



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, MNDC, FF, OLC

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* (the *Act*).

The landlord applied for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for 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 security deposit and pet damage deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- an Order that the landlord comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43;
- authorization to obtain a return of all or a portion of the security deposit and pet damage deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

At the outset of the hearing the parties testified that the tenancy has ended and the parties withdrew the portions of their respective applications pertaining to an ongoing tenancy. The landlord withdrew the portion of his application seeking an Order of Possession. The tenant withdrew the portions of his application seeking a cancellation of the 10 Day Notice, disputing an additional rent increase and an Order that the landlord comply with the Act, regulation or tenancy agreement.

As both parties were in attendance, I confirmed that there were no issues with service of the tenant's application for dispute resolution, the landlord's application for dispute resolution or the respective evidentiary materials. The parties confirmed receipt of each other's materials. In accordance with sections 88 and 89 of the *Act*, I find that the parties were duly served with copies of the respective applications and evidence.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for damages as claimed?

Is the landlord entitled to retain the security deposit and pet damage deposit? If not is the tenant entitled to a monetary award equivalent to double the value of the security deposit and pet damage deposit as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*?

Is either party entitled to recover the filing fee for this application from the other?

Background and Evidence

The parties agreed on the following facts. This fixed term tenancy began in May, 2016 and ended on May 1, 2017. The rental unit is a detached home and the tenant had full use of the whole building. The basement of the rental unit required construction and it was primarily used as storage space. The rent was \$1,900.00 payable on the first of each month. The parties agreed to a late fee of 10% if rent was received after the seventh day of the month.

The landlord said that a security deposit of \$850.00 and a pet damage deposit of \$600.00, for a total of \$1,450.00 were paid at the start of the tenancy and are still held by the landlord. The tenant recalled that he paid an initial security deposit fee of \$100.00 and a subsequent amount of \$1,450.00 for a total of \$1,550.00. The tenant submitted into written evidence a hand written note prepared by the tenant's wife indicating that \$1,450.00 was paid in full on April 19, 2016.

The parties agreed that no condition inspection report was prepared at either the start or the end of the tenancy. The parties said that they performed a visual inspection of the

rental unit at both the start and end of the tenancy but no written record of the condition of the rental unit was made.

The parties confirmed that the tenant failed to pay the rent for April, 2017. The landlord said the tenancy is in arrears by \$2,090.00 as at May 24, 2017 the date of the hearing. The tenant confirmed that he has not paid the monthly rent for April, 2017.

The landlord testified that the rental unit was in a state of disrepair and there would be costs related to cleaning and repair. The landlord said that the basement of the rental unit had several areas of the wall where the drywall was removed, the basement bathroom was unusable, and there was garbage strewn about the premises. The landlord noted that the carpet in the living space appeared to be frayed and worn. The tenant disagreed with the landlord's assessment of the state of the rental unit. The tenant agreed that the carpet was worn but said that was due to the regular wear and tear. He disagreed that the basement of the rental unit was any markedly worse than when the tenancy began.

Analysis

The parties provided conflicting testimony in regards to the security deposit and pet damage deposit initially paid. The tenant said that he paid \$100.00 initially then \$1,450.00 subsequently for a total of \$1,550.00. The tenant said the second payment was noted in writing. The landlord said that the total amount received from the tenant for security deposit and pet damage deposit is \$1,450.00 as noted in the tenant's hand written note and in accordance with the written tenancy agreement.

Based on the totality of the evidence I find the landlord's evidence to be more credible regarding the security deposit and pet damage deposit paid. The tenant said that he paid an initial amount of \$100.00 but was unable to provide written evidence in support of the payment. The hand written note submitted into evidence states that the amount of \$1,450.00 was paid to the landlord. The amount corresponds to the total amount required for security deposit and pet damage deposit under the tenancy agreement. If an extra \$100.00 was paid it would be reasonable to expect that there would be some note made, whether a receipt issued by the landlord or a hand written note prepared by the tenant as one was for the \$1,450.00 payment. I find it more likely that a total of \$1,450.00 was paid for the security deposit and pet damage deposit for this tenancy.

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit and pet damage deposit in full or file for dispute resolution for authorization to retain the deposits 15 days after the later of the end of a tenancy and or upon receipt of 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 and pet damage 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 and pet damage deposit to offset damages or losses arising out of the tenancy as per section 38(4)(a).

I accept the parties' evidence that the tenant provided the landlord with a forwarding address in writing sometime in April, 2016. I accept the evidence of the parties that the landlord made an application claiming against the security deposit and pet damage deposit during the 15 day time frame granted under section 38(1)(c) of the *Act*.

I find that the landlord has not fulfilled the reporting requirements of section 24 of the *Act*. I accept the evidence of the parties that a condition inspection report was not prepared at the start of the tenancy.

Section 24 of the *Act* outlines the consequences if reporting requirements are not met. The section reads in part:

24 (2) The right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord
...
(c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

Accordingly, I find that the landlord has extinguished any right to claim against the security deposit and pet damage deposit by failing to prepare a condition inspection report at the start of the tenancy.

I accept the tenant's evidence that they have not waived the right to obtain a payment pursuant to section 38 of the *Act* as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is entitled to a \$2,900.00 Monetary Order, double the value of the security deposit and pet damage deposit paid for this tenancy. No interest is payable over this period.

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the *Act*, regulations or a tenancy agreement. 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 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. Pursuant to section 7(2) of the Act the claimant must take reasonable steps to attempt to minimize the damage or loss.

Based on the evidence of the parties I find that the tenant was obligated to pay the monthly rent in the amount of \$1,900.00. I accept the testimony of the parties that the tenant failed to pay the rent for April, 2017. The landlord testified that the tenancy agreement provides that a late fee of 10% is payable on rent payments made after the seventh of the month. However, a 10% late charge would be \$190.00, which is higher than allowed under the Residential Tenancy Regulation 7(d). Consequently, I reduce the late fee to \$25.00 the amount allowed under 7(d) of the regulation. I issue a monetary award in the landlord's favour in the amount of \$1,925.00 for outstanding rent and late charges for this tenancy.

While I accept the evidence of the parties that there was some damage on the rental property, I do not find that there is sufficient evidence to justify the landlord's full claim for damage and loss. In the absence of a condition inspection report completed at the start of the tenancy in accordance with the Act, there is little evidence of the original condition of the rental unit.

I accept the evidence of the parties that the carpet in the living area was frayed and torn at the end of the tenancy. However, the landlord has provided little evidence in support of their loss. The landlord did not provide evidence regarding the total area of damage, the scope of the damage, nor did he submit any quotation for cleaning or repairs in support of their loss. Under the circumstances I issue a nominal monetary award in the amount of \$175.00 for damage to the rental unit.

I find that there is insufficient evidence in support of the landlord's claim for damages to the basement of the rental unit. Based on the conflicting testimonies of the parties I find that the landlord has not shown, on a balance of probabilities, that the damage to the basement was attributable to the tenant and that the landlord suffered any damage or loss. I accept the evidence of the parties that the basement was unfinished and used as a storage space. I find there is insufficient evidence that the basement was markedly damaged so that repairs are necessary to put it back in its original condition. I dismiss this portion of the landlord's claim.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain \$2,100.00 of the tenant's security deposit and pet damage deposit in satisfaction of this monetary award.

As the tenant was primarily successful in his application, he is entitled to recovery of the \$100.00 filing fee. As the landlord was only partially successful in their application, I find they are not entitled to recovery of their filing fee.

Conclusion

I issue a Monetary Order in the tenant's favour in the amount of \$900.00 against the landlord in the following terms.

Item	Amount
Double Security Deposit (2 x \$850.00)	\$1,700.00
Double Pet Damage Deposit (2 x \$600.00)	\$1,200.00
Filing Fee	\$100.00
Less Rent and Late Fee (April, 2017)	-\$1,925.00
Less Damages to Landlord for cleaning and carpet	-\$175.00
TOTAL	\$900.00

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 remainder of both the tenant and the landlord's respective applications are withdrawn.

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: May 24, 2017

Residential Tenancy Branch