Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- authorization to obtain a return of all or a portion of his security deposit pursuant to section 38;
- compensation for the landlord's failure to return his security deposit pursuant to subsection 38(6);
- compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67 in relation to removed service; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

The tenant attended the hearing. The landlord attended the hearing and was accompanied by his agent.

Preliminary Issue – Evidence

This hearing was previously adjourned as the tenant had failed to serve some of his evidence to the landlord. In particular, the tenant failed to serve the tenancy agreement.

The tenant did not receive a copy of the interim decision dated 30 July 2015 until 23 September 2015. As a result, the tenant did not serve his evidence and the notice of reconvened hearing until 23 September 2015 by registered mail. The landlord received this mailing on 26 September 2015. The landlord confirmed that the had time to review the evidence, but stated that as a result of the late receipt the landlord did not provide his evidence to the government agent's office until 7 October 2015. The landlord did not make any attempt to provide this evidence to the tenant.

Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) establishes that evidence from the applicant must be submitted not less than 14 days

before the hearing. Rule 3.15 sets out that an applicant must receive evidence from the respondent not less than seven days before the hearing. The definition section of the Rules contains the following definition:

> In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, qualified by the words "not less than", the last day for the landlord to file and serve additional evidence was 23 September 2015. In accordance with rule 3.15 and the definition of days, the last day for the landlord to file and serve evidence in reply to the tenant's application was 30 September 2015.

This evidence was not served within the timelines prescribed by rule 3.14 and rule 3.15 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

In this case, the landlord has advanced that the tenancy agreement provided by the tenant is not authentic. The landlord submits that he has a tenancy agreement that shows this. I understand that the late delivery of the interim decision and notice of reconvened hearing had the "knock on" effect of the late submission of evidence by both parties. It would unfairly prejudice the parties to prevent them from advancing their evidence on the basis of a possible administrative error. As such, I determined that I would accept both the landlord's and tenant's late evidence.

At the hearing, I ordered that the landlord serve the tenant with the landlord's late evidence no later than 16 October 2015. I was provided with a letter acknowledging service from the tenant.

In order to ameliorate the prejudicial effects on the tenant, the tenant was permitted to provide reply evidence and submissions in writing to this Branch and to the landlord no later than 23 October 2015. The tenant provided a response and as well provided proof of service indicating that the submissions were sent to the landlord by registered mail.

Issue(s) to be Decided

Is the tenant entitled to a monetary award for the return of a portion of his security deposits? Is the tenant entitled to a monetary award equivalent to the amount of his

security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the Act? Is the tenant entitled to a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67 in relation to lost service? Is the tenant entitled to recovery of his filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

The landlord testified that the tenancy began 1 July 2013; the tenant testified that the tenancy began 15 July 2013. The parties agree that the tenancy ended 1 November 2014. Monthly rent was $1,500.00. The landlord testified that the tenant began occupying the rental unit at some point after 15 July 2013.

I was provided with several iterations of the written tenancy agreement. All versions of the tenancy agreement set out that:

- the agreement was entered into on 18 June 2013;
- rent was $1,500.00;
- rent was due on the first of the month.
- "The tenant acknowledges that the appliances in the Premises are in good condition and that the Tenant will maintain the appliances in good condition";
- The tenant agrees to pay to the Landlord a security deposit…of $750.

The First Version was provided by the tenant in his initial package of evidence. The First Version sets out that the tenancy starts on 15 July 2013 and ends 15 July 2014. The First Version is signed by the tenant only.

The Second Version was provided by the landlord in October 2015. The Second Version sets out that the tenancy starts on 1 July 2013 and ends 1 November 2014. The changes are initialled by the landlord only. The Second Version is signed by both parties. The tenant testified that the end date of the tenancy was changed from 15 July 2014 to 1 November 2014 at the result of a washer and dryer being installed in suite.

The Third Version was provided by the tenant in his second package of evidence. The Third Version sets out that the tenancy starts on 15 July 2013 and ends 1 November 2014. The changes are initialled by both parties. The Third Version is signed by both parties. The landlord disputes that he placed his initials there or agreed to this change.

The landlord submits that the Third Version is “doctored”. The tenant denies “doctoring” the document and says that the changes were made an initialled by both parties after the mistake in the starting date was corrected.

The tenant testified that he paid his security deposit to the landlord in the lobby of his bank. The tenant testified that gave the landlord a ride and that the receipt was created in the car. The tenant provided a copy of a receipt dated 14 June 2013. The receipt is handwritten and is signed by both the tenant and landlord. The landlord does not question the authenticity of this document. The receipt reads:

> *$750*
> *Rec’d as deposit for year rental agreement (contract to follow)*
> *At [address] $1500/mo*

The landlord sent a copy of the receipt by email to the tenant on 15 June 2013.

The landlord testified that he does not collect security deposits in respect of his tenancies. The landlord submits that this “deposit” was actually a payment of the first half of rent for July, that is from 1 July 2013 to 14 July 2013. The landlord testified that there is no overpayment of $750.00 for the tenant’s rent for the period of occupation.

The tenant texted the landlord on 3 October 2013:

> *[landlord] – I’ve spent the last few days trying to get through to you – I’ve called and left VM, texted, emailed and there’s been no response so this is the last thing I can think of.*
>
> *Long and short of it is that you urgently need to sort out these house issues I’ve raised with you over and over again.*
> *…*
> *I need a receipt for the $750 damage deposit. I’ve been asking for this since I moved in. 11 weeks ago.*
> *…*
> *Please come and see me in person when you arrive next so we can work something out with this hot tub. I’m $50 out of pocket for this thing and I need your help in ensuring I don’t get screwed with maintaining it. You need to tell the tenants how to clean it etc, which you don’t seem to have done. I will not be solely responsible for it. I need your help as the landlord here. …*

The landlord texted the tenant on 7 October 2013:

> *[B1] went by last night, but you were not home. He will come again today. Ask [B2] too. He’s right there. Do what you can and let me know what that entails.*

Together we can reduce these items quickly. I will deal with the hot tub issues or turn it off and there should not be smoking downstairs.
I am back tonight and will look forward to a visit ASAP to be sure all is as you wish.

[emphasis added]

The tenant provided a copy of a receipt dated 8 October 2013. The landlord disputes that he signed this document and submits that the signature is different. The landlord suggests that there is no reason why he would sign the document months after the fact. The tenant denies that this document is inauthentic. The tenant testified that he created the document and had the landlord sign it as the tenant wanted a better receipt than the handwritten receipt of 14 June 2013. This receipt sets out:

This receipt acknowledges payment of $750CAD as damage deposit for: [address]
Paid in full by [tenant] on June 14th 2013.

The tenant testified that when he viewed the rental unit he assumed that the hot tub was working. The tenant testified that it took two months after the commencement of the tenancy for the hot tub to work. The tenant testified that at some point later in the tenancy the hot tub service was removed. The tenant testified that he does not quite recall exactly when this occurred, but believes that it was around January 2014. The tenant testified that he calculated his compensation for the hot tub removal on the basis of the hydro savings to the landlord. The tenant submitted that his actual loss from the service was greater than the amount claimed.

The landlord testified that he did not want to be involved in providing a hot tub and denies that he provided the hot tub as part of the tenancy agreement or that he shut it off.

The tenant sent his forwarding address by text message to the landlord. The tenant also delivered his forwarding address in writing to the landlord by registered mail on 17 December 2014. The tenant provided me with a tracking number for that mailing.

The tenant provided banking records that document the following rent payments to the landlord:

Item	**Amount**
20 June 2013	$1,500.00
30 July 2013	750.00
15 August 2013	750.00

29 August 2013	750.00
16 September 2013	750.00
1 October 2013	750.00
15 October 2013	750.00
30 October 2013	750.00
15 November 2013	722.68
Smoke Alarm Receipt	27.32
13 December 2013	1,500.00
15 January 2014	1,500.00
15 February 2014	1,500.00
14 March 2014	1,500.00
15 April 2014	1,500.00
15 May 2014	1,500.00
15 June 2014	1,500.00
15 July 2014	1,500.00
15 August 2014	1,500.00
15 September 2014	1,500.00
15 October 2014	1,500.00
Total Payments	**$24,000.00**

The tenant seeks a total monetary order in the amount of $1,820.00:

Item	**Amount**
Return of Security Deposit	$750.00
36(8) Compensation	750.00
Compensation for Loss of Services	270.00
Recovery of Filing Fee	50.00
Total Monetary Order Sought	**$1,820.00**

Analysis

"Security deposit" is defined in section 1 of the Act:

> "security deposit" means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:
>
> (a) post-dated cheques for rent;
>
> (b) a pet damage deposit;
>
> (c) a fee prescribed under section 97 (2) (k) *[regulations in relation to fees]*;

I find the landlord's explanation that the "deposit" amount was the payment of the first half of July's rent to be implausible and completely untenable. The use of "deposit" and not "rent" on the receipt indicates that it was received on the basis of a deposit. Further, the tenant's text message of 3 October 2013 provides a contemporaneous basis for the 8 October 2013 "damage deposit" receipt. I find that the receipt provided by the tenant that was signed 8 October 2013 is a true document and reject the landlord's submission that it is a forgery. I find the landlord's testimony lacked credibility and prefer the tenant's testimony. The most overwhelming evidence that the landlord's characterization of the deposit is has no basis in the truth is that, even if the tenancy began 1 July 2013 and not 15 July 2013, the tenant provided evidence of additional payments of 16 full months of rent or $24,000.00, which would compensate the landlord fully for the tenant's use of the rental unit from 1 July 2013 to 1 November 2014.

On the basis of this overwhelming evidence, I completely reject the landlord's evidence with respect to the deposit and accept the evidence of the tenant. I find that the amount collected 14 June 2013 was an amount collected in excess of the rent owed by the tenant and find that it was security deposit within the meaning of the Act.

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to subsection 38(6) of the Act equivalent to the value of the security deposit.

I was provided with no evidence that would permit the landlord to retain any amount from the tenant's security deposit. On this basis, the tenant is entitled to return of his security deposit. The tenant provided his forwarding address in writing to the landlord on 17 December 2014. More than fifteen days have elapsed. The landlord has failed to return the tenant's security deposit. On this basis, the tenant is entitled to compensation equivalent to the amount of his security deposit.

Pursuant to subsection 27(2) of the Act, where a landlord terminates or restricts a service or facility, the landlord must reduce rent in an amount equivalent to the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

The tenant testified that he understood that the hot tub service was provided as a part of the tenancy agreement. The landlord testified that the hot tub service was not provided as part of the tenancy. All versions of the tenancy agreement are silent on the issue of a hot tub. The landlord's text message of October 2013 indicates that the hot tub was part of the tenancy. I find, on a balance of probabilities, that the hot tub was represented as a part of the tenancy agreement.

The tenant testified that the hot tub service was removed in or about January 2014. I find that the landlord removed the hot tub service in early 2014 and that the tenant was without the hot tub service until the end of the tenancy.

The tenant seeks compensation in the amount of $270.00 for the landlord removing the tenant's hot tub. The tenant stated that he did not calculate this amount with reference to his loss, but with reference to the landlord's hydro saving. The tenant testified that the loss in value to him exceeded this amount. I find that the value of the tenancy for the period that the hot tub was removed decreased by a total amount of $270.00. The tenant is entitled to his compensation in the amount of $270.00 for the unlawful removal of the service.

As the tenant has been successful in his application, he is entitled to recover his filing fee from the landlord.

Conclusion

I issue a monetary order in the tenant's favour in the amount of $1,820.00 under the following terms:

Item	Amount
Security Deposit Return	$750.00
38(6) Compensation	750.00
Loss of Hot Tub	270.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	**$1,820.00**

The tenant is provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial 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 subsection 9.1(1) of the Act.

Dated: November 12, 2015

Residential Tenancy Branch