



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing and Social Development

## **DECISION**

### Dispute Codes:

**MNR, MNSD, FF**

### Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the Landlord's Application for Dispute Resolution, in which the Landlord has made application for a monetary Order for damages, loss and unpaid rent, to retain all or part of the security deposit and to recover the filing fee from the Tenants for the cost of this Application for Dispute Resolution.

The Tenants have applied for Dispute Resolution requesting return of the deposit paid and to recover the filing fee from the Landlord for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself, the Application for Dispute Resolution was reviewed, the hearing process was explained to the parties and the parties were provided an opportunity to ask questions in relation to the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present oral evidence, to cross-examine the other party, and to make submissions during the hearing.

### Preliminary Matter

At the beginning of the hearing it was determined that the Tenants were served with a copy of a residential tenancy agreement submitted by the Landlord as evidence. The Tenants provided affirmed testimony that the Landlord's document differed from that given to the Tenants at the start of the tenancy. The Tenants were requested to submit the original copy of their tenancy agreement to the Residential Tenancy Branch by October 23, 2009 for consideration and comparison to the copy submitted as evidence by the Landlord.

During the hearing an attempt was made to allow a Tenant witness attend the hearing; this individual was called but declined to participate as he was working.

## Issue(s) to be Decided

Is the tenant entitled to return of the deposit paid to the landlord?

Is the landlord entitled to compensation for unpaid rent?

Is the landlord entitled to compensation for the loss of rent revenue?

Is either party entitled to filing fee costs?

## Background and Evidence

This tenancy commenced on March 1, 2009. The tenancy agreement required the Tenants to pay monthly rent of \$900.00 per month due on the first day of the month. The Tenants paid a security deposit of \$450.00 on March 1, 2009.

The Landlord is claiming compensation in the sum of \$3,600.00 for loss of rent revenue as a result of the Tenant's breach of their fixed-term tenancy agreement, \$475.00 for painting and carpet tile replacement and \$700.00 for carpet replacement.

During the hearing the parties agreed that in late March, 2009 the Tenants gave the landlord verbal notice that they would be moving out of the rental unit at the end of April. The Landlord testified that he accepted this notice as the Tenants had purchased a home.

The Tenants supplied a copy of a note to the Landlord dated May 1, 2009 requesting return of the deposit and providing a forwarding address. During the hearing the parties agreed that the Landlord gave the Tenant a cheque dated May 15, 2009 in the sum of \$200.00. The Tenant did not cash this cheque and the Landlord has now placed a stop payment on the cheque. The Landlord testified that he calculated the tenants were entitled to return of only \$200.00 of the deposit paid as they owed the landlord a fee as a result of their early move. The Landlord's copy of the tenancy agreement indicates that the Landlord deducted \$225.00 as a penalty for moving early. The Landlord denied receiving a written forwarding address requesting return of the deposit.

The Landlord testified that this was a fixed-term tenancy ending on September 1, 2010. The Landlord is claiming loss of revenue for May, June, July and August 2009 as the Tenants breach the fixed-term tenancy agreement. The Landlord supplied copies of hand-written advertisements that they placed at businesses and sky train stations

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advertising the rental unit after the Tenants moved out. The landlord testified that some time in May, 2009 an advertisement was placed on a web site, advertising the rental unit. A copy of this advertisement was not submitted as evidence and the Landlord could not provide details, as their nephew had placed the ad. The Landlord stated that they located another Tenant for September 1, 2009.

The Landlord submitted photographs which indicate some damage to walls and drawings on walls and provided a receipt issued by an individual who charged \$475.00 for painting and kitchen carpet tile replacement. The Landlord stated that the Tenant did not clean the kitchen floor and it required replacement. The Landlord stated they purchased this rental unit in 2005 and do not know the age of the flooring. The Landlord supplied a copy of a receipt for carpet installation and underlay in the sum of \$700.00.

The Tenants testified that when they moved into the rental unit the ceiling was damaged and leaking and that the Landlord told him they would be replacing the carpets. The Landlord testified that the Tenants did not clean the carpets when they moved out and that they had been cleaned at the start of this two month tenancy.

The Tenants testified that there were no marks on the walls when he moved in and that he believes the photographs indicate damage caused by a subsequent tenant. The Tenants also questioned why the Landlord returned \$200.00 to him if the Landlord believed that the Tenants owed him money for damages and loss of rent.

## Analysis

In relation to the Tenant's claim for return of the deposit I have considered the Tenant's submission that he provided the Landlord with a written request for return of the deposit, including a forwarding address. I have determined, on the balance of probabilities, that the Landlord did not receive a written request dated May 1, 2009. I base this decision on the Tenant's failure to provide a date upon which the note was given to the Landlord or any other proof of service to the Landlord. I find that by May 15, 2009 the Tenant did request return of the deposit and, as a result, the Landlord supplied the Tenant with a \$200.00 cheque dated May 15, 2009, which the Tenant received in person.

I find, based upon the testimony of both parties and the evidence before me that the Landlord's claim for painting and carpet costs is dismissed without leave to reapply. I have no evidence before me that a move-in condition inspection or move-out condition inspection was completed as required by the Act. Condition inspections provide an opportunity for each party to inspect and agree upon the state of the rental unit at the start and end of a tenancy and in the absence of inspection reports the landlord must

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present a preponderance of evidence when claiming damages. I have accepted the Tenant's testimony that the marks on the walls could have occurred since the Tenants moved out of the unit at the end of April, 2009. There is no evidence before of the date the Landlord's photographs were taken and I accept that it is possible that subsequent tenants may have caused this damage to the walls.

In relation to the carpets, the Landlord has not provided evidence of the state of the carpet at the start of the tenancy or the end of the tenancy. The Landlord's failure to complete a condition inspection report with the tenant's constitutes a breach of section 35 of the Act, which provides:

- 35** (1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit
- (a) on or after the day the tenant ceases to occupy the rental unit, or
  - (b) on another mutually agreed day.
- (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
- (3) The landlord must complete a condition inspection report in accordance with the regulations.
- (4) 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.
- (5) The landlord may make the inspection and complete and sign the report without the tenant if
- (a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or
  - (b) the tenant has abandoned the rental unit.

I also base my decision on the behaviour of the Landlord who returned the Tenants a portion of the deposit; indicating that the Landlord's intended to retain only that amount the Landlord felt the Tenant's owed him; a penalty for moving early.

The Tenants did not cash the partial payment supplied by the Landlord and have not received return of the deposit in full.

In respect to the Landlord's claim for compensation for loss of rent revenue, I have examined the original copy of the tenancy agreements submitted by each party and note the following discrepancies between the copies:

Landlord Copy	Tenant's Copy
Length of Tenancy - page 2, #2(b) "1 year 6 months ending on 1 <sup>st</sup> Sept. 2010	page 2, #2(b) – this area is not completed
page 2, #2(ii) initialed by landlord and tenant	[page 2, #2(ii) is initialed only by the landlord
page 2, #2(c) other is checked and notation "1 year 6 months as of above date"	page 2, #2(c) other is checked and notation "1 year as of above date" – the words 6 months are crossed out
Security Deposit - page 3 – indicates \$450.00 deposit paid with notation that \$225.00 has been deducted for early move-out	the tenant did not supply a copy of page 3
page 6 – identical to tenant's copy	page 6 – identical to landlord's copy

I have considered the inconsistencies between the two copies of the residential tenancy agreements submitted as evidence and find that neither copy can be relied upon. It appears the landlord has altered their copy of the agreement in a number of areas and that the Tenants have altered their copy to remove the reference to an additional 6 month term of the tenancy. Of most concern to me is the absence of the Tenant's initials accepting a fixed-term tenancy on the tenant's copy, while the landlord's copy indicates initials by both the landlord and one of the Tenants. Therefore, I find that this was a month-to-month tenancy and not a fixed term tenancy. I have also determined that, despite the Tenant's failure to provide the Landlord with written notice to end the tenancy, that the Landlord did willingly agreed to an end of the tenancy, based upon verbal notice given by the Tenants at the end of March, 2009 and the Landlord's testimony that he accepted this notice.

Further, I find the return of a portion of the deposit to the Tenants in May indicates that, on the balance of probabilities, the Landlord did not intend to make a claim against the Tenant for damages. Even if I accepted that the Tenants breached the Act by not providing proper notice to end the tenancy, the Landlord has not provided evidence that adequate efforts were made to mitigate as the Landlord has failed to provide evidence of sufficient advertising. Section 7 of the Act provides:

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7 (1) 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.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

I find that hand-written notices placed at local businesses, combined with a web site advertisement of which the landlord has no knowledge, provides inadequate proof of a serious attempt to mitigate his loss. Therefore, the Landlord's claim for loss of rent revenue is dismissed without leave to reapply.

As the Landlord's application does not have merit, and I find that the Landlord is not entitled to recover the filing fee from the Tenants for the cost of this Application for Dispute Resolution.

I find that the Tenant's application has merit and that the Tenants are entitled to return of the filing fee for the cost of this Application for Dispute Resolution.

The landlord is retaining a deposit in the sum of \$450.00 and I find that the Landlord must return this sum to the Tenants.

## Conclusion

I find that the Tenants have established a monetary claim in the amount of **\$500.00**, which is comprised of \$450.00 security deposit owed and \$50.00 in compensation for the filing fee paid by the Tenants for this Application for Dispute Resolution.

Based on these determinations I grant the Tenants a monetary Order in the sum of \$500.00. In the event that the Landlord does not comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

The Landlord's claim for compensation for damage and loss is dismissed without leave to reapply.

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*.



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Dated: October 26, 2009.

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Dispute Resolution Officer