# Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

## Decision

**Dispute Codes**:

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| MND | For Damage to the Unit/Site/Property |
| MNR | Monetary Order for Rent Owed |
| MNSD | Return of the Security Deposit |
| 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 claim for $765.00 for rent owed for the month of March 2009 and $478.60 for costs of damage to the unit/site/property during the tenancy.

The hearing was also convened to deal with the tenant's application for the return of the $380.00 security deposit plus interest and a monetary order for $15,691.63 for compensation for damage or loss under the Act and the $100.00 fee paid by the tenant for this application.

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

**Issues to be Decided for the Tenant's Application**

The tenant was seeking to receive a monetary order for the return of the security deposit retained by the landlord and monetary compensation for loss of value to the tenancy.

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

- Whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act. This determination is dependant upon the following:
    - Did the tenant pay a security deposit and pet damage deposit?
    - Did the tenant provide written consent to the landlord permitting the landlord to retain the security deposit at the end of the tenancy?
    - Was an order issued permitting the landlord to retain the deposit?
- Has the tenant submitted proof that the monetary claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing on a balance of probabilities:
    - That damages and losses were incurred
    - That the claimed damages and losses were directly due to the actions, or inaction, of the landlord ***and*** in violation of the Act
    - That the amount being claimed is justified and
    - That the tenant made reasonable effort to minimize the damages

**Issues to be Decided for the Landlord's Application**

The landlord was seeking to receive a monetary order for damages and compensation for one month's rent for inadequate notice by the tenant.

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 loss of rent and damages. This determination is dependant upon answers to the following questions:

- Has the landlord submitted proof that rent was owed and unpaid?
- Has the landlord submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing on a balance of probabilities that the costs were incurred due to the actions of the tenant in violation of the Act, that the amount or value being claimed is justified and that the landlord made reasonable effort to minimize the damages?

The burden of proof is each party to establish their claims and to prove the damages being claimed.

**Background and Evidence**

The tenancy began on June 1, 2007 and a security deposit of $380.00 was paid. The rent was $765.00 per month. At the end of March 2009, the tenant placed a stop-pay on the rent cheque for March and vacated the unit at the end of March 2009.

The tenant's forwarding address was provided to the landlord, but the security deposit had not been returned to date. The tenant made application for the deposit and additional damages on August 4, 2009. The landlord applied on November 6, 2009 to keep the deposit as partial compensation for additional damages being claimed.

Evidence: Tenant's Application

The tenant testified that when they moved into the unit in June 2007, the carpets had been recently shampooed and the landlord, who was with the tenants at that time made a comment about the presence of a strong odour. The tenant testified that the landlord then stated that they should open some of the windows for ventilation purposes.

The tenant testified that 19 months later, near the end of February 2009, the tenant suddenly noticed evidence of serious mold in the unit. The tenant testified that, prior to that date, they had not realized that mold was growing in several areas of the unit because most of the growing mold was well hidden behind furnishings. Moreover,

some of the discoloration had been mistaken by the tenant to be grime, particularly around the metal windows. However, during the last week of February, according to the tenant, it became evident that a serious mold problem had developed.

The tenant testified that when the mold was discovered at the end of February, they decided to act. In response to the question of why the tenant did not approach the landlord to ask that the landlord hire mold a inspection specialist which is a landlord responsibility under the Act, the tenant stated that they felt the matter was too urgent to wait for the landlord's return and that they did not want to deal with the landlord's agent who had been delegated to take taking care of the rental business in the landlord's absence.

The tenant testified that they decided to immediately hire a mold inspector on their own because of the urgency of the matter and the fact that they did not want to deal with the landlord's agent. The tenant stated that a "stop-pay" was placed on the rent cheque because these funds were required to pay for the mold inspection.

The tenant testified that on March 5, 2009 a certified mold inspector did a thorough inspection and concluded that there was a serious mold contamination problem which made the residence hazardous for the tenants to continue to reside in. A copy of the report was submitted into evidence. The tenant pointed out that the report clearly indicated that the formation of mold was in no way the fault of the tenant and was likely caused by leaking pipes in the wall, a poor seal on the toilet and the fact that the windows were aluminum.

The tenant testified that, after the mold inspection, a decision was made to vacate the unit as soon as possible for the sake of the tenant's health. However, the tenants had to remain in the unit long enough to dedicate a substantial amount of time and labour to disinfecting as many items as possible in an effort to try and save the tenant's personal possessions.

The tenant testified that on March 13, 2009 when the landlord returned from his vacation, the tenant spoke to the landlord about the mold problem for the first time and the landlord immediately offered to commence remediation. However, the tenant advised the landlord that that they were not interested in remaining in the rental unit during any kind of renovation work because the tenant felt that this was not safe. The tenant stated that it had already been decided that the tenant would end the tenancy and the family prepared to move.

The tenant gave detailed testimony about the extent of the mold and about its detrimental effect on the health of the inhabitants, particularly one of the tenant's children who evidently suffers from a debilitating medical condition affected by mold spores. The tenant had submitted into evidence medical data relating to this issue.

The tenant believes that the landlord should be held responsible under the Act to compensate the tenant for all damage and losses stemming from the mold situation.

The tenant stated that the landlord was at fault because it knew about the mold problem prior to the tenancy and failed to disclose this fact to the tenants or to take steps to rectify the issue. The tenant based this allegation on the fact that in 2007 when they were moving in, the landlord had commented about a strong odour and advised the tenant to keep the windows open for ventilation. The tenant testified that they also discovered that the landlord had had previously painted over mold in places. The tenant alleged that another resident living in the same building but another suite, had told the tenant that in the past she reported condensation and mold to the landlord. According to the information, this happened five or six years ago. The tenant supplied the name and phone number of this individual. The tenant also pointed out that the unit has few windows, is in a dark section of the building and is shaded by high bushes and a fence, which likely contributed to the propensity for mold.

The tenant stated that the mold was not caused by the tenant's lifestyle as put forth in the landlord's evidence. The tenant stated that they kept the unit clean and also well-

heated at a reasonable temperature by using a space heater which was moved from room to room as occupants required for warmth. The tenant testified that her son would also sometimes activate the baseboard heaters in his room when it got too cold. The tenant pointed out that the kitchen was kept extremely warm as the tenant was "cooking all day" and that the stove heat helped keep the entire rental unit from becoming too cold. The tenant stated that fans were also used when appropriate and windows were opened for ventilation as necessary.

The tenant provided a substantial number of photographs showing extensive mold in the unit, which the tenant had evidently not noticed for 19 months because these moldy spots had developed behind furniture in the unit. Also submitted were numerous photographs of the tenant's personal possessions which were allegedly compromised by the mold. The tenant also provided a list documenting every item being claimed with the value listed along side. The total amount of the claim added up to $15,691.63.

The landlord testified that the unit was never previously contaminated with mold and that mold growth was never reported to the landlord at any time prior to March 13, 2009. The landlord stated that his agent was available at the end of February and beginning of March when the tenant decided to go ahead and hire a mold inspector without the landlord's knowledge and that the tenant did not make any effort whatsoever to involve the landlord in this pursuit. The landlord stated that, as soon as the mold was reported to the landlord, he immediately took action and offered to start repairs, but this initiative was rebuffed by the tenant who was intent on moving out and ending the tenancy. The landlord testified that because nothing about mold was ever brought to the landlord's attention during the19-month tenancy, the landlord was never given any reasonable opportunity to have the mold complaint investigated and to have the problem addressed. The landlord testified that in the past other tenants had lived in the suite with never any indication of mold problems. The landlord supplied a letter from a former tenant stating that "*the apt was immaculate and building well maintained….If I ever there was a concern or a maintenance issue Ed would have it looked after*

*immediately…….Mold was never seen in that apt. when we lived there*." The landlord pointed out that he and his family resided in the unit for 5 years and had never witnessed any kind of mold formation. The landlord denied knowingly painting over mold and stated that if he was ever aware of a mold infestation, it would certainly be addressed immediately in an effective manner, because of the risk to the tenants as well as to his building and investment. The landlord also testified that he could not recall making a verbal observation at the start of the tenancy in 2007, that the unit smelled musty, and if such a statement was made, it did not relate to any knowledge of an existing mold issue.

The landlord stated that it was likely that the tenant had caused or contributed to the mold situation by the tenant's lifestyle, neglecting to ensure that the unit was properly heated with the baseboard heaters that were situated in every room. The landlord testified that, although the heating system was fully functional, for reasons known only to the tenant the electric base-board heat was evidently not utilized by the tenant as the main heating source. The landlord stated that electric baseboard heat with thermostatic control was the primary heat source installed when the building was constructed to maintain consistent temperatures in evenly heating the unit but it was the tenant's choice to use a space heater instead of the primary heating system built into the unit. The landlord speculated that, in addition to the above, the tenant made it a practice of blocking natural ventilation and failing to use the exhaust fans to vent moist air from cooking and bathing. The landlord testified that the suite was built in compliance with the building code of its day and was well maintained by the landlord. The landlord testified that, after the tenant moved, the renovations revealed no structural deficiencies. The landlord disputed the tenant's claim in its entirety.

**Analysis: Tenant's Application**

Claim for Return of Security Deposit

In regards to the return of the security deposit and pet damage deposit, I find that section 38 of the Act is clear on this issue. Within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit or pet damage deposit to the tenant with interest or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The Act states that the landlord can only retain a deposit if the tenant agrees in writing the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the director orders that the landlord may retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make application for an order to keep the deposits.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I find that the tenant’s security deposit with interest was $389.33 and that the landlord failed to follow the Act in retaining the funds being held in trust for the tenant. I find that the tenant is therefore entitled to compensation of double the deposit, amounting to $760.00 plus the $9.33 interest on the original deposit totalling $769.33.

Tenant’s Claim for Damages

The tenant is claiming damages for loss of property that resulted from mold contamination. In regards to the right to claim damages from the another party, Section 7 of the Act states that if a landlord or tenant does not comply with the Act, regulations or tenancy agreement, the non-complying party 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, the applicant must prove that the other party did not comply with the Act and that this resulted in costs to the applicant, pursuant to section 7. 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 tenant, 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 mitigate the damage or losses that were incurred

I find as a fact that that the tenant has established that there was mold, that this mold damaged the tenant's property and that the mold problem resulted in the tenant ending the tenancy on short notice. However, to support a claim for the payment of compensation by the landlord, the tenant must first prove that the landlord was at fault by not following the Act.

I find that section 32 of the Act imposes responsibilities on both the landlord and the tenant for the care and cleanliness of a unit. A landlord must provide and maintain

residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, having regard to the age, character and location of the rental unit to make it suitable for occupation by a tenant. A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit. While a tenant of a rental unit must repair damage to the rental unit caused by the actions or neglect of the tenant, a tenant is not required to make repairs for reasonable wear and tear.

The tenant's position was that the landlord did not comply with the landlord's obligations under this section of the Act for the entire period of time during which the mold was apparently growing unbeknownst to the tenant. According to the tenant, this mold developed to a serious state over the 19 months of the tenancy and possibly prior to that and the landlord was aware of the problem but failed to take action, contrary to the Act and, even hid the problem from the tenant, which would also contravene the Act.

I do not accept the tenant's testimony that the landlord knew about a mold problem prior to, and during, the tenancy and intentionally ignored it or covered it up. It would not make good business sense for an owner to neglect protecting an investment property and to knowingly have permitted mold to remain and escalate.

I find that it also does not follow logic that several people lived in the unit for 19 months during which mold was evidently growing unchecked, without the tenant even noticing it and yet impose an expectation on the landlord that it should have been aware of the development of the mold problem. I find that under the Act, a landlord is required to make repairs in a timely manner once the issue has been reported to the landlord by the tenant. If building deficiencies or malfunctions are not reported, then I am not able to find that the landlord to be in violation of the Act.

On the question of whether or not the landlord was in violation of section 32 of the Act, by failing to address the mold issue in a timely fashion, I find that the landlord did

immediately take measures to address the mold issue as soon as it was finally reported by the tenant.

In fact, I find that the tenant wilfully delayed the landlord's intervention and was in violation of the Act by intentionally precluding the landlord from conducting an investigation of the mold problem at the time it was discovered by the tenant.

Given the above, I find that the tenant's claim fails to satisfy element 2 of the test for damages and I find that the portion of the claim relating to damages caused by the mold issue must be dismissed.

**Analysis: Landlord's Application**

The landlord is claiming compensation for unpaid rent for the month of March 2009 and reimbursement for the costs of cleaning and repairing the unit. The tenant had admitted that the rent was withheld to pay for the mold investigation and the fact that the tenant could not safely reside in the unit after the results were reported.

In certain circumstances, a tenant may withhold rent to pay for emergency services, provided the criteria set out in the Act is fully met. I find that it is evident that the tenant genuinely considered the discovery of serious mold near the end of February 2009 constituted an emergency situation.

Section 33 of the Act contains specific provisions for handling emergency repairs. These are defined as repairs that are (a) urgent, (b) necessary for the health or safety of anyone or for the preservation or use of residential property, and (c) made for the purpose of repairing major leaks in pipes or the roof, damaged or blocked water or sewer pipes or plumbing fixtures, the primary heating system, damaged or defective locks that give access to a rental unit, the electrical systems, or in prescribed circumstances, a rental unit or residential property.

However, there is a requirement under section 33(3) the Act that the tenant first

- report an emergency to the landlord and

- give the landlord a reasonable amount of time to make the urgent repairs.

In this instance I find that the tenant did not follow the provisions of the Act in regards to the handling of the emergency situation because the tenant failed to give the landlord a reasonable amount of time to make the emergency repairs before the tenant incurred the costs. In regards to the tenant's action in withholding rent for march 2009, I find that section 33 (5) of the Act provides that a landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant follows the required steps.

However, 33 (6)of the Act states that a landlord does not have to reimburse the tenant for amounts claimed for repairs when the tenant made the repairs before one or more of the conditions were met. In this instance, I find that the tenant did not follow the mandatory steps of giving the landlord a chance to address the problem before withholding the cost from the rent.

Moreover, I find that the tenant also withheld the remainder of the rent, which is a violation of section 26 of the Act which states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement.

That being said, I find that there is no doubt that the tenancy was substantially devalued *after* the discovery of mold as confirmed by the photos and report issued early in March 2009. I find as a fact that the tenant could not be expected to reside comfortably in the unit and to pay full rent during this period when the unit was not likely fit to be inhabited and would have to be vacated for the landlord to do the remedial work in any case. I accept that the tenant remained solely to sort and clean their contaminated possessions and was thereby deprived of the right to quiet enjoyment of the suite guaranteed by section 28 of the Act for which a rent abatement is justified in the amount of $765.00. Therefore, I find that the landlord 's claim for $765.00 rent owed for the month of March 2009 is not supported and I dismiss this portion of the landlord's application.

In regards to the remainder of the landlord's monetary claims, including rekeying the locks, missing freezer shelf and patio blind, damaged floor and cleaning the oven, I find that these claims do not meet the test for damages. The parties did not conduct a move-in and move-out inspection report and therefore the landlord did not provide adequate verification regarding when the damage occurred and that the tenant was responsible for the damage. I find that the landlord did not provide sufficient evidence to meet the test for damages and to support this monetary claim. Accordingly, the portion of the landlord's application for damages is dismissed.

**Conclusion**

Based on the testimony and evidence presented during these proceedings, I find that the landlord's application for monetary compensation in the amount of $478.60 for cleaning and repairs and $765.00 for rent for March 2009 was not supported and the landlord's application is dismissed in its entirety without leave.

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to the return of double the security deposit and interest under section 38 of the Act totaling $769. 33. I find that the tenant is also entitled to be reimbursed for half of the cost of filing the application in the amount of $50.00.

I hereby issue a monetary order in favour of the tenant in the amount of $819.33. 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.

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November 2009 _____

Date of Decision

Dispute Resolution Officer