she needed to recover from the tenant. The tenant had paid rent for the month of January 2017 and had therefore no amount that remained unpaid at the end of the tenancy, nor did the landlord have written permission to retain the security deposit. Had the landlord wished to recover for her losses associated with the tenant's breaking of the lease or the sourcing fee, she would need to pursue a Monetary Order against the tenant. At the outset of the hearing the landlord stated that she wished to withdraw her Monetary Order.

As such pursuant to section 38 of the *Act*, the tenant is entitled to a return of his Security Deposit.

Analysis – Landlord's Monetary Order

At the outset of the hearing the landlord stated that she no longer wished to pursue her Monetary Order and wished to simply retain the tenant's Security Deposit as compensation for having to pay the sourcing fee associated with finding a new tenant. As a result, the landlord amended her application for dispute resolution package to reflect this. The landlord's application for a Monetary Order is therefore withdrawn.

Analysis – Tenant's Monetary Order

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the tenant to prove his entitlement to his claim for a monetary award.

The tenant explained that he was seeking a Monetary Order of \$2,201.61. This amount reflects a return of his security deposit along with a refund on the rent he paid for the time that he occupied the rental unit. The tenant alleged that the agent with whom he communicated prior to taking possession of the rental misrepresented the amenities that were available in the apartment. As a result, the tenant was unsatisfied with the rental unit and moved out.

I am not convinced that the tenant has suffered damages which have stemmed directly from a violation of the agreement or which are a contravention of the *Act* on the part of the other party. Evidence was provided at the hearing that the landlord made concerted efforts to rectify the issue around the availability of workout facilities for the tenant. The landlord offered a reduction in rent so that the tenant could purchase his own gym membership and provided use of a gym in another facility which was 250 meters away from the tenant's building. The tenant did not find these options to be satisfactory. While I appreciate the tenant's frustrations in moving into a building that did not have the facilities which were advertised, significant steps were taken by the landlord to rectify the situation. The advertisement submitted to the hearing makes no mention of a gym, it simply states that the apartment includes a swimming pool and a "5-star living experience."

The tenant has not provided evidence that can verify the actual monetary amount of the loss or damage. The tenant cited inconvenience as reason for why he should be returned the rent that he paid. Inconvenience, when the landlord has made concerted efforts to rectify the situation, is not sufficient grounds to be granted a Monetary Order. In addition, the tenant did occupy the rental unit for 14 days and must pay rent for the time that he occupied it.

As a result of the landlord's actions to satisfy the tenants misgivings about the buildings, and the lack of evidence that a gym was advertised as an amenity, I am dismissing the tenant's application for a Monetary Order.

Since the tenant was unsuccessful in the entirety of his claim, each party must bear the costs of their own filing fee.

Conclusion

The landlord's Monetary Order is withdraw.

The landlord is ordered to return the tenant's security deposit.

The tenant's application for a monetary order is dismissed.

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: March 16, 2017

Residential Tenancy Branch