



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MND, MNR, MNSD, MNDC, FF, CNR, ERP, RP, RR

Introduction

This hearing dealt with applications by both the landlord and tenant pursuant to 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 damages, loss and unpaid rent pursuant to section 67;
- authorization to retain the security deposit and pet damage deposit pursuant to section 38; and
- recovery of the filing fee from the tenant pursuant to section 72 of the *Act*.

The tenant sought:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Unpaid Rent pursuant to section 47;
- an order for repairs and emergency repairs pursuant to section 33; and
- an order that the rent be reduced for services or facilities agreed to but not provided pursuant to section 66.

Both parties attended the hearing and were given a full opportunity to be heard, present sworn testimony and make submissions. Both parties were assisted by their own interpreters.

As both parties were in attendance I confirmed service of documents. The parties each confirmed they were in receipt of the other's respective applications for dispute resolution and evidentiary materials. I find that the parties were each served in accordance with sections 88 and 89 of the *Act*.

At the outset of the hearing the parties testified that the tenant had moved out of the rental unit on September 13, 2017. The tenant withdrew their application in its entirety. The landlord withdrew the portion of their application seeking an order of possession.

The tenant said that they have incurred losses and wished to add claims for monetary damages and loss. The tenant indicated that the details of her loss are detailed in the contents of her written evidence package. I decline to amend the tenant's Application to include a monetary claim as the tenant has not served the landlord in accordance with Rule 4.6 and adding a new head of claim without proper notice would be prejudicial to the landlord. The tenant is at liberty to file a separate application for dispute resolution for a new claim for a monetary award.

Issue(s) to be Decided

Is the landlord entitled to a monetary award as claimed?

Is the landlord entitled to retain all or a portion of the security deposit for this tenancy?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

The parties agreed on the following facts. This tenancy began in May, 2017. The monthly rent was \$1,250.00 payable on the first of each month. The tenant paid \$1,250.00 towards a security deposit at the start of the tenancy. No condition inspection report was prepared at either the start or the end of the tenancy.

During the summer of 2017, while the tenant was out of the country, the rental unit experienced plumbing issues and flooding. The tenant reported the issue to the landlord on August 27, 2017 when she returned to the country.

The tenant did not pay rent for the month of September. The landlord issued a 10-Day Notice for Unpaid Rent on September 2, 2017. On September 13, 2017 the tenant moved out of the rental unit. The tenant did not give the landlord written authorization that the landlord may retain any portion of the security deposit. The tenant gave the landlord her forwarding address in writing after moving out of the rental unit. The tenant said she gave the forwarding address on October 1, 2017. The landlord disputes that date and said the forwarding address was received on November 1, 2017.

The landlord seeks a monetary award in the amount of \$5,005.00 for the following items:

Item	Amount
Plumbing Fee	\$150.00
Carpet Cleaning Fee	\$105.00
Rent for September-November, 2017	\$3,750.00
Insurance Deductible	\$1,000.00
TOTAL	\$5,005.00

Analysis

Section 19 of the *Act*, requires that a security deposit must not exceed one-half of one month's rent. In the case at hand, the \$1,250.00 payment exceeds the one-half limit. Section 19(2) of the *Act* allows the tenant to deduct the overpayment from rent or otherwise recover the overpayment. Therefore, I find that the \$1,250.00 payment was comprised of a \$625.00 security deposit and \$625.00 towards the monthly rent for this tenancy.

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the security deposit as per section 38(4)(a).

Furthermore, section 24 of the *Act* sets out that if the landlord does not prepare a condition inspection report at the start of the tenancy or fails to provide the tenant with 2 opportunities to participate in an inspection, their right to claim against the security deposit is extinguished.

While the parties indicated they inspected the rental unit at the start of the tenancy, I find based on the evidence, that this was a visual inspection and no condition inspection report was prepared in accordance with the *Act*. Consequently, pursuant to section 36(2) of the *Act* I find that the landlords have extinguished their right to claim against the security deposit.

Based on the undisputed evidence before me, I find that the landlord has failed to return the tenant's security deposit in full. I accept the tenant's evidence that they have not waived their 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 \$1,250.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

The parties testified that the tenant failed to pay rent for the month of September, 2017.

A tenant must pay rent when it is due, whether or not the landlord complies with the *Act*, regulations or tenancy agreement pursuant to section 26(1) of the *Act*. I accept the undisputed evidence of the parties that the tenant failed to pay rent in the amount of \$1,250.00 for September 1, 2017. However, the tenant overpaid rent for the first month of the tenancy when they made payment of \$1,250.00 towards a security deposit. As detailed above I find that this payment consists of a security deposit as well as \$625.00 towards monthly rent. Therefore, I find that the actual amount of unpaid rent for the month of September was \$625.00. I therefore issue a monetary award in the landlord's favour in the amount of \$625.00 for unpaid rent for September, 2017.

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. The claimant also has a duty to take reasonable steps to mitigate their loss.

I accept the evidence that the tenant moved out of the rental unit on September 13, 2017 in accordance with the 10 Day Notice issued by the landlord on September 2, 2017. I find, therefore that as the tenancy ended the landlord is not entitled to rent for the months of October or November, 2017.

I find that the landlord has not shown on a balance of probabilities that there has been a violation of the *Act*, regulations or tenancy agreement giving rise to a claim in damages. While both parties testified that there was flooding in the rental unit, there is little evidence as to its cause. The evidence is that the issue was reported by the tenant when they first became aware of it after returning from travels overseas. The undisputed evidence is that both parties were aware that the tenant was out of the country for a period of time and the rental unit was unoccupied. I find that there is insufficient evidence to conclude that the damage to the rental unit was caused by the tenant's action or negligence. Consequently, I dismiss this portion of the landlord's claim.

As the landlord's application was partially successful I allow the landlord to recover a portion of the filing fee for this application in the amount of \$50.00 from the tenant.

Conclusion

I issue a Monetary Order in the tenant's favour in the amount of \$575.00 against the landlord in the following terms:

Item	Amount
Double Security Deposit (2 x \$625.00)	\$1,250.00
Rent Overpayment (\$625.00)	\$625.00
Less Unpaid Rent for September 2017	-\$1,250.00
Less Filing Fee to Landlord	-\$50.00
TOTAL	\$575.00

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.

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: November 30, 2017

Residential Tenancy Branch