



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, MNDC, MNR, FF

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* ("the *Act*"). The landlord applied for:

- a monetary order for unpaid rent, damage and loss pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38;
- an 'other' remedy under the *Act*; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. The landlord was assisted by a translator. The tenant called one witness. Other witnesses on his list were determined to be unnecessary given the evidence at the hearing.

The tenant testified that he served the landlord with his dispute resolution hearing package on March 9, 2015. The landlord denied receipt of the tenant's notice for a dispute resolution hearing and written evidence. The tenant provided a Canada Post receipt and tracking number for this mailing. He testified that the material was returned as, "person does not reside at this address". The tenant testified that he used the residential tenancy address for delivery of the package. The landlord testified that he resides next door to the residential tenancy address and receives his mail in the same mailbox as the residential tenancy address. The landlord testified that he received no

notice of a package or a package. However, the landlord also provided unsolicited testimony acknowledging the nature and contents of the tenant's application. Also, I note that the address provided by the landlord on his own application for dispute resolution is the same address that the tenant used in sending his materials.

Residential Tenancy Policy Guideline No. 12 states that,

Deemed service means that the document is presumed to have been served unless there is clear evidence to the contrary. Deemed service applies to all types of documents not personally served.

and,

Where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail, does not override the deemed service provision. Where the registered mail is refused or deliberately not picked up, service continues to be deemed to have occurred on the fifth day after mailing.

Based on the evidence provided by the tenant, in testimony and documentary proof and in accordance with section 88 and 90 of the *Act*, I find that the landlord was deemed served with the tenant's notice and written evidence on March 14, 2015, 5 days after the tenant sent the package registered mail to the landlord. I do not find that the landlord has provided clear evidence to contradict the presumption that this registered mail package has been served.

The landlord testified that he served his Notice of Hearing to the tenant on December 24, 2014 by registered mail. He supplied a Canada Post tracking number during the hearing. The tenant acknowledged receipt of this hearing notice and the landlord's application. Based on the tenant's testimony, and pursuant to section 89 and 90 of the *Act*, I find the tenant duly served with the Notice of hearing and landlord's application.

The landlord testified that he submitted an evidence package to support his application on March 12, 2015 to the Residential Tenancy Branch. He testified that he also served this material to the tenant by leaving it in the tenant's mailbox. The tenant denied receipt of the supporting evidence package submitted by the landlord on March 12, 2015. I accept the tenant's testimony that he did not receive this evidence package, noting the landlord was unable to provide any proof of service. The landlord also testified that he submitted further evidence on March 19, 2015 to the Residential Tenancy Branch, the day before this hearing. The landlord testified that he did not provide this evidence, to the tenant. I find that the tenant was not served in accordance with the *Act* with either of the landlord's evidence packages and further that those evidence packages were filed late under the Rules of Procedure. Based on these findings, the landlord's evidence cannot be considered at this hearing.

Issues to be Decided

Is the landlord entitled to a monetary award for unpaid rent, damages or loss arising out of this tenancy? Is the tenant entitled to a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Is the tenant entitled to authorization to obtain a return of all or a portion of her security deposit or is the landlord entitled to retain all or a portion of the tenant's security deposit towards any monetary award?

Is either the landlord or the tenant entitled to recover the filing fee for this application from the tenant?

Background and Evidence

Both parties agreed that this tenancy began on September 1, 2014 with the signing of a month to month tenancy agreement. The rental amount of \$1500.00 was payable on the first of each month. Based on the requirements of the tenancy agreement created by the landlord, the tenant was obliged to pay his rent in full in cash. The landlord testified that he continues to hold a \$750.00 security deposit that the tenant paid on August 22, 2014. He sought to retain this security deposit for the tenant's lack of notice to end this tenancy and for damage to the rental unit by the tenant.

The landlord testified that the tenant moved in on September 7, 2014. The tenant testified that the tenant moved in on September 17, 2014. The tenant testified that he provided notice that he intended to vacate the rental unit. He submitted a copy of the letter to the landlord with his notice to vacate dated November 12, 2014 to be effective December 15, 2014. He also submitted a copy of a second letter to the landlord providing his forwarding address on December 16, 2014. The tenant testified that he moved out of the rental unit on December 14, 2014. The landlord submitted that the tenant provided insufficient notice because he did not leave at the end of the month and the rental agreement the landlord created requires one and a half months' notice to vacate. The landlord testified that, because he did not have proper notice from the tenant, it was difficult for him to immediately re-rent the unit. He testified that he lost rental income for at least the rest of the month of December 2014.

The landlord applied for a monetary order in the amount of \$1130.00 with respect to unpaid rent, testifying that the tenant paid only \$1300.00 for the month of October 2014. The tenant testified that he paid full rent for all months of his tenancy from October to December 2014. The landlord testified that he provided receipts for all rental payments but did not submit any receipts for this hearing.

The landlord testified that the tenant did not pay utilities in January or February 2015. The landlord testified that electricity bills were the tenant's obligation. The landlord submitted no evidence to support his claim that the tenant was obliged to pay electricity or any particularization of the amount outstanding.

The landlord testified that the tenant caused damage to the rental unit, specifically; a broken light; some holes in the drywall; and a damaged baseboard. I had no evidence before me to support this claim of damage. The landlord testified that he had not repaired any of the damage done by the tenant and therefore had no receipts or estimates to submit for consideration.

The tenant testified that his tenancy was replete with problems for him. He testified that he resided in the rental unit with his girlfriend. They had moved in together for the first time. The tenant testified that the move-in was delayed because the landlord had not finished renovations on the rental unit. The tenant testified that, throughout his tenancy, contractors and workers regularly came and went from the rental unit. The landlord testified that contractors only entered the rental unit "a couple times."

The tenant's witness, an electrician hired by the landlord, testified that the work on the rental unit was not completed on the unit prior to the tenant's move-in. The tenant's witness also testified that he attended the unit on several occasions to continue renovations or work within the rental unit while the tenant resided in the unit. The tenant's witness testified that he was not the only contractor who was regularly inside the rental unit. The tenant's witness also testified that, just before the tenant moved in, the landlord decided to make some changes to his plans, delaying the work to be done.

The tenant testified that, prior to move-in, the landlord indicated that he could access a second washroom as part of his tenancy. In response, the landlord testified that there is only one washroom within the rental unit and one "shared" washroom in the garage for "garden useage". The landlord testified that the second washroom was only offered as a "trial" and that he could take it back anytime he wanted. Later in his testimony, the landlord varied this initial statement when he said that he did his best not to limit the tenant's access to the second washroom and when he acknowledged that this service had been discussed at the outset of the tenancy.

The tenant testified that he and his girlfriend did not have hot water in the rental unit for the duration of his tenancy. He testified that they were forced to take short, cold showers. The tenant testified that on several occasions he asked the landlord to undertake repairs regarding the lack of hot water. The landlord testified that, when he sent in contractors, they could not identify any issue with the water temperature.

The tenant testified that, as a result of the disruptions, lack of hot water and lack of second washroom with respect to this tenancy, he and his girlfriend fought extensively and ultimately broke up. He testified that, as a result of this break-up, his work with his girlfriend's brother was no longer available and so he has lost income. The girlfriend's brother provided a letter indicating that, due to "relationship issues", the tenant could no longer work with him. The brother further submitted, in his letter, that the tenant could have made approximately \$100,000.00 over a year.

The tenant testified that all of the stress related to this tenancy required him to attend regular therapy. He provided copies of receipts and stated in testimony that he is very depressed. He has been unable to find other work since January 2015 and he is struggling since dealing with this tenancy.

Analysis – Landlord's Claim

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In his application for a monetary award for damages and unpaid rent, the landlord must prove the existence of damage and unpaid rent. Given that the landlord's materials were filed late and not served in accordance with the requirements under *Act*, the landlord presented no written evidence to support his claim. The landlord testified that the rent was not paid in full in October 2014. Regardless of this unpaid rent, the tenancy continued. The tenant testified that the rent was paid in full. On a balance of probabilities and in the absence of any corroborating evidence from the landlord, I find that the tenant paid the rent for October 2014. I find the landlord is not entitled to his \$200.00 claim for unpaid rent.

With respect to the landlord's claim in damages to the rental unit, he referred to three minor repairs and testified that he has not completed these repairs. He provided no estimates or receipts to repair the damages. He acknowledged that the rental unit continues to be in 'renovation-state'. I find that the landlord is not entitled to recover for damage to the rental unit based on his lack of proof.

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the security deposit in full or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). This provision applies to the landlord regardless of the fact that the tenancy agreement that he created for this tenancy indicates he will not pay interest on a security deposit.

With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. In this case, the landlord had 15 days after December 16, 2014 to take one of the actions outlined above. The landlord applied, within 15 days to retain the deposit in partial satisfaction of his claim for lack of notice and damage to the rental unit. The application by the landlord stated that he was seeking to retain the security deposit. However, his claim was not particularized and evidence submitted later was not served to the tenant, providing no opportunity for the landlord's application for retaining the deposit to be scrutinized.

Under section 45(1) of the *Act*, a tenant may end a period tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice, and
- (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

While the tenant did provide 30 days' notice meeting the requirements of section 45(1)(a), he did not provide an effective date to end the tenancy that was the day before the day the rent is due, as required by section 45(1)(b). The tenant testified that he provided notice midmonth and moved midmonth despite the fact that his rent was due regularly on the first of the month. I accept the landlord's testimony that he was unable to immediately re-rent the unit. I therefore find that the landlord is entitled to \$750.00 for loss of rent suffered by the landlord as a result of the tenant's actions I find that, pursuant to section 72 of the *Act*, the landlord may retain the security deposit to offset this award.

As the landlord was unsuccessful with the majority of his application, I find the landlord not entitled to recover his filing fee for this application.

Analysis – Tenant's Claim

The *Residential Tenancy Act* recognizes two types of remedies; the statutory remedy allowed with respect to a service or facility; and a monetary claim in Tort and/or Breach of Contract. The Legislation allows a tenant to make a claim in damages against the other party where there has been a breach of the tenancy agreement or the *Act*. Damages, in the form of a monetary award, can be given to a party who has suffered a loss recognized by the law.

The tenant has made an application for a monetary award in the amount of \$25,000.00 on the basis that he incurred out of pocket expenses for therapy as a result of this tenancy and that he has lost substantial work opportunities and compensation as a result of this tenancy. Finally, he applied for return of his security deposit.

Within the landlord's claim to retain the security deposit, I have considered whether the landlord is entitled to retain any portion of the deposit and determined that he is entitled to retain the security deposit for loss of rent for the portion of December 2014 rent after the tenant had vacated

The tenant testified that this landlord caused him a great deal of aggravation with lack of the facilities originally agreed upon (second washroom and hot water); constant coming and going of contractors; and a stressful situation that resulted in the loss of his girlfriend and his employment.

Residential Policy Guideline No. 16 discusses various forms of damages:

The purpose of damages is to put the person who suffered the loss in the same position as if the contract had been carried out. It is up to the person claiming to prove that the other party breached the contract and that the loss resulted from the breach. The loss must be a consequence that the parties, at the time the contract was entered into, could reasonably have expected would occur if the contract was breached. Losses that are very unexpected are normally not recoverable. The party making the claim must also show that he/she took reasonable steps to ensure that the loss could not have been prevented, and is as low as reasonably possible.

Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. A landlord is expected to

provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. If, on the other hand, the tenant is deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of an abatement of rent or a monetary award for the portion of the premises or property affected.

With respect to the tenant's application for loss of his girlfriend and subsequently his employment, I find that the landlord could not have anticipated this type of loss as a result of tenancy issues. However, based on a balance of probabilities, I find that the tenant did not receive use of the second washroom that he was promised. I also find that the tenant did not receive hot water within the rental unit. He also did not enjoy quiet enjoyment of his residence, given the coming and going of contractors.

In the substance of the tenant's claim, he sought damage for loss of quiet enjoyment. When evaluating a claim of this nature pursuant to sections 28 and 65 of the Act, an arbitrator may consider the following criteria in determining the amount of damages:

- the amount of disruption suffered by the tenant.
- the reason for the disruption.
- if there was any benefit to the tenant for the disruption.
- whether or not the landlord made his or her best efforts to minimize any disruptions to the tenant.

While the landlord cannot be held responsible for the saddened state of the tenant and the unfortunate series of events that ensued at the time of this tenancy, I find the landlord is responsible for the tenant's lack of services/facilities that the tenant could reasonably have been expected to receive as part of his tenancy agreement, as well as the reduction in the tenant's quiet enjoyment at his personal residence.

I assess the value of the use of the second washroom at \$200.00 per month out of a \$1500.00 monthly tenancy based on its significance as a feature of the residence and the tenant's testimony that this amenity was a deciding factor in the tenant taking this rental unit. I assess the value of the hot water at \$300.00 per month over the course of the three month tenancy based on the basic nature of this amenity and the testimony of the tenant that it was not available throughout the tenancy. I assess the tenant's loss of quiet enjoyment at \$250.00 per month of this tenancy based on the witness testimony confirming a high number of contractors in and out of the residence creating a lack of privacy or comfort in the tenant's own residence. I find that the tenant is entitled to an amount of compensation that reflects the above:

Item	Amount
Loss of 2 nd washroom	\$600.00
Loss of hot water	900.00
Loss of quiet enjoyment	750.00
Recovery of Filing Fee for this Application	50.00
Deduction of Security Deposit: rental loss	-750.00
Total Monetary Order	\$1550.00

As the tenant was successful in part in his application, I find the tenant entitled to recover his filing fee.

Conclusion

I find the landlord is entitled to a monetary award in the amount of \$750.00 for loss of rent. I find the landlord is entitled to retain the security deposit to offset this amount of \$750.00. I dismiss the landlord's application to recover his filing fee.

I dismiss the tenant's application for recovery of loss of income. I dismiss the tenant's application for recovery of therapy bills. I find the tenant is entitled to a monetary order for a loss in the value of his tenancy and for a loss in the quiet enjoyment of these rental premises during the course of this tenancy as well as recovery of his filing fee. Therefore, he is entitled to a total monetary Order in the amount of \$1550.00.

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: March 26, 2015

Residential Tenancy Branch