Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD FF

Introduction

This hearing was convened as a "New Hearing" to hear matters pertaining to the Tenants' application for Dispute Resolution. The New Hearing was granted by a Dispute Resolution Officer (DRO) in her May 09, 2012 decision, in response to the Landlords' application for Review Consideration.

That DRO suspended the Decision and Order initially issued on April 03, 2012 and amended on April 23, 2012, pending the outcome of this New Hearing.

The Tenants made application for Dispute Resolution to seek a Monetary Order for the return of double their security deposit plus recovery of the filing fee.

The parties appeared at the teleconference hearing and acknowledged receipt of the Notice for this Dispute Resolution Hearing. The Landlord affirmed that she served the Notice of Hearing to the Tenants via registered mail in one envelope, within three days of receiving the Review Decision. During the hearing each party was given the opportunity to provide their evidence orally and respond to each other's testimony. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Are the April 4, 2012 and Amended April 23, 2012 Decisions and Orders reinstated or set aside?
2. If the above mentioned Decisions and Orders are set aside are the Tenants entitled to a new Monetary Order pursuant to section 67 of the *Residential Tenancy Act*?

Background and Evidence

The female Landlord confirmed receipt of the Tenants' evidence submissions. One was received in April 2012 and a second submission was received sometime around May 24, 2012. She also confirmed that they did not send evidence to the Tenants in response to their original application or in support of this new hearing that was granted based on the Landlords' review consideration application.

The parties agreed they entered into a fixed term tenancy agreement that began on March 1, 2011 and ended February 28, 2012. Rent was payable on the first of each month in the amount of $1,246.00 and on January 19, 2011 the Tenants paid $622.00 as a security deposit.

The female Tenant affirmed that no formal walk through was conducted however on February 28, 2011, prior to them moving into the unit the Landlords presented her with a completed Move-in condition inspection form which she read over, agreed with, and signed. They provided the Landlords with approximately two months notice that they would be ending their tenancy at the end of their fixed term and they provided the Landlords with their forwarding address at the time of the move out and it was written on the condition inspection form.

The Tenant stated that on approximately March 5, 2012 they received a copy of a printed out e-mail and a cheque for $284.80 from the Landlords via Canada Post. The e-mail indicated the Landlords were keeping $337.20 of their deposit for carpet cleaning, painting, and cleaning and maintenance supplies.

The Tenants submit that they were never sent a copy of the move-in condition report at the beginning of their tenancy and were never send a copy of the move-out condition report at the end of the tenancy.

The female Landlord confirmed that the normal method of communication between her and the Tenants was through e-mail and there were occasions where she would send the female Tenant text messages. She confirmed receiving approximately two months notice that the Tenants would be ending their tenancy at the end of the fixed term and that this notice was received via e-mail. She initially did not know how the Tenants' forwarding address was received and then looked through some papers and confirmed it was written on the condition inspection form.

The female Landlord stated the move-in condition report was sent to the Tenants via e-mail; however she did not have a copy of that e-mail so she could not prove when it was sent to them. She then testified that the Tenants were not sent a copy of the move out condition report form at which time the male Landlord entered into the hearing. He was

affirmed and stated that he recalls sending the Tenants a copy of the condition report form after the tenancy had ended and that it was sent via e-mail. He stated that he did not keep a copy of the e-mail and could not provide me with a date it was sent.

The Landlords confirmed they do not have the Tenants' written permission to keep the security deposit; they do not have an Order issued by the *Residential Tenancy Branch* giving them the authority to keep a portion of the security deposit; and they have not made an application for dispute resolution.

In closing the Landlords assert the move out condition inspection was not completed because the Tenants had a baby in tow and were in a hurry to hand over the keys and leave. So the Landlords took the Tenants at their word that they had cleaned the unit and signed off on it. They found out later that the unit had not been fully cleaned and had some damage.

The Tenants submitted evidence that the Landlords sent each of them a cheque in the amount of $362.20 along with a letter dated May 7, 2012 which the Tenants found to be threatening. The Tenants confirmed they have not cashed these cheques as they were awaiting the outcome of this new hearing.

At the end of the teleconference hearing the Tenants confirmed they had not cashed the May 7, 2012 cheques received from the Landlords. I issued a verbal Order for the Tenants to destroy these cheques and to return them to the Landlords upon receipt of this decision.

Analysis

The Landlords were issued a Decision of Review Consideration along with a Notice of Dispute Resolution Hearing which states:

> "*Evidence to support your position is important and must be given to the other party and to the Residential Tenancy Branch before the hearing."*

Notwithstanding the information provided on the Notice of Hearing and despite the fact the Tenants submitted evidence to the Landlords in advance of this hearing, the Landlords confirmed that they did not serve the Tenants with copies of any evidence they wished to rely upon for this new hearing. They did however submit evidence to the *Residential Tenancy Branch* with their application for review.

Not providing evidence to the other party in advance of the hearing is a contravention of section 4.1 of the *Residential Tenancy Branch Rules of Procedure.* Considering evidence that has not been served on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore as the applicant Tenants have not received copies of the Landlords' evidence I find that the Landlords' evidence cannot be considered in my decision. I did however consider the Landlords' testimony.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus of proof. In this case, the Landlords have the burden to prove they provided the Tenants with copies of the move-in and move-out condition inspection documents in accordance with Section 23 of the Act and Section 7 of the Regulation. Accordingly, the only evidence before me was disputed verbal testimony which I find to be insufficient to meet the Landlords' burden of proof.

The Tenants assert the move-in inspection or walk through was not completed in accordance with the Act while the Landlords admit they did not conduct a proper inspection at the end of the tenancy.

When a landlord fails to prove they provided the tenant with copies of a condition inspection report, the landlord's right to claim against the security deposit for damage is extinguished. In this case, because there is insufficient evidence to prove the Landlords provided copies of the condition report and there is supportive evidence that the inspections were not properly conducted, I find the Landlords lost their right to claim any portion of the security deposit for damage to the property, pursuant to sections 24 and 36 of the Act..

The Landlords were therefore required to return the full security deposit to the Tenants within 15 days of the later of the two: (1) the tenancy ending (February 28, 2012) and (2) having received the Tenants' forwarding address (February 28, 2012), pursuant to section 38(1) of the Act. The Landlords were therefore required to return the full security deposit no later than March 14, 2012. They returned only a portion of the deposit in the amount of $284.80 and kept the balance of $337.20.

The Landlords have admitted that they did not apply for dispute resolution to keep the security deposit, do not have an Order allowing them to keep any portion of the deposit, and they do not have the Tenants' written consent to retain $284.80 of the security deposit.

As per the aforementioned, I find that the Landlords have failed to comply with Section 38(1) of the *Act* and that the Landlords are now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security deposit and the landlord must pay the tenant double the security deposit. Accordingly I award the Tenants' double their deposit less the $284.80 previously received.

The Tenants have succeeded with their application; therefore I award recovery of the $50.00 filing fee.

Tenants' Monetary Order

Double Security Deposit (2 x $622.00)	$1,244.00
Interest owed on the security deposit	0.00
Filing Fee	50.00
SUBTOTAL	$1,294.00
LESS: Partial payment received March 5, 2012	-284.80
Offset amount due to the TENANTS	**$1,009.20**

Conclusion

I HEREBY SET ASIDE the Decision and Orders issued on April 03, 2012 and amended April 23, 2012.

The Tenants have been awarded a Monetary Order in the amount of $1,009.20. This Order is legally binding and must be served upon the Landlords.

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 30, 2012.

Residential Tenancy Branch