Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNSD MNDC FF

Introduction

This hearing was convened in response to cross applications - an application by the landlord **and** an application by the tenant.

The tenant filed an application on September 26, 2011pursuant to the *Residential Tenancy Act* (the Act) for Orders as follows:

1. Return of the security deposit ($3200) pursuant to the doubling provisions of - Section 38
2. Recover filing fee ($50) – section 72

The landlord filed an application on October 06, 2011 pursuant to the *Residential Tenancy Act* (the Act) for Orders as follows:

1. A Monetary Order for damage or loss under the Act, Regulation or Tenancy Agreement ($6400) - Section 67
2. Recover filing fee ($100) – section 72

Both parties attended the hearing and were given full opportunity to present all relevant evidence and provide relevant sworn testimony in respect to their claims and to make relevant prior submission to the hearing and fully participate in the conference call hearing. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

Preliminary matters

In their application the landlord named the tenant's employer as a party to these proceedings. The employer was not a party within the tenancy agreement with the landlord. The employer provided a letter identifying that they should not be a party in the style of cause. I find that only the legal entities to a dispute must be named in the style of cause. I find the style of cause should be altered to only include the tenant and the

landlord, effectively removing the name of the tenant's employer. I so Order the style of cause amended.

The hearing proceeded on the merits of the cross - applications.

Issue(s) to be Decided

Is the tenant entitled to the monetary amount claimed?
Is the landlord entitled to the monetary amounts claimed?

Background and Evidence

Both parties provided an abundance of evidence, including the tenancy agreement, correspondence, a Mutual Agreement to End Tenancy form, and correspondence from the tenant's employer. The undisputed facts before me, under affirmed testimony by both parties, are as follows.

The tenancy ended August 31, 2011 pursuant to a Mutual Agreement to End a Tenancy (the Agreement) signed on august 04, 2011. The parties confirmed the Agreement was between the legal landlord and the legal tenant. The landlord collected a security deposit of $3200 at the outset of the tenancy. Neither party testified to a conflict respecting a move in inspection. There was a move out inspection conducted at the end of the tenancy on August 31, 2011. The report associated with the move out inspection is lacking in many details, but it is clear that the parties did not agree within the inspection document on how the security deposit would be administered at the end of the tenancy. The report clearly states the tenant's forwarding address. The landlord testified that they sent the tenant their full security deposit in the amount of $3200 on September 23, 2011. There is no dispute that the tenant received the deposit by September 29, 2011.

The tenant claims $3200 pursuant to the doubling provision of section 38(6) as the landlord did not return the security deposit within the legislated period of time as expressed in Section 38 of the Act.

The landlord claims compensation equivalent of two (2) month's rent pursuant to a clause in the tenancy agreement (Diplomacy Clause) which states the tenant agrees to pay 2 month's rent in the event of an early termination of lease in accordance with the Diplomacy Clause. Such clause states that the tenant is entitled to terminate the lease in the event the tenant is transferred to a different location before the end of the lease

term, or the diplomatic relationship between Canada and Germany ceases before the end of the lease term – under each of such events the parties agree the tenant was entitled to terminate the lease. The landlord claims that the tenancy ended early because of a, “diplomatic situation” – therefore, the clause in the tenancy agreement should be upheld in favour of the landlord.

Analysis

On preponderance of the evidence and on the basis of the sworn testimony, I have reached a decision.

The tenant’s claim

Section 38(1) of the Act provides as follows **(emphasis for ease)**

> 38(1) Except as provided in subsection (3) or (4) (a), **within 15 days after the later of**
>
> 38(1)(a) the date the tenancy ends, and
>
> 38(1)(b) the date the landlord receives the tenant's forwarding address in writing,
>
> the landlord **must** do one of the following:
>
> 38(1)(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> 38(1)(d) file an application for dispute resolution to make a claim against the security deposit or pet damage deposit.

I find that the landlord failed to repay the security deposit, or to make an application for dispute resolution within 15 days of receiving the tenant’s forwarding address in writing and is therefore liable under section 38(6) which provides:

> 38(6) If a landlord does not comply with subsection (1), the landlord
>
> 38(6)(a) may not make a claim against the security deposit or any pet damage deposit, and
>
> 38(6)(b) **must pay the tenant double the amount of the security deposit,** pet damage deposit, or both, as applicable.

The landlord returned the security deposit of $3200 no earlier than September 23, 2011, and was obligated under section 38 to return this amount no later than September 15, 2011. The amount which is doubled by the provisions of Section 38(6) is the $3200 original amount of the deposit. There is no interest applicable. As a result I find the tenant has established an entitlement claim for **$3200** and is further entitled to recovery of the **$50** filing fee for a total entitlement of **$3250.**

The landlord's claim

I find the Diplomacy Clause in this tenancy agreement was for the mutual benefit of the parties. The clause provided the tenant with a means to end the tenancy early in the event of two specific conditions, and for the landlord to receive compensation if the tenant terminated the lease early because of either two conditions. I find this hearing was not provided with evidence that either of the specific conditions unfolded. It is not enough to state that the tenancy ended early due to a "diplomatic situation". I find the evidence is that the tenant did not exercise the Diplomacy Clause to end the tenancy early. Rather, I find that both parties determined to end the tenancy early by mutual agreement signed on August 04, 2011; and, that the Mutual Agreement is what legally terminated the tenancy agreement. As a result**, I dismiss** the landlord's application, without leave to reapply.

Conclusion

The landlord's application is **dismissed** without leave to reapply.

The tenant's application **is allowed. I grant** the tenant an Order under section 67 for the sum of **$3250**. If necessary, this Order may be filed in the Small Claims 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: December 14, 2011

Residential Tenancy Branch