



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Public Safety and Solicitor General

## **DECISION**

**Dispute Codes**      MNR, MNSD, MNDC, FF

### **Introduction**

This hearing was convened by way of conference call to deal with the landlord's application for a monetary order for unpaid rent or utilities; for an order permitting the landlord to retain the security deposit in partial satisfaction of the claim; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; and to recover the filing fee from the tenant for the cost of this application.

The parties both attended the hearing, and the landlord, who is hard of hearing, had his wife attend to assist with translating. The landlord also had two witnesses who called into the conference call hearing at the outset of the tenancy, however they did not testify. The tenant's daughter also attended the hearing and testified. All parties and the witness gave affirmed testimony and the parties were given the opportunity to cross examine each other and the witness on their testimony.

All information and testimony received has been reviewed and is considered in this Decision.

### **Issue(s) to be Decided**

Is the landlord entitled to a monetary order for unpaid rent or utilities?

Is the landlord entitled to retain the security deposit in partial satisfaction of the claim?

Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?

### **Background and Evidence**

This month-to-month tenancy began on June 1, 2009 and ended in mid-August, 2010. Rent in the amount of \$875.00 was payable in advance on the 1<sup>st</sup> day of each month.

The landlord collected a security deposit from the tenant in the amount of \$437.50 on May 25, 2009, and still holds that deposit in trust.

The landlord testified that he received notice from the tenant on July 20-something stating that the tenant intended to vacate the rental unit in mid-August. He stated that the keys were returned to him on August 16, 2010. The tenant did not leave a forwarding address.

Upon inspecting the unit, the landlord testified that the living room, hall and kitchen required re-painting due to scuffed paint from furniture and picture or tack holes left by the tenant. He stated that the rental unit had been painted 6 months prior to the tenant taking possession. He has materials on hand, and used about half a can of paint which costs \$70.00 at Home Depot, he used a whole can of urethane to re-finish the hardwood floor in the living room which costs \$40.00 per can at Home Depot; he used 3 sponges to do the hardwood floor refinishing, at a cost of \$6.00 each; another can of paint for the kitchen at a cost of \$40.00. Further, the tenant left garbage and debris, such as cleaning cloths and rags, as well as stuff on the back porch, for which the landlord claims \$15.00 for a trip to the local landfill including gas and wear and tear on his vehicle.

The landlord claims \$100.00 for cleaning and repairs, as well as \$875.00 for one month of rent. The unit was re-rented on September 1, 2010.

The tenant and her witness both testified that the floor in the living room had a rose-colored carpet when she moved in and it was still there when they moved out. The tenant testified that the carpet had not been cleaned before she moved in, and she had asked the landlord to have it cleaned. There was no hardwood.

The tenant further testified that she sent a letter to the landlord dated January 25, 2010, a copy of which was provided in advance of the hearing, with a number of concerns and repair items that required the landlord's attention. Those items include:

- Heat turned on
- Toilet fixed (tank and flusher)
- Weather stripping on back door
- Enforce "your" No Smoking rule
- Address the mouse problem
- Replace non working fluorescents lights
- Switch covers (lights and outlets)
- Various windows

She stated she hated living there but couldn't move because she didn't have the money to pay a security deposit. She stated that the people living downstairs were noisy all hours of the day and night, smoked cigarettes, marihuana and crack cocaine, and the landlord did nothing about requiring the tenants in that unit to comply with the no-smoking rule. She stated that she complained to the landlord every time she saw him, but he didn't do anything.

The tenant further testified that when she returned the keys on August 14<sup>th</sup>, not 16<sup>th</sup>, and when she gave notice to the landlord, he didn't say anything to her about her obligation to give notice at the end of the month effective the end of the following month. She stated that she moved out on the 14<sup>th</sup> of August and had given the landlord notice on the 14<sup>th</sup> of July, and therefore, she gave one month's notice. She stated that she told the landlord he could keep the security deposit for the half month that she resided there in August, 2010 and thought that was all that the landlord required.

The tenant also testified that nail holes existed in the walls before the tenant moved into the unit. Further, the flusher on the toilet was held with dental floss that she installed herself, and that snow blew into the rental unit under the door. The tenant felt she was justified in leaving the unit mid-month.

### **Analysis**

Firstly, dealing with the landlord's application for a monetary order for unpaid rent, I refer to the *Residential Tenancy Act*:

**26 (1)** A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

In the circumstances, I cannot find that the tenant had a right under the *Act* to deduct any portion of the rent. If the tenant found the accommodations unsuitable, the tenant had a right under the *Act* to apply for dispute resolution for an order that the landlord comply with the *Act*, or apply for dispute resolution for an order that rent be reduced for services or facilities agreed upon but not provided. I have no application by the tenant before me.

Further, Section 45 of the *Act* states as follows:

**45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice, and
- (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

With respect to the landlord's application for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, I refer to Section 35:

**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.

In the circumstances, I find that the tenant did not abandon the rental unit, and the landlord had plenty of opportunity to schedule the move-out condition inspection report with the tenant once the tenant had given notice of her intention to vacate the rental unit. The consequences for failing to comply with that requirement, is set out in Section 36 of the *Act*, which states that the landlord's right to claim against a security deposit for damage to the residential property is extinguished. Therefore, I must find that the landlord's right to claim against the security deposit for damage to the unit is

extinguished. I further find that the landlord's actions in failing to complete a move-out condition inspection report with the tenant present causes a deficiency because it does not effectively deal with situations where parties may disagree on the findings. In this case, the parties don't even agree whether the living room floor had carpet or hardwood during the tenancy. An inspection conducted by one party is particularly problematic with an End-of-Tenancy Report completed in the tenant's absence or after-the-fact.

An inspection must be done contemporaneously with the vacating of the unit as required by the *Act* and by engaging in an alternate procedure not sanctioned by the legislation, the evidentiary weight of the move-out inspection report was negated. The landlord's methodology also created a credibility problem in that the landlord was seeking to obtain an order enforcing the *Act*, after having neglected to follow the *Act*. The move-out condition inspection should also give the tenant an opportunity to correct any deficiencies respecting cleanliness beyond reasonable wear and tear and damages in order to protect the security deposit or any pet damage deposit.

Further, in order to be successful in a claim for damages, the onus is on the claiming party to prove a 4-part test for damages:

1. That the damage or loss exists;
2. That the damage or loss exists as a result of the negligence or the failure of the tenant to comply with the *Act* or the tenancy agreement;
3. The amount of the damage or loss;
4. What efforts the claiming party made to mitigate such damage or loss.

I find that the landlord has failed to prove element 3. Although I find that the landlord ought to be permitted to use supplies such as paint that he has on hand, the landlord has failed to prove that a can of the paint used costs \$40.00 or that sponges cost \$6.00 each. I further find that the landlord's claim for gas and wear and tear on his vehicle for a dump run is without basis, and the landlord has failed to prove the cost for dumping debris left on the rental premises at the local landfill.

## **Conclusion**

For the reasons set out above, the landlord's application for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement is hereby dismissed without leave to reapply.

The landlord's application for a monetary order for unpaid rent is hereby awarded at \$875.00. The landlord is also entitled to recovery of the \$50.00 filing fee. I hereby order that the landlord retain the security deposit in partial satisfaction of the claim, and I

grant the landlord a monetary order for the balance of \$437.50, plus \$50.00 for the filing fee, for a total of \$487.50. This order may be filed in the Provincial Court of British Columbia, Small Claims division 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: January 17, 2011.

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Residential Tenancy Branch