



# Dispute Resolution Services

Residential Tenancy Branch  
Ministry of Housing and Social Development

## Decision

### Dispute Codes:

MNDC Money Owed or Compensation for Damage or Loss

FF Recover the Filing Fee for this Application from the Respondent

### Introduction

This Dispute Resolution hearing was convened to deal with an Application by the landlord for a monetary order for loss of rent stemming from the tenant ending the tenancy without proper notice under the Act.

Both the landlord and tenant were present and each gave affirmed testimony in turn.

### Issue(s) to be Decided

The landlord was seeking a monetary order for loss of rent due to the tenant not complying with the Act in ending the tenancy without notice causing the landlord a loss of rent for the month of March 2009, and causing the landlord to incur advertising and painting costs.

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act* for damages or loss of rent. This determination is dependant upon answers to the following questions:
  - Has the landlord submitted proof that a claim for damages or loss is supported pursuant to *section 7* and *section 67* of the *Act*?

- Has the landlord met the requirement under section 7(2) of the Act to do whatever is reasonable to minimize the damage or loss?

### **Background and Evidence**

The landlord submitted into evidence a copy of the tenancy agreement, a copy of emails sent between the parties including the tenant's notice that she would not be moving in dated February 28, 2009, copies of invoices and estimates and photographs taken of the finished suite. The landlord testified that the tenant signed a fixed term tenancy agreement for 6 months at the rental rate of \$700.00, having been granted a rent abatement from the normal rent of \$775.00 to do the painting herself. The landlord testified that the tenant was to move in on March 1, 2009 and paid a total deposit of \$400.00. The landlord testified that, although the tenant was provided with access to the key, she did not do any of the painting in advance. The landlord testified that the tenant asked to paint on February 27, 2009, but this was not possible as the flooring contractors were installing the floors that day. The landlord acknowledged that by the evening of February 28, 2009, there were still some tasks to be finished. However, the remainder of the work would have been completed prior to the tenant moving in or shortly thereafter.

The landlord testified that the tenant failed to comply with the agreement she signed and because of this a rental loss of \$ 700.00 for the month of March was incurred. Additional damages of \$44.25 for advertising costs and painting costs. The landlord is claiming compensation.

The tenant testified that she had signed the tenancy agreement in good faith with a move-in date of March 1, 2009 and with a promise by the landlord and the contractor that the renovations to the suite would be completed. The tenant testified that she had agreed to paint the unit and was led to believe that there would be an opportunity in advance of the move-in date. The tenant testified that, after some

email communications with the landlord during the latter part of February expressing concern over the progress of the renovation work, the tenant visited the site on the evening of February 28, 2009. The tenant testified that the unit was not fit to be painted and in fact, while the paint itself was there on site, the agreed-upon equipment had not been left. The tenant was shocked to find that the unit was not sufficiently completed to permit her to move in. The tenant found electrical connections unfinished, a uncapped metal vent protruding from the drywall, the toilet was not connected, the laundry facilities not done, trim and baseboards were not completed, doors were not yet hung and whole portions of walls were missing. The tenant also found that there were broken windows, incomplete lighting and construction refuse left on the premises. The tenant supplied photos of the condition of the suite.

The tenant spoke to the contractor on site who was just leaving, and was advised that he would not be returning to finish the job until after the weekend. The tenant's position is that the landlord breached the agreement between the parties by not providing a rental unit fit for habitation. The tenant testified that if the only issue was that the painting was to be done, she would gladly have occupied the unit and completed the painting. However, according to the tenant, she had no choice and was forced to mitigate her circumstances by finding another place to live on extremely short notice.

The landlord testified that the tenant could have painted at any time prior to the move-in date as she had been shown where the key was kept and could feasibly have retrieved it. The landlord testified that certain things were left undone to allow for the painting. In regards to the plumbing, the landlord testified that the plumber worked overtime to have it done on the February 28. In regards to the cleaning, the landlord's position was that this could have been done prior to the move in as well. The landlord stated that the contractor the tenant spoke to was only in charge of the painting and drywall. The cleaners and the plumbers were scheduled to ready the

unit for the tenant and as a gesture of good faith, the ceilings were painted for the tenant. The landlord maintains that there was no reason that the tenant could not move in and live up to her commitment.

### **Analysis**

In regards to an Applicant's right to claim damages from the other party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses pursuant to section 7.

In a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

### **Test For Damage and Loss Claims**

- 1 Proof that the damage or loss exists,
- 2 Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
- 3 Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
- 4 Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord, to 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 respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred.

I find that, while it is evident that the tenant did not comply with the agreement signed by the parties, the landlord did not comply with the agreement either. The basis of the tenant's defence against the landlord's claim was that her breach of the agreement was precipitated by the landlord's failure to meet his obligations under the agreement. .

In most instances one party's violation of the Act does not excuse the violations committed by the other party, nor render the other party immune from liability for their own transgressions. However, in this instance I find that provision of a rental unit suitable for occupation was a material term of the contract and it appears that the landlord's timing in preparing the suite was just slightly off. I do not accept the landlord's claim that only the painting was left to do. It is clear that there were some other tasks that needed to be finished. I find that the tenant had every intention of moving in according to the schedule, as evidenced by the fact that she had arranged hook-ups of hydro and other services and only cancelled them when she believed that the move-in date of March 1, 2009 was impossible. I find that the seemingly minor delay on the part of the landlord held major consequences for the tenant, who had no choice but to vacate her current residence as of March 1, 2009. I find that on February 28, 2009, the tenant had a valid basis to believe that the suite was not ready and would not be ready to move in. I find that the contractor with whom the tenant spoke, had been her primary contact in the past and that there was no reason for the tenant to doubt the information she received as well as her own observations regarding the state of the suite, despite written assurances from the landlord.

I find that the landlord did genuinely incur a loss. However, I find that this loss was not solely due to the tenant's violation of the agreement, but was primarily due to factors

that were the responsibility of the landlord under both the agreement and the Act. In this regard, I find that the landlord's claim does not satisfy element 2 of the test for damages and loss. Accordingly, I find that the landlord's application must be dismissed.

### **Conclusion**

Based on the testimony and evidence presented during these proceedings, I hereby dismiss the landlord's application in its entirety without leave to reapply. The landlord is obligated to return the tenant's security deposit of \$400.00 forthwith and I hereby issue a monetary order in favour of the tenant for this amount. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

June 2009

Date of Decision

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Dispute Resolution Officer