

## **DECISION**

Dispute Codes      MNDC FF

### Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order for compensation for damage or loss under the *Act*, to retain the security deposit in partial satisfaction of his claim, and to recover the cost of the filing fee from the Tenant for this application.

Service of the hearing documents, by the Landlord to the Tenant was done in accordance with section 89 of the *Act*, sent via registered mail on March 24, 2009. Mail receipt numbers were provided in the Landlord's documentary evidence. The Tenant was deemed to be served the hearing documents on March 29, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

The Landlord appeared, acknowledged receipt of evidence submitted by the Tenant on June 23, 2009, gave affirmed testimony, was provided the opportunity to present his evidence orally, in writing, and in documentary form.

All of the Landlord's testimony and documentary evidence was carefully considered.

### Preliminary Issues

Rule 4 of the *Residential Tenancy Branch Rules of Procedure* stipulate that if a respondent intends to dispute an Application for Dispute Resolution, copies of all available evidence the respondent intends to rely upon at the dispute resolution proceeding must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute resolution.

In considering the acceptance of late evidence, rule 11.5 of the *Residential Tenancy Branch Rules of Procedure* state that a party may request, at the dispute resolution proceeding, that the Dispute Resolution Officer accept any evidence that was not

provided to the other party or the Residential Tenancy Branch in advance of the dispute resolution proceeding as required by the Rules of Procedure and must satisfy the Dispute Resolution Officer that the evidence is relevant.

Based on the above, and in the absence of the respondent Tenant, I find that the Tenant failed to comply with the Rules of Procedure and I hereby refuse to accept or consider the Tenant's evidence in this decision.

#### Issues(s) to be Decided

Is the Landlord entitled to a Monetary Order pursuant to sections 38, 67 and 72 of the *Residential Tenancy Act*?

#### Background and Evidence

The tenancy was a fixed term tenancy which began on March 18, 2008 and scheduled to end on March 17, 2009. Rent was payable on the 18<sup>th</sup> of each month in the amount of \$3,500.00 and the Tenant paid a security deposit of \$1,750.00 on March 18, 2008.

The Landlord testified that the Tenant advised him on November 11, 2008 of a water leak around the upstairs shower which was leaking into a bedroom on the lower floor, that the Tenant, who spoke French, requested to use his own French speaking contractor to repair this leak, and that the Landlord had approved the Tenant's request to get his own contractor.

The Landlord advised that the Tenant contacted him on November 15, 2008 to advise that the Tenant's contractor could not take on the job of repairing the leak and requested that the Landlord get a contractor in as soon as possible. The Landlord stated that he had advised the Tenant that the Landlord was leaving the Country on a holiday with his family from November 19 to December 9, 2008 and that he would try and get someone to attend to the leak before he left.

The Landlord provided in evidence a chronological list of when the Landlord's contractor attended to the leak and when all of the work was completed.

The Landlord testified that when he returned from his vacation the Tenant requested a meeting with the Landlord and that on December 11, 2008 the Tenant informed the Landlord that they were moving out of the rental unit June 17, 2009, two months prior to the end of the lease, claiming that the leak from the shower had aggravated their child's asthma.

The Landlord advised that he received written notice to end the tenancy, from the Tenant, dated December 13, 2008, via registered mail, that the Tenant vacated the rental unit on January 17, 2009, and that the Tenant provided the Landlord with his forwarding address in writing on February 6, 2009.

The Landlord stated that he was able to re-rent the rental unit for a 1 week lease in June 2009 and that he now has a new long term lease effective August 1, 2009. The Landlord is claiming unpaid rent for February and March 2009, the last two months of the Tenant's lease.

### Analysis

I find that in order to justify payment of damages or loss under section 67 of the *Act*, the Applicant Landlord 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 to the Applicant Landlord pursuant to section 7. It is important to note that in a claim for damage or loss under the *Act*, the party claiming the damage or loss, in this case the Landlord, bears the burden of proof and the evidence furnished by the Applicant Landlord 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 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 regards to the Landlord's right to claim damages from the Tenant, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, 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.

Given the evidence before me, in the absence of any evidence from the Tenant who did not appear despite being properly served with notice of this proceeding, I accept the version of events as discussed by the Landlord and corroborated by his documentary evidence.

Section 45 of the *Residential Tenancy Act* states that a Tenant may end a fixed term tenancy by giving the Landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the Landlord received the notice and is not earlier than the date specified in the tenancy agreement as the end of the tenancy. Based on the above I find that the Landlord and Tenant entered into a fixed term tenancy which was scheduled to expire on March 17, 2009 and that the Tenant vacated the rental unit two months prior to the rental unit. I find that the Tenant has breached the fixed term tenancy and contravened Section 45 of the *Act* and that the Landlord has proven the test for loss and I approve his claim of rent for February 2009 of \$3,500.00 and March 2009 of \$3,500.00 for a total of \$7, 000.00

The Landlord has requested to retain the security deposit in partial satisfaction of his claim. Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the

date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit to the tenant with interest or make application for dispute resolution claiming against the security deposit or pet damage.

Based on the above, I find that the landlord has failed to comply with Section 38(1) of the *Act* as he did not apply for dispute resolution within 15 days of receiving the Tenant's forwarding address on February 6, 2009 nor did he apply within 15 days of the Tenant ending the tenancy agreement on January 17, 2009, and that the landlord is subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord must pay the tenant double the amount of the security deposit. As per the aforementioned the Tenant would be entitled to the return of double his security deposit plus interest in the amount of \$1750.00 x 2 plus interest of \$20.73.

**Monetary Order** – I find that the Landlord is entitled to a monetary claim, that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenant's security deposit, and that the Landlord is entitled to recover the filing fee from the Tenant as follows:

Unpaid Rent for February and March 2009 (\$3,500.00 per month)	\$7,000.00
Filing fee	100.00
Sub total (Monetary Order in favor of the landlord)	<b>\$7,100.00</b>
Less Double Security Deposit of \$1750.00 x 2 + \$20.73	-3520.73
<b>TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD</b>	<b>\$3,579.27</b>

### Conclusion

I HEREBY FIND in favor of the Landlord's monetary claim. A copy of the Landlord's decision will be accompanied by a Monetary Order for \$3,579.27. The order must be

served on the respondent Tenant and is enforceable through the Provincial Court 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: June 26, 2009.

---

Dispute Resolution Officer