



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing and Social Development

## **DECISION**

Dispute Codes      MNR, MNSD, MNDC, FF

### Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking a monetary order.

The hearing was conducted via teleconference and was attended by two agents for the landlord and the male tenant.

The landlord testified at the outset of the hearing that he had not received the tenant's evidence. The tenant confirmed that he served the landlord with his evidence on October 14, 2010 to the service address provided in the landlord's Application for Dispute Resolution by leaving it in the mail box.

The landlord testified there is no one living at this address and he could not confirm when the last time the mail was checked. I accept the tenant has served the landlord in accordance with Section 88 of the *Residential Tenancy Act (Act)* for the purposes of this hearing.

The landlord confirmed that he had not submitted evidence but that he could submit copies of what documents he would be referring to during the hearing at a later time. I advised the landlord that evidence must be served in accordance with the Residential Tenancy Rules of Procedure and must be served at least 5 days prior to the hearing. As a result, I would not accept any further evidence.

At the outset of the hearing the tenant suggested this hearing had no jurisdiction over the matter as a tenancy agreement was not entered into. As the determination of whether or not a residential tenancy agreement was entered into falls under the *Act*, I accept jurisdiction on the matter.

### Issues(s) to be Decided

The issues to be decided are whether a tenancy agreement was entered into and if so if the landlord is entitled to a monetary order for unpaid rent; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 1, 16, 17, 38, 67, and 72 of the *Act*.

### Background and Evidence

The tenant has submitted into evidence the following documents:

- Email correspondence between the parties, including the tenants and the two agents representing the landlord, dating from August 26, 2010 to September 13, 2010 inclusive;
- A copy of a tenancy application completed by the tenant and dated August 26, 2010, including attached unsigned “Addendums to Residential Tenancy Agreement”;
- A copy of the tenant’s consent to allow the landlord to complete a credit check signed and dated on August 26, 2010;
- A copy of an unsigned tenancy agreement and addendums for a 9 month fixed term tenancy beginning on September 18, 2010 that would convert to a month to month tenancy effective July 1, 2011 for a monthly rent of \$4,477.00 due on the 1<sup>st</sup> of the month;
- Copies of lease agreements the tenant was a party to in other countries;
- A copy of a letter of reference dated October 8, 2010 from a previous landlord for the period of 2004 to 2008;
- A copy of handwritten notes indicating they were made during a phone call with the landlord’s agent on September 3 at 10:00 a.m. indicating the “proposed lease is not what we have agreed upon” with several notations indicating the tenant’s requirement for a long fixed term tenancy;
- A copy of typewritten notes outlining the meeting held between the parties on August 31, 2010 indicating details of the tenant’s understanding of what was to be outlined in written tenancy agreement; and
- A copy of a webpage advertisement for the rental unit listing the rental amount at \$4,200.00.

The landlord provided testimony that he was first contacted by the tenants on August 22, 2010 who were interested in the possibility of renting the rental unit. The parties

met to view the rental unit and on August 26, 2010 the landlord stated he received another email indicating the tenants were interested in entering into a tenancy.

The landlord testified that the two agents and the tenant met on August 31, 2010 to work out the details of the tenancy agreement and upon the conclusion of the meeting the landlord accepted the tenant's cheque in the amount of \$2238.50 for a security deposit.

The landlord contends that at this point the parties had entered into a tenancy agreement and he seeks compensation in the amount of \$4,477.00, the equivalent of rent for one month under the tenancy agreement.

The tenant and one of the landlord's agents confirmed that the one agent advised the other agent not to cash the security deposit cheque until the tenancy agreement was signed. The agent confirmed that he has cashed the cheque.

The tenant contends that during the meeting he indicated the importance of a long fixed term tenancy to him, his family, and to his employer. He indicates that he did not understand the need for a probationary period but that if the landlord changed the wording on the tenancy agreement from "the tenancy may continue on a month- to-month basis or another fixed length of time" to read "the tenant may extend the lease on a month-to-month basis or another fixed length of time" he would agree.

The parties agree the meeting ended with the tenant promising to provide some wording on some issues and to provide some additional documents (insurance papers) and that the landlord's agent would adjust the tenancy agreement to read as they had agreed at the meeting.

The tenant contends that when he did receive the agreement on September 3, 2010 via email it did not have the wording as agreed to at the meeting. The landlord contends the agreement was worded as they had agreed upon during the meeting.

The landlord states the tenant called him on September 5, 2010 (the tenant states it was on September 6, 2010) to say that the agreement did not reflect the discussion on August 31, 2010 accurately, in particular the matter of the longer fixed term or ability for the tenant to extend the fixed term.

On September 7, 2010 the tenant sent a follow up email to the landlord stating that he did not believe that the parties could reach a mutual agreement and requested the refund of his security deposit.

### Analysis

The three basic tenets used to determine if a contract has been entered into include: capacity, consensus and consideration. In this case neither party presented evidence or testimony questioning the other party's capacity, as such I make no findings on capacity. As the parties agree the tenant provided the landlord with a cheque for a security deposit, I find that there was financial consideration.

In relation to the matter of consensus, if the consensus is found in written form it is evident, however, in the case of verbal agreements when the parties, after the fact, disagree with what was agreed-upon, it is virtually impossible for a third party to interpret whether consensus was reached.

Having said this, I accept the tenant's position showing that negotiations as to the terms of the final tenancy agreement continued beyond the close of the August 31, 2010 meeting.

In particular, in an email dated September 2, 2010 from the landlord's agent to the tenant the agent indicates that he is still waiting for the tenant to provide the "diplomatic clause, so I could send you the Rental Agreement". Further, on September 3, 2010 the agent then sent a copy of the tenancy agreement and addendum for the tenant to "have a look and sign". The agent also offers to have the tenant call if he has any questions.

From this communication, I find it likely that should the landlord have had some objection to the diplomatic clause he could have required some further negotiation or determined that he felt the clause was not to his liking and decided not to enter into the agreement.

I also find it likely that by the agent's offer to the tenant to "have a look and sign" and to call if there are any questions, there is an implied opportunity for the tenant to raise any issues if he was not satisfied with what was in the document prior to signing, indicating the agreement was not finalized.

From both parties testimony it is clear that on either September 5, 2010 or September 6, 2010 the parties continued to discuss the terms of the tenancy agreement that ultimately lead to the tenant's email of September 7, 2010 that indicates he feels the parties will not be able to come to a full agreement.

Section 17 of the *Act* stipulates that a landlord may require a tenant to pay a security deposit as a condition of entering into a tenancy agreement or as a term of a tenancy agreement.

I find that from the landlord's agent warning to the other agent to not cash the security deposit until the tenancy agreement was signed, the first agent understood that the tenancy agreement was not yet finalized at the close of the August 31, 2010 meeting and the landlord did not yet have the authority to collect a security deposit.

Section 16 of the *Act* states that the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

In this case, I find the parties had not yet entered into a tenancy agreement and as such the tenant has no obligations to landlord in regards to the payment of rent. I also find the landlord has no right to retain any funds from the tenant, including the security deposit paid by the tenant on August 31, 2010.

### Conclusion

Based on the above, I dismiss the landlord's application in its entirety.

I find that the tenant is entitled to monetary compensation pursuant to Section 67 and I grant a monetary order to the tenant in the amount of **\$2,238.50** comprised of the security deposit collected. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced 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: October 19, 2010.

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Dispute Resolution Officer