



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

Decision

Dispute Codes:

MNSD, MNDC, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for the return of double the \$312.50 security deposit under the Act and damages for the landlord's actions in changing the locks. The hearing was also to deal with a cross application by the landlord for a monetary order for money owed or compensation for damage or loss under the Act and to keep the deposit in partial satisfaction of the claim.

Both the landlord and tenant were present and gave testimony in turn.

Issues to be Decided for the Tenant's Application

The tenant was seeking to receive a monetary order for the return of the security deposit retained by the landlord.

The issues to be determined based on the testimony and the evidence are:

- Whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act.
- Whether the tenant is entitled to a refund of two days rent as damages due to the landlord prematurely changing the locks.

Issues to be Decided for the Landlord's Application

The landlord was seeking to receive a monetary order for loss of rent owed due to the tenant's failure to give proper written notice to vacate.

The issue to be determined based on the testimony and the evidence is whether the landlord is entitled to monetary compensation under section 67 of the *Act*.

The tenant had the burden of proof to establish that a written forwarding address was provided and that compensation for damages for the change of locks was justified, while the landlord had the burden of proof to show that compensation for damages and losses was justified due to the tenant's noncompliance with the Act.



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Background and Evidence

The tenancy began on April 1, 2010 with rent set at \$625.00 per month. A security deposit of \$312.50 was paid. The tenant testified that written notice to vacate was given to the landlord on June 28, 2010 and submitted a copy of the notice into evidence. The tenant vacated on August 31, 2010. However, the landlord had changed the lock on August 30, 2010 and the tenant had to demand entry when she returned on August 31, 2010. The tenant was requesting reimbursement of the equivalent of two days rent.

According to the tenant, the landlord was given a written forwarding address on September 1, 2010. A copy of the notification was submitted into evidence. The tenant testified that the landlord did not return the deposit and the tenant is therefore seeking a monetary order for double the security deposit pursuant to section 38 of the Act.

The landlord acknowledged that the locks were changed on August 30, 2010 based on a perception that the tenant had vacated and a fear that the unit would be vandalized. The landlord testified that on August 31, 2010, the tenant was granted entry to the unit.

The landlord confirmed that the tenant provided a written forwarding address on September 1, 2010, and the deposit was not returned due to loss of rent, carpet-cleaning costs and a late payment charge owed to the landlord. The landlord testified that the evidence submitted by the tenant, consisting of a copy of a hand-written notice to move dated July 28, 2010, was never given to the landlord as claimed by the tenant and in fact no written notice to move had ever been issued. The landlord's position was that, because the tenant violated the Act by failing to provide a month written notice to move, the tenant owed \$625.00 for lost rent for September 2010.

The landlord was also claiming a \$25.00 late fee and \$85.00 for carpet cleaning based on provisions in the tenancy agreement for a total of \$735.00 owed to the landlord. The landlord was requesting to retain the security deposit of \$312.50 in partial satisfaction of this debt and to be granted a monetary order for the remainder of \$422.50.

Claim for Return of Security Deposit

In regard to the return of the security deposit and pet damage deposit, I find that section 38 of the Act provides that within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit to the tenant or make an application for dispute resolution claiming against the security deposit.

The Act states that the landlord can only retain a deposit if the tenant agrees in writing the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the director orders that the landlord may retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord previously make application for an order to keep the deposits.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I find that the tenant's security deposit was \$312.50 and that the landlord failed to follow the Act in retaining the funds being held in trust for the tenant. I find that the tenant is therefore entitled to compensation of double the deposit, amounting to \$625.00.

In regards to an Applicant's right to claim damages from another party, Section 7 of the Act states that if a landlord or tenant fails to comply with the Act, the regulations or tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and order payment under the circumstances.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

With respect to the tenant's claim for compensation due to the landlord's violation of the Act by changing the locks, I find that, while the claim did meet elements 1 and 2 of the test for damages, it did not satisfy element 3 because of insufficient proof in regard to the claimed monetary loss suffered by the tenant. Accordingly I find that the tenant's claim for damages of \$40.32 for the equivalent of two days rent must be dismissed.

I find that compensation for the cost of preparing for the hearing, other than the filing, are not recoverable under the Act and therefore the tenant's \$20.24 claim for compensation for photos and supplies must be dismissed.

With respect to the landlord's monetary claims, the burden of proof is on the landlord, to prove the existence of the loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that is established, the claimant must verify the amount of the loss or damage. Finally it must be proven that the claimant took reasonable measures to mitigate the damage or loss.

In regard to the landlord's claims for the cost of carpet cleaning and the late fee, I find that these charges were presumably based on terms contained within the tenancy agreement. Section 6 of the Act states that rights, obligations and prohibitions established under the Act are enforceable between a landlord and tenant under a tenancy agreement. (my emphasis).

However, no copy of the tenancy agreement was in evidence to verify that terms relating to the above were included. Moreover, I find that late fees for the month of September 2010 would not apply as the tenancy already ended on August 31, 2010. Accordingly I find that the portion of the landlord's application claiming compensation for the late fee and carpet-cleaning must be dismissed.

The landlord was adamant that the tenant had never served any written notice to vacate, despite the copy of a handwritten notice signed by the tenant in evidence, which the tenant was alleging had been personally served on the landlord on June 28, 2010. This is a difficult discrepancy to resolve as each party has accused the other of providing fraudulent testimony and evidence.

Based on the evidence and testimony, I find that on a balance of probabilities I can accept the landlord's position that the tenant was responsible for ending the tenancy in a manner that did not comply with the Act. In applying the test for damages to the landlord's claim for loss of rent for September I find that elements 1 and 2 of the test for damages were satisfied.



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However I find that the evidentiary proof offered by the landlord to satisfy element 3 and 4 of the test was inadequate. I find that the landlord's verbal testimony that the unit was left vacant for the month of September 2010 due to the tenant's failure to give proper notice, and the testimony that it was not actually re-rented until October, to be believable. That being said, other than the testimony, no evidence was received in support of this claim. I also find that, despite the landlord's verbal testimony that reasonable efforts were immediately initiated to re-rent by placing advertisements in the local newspaper, supportive documentary evidence was not submitted by the landlord to prove this was done. Therefore I find that proof to show the landlord met elements 3 and 4 of the test for damages was not sufficient to support the landlord's claim of \$625.00 loss of rent for September. Therefore this claim must be dismissed as a result.

Given the above, I find that the tenant is entitled to a monetary order in the amount of \$625.00 representing double the security deposit.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to the return of double the tenant's security deposit and I hereby grant a monetary order in favour of the tenant in the amount of \$625.00. This order must be served on the Respondent and may be filed in the Supreme Court, (Small Claims), and enforced as an order of that Court. The remainder of the tenant's application is dismissed.

Based on the testimony and evidence the landlord's application is hereby dismissed in its entirety without leave to reapply.

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: January 2011.

Residential Tenancy Branch