



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD

Introduction

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

- a monetary order for compensation for losses or other money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to obtain a return of all of their security deposit pursuant to section 38.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the tenant confirmed that they received a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) on July 12, 2018, when it was placed in their mailbox by the landlord, I find that the tenant was duly served with this Notice in accordance with section 88 of the *Act*. As the landlord confirmed that they received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on March 26, 2019, I find that the landlord was duly served with this package in accordance with section 89 of the *Act*. Since both parties confirmed that they had received one another's written evidence, I find that the written evidence was served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Is the tenant entitled to a monetary award for losses or other money owed arising out of this tenancy? Is the tenant entitled to a monetary award for the return of a portion of the security deposit? Is the tenant entitled to a monetary award equivalent to double the

value of the security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*?

Background and Evidence

The parties agreed that this tenancy began as a one-year fixed term tenancy that was scheduled to run from April 1, 2015 until March 31, 2016. At the expiration of the initial term, the tenancy continued on a month-to-month basis. Monthly rent was initially set at \$900.00, payable in advance on the first of each month. The monthly rent increased to \$963.14 by the end of this tenancy in July 2018. The landlord continues to hold the tenant's \$450.00 security deposit paid before this tenancy began.

Although the landlord testified that a joint move-in condition inspection was conducted at the beginning of this tenancy, the landlord did not create a report of that inspection nor did the landlord provide the tenant with any copy of a report of that inspection.

The tenant was unable to pay their rent for July 2018 at the beginning of that month. Although the tenant maintained that the landlord originally agreed to use part of the tenant's security deposit for the tenant's July 2018 rent while the tenant awaited a response from the Ministry of Social Development and Poverty Reduction for a decision on their application for income assistance, the landlord issued the 10 Day Notice on July 12, 2018 for the non-payment of the \$963.14 in rent for that month. The tenant gave undisputed sworn testimony at the hearing that the tenant paid all of the rent identified as owing on the 10 Day Notice on July 22, 2018.

When the landlord did not receive a full payment of the \$963.14, the amount identified as owing in the 10 Day Notice within five days of receiving that Notice, the landlord applied to the RTB on July 23, 2018, using the RTB's direct request process for an Order of Possession and for a monetary award of \$1,063.14. This amount included the recovery of unpaid rent noted on the 10 Day Notice and the \$100.00 filing fee for the landlord's application. In the decision identified above on July 30, 2018, an Adjudicator appointed pursuant to the *Act*, issued a two day Order of Possession and a monetary award of \$100.00 to enable the landlord to recover the filing fee for the landlord's application. The Adjudicator dismissed the landlord's application for a monetary award of \$963.14 with leave to reapply.

The parties agreed that the tenant vacated the rental unit on July 30, 2018. The landlord maintained that the tenant abandoned the rental unit at that time, leaving the key on the table inside the open rental unit. The landlord provided sworn testimony and

written evidence that the tenant did not remove all of their belongings from the premises at the end of this tenancy, and that the landlord incurred costs in repairing damage done during this tenancy and in cleaning the rental unit.

The tenant provided written evidence that they tried to leave the key with the landlord and/or the landlord's spouse at the end of this tenancy, but the landlord threatened to bring the police with him and did not return to the rental unit at the time the tenant was planning to vacate the premises. The tenant also submitted written evidence and sworn testimony that they were forced to leave belongings behind at the end of this tenancy because all of their resources were used to pay the landlord the monthly rent of \$963.14, the amount owing for July 2018 on July 22, 2018.

The tenant's application for a monetary award of \$1,313.14 included the following items as listed on the tenant's Monetary Order Worksheet entered into written evidence:

Item	Amount
Return of Security Deposit	\$450.00
Less Monetary Award of \$100.00 from Earlier July 30, 2018 Decision	-100.00
Recovery of Rent Paid by Tenant for July 2018	963.14
Total Monetary Award Requested	\$1,313.14

At the hearing, I sought clarification of the component parts of the tenant's claim.

The parties agreed that the tenant has not paid the \$100.00 monetary award issued in the Adjudicator's July 30, 2018. The landlord said that they had not served the tenant with that Monetary Order, which remains outstanding.

The landlord testified that they did not submit another application for a monetary award for unpaid rent owing from July 2018 because they received all of the tenant's \$963.14 payment for rent owed by the tenant on July 22, 2018, as declared by the tenant. It would appear that the landlord must have accepted that payment following the expiry of the five day time limit for paying the amount identified as owing in full on the 10 Day Notice for the tenant's use and occupancy of the rental unit, although that was not the tenant's understanding of this matter.

At any rate, the parties agreed that rent was paid, albeit late, for July 2018, and that the landlord has no further claim for unpaid rent owing for this tenancy.

The tenant applied for the recovery of the rent they paid that month, because the tenant believed that they were evicted unfairly and prematurely, leading to the tenant's inability to afford movers who could remove their possessions from the rental unit at the end of this tenancy.

The tenant also sought the return of their security deposit, after having provided the landlord with their forwarding address, upon the landlord's return to his residence. The landlord confirmed that they received the tenant's forwarding address upon their return in February 2019. Although the landlord believed that the tenant abandoned the rental unit and should be held responsible for damage incurred during the course of this tenancy, the landlord has made no application for a monetary award for damage and has not applied for authorization to keep the tenant's security deposit.

Analysis

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 this case, the onus is on the tenant to prove on the balance of probabilities that the landlord contravened the *Act*, the *Regulation* or their tenancy agreement and that the tenant is entitled to a monetary award for their losses arising out of this contravention.

Section 26(1) of the *Act* establishes that “a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.”

As discussed at the hearing, I find no reason why the tenant is entitled to the recovery of their July 2018 rental payment, the amount claimed in the tenant's application. The tenant resided in the rental unit for the month of July 2018, paid the monthly rent for that month, the monthly rent was accepted by the landlord on July 22, 2018, well after the five day time period identified in the 10 Day Notice had expired, and the parties agreed that no rent remains owing for the month of July 2018, or any other month of that

tenancy. There is no legislative provision that would enable me to make a monetary award to the tenant for rent that was due on July 1, 2018, for the tenant's use and occupancy of the rental unit for that month. Under these circumstances, I dismiss the tenant's application for a monetary award for the recovery of rent paid for the month of July 2018 without leave to reapply.

Sections 23 and 24 of the *Act* establish the rules whereby joint move-in condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy.

Section 23 of the *Act* reads in part as follows:

23 *(1) The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.*

(3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

(4) The landlord must complete a condition inspection report in accordance with the regulations.

(5) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

(6) The landlord must make the inspection and complete and sign the report without the tenant if

(a) the landlord has complied with subsection (3), and

(b) the tenant does not participate on either occasion...

Section 24(2) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

24 *(2) The right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord*

(a) does not comply with section 23 (3) [2 opportunities for inspection],

(b) having complied with section 23 (3), does not participate on either occasion, or

(c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...

Sections 36 and 37 of the *Act* establish similar provisions regarding a joint move-out condition inspection and the report to be produced by the landlord(s) regarding that inspection.

In this case, the landlord testified that they did not prepare a report of their joint move-in condition inspection with the tenant when this tenancy began. On the basis of the undisputed evidence that the landlord did not create a joint move-in condition inspection report and provide it to the tenant and in accordance with paragraph 24(2)(c) of the *Act* as outlined above, I find that the landlords' right to apply to retain the tenant's security deposit was extinguished at the beginning of this tenancy.

The landlord claimed that the tenant abandoned the rental unit at the end of this tenancy, which would also have extinguished the tenant's right to claim for the recovery of the security deposit. Although the tenant denied having abandoned the rental unit, I noted the following provisions of Residential Tenancy Branch Policy Guideline #17 which reads in part as follows and has a direct bearing on this application:

8. In cases where both the landlord's right to retain and the tenant's right to the return of the deposit have been extinguished, the party who breached their obligation first will bear the loss. For example, if the landlord failed to give the tenant a copy of the inspection done at the beginning of the tenancy, then even though the tenant may not have taken part in the move out inspection, the landlord will be precluded from claiming against the deposit because the landlord's breach occurred first...

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 deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing as long as the landlord's right to apply to retain the deposit had not been extinguished. If that does not occur or if the landlord applies to retain the deposits within the 15 day time period but the landlord's right to apply to retain the tenant's deposit had already been extinguished, the landlord is required to pay a monetary award pursuant to section 38(6) of the *Act* that is double the value of the deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the deposits to offset damages or losses arising out of the tenancy.

In this case, the landlord confirmed that they had received the tenant's forwarding address in February 2019, but believed that they were allowed to keep the tenant's security deposit. As was noted above, even if the landlord had filed an application to keep the security deposit, the landlord's right to do so had been extinguished by the failure to create a report of the joint move-in condition inspection at the beginning of this tenancy pursuant to section 24(2) of the *Act*.

In this case, the landlord had 15 days after receiving the tenant's forwarding address in February 2019, to take action to return the tenant's security deposit. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant." As there is no evidence that the tenant has given the landlord written authorization at the end of this tenancy to retain any portion of the security deposit, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit. There is also no evidence that the tenant ever waived their right to obtain monies owed to the tenant arising out of their payment of the security deposit to the landlords.

The following provisions of Policy Guideline 17 of the Residential Tenancy Branch's Policy Guidelines would seem to be of relevance to the consideration of this application:

Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

- *If the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;*
- *If the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*
- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process;*
- *If the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;*
- *whether or not the landlord may have a valid monetary claim.*

Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the value of

their security deposit with interest calculated on the original amount only. No interest is payable. This results in a monetary award of \$900.00 in the tenant's favour.

As explained at the hearing, I have no authority to incorporate the \$100.00 monetary award issued in the previous decision referred to above to partially offset the monetary award I am issuing with respect to the tenant's application. These are separate final and binding monetary Orders and I have no authority to set aside an Order issued by another individual delegated powers under the *Act*.

Conclusion

I allow the tenant's application to recover double the value of their security deposit. I issue a monetary Order in the tenant's favour in the amount of \$900.00. 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.

The remainder of the tenant's application is dismissed.

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: April 30, 2019

Residential Tenancy Branch