



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC

Introduction

This hearing was convened in response to an application by the Tenant pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. A Monetary Order for compensation - Section 67; and
2. An Order for the return of the security deposit - Section 38.

The Landlords and Tenant were each given full opportunity to be heard, to present evidence and to make submissions under oath.

Preliminary Matter

At the onset of the Hearing, the Landlord indicated that they were appearing in relation to their application. The Landlords were informed that their application was not scheduled for this conference hearing today. The Landlord provided a file number for their application and this file number indicated that the hearing on their application had been held previously and was dismissed as the Landlords did not appear at their hearing. It is noted that this application included a claim for the return of the security deposit.

Issue(s) to be Decided

Is the Tenant entitled to the monetary amounts claimed?

Background and Evidence

The following are agreed facts: The tenancy started on February 15, 2013 for a one year term ending February 15, 2014. Rent of \$725.00 was payable monthly and at the outset of the tenancy the Landlord collected a security deposit of \$362.50. The Parties mutually conducted a move-in inspection and report. The tenancy ended on February 27, 2013. The Tenant provided her forwarding address by email on March 7, 2013 and by regular mail on March 28, 2013. The security deposit has not been returned to the Tenant.

The Tenant states that no move-out inspection was offered by the Landlord. The Landlord states that the Tenant was told on February 27, 2013 to contact the Landlords to arrange for a move-out inspection but that the Tenant did not respond and never called the Landlords to arrange a date. The Landlord states that the Tenant was called 3 or 4 times but never returned their calls. The Tenant claims return of the security deposit and does not waive the return of double the security deposit.

The Tenant states that prior to renting the unit she told the Landlord that she was highly sensitive to second hand smoke and knew that a tenant living below the unit was a smoker. The Tenant states that she was told that this tenant would smoke outside the building and that he would be moving out at the end of February 2013. The Tenant states that when she moved into the unit the smoke continued to bother her and that she therefore had to end the tenancy. The Tenant states that she gave the Landlord a letter setting out a mutual agreement to end the tenancy but that the Landlord never signed this agreement. The Tenant states that she did not spend many nights at the unit.

The Landlord states that the lower tenant did not smoke in the house for the last two weeks of February 2013 but that this did not seem to lessen the Tenant's sensitivity. The Landlord states that he also sealed the door between the units to keep any smoke out. There is no dispute that the Parties agreed to end the tenancy as soon as a new tenant was found. The Landlord states that they never agreed to end the tenancy

sooner. The Landlord states that a new tenancy started on March 3, 2013 with the first month's rent discounted and thereafter the rent was \$750.00. The Landlord states that the Tenant's security deposit was used by the Landlord to cover the rental incentive given to the new tenant as advised by the Residential Tenancy Branch and that for that reason was not returned to the Tenant.

The Tenant states that on February 22, 2013 the male Landlord was working in the basement of the house making renovations. The Tenant states that she was in the basement for the laundry and that the landlord told the Tenant he had a sore hand and back. The Tenant states that she told the Landlord about a salve and that she went up stair, got the salve and returned to put some in his hand. The Tenant states that the Landlord had his back to her, dropped his pants to his knees, exposed his naked buttocks, and asked the Tenant to put some salve on his back. The Tenant states that she told the Landlord to pull his pants back up and the Tenant put some salve on his back. The Tenant states that she then went back to her unit and started shaking. The Tenant states that she left the unit and only thereafter returned at night as the male Landlord was working on the renovations in the basement during the day.

The Tenant states that the incident was reported to the police and provided both the police officer's name and the file number for the report to the police. The Tenant states that she did not hear anything back from the police other than them having difficulty finding the Landlord's address. The Tenant states that her sister had been at the unit on two occasions and had also felt uncomfortable with the male Landlord. The Tenant provided a letter from this sibling. The Tenant states that she did not see the male Landlord after the incident of February 22, 2013. The Tenant states that she did not sleep at the unit after the incident, that she had a nightmare following the incident, and that she was completely moved out of the unit by February 27, 2013. The Tenant states that she was going to end the tenancy due to the smoking but ultimately left due to the Landlord's act. The Tenant claims \$2,500 for loss of quiet enjoyment and harassment as a result of the incident on February 22, 2013.

The Landlord agrees that the Tenant offered to put salve on his back but states that he only dropped his pants a little and did not expose his buttocks. The Landlord agrees that the Tenant told him he dropped his pants too low so he apologized. The Landlord states that the police have not contacted him about this incident. The Landlord denies that the Tenant was harassed in any manner by himself. The Landlord states that the Tenant's claim that he exposed himself to her is absurd along with the amount the Tenant is claiming. The Landlord states that he only saw the Tenant's sister once while they were moving into the unit and that he helped them carry items into the unit. The Landlord states that at the end of the move, he did hug the sister and left. The Landlord states that the Tenant moved out of the unit because of the smoke and her allergies and that there was no harassment or innuendos made towards the Tenant.

The Tenant states that the Landlord has failed to return her post dated cheques. The Landlord states that the post dated cheques were returned to the Tenant by registered mail on March 30, 2013 and provided the tracking number as proof.

Analysis

Section 38 of the Act provides that within 15 days after the later of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit or make an application for dispute resolution claiming against the security deposit. Where a Landlord fails to comply with this section, the landlord must pay the tenant double the amount of the security deposit. The Act does not contemplate allowing a mere formality of making an application to meet the substantive requirements of a Landlord in claiming against the security deposit. Although the landlord made an application to retain the security deposit this application was dismissed due to the Landlord's failure to appear resulting in the equivalent of not having made an application. As the Landlord failed to return the security deposit within 15 days of receipt of the Tenant's forwarding address, I find that the Landlord is now required to pay the Tenant double the security deposit in the amount of **\$725.00**. I note further that although the Landlord argues that the Tenant failed to participate in a move-out inspection, considering the Tenant's evidence that no

opportunity was given to participate in a move-out inspection and considering the Landlord's evidence that the Tenant was told to contact them for an inspection time, I find that the Landlord has not substantiated that the Tenant was offered two opportunities to conduct the inspection.

Section 28 of the Act provides that a tenant is entitled to quiet enjoyment, including a right to reasonable privacy and freedom from unreasonable disturbance. Section 7 of the Act provides that where a landlord does not comply with the Act, regulation or tenancy agreement, the landlord must compensate the tenant for damage or loss that results. Although the Landlord denies baring his buttocks, I find that the Tenant's evidence held a ring of truth and I therefore accept that this incident occurred as described by the Tenant. As this was a onetime incident, however I do not find this to be harassment. I find that the Tenant is entitled to some compensation for this incident as the tenancy was affected by the conduct of the Landlord and award the Tenant the amount of **\$100.00** for the loss of her quiet enjoyment of the unit, which I find to be minimal. I would direct the Tenant to the Crime Victim's Program or some other body for consideration of her complaint as a criminal act.

As the Tenant was aware at the time of entering into the tenancy agreement that a smoker lived in the adjoining unit, I find that the Tenant has no basis to claim against the Landlord for the return of the rent paid for February 2013 for the presence of a smoker in the building and I dismiss this claim.

Given the Landlord's postal evidence of return of the post dated cheques, I find that the Tenant has failed on a balance of probabilities to show that the Landlord failed to return the cheques and I dismiss this claim.

Conclusion

I grant the Tenant an order under Section 67 of the Act for the amount of **\$825.00**. 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: August 28, 2013

Residential Tenancy Branch