



# Dispute Resolution Services

Residential Tenancy Branch  
Ministry of Housing and Social Development

## Decision

### Dispute Codes:

MNSD, MNDC, FF

### Introduction

This Dispute Resolution hearing was convened to deal with an application by the tenant for a monetary order for money owed or compensation for damage or loss under the Act for \$500.00 moving costs, \$725.00 for the value of labour for painting and diminished value of the tenancy and \$200.00 cost of paint. The total amount of the damages being claimed was \$1,425. The tenants were also seeking the return of \$825.00 from the security and pet damage deposit that was withheld by the landlord and the \$50.00 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

The tenant advised that the landlord had reimbursed the \$200.00 for cost of paint so this matter was no longer at issue. 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, damages and moving costs.

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 furnish a forwarding address in writing to the landlord?
- Did the tenant provide written consent at the end of the tenancy permitting the landlord to retain the security deposit or any portion thereof?
- Was any order issued permitting the landlord to retain the deposit?
- Has the tenant submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing that the losses were incurred due to the actions of the landlord in violation of the Act or tenancy agreement?

The tenant has the burden of proof to establish that the deposit existed. In regards to the monetary claim for damages, the burden of proof is on the tenant/claimant.

### **Preliminary Issue**

The landlord confirmed that the landlord's evidence was never served on the respondent tenants. It was also confirmed that the tenant's subsequent evidence was served to an incorrect address for the landlord.

The Residential Tenancy Rules of Procedure, Rule 3.1, requires that all evidence must be served on the respondent and Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding. If the respondent intends to dispute an Application for Dispute Resolution, Rule 4 states that copies of all available documents, photographs, video or audio tape evidence the respondent intends to rely upon as evidence 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 proceeding but if the date of the dispute resolution proceeding does not allow the five (5) day requirement in a) to be met, then all of the respondent's evidence must

be received by the Residential Tenancy Branch and served on the applicant at least two (2) days before the dispute resolution proceeding.

If copies of the evidence are not served on the respondent or the applicant as required, and if the evidence is relevant, the Dispute Resolution Officer must decide whether or not accepting the evidence would prejudice the other party, or would violate the principles of natural justice. Even if the Dispute Resolution Officer decided to accept the evidence, the other party must still be given an opportunity to review the unseen evidence before the application can be heard which would necessitate a possible adjournment to a future date to allow service of the evidence by both parties.

In the case before me, the landlord stated that he misunderstood the process and had mistakenly submitted their evidence only to the Dispute Resolution file and not to the other party. I note that the Landlord and Tenant Fact Sheet contained in the hearing package makes it clear that “*copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by RTB as soon as possible..*”

Given the above, I decline to accept or consider any evidence that was not properly served on the other party. However, I will still consider the evidence that was properly served, as well as verbal testimony from both parties.

### **Background and Evidence**

The tenancy was to begin on February 1, 2010 and a written tenancy agreement was signed. However, the parties entered into some form of verbal agreement which involved the tenant supplying labour to re-paint the residence in January 2010 and moving in early and being reimbursed by the landlord for the cost of supplies. In fact, the tenant testified that the landlord had already reimbursed the \$200.00 for cost of paint that was claimed in the application and therefore the damages claim consisted only of the \$725.00 being claimed for the labour in painting and as compensation for

being denied early-move-in as promised and \$500.00 for the cost of moving, as well as the return of the \$825.00 security and pet deposit.

The tenant testified that they moved out of the unit prior to the end of February 2010.

The tenant testified that, the tenant had attempted to give the landlord the forwarding address for the return of the security and pet damage deposits on the move-out inspection report. According to the tenant, however, the landlord refused to accept the move-out report and the address was never provided to the landlord in writing. The tenant testified that despite discussions about the return of the deposits they were never refunded and the tenant was seeking \$825.00.

The landlord acknowledged that the deposit was not returned and that no application by the landlord claiming damages had been filed seeking to keep the deposit.

In regards to the claim for painting, the tenant testified that the parties had made a deal that would allow the tenant to move in early in January 2010 in exchange for painting. However, the tenant was not permitted by the landlord to move in early. The tenant's position was that they supplied labour for painting and did not receive any benefit. The tenant was claiming \$725.00 which is the equivalent of half a month's rent.

The landlord testified that the painting was agreed to at the request of, and for the benefit of, the tenant and that the early move-in was delayed by the tenant's failure to promptly pay the deposit and the rent in advance of the February 1, 2010 move-in date. The landlord disputed the tenant's claim for compensation for the labour for painting.

In regards to the \$500.00 claimed for moving costs, the tenant has based this claim on an allegation that, prior to agreeing to rent the unit, the tenant had received assurances that the landlord was going to take the property off the market, which was listed for sale when they viewed it. The tenant testified that this was a material factor in their decision to rent the home. The tenant testified that while the painting was being done, they were upset to suddenly find out that the landlord's realty agents were still showing the property to prospective buyers. The tenant testified that this development caused them

to stop painting. The tenant testified that the landlord then tried to verbally terminate the tenancy, but then relented and the tenant moved in. However, because the rental period was not going to be as secure as expected for the long term contrary to what they were led to believe, the tenant immediately on February 1, 2010 to end the tenancy effective February 28, 2010. The tenant testified that the landlord's actions in forcing this move by not fulfilling a verbal commitment made, caused the tenant substantial inconvenience and expenses in excess of \$500.00, which the tenant was seeking in reimbursement from the landlord..

The landlord's position was that no verbal contract was made promising not to list the property at the time the tenancy agreement was entered into. The landlord stated that, despite this, had the tenant not given notice to move, the landlord actually did intend on taking the listing off the market. The landlord testified that the tenant's choice to vacate the rental property was made based on the tenant's own reasons and needs rather than caused by an alleged violation of a verbal promise by the landlord. The landlord further submitted that the tenant's notice was one day short of the required full month of notice to vacate under the Act.

## **Analysis**

### **Security Deposit Claim by Tenant**

Section 38 of the Act deals with the rights and obligations of landlords and tenants in regards to the return of security deposit and pet damage deposit. Section 38(1) states that within 15 days of the end of the tenancy and receiving the tenant's forwarding address a landlord must either repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations; OR make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord retained the tenant's security deposit held in trust on behalf of the tenant. However, the tenant had not yet provided the landlord with a written forwarding

address. I find that the landlord did not make an application to retain the deposits and also conceded that the interior of the unit was left in a reasonably clean condition. Accordingly I find that the tenant is entitled to a refund of \$825.00 representing \$725.00 security deposit and \$100.00 pet damage deposit for a total entitlement of \$825.00.

In regards to the compensation for painting or for the denial of early move-in, I find that it is important to note that 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 situation, 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 verifies the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything reasonable to address the situation and to mitigate the damage or losses that were incurred.

In this instance, I find that the parties made an agreement in which the tenant would provide labour to paint in exchange for an early move-in date and I find that the tenant complied with their part of this bargain. I do not accept the landlord's contention that the

tenants had violated the terms of the agreement by not paying rent or security deposit in advance, which is not permitted under the Act in any case. I find that the landlord breached the agreement by neglecting to give the tenant some value for the work they did and I therefore find that the tenant is entitled to be compensated \$725.00.

In regards to the tenant's claim for moving costs based on having to move out because the landlord betrayed his verbal commitment to take the home off the market. The tenant's position was that this constituted a serious breach of a material term.

I find that in order to establish that a breach of a material term in the tenancy has occurred the following three components must exist:

- There must be a clear term contained in the tenancy agreement
- This term must fit the definition of being "material"
- There must be a genuine breach of the material term.

I find that the written tenancy agreement did not contain any specific term that required the landlord to remove the property from being listed for sale. A material term is a term that the parties had both agreed was so important that the most trivial breach of that term would give the other party the right to end the agreement.

I find that if the promise that the home would be taken off the market was to be considered as a material term of the tenancy, it should have been included in the written tenancy agreement. I find that section 6(3)(c) of the Act states that a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it and by their nature disputed verbal terms are not clear..

Under section 45 of the Act, a tenant is always at liberty to terminate a month-to-month tenancy by giving one month notice and can do so at their own will for any reason. A tenant can also choose to enforce compliance with a term of the tenancy, including a material term, by making an application for an order to force the landlord to comply. In

this instance, the tenant alleged a breach of a material term of the tenancy which the tenant chose to deal with by ending the tenancy instead of making application to enforce the alleged term. In doing this, I find that the tenant did not pursue statutory remedies available under the Act.

Therefore, even if I accepted that there was a material breach by the landlord, I would also have to find that the tenant's decision not to continue the tenancy by enforcing compliance under the Act would function to circumvent the tenant's claim for damages that were based on being "forced" to end the tenancy. Given the above, I find that the portion of the application relating to moving costs of \$500.00 must be dismissed.

### **Conclusion**

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to total monetary compensation of \$1,600.00, comprised of \$825.00 for return of the security deposit, \$725.00 compensation for painting wrongfully retained and the \$50.00 fee paid by the tenant to file this application. I hereby grant a monetary order in the amount of \$1,600.00 in favour of the tenant. This order must be served on the respondent and if unpaid may be enforced in Small Claims Court if necessary.

The remainder of the tenant's application is dismissed without leave.

March 2010

Date of Decision

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Dispute Resolution Officer