



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing and Social Development

## DECISION

Dispute Codes      MNR, MNSD, FF

### Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord for an Order of Possession, a monetary order and an order to retain the security deposit in partial satisfaction of the claim and to recover the filing fee.

Although served with the Application for Dispute Resolution and Notice of Hearing by registered mail on August 24, 2010, and the Amended Application by registered mail on October 18, 2010, the Tenant did not appear.

The Landlord appeared, gave affirmed testimony and was provided the opportunity to present her evidence orally and in written and documentary form, and make submissions to me.

### Issue(s) to be Decided

Has the Tenant breached the Act or tenancy agreement, entitling the Landlord to an Order of Possession and monetary relief?

### Background and Evidence

The Landlord testified that the rental unit was vacated on August 20, 2010, and there was no need to proceed further for an Order of Possession.

This was a one year fixed term tenancy, beginning on June 1, 2010, and was to end on May 31, 2011, rent was \$800.00 per month, payable on the 1<sup>st</sup> day of the month and a security deposit of \$400.00 was paid June 1, 2010.

The Landlord gave affirmed testimony that the Tenant was served with a Notice to End Tenancy for non-payment of rent on August 3, 2010 by posting on the door. A copy of the Notice to End Tenancy was supplied into evidence, with an effective move out date of August 16, 2010. The Notice stated the amount of unpaid rent was \$850.00 and unpaid utilities was \$52.14.

The Notice informed the Tenant that the Notice would be cancelled if the rent was paid within five days. The Notice also explained the Tenant had five days to dispute the Notice.

The Tenant did not apply to dispute the Notice. The Landlord provided evidence and gave affirmed testimony that the Tenant made a partial payment of rent in the amount of \$400.00 on August 13, 2010, did not pay the balance or the utilities and is now claiming a monetary amount of \$2,194.80, for unpaid rent in August and September, unpaid utilities, late fees, and a liquidation fee of \$800.00.

### Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

The Tenant has not paid the outstanding rent and did not apply to dispute the Notice and is therefore conclusively presumed under section 46(5) of the Act to have accepted that the tenancy ended on the effective date of the Notice.

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, based on a balance of probabilities.

To prove a loss and have the other party pay for the loss requires the claiming party to prove four different elements:

First, proof that the damage or loss exists, secondly, that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement, thirdly, to establish the actual amount required to compensate for the claimed loss or to repair the damage, and lastly, proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

I find the Landlord has submitted evidence and has proven her claim for \$400.00 for unpaid rent in August, \$50.00 in administrative late fees for July and August and propane for \$94.80.

I find the tenancy ended on the effective date of August 16, 2010, and the Landlord took reasonable steps to mitigate her loss by advertising the rental unit in the local paper and on the internet. I accept the Landlord's testimony that the earliest she could rent the rental unit was October 1, 2010, and therefore I find the Landlord is entitled the rent of \$800.00 for September 2010.

RTB Policy Guideline #4 (Liquidated Damages) states that in order to be enforceable, a liquidated damages clause in a tenancy agreement must be a genuine pre-estimate of loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. If the liquidated damage clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible. The Landlord claims the liquidated damages were intended to compensate them for their time and expense in re-renting the rental unit as

a result of the early end to tenancy by the Tenant. The Landlord has not submitted any proof of actual damage in re-renting the rental unit, as the testimony indicated the advertising was through free sources. Therefore I find the liquidated damages clause in this tenancy agreement to be a penalty and unenforceable and I **dismiss** her claim for \$800.00 in liquidated damages.

I find that the Landlord has established a total monetary claim of **\$1,394.80** comprised of **\$400.00** in unpaid rent for August, **\$50.00** in late fees, **\$800.00** lost rent in September, **\$94.80** for propane and the **\$50.00** fee paid by the Landlord for this application.

I order that the Landlord retain the deposit of **\$400.00** in partial satisfaction of the claim and I grant the Landlord an order under section 67 for the balance due of **\$994.80**.

This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

#### Conclusion

The Landlord may keep the security deposit in partial satisfaction of the claim and is granted a monetary order for the balance due of **\$994.80**.

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: November 02, 2010.

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Dispute Resolution Officer