



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes CNC, MNDC, MNSD, MND, FF

Introduction

This hearing dealt with cross applications. The tenants applied to cancel a Notice to End Tenancy for Cause, for a Monetary Order for return of double the security deposit and damage or loss under the Act, regulations or tenancy agreement in the amount of \$4,731.17. The landlord applied for a Monetary Order for damage to the rental unit, damage or loss under the Act, regulations or tenancy agreement and retention of the security deposit. Both parties requested recovery of the filing fee. Both parties appeared at the hearing and were provided an opportunity to be heard and to respond to the other parties' submissions.

At the commencement of the hearing the tenants testified that they had not received the Landlord's Application for Dispute Resolution. The landlord testified that she had served the landlord's application on April 29, 2009 by registered mail; however, the landlord could not produce a tracking number or receipt despite ample opportunity to provide such. I was not satisfied that the landlord served the tenants with the landlord's application and I dismissed the landlord's application with leave to reapply.

The hearing proceeded with the tenants' application. As I heard the tenants have vacated the rental unit and a landlord's Notice to End Tenancy was not presented as evidence, the tenant's request to cancel a Notice to End Tenancy was dismissed and I proceeded to hear the tenant's claim for monetary compensation.



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Issues(s) to be Decided

1. Was service upon both landlords sufficient?
2. Have the tenants established an entitlement to return of double the security deposit?
3. Have the tenants established an entitlement to compensation for damage or loss under the Act, regulations or tenancy agreement?
4. Award of the filing fee.

Background and Evidence

The landlords testified that they are tenants who rent the residential property they entered into a tenancy agreement as landlords to rent the lower unit to the tenants. The male landlord testified that he had not received the tenants' hearing package as he ceased living at the residential property in January 2009 and was no longer a landlord. The tenants had served the landlords by registered mail addressed to the residential property in February 2009.

Based on undisputed testimony of the parties, I make the following findings. The month-to-month tenancy commenced October 1, 2008. The tenants were required to pay rent of \$1,300.00 on the 1st day of every month. The tenants had paid a \$650.00 security deposit on September 19 or 20, 2008. On November 30, 2008 the tenants gave notice to end the tenancy effective December 31, 2008. The tenants did not actually vacate the rental unit until January 4, 2009 due to a snow storm. The parties conducted an informal move-in inspection; however, an inspection report was not prepared by the landlord. An inspection was conducted on January 4, 2009; however, an inspection report was not prepared. The tenants provided their forwarding address to the landlords, in writing, on January 4, 2009. The landlords did not return the security deposit and requested to retain it by making an application on April 28, 2009.



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The tenants are requesting return the security deposit as the landlords failed to return their security deposit or apply to retain it by the time the tenant's filed their application on February 17, 2009. The landlords submitted that the tenants damaged the rental unit and the landlords were unfamiliar with the landlords' obligations under the *Residential Tenancy Act*. As the landlords' application for compensation for damage to the rental unit was dismissed, I did not accept detailed testimony concerning the alleged damage to the rental unit.

In making this application, the tenants are also seeking to recover their moving costs of \$210.91 and the \$3,000.00 in increased in rent they are paying over 10 months. The tenants submitted that the landlords' actions caused the tenants to end their tenancy. The issues identified by the tenants in their notice to end tenancy are: cigarette smoke entering the rental unit; loud music coming from the landlords' unit, and hostile overtones from the male landlord.

The tenants testified that the rental unit was advertised as a non-smoking unit yet smoke entered their unit through the central air vents and the common laundry room. The landlord testified that she did not advertise the rental unit as non-smoking as the landlords are smokers. The landlord acknowledged that the tenants had complained of cigarette smoke; however, the landlords offered to close the central air vents as the rental unit was heated by baseboard heaters. The landlords claimed that the tenants had sealed a vent in their unit with boxboard and told the landlords not to worry about sealing off the other vents. The landlord also testified that one of the tenants smoked marijuana.

The tenants testified that loud music and arguments could be heard coming from the landlords' unit and that the tenants had complained to the landlords about the noise level to no avail. The landlords testified that the residential property is a very old house

that may not be very well insulated. The landlord testified that they had three teenagers living with them and when the tenants viewed the rental unit the landlords told the tenants that they were not a quiet family. The landlord stated that the tenants had only mentioned one occasion of excessive noise to them and the tenants did not seem too concerned about it.

The tenants described how the male landlord was gruff and took a threatening tone with them. The tenants testified that they believed the female landlord was their landlord as she was the only landlord to sign the tenancy agreement in their presence; however, the tenants named both the female and male landlord in making their application. The tenants described how they would try to approach the female landlord; however, the male landlord would tell the tenants to deal with him. The female landlord testified that the male landlord was identified as a landlord on the tenancy agreement but that the male landlord was working when the tenancy agreement was signed. The female landlord also acknowledged that she is of a more passive nature and the male landlord is more dominant.

I also heard testimony concerning an assault that took place between one of the tenants and an adult occupant living in the landlords' rental unit. The tenants submitted that they did not believe the assault was at the encouragement or direction of the landlords. During the assault, the tenant's cell phone was damaged and the tenant was seeking compensation of \$95.00 for the cell phone.

In seeking that the landlords compensate them for increased rental costs, the tenants testified that they had to find a rental unit very quickly and because they have two dogs the tenants were forced to take a more expensive rental unit with a 10 month fixed term.



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Other compensation claimed by the tenants included registered mailing costs, costs to provide evidence to the Residential Tenancy Branch and the cost of a postal box rental that the tenant's claimed was necessary out of fear of retaliation by the landlords. The total of these amounts is \$125.26.

The tenants submitted that the male landlord was frequently drunk and aggressive. The landlords submitted that one of the tenants was frequently drunk and brought confrontation upon himself.

The tenants raised other issues with respect to having to keep their dogs on a leash during their last week of tenancy and the landlord failing to shovel snow during the snow storms that occurred near the end of their tenancy. Both of these issues occurred after the tenants had decided to give notice and I did not find it relevant to the tenants' claims for moving costs, their security deposit or any other amounts claimed by the tenants.

Analysis

A landlord is defined by the Act and includes any person that is entitled to possession of a rental unit and exercises any of the rights of a landlord under a tenancy agreement in relation to the rental unit. The definition of landlord also includes a former landlord when the context requires this. I find both the named landlords to meet the definition of a landlord.

As I heard that the male landlord was served at the male landlord's former address and did not receive the tenant's hearing package, I do not find that the male landlord was served with the tenants' application in accordance with section 89(1) of the Act. Rather, it is more likely the male landlord appeared at the request of the female landlord and I consider the male landlord's appearance to be of a witness. Therefore, any monetary award for the tenants will only be enforceable against the female landlord as she is the



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only landlord that I am satisfied was sufficiently served in accordance with section 89(1) of the Act.

Security deposit

As the parties were informed during the hearing, the landlord's claims for damages were not issues for me to decide as the landlord's application was dismissed with leave to reapply. The purpose of this hearing was to hear the tenants' application for dispute resolution and determine whether the landlord complied with the Act with respect to the security deposit and other matters.

Section 38 of the Act provides for the return of security deposits. The Act permits a landlord to retain an amount from a tenant's security deposit where the tenant provides written consent and the landlord has complied with the move-in and move-out inspection report requirements. In this case the landlord did not comply with the move-in and move-out inspection report requirements and did not obtain the tenants' written consent to make deductions from the security deposit. Therefore, the landlord did not have the legal right to retain the tenants' security deposit.

Section 38(1) requires the landlord to either return the security deposit to the tenant or make an application for dispute resolution claiming against the security deposit within 15 days from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing. I find that the tenancy ended December 31, 2008, yet the tenants retained possession until January 4, 2009 and the tenants provided a forwarding address in writing on January 4, 2009 meaning the landlord had until January 19, 2009 to either repay the security deposit to the tenants or make an application for dispute resolution.



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Since the landlord did not comply with section 38(1) of the Act and the landlord must now repay the tenants double the security deposit pursuant to section 38(6) of the Act. The tenants are also entitled to interest on the original amount of the deposit.

Other monetary claims

Where a party makes a monetary claim against another party, the burden of proof is upon the party making the claim. A party making a monetary claim is expected to establish the following criteria have been met:

- i. Proof that the damage or loss exists,
- ii. Proof that this damage or loss happened solely because of a violation of the Act, regulations or tenancy agreement by the respondent,
- iii. Verification of the actual monetary amounts to compensate for the claimed loss or to rectify the damage, and
- iv. The applicant did whatever was reasonable to minimize their damage or loss.

The burden of proof is based on the balance of probabilities. When one party provides evidence of the facts in one way and the other party provides an equally probable explanation of the facts, without other evidence to support the claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails.

In order for the tenants to succeed in establishing an entitlement to recover their moving costs from the landlords, the tenants would have to show that the landlord seriously

breached the Act, regulations or a material term of the tenancy agreement and that other remedies were not appropriate or available to the tenants.

In considering the tenants' claim, the tenants allege cigarette smoke penetrated their unit. I have insufficient evidence that there was an agreement between the parties that there would be no smoking anywhere in the residential property and I do not find a violation of a material term of the tenancy agreement. Cigarette smoking is a legal activity; however, if it seriously interferes with or unreasonably disturbs the tenants' enjoyment of the rental unit then a breach of the Act could be found. I heard testimony that the landlord's had offered to close off the air vent ducts but the tenants did not request this of the landlord. Therefore, I find the tenants did not do whatever was reasonable to minimize their loss of enjoyment of the rental unit with respect to the cigarette smoke and I do not find this reason to justify the landlord being obligated to pay the tenants' moving costs.

The parties were in dispute as to the frequency of excessive noise from the landlord's unit. The tenants testified that they had made regular complaints with respect to noise yet the landlord acknowledged only one verbal comment about a party the teenagers had while the landlords were away. I do not find the disputed verbal testimony sufficiently established that the landlords were causing an excessive amount of noise that would have significantly interfered with or unreasonably disturbed the tenants and that the tenants had brought the issue to the attention of the landlords before giving notice to end their tenancy. It is important to note that to find a breach of the tenants' right to quiet enjoyment the tenants must show more than a temporary inconvenience or discomfort. Therefore, I find that the tenants failed to show that the tenants had no alternative but to move as a result of the landlords breaching the tenants' right to quiet enjoyment of the rental unit.



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From the testimony I heard during the hearing, there is no doubt that there was animosity between the tenants and the male landlord. However, I also heard testimony that the hostility was brought on by both parties. Therefore, I do not find sufficient evidence that the tenants gave their notice to move due to the landlord's hostile overtones.

In light of the above findings, I do not award moving costs or increased rent costs to the tenants as I was not satisfied that the landlords actions constituted a significant breach of the Act or regulations or a material breach of the tenancy agreement. Even if the landlord had breached the Act, regulations or tenancy agreement, I was not satisfied that the only remedy available to the tenants was moving. Rather, I find the tenants' decision to give notice and move was a personal choice of the tenants and they must bear the costs of that choice.

I do not find sufficient evidence to conclude that the tenants are at risk of retaliation by the landlords and I do not award the tenants the cost of their postal box.

Registered mail costs and costs to prepare for a dispute resolution hearing and not recoverable costs under the Act and I deny the tenants request to recover these costs from the landlord.

I find that the cell phone was damaged during an assault that took place between another occupant of the residential property and this was not a result of a violation of the Act by the landlord. Therefore, this cost is not recoverable from the landlord.

In summary, the tenants have established an entitlement to return of double the security deposit and accrued interest. The tenants are awarded the filing fee paid for making this application. I calculate the tenant's total award as follows:



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Double security deposit (\$650.00 x 2)	\$ 1,300.00
Accrued interest	2.74
Filing fee	<u>50.00</u>
Monetary Order for tenants	<u><u>\$ 1,352.74</u></u>

The tenants must serve the Monetary Order upon the landlord and may file it in Provincial Court (Small Claims) to enforce as an Order of that court.

Conclusion

The tenants' application was partially allowed and the tenants were provided with a Monetary Order in the amount of \$1,352.74.

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 07, 2009.

Dispute Resolution Officer