



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MND, MNSD, MNDC, FF

### Introduction

This hearing was convened by way of conference call in response to an application made by the landlord for a monetary order for damage to the unit, site or property; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of this application.

The landlord and the tenant attended the hearing, gave affirmed testimony and provided evidence in advance of the hearing. The landlord also called a witness who gave affirmed testimony. The parties were given the opportunity to cross examine each other and the witness on the testimony given and evidence provided, all of which has been reviewed and is considered in this Decision.

### Issue(s) to be Decided

Is the landlord entitled to a monetary order for damage to the unit, site or property?

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

Is the landlord entitled to keep all or part of the pet damage deposit or security deposit in full or partial satisfaction of the claim?

### Background and Evidence

The parties agree that this fixed term tenancy began on September 1, 2009 and expired on August 31, 2010 at which time it reverted to a month-to-month tenancy until the tenant moved from the rental unit on January 31, 2012. Rent in the amount of \$1,100.00 per month plus \$75.00 per month for utilities was payable in advance on the 1<sup>st</sup> day of each month. On August 6, 2009 the landlord collected a security deposit from the tenant in the amount of \$550.00 as well as a pet damage deposit in the amount of \$550.00.

The landlord testified that paragraph 6 of the tenancy agreement states that if an additional person moves into the rental unit the tenant is liable for additional rent in the amount of \$150.00 per month. A copy of the tenancy agreement was provided for this hearing and paragraph 6 states,

“Subject to clause 13, Additional Occupants, the tenant agrees that for each additional tenant or occupant not named in clause 1 or 2 above, the rent will increase by \$150.00 per month, effective from the date of his occupancy. The acceptance by the landlord of any additional occupant does not otherwise change this agreement or create a new tenancy.”

Clause 13 states,

“Additional Occupants. No person, other than those listed in paragraphs 1 and 2 above, may occupy the rental unit. A person not listed in paragraph 1 or 2 above who resides in the rental unit for a period in excess of fourteen cumulative days in any calendar year will be considered to be occupying the rental unit contrary to this Agreement and without right or permission of the landlord. This person will be considered a trespasser. A tenant anticipating an additional person to occupy the rental unit must promptly apply in writing for permission from the landlord for such person to become an approved occupant. Failure to comply and obtain the necessary approval of the landlord in writing is a breach of a material term of the Agreement, giving the landlord the right to end the tenancy after proper notice.”

The tenant's friend moved into the rental unit with the tenant on March 17, 2011 along with the friend's 2 dogs. The first indication that the landlord had was on March 7, 2011 when the landlord sent a text message to the tenant asking if the tenant knew whose truck was parked in the tenant's parking spot. The tenant replied that the tenant knew who owned the truck and that it was okay to be parked there, and the truck was parked there 5 days a week. Further, the rental unit is in a 6 suite character building and mail is delivered by Canada Post into a mail slot in a locked door. The mail for all 6 suites goes onto a window sill by the mail boxes or into the mail boxes by the tenants. The landlord saw mail for the tenant's friend on the window sill. Also, while the tenant was on vacation the landlord saw another friend walking the 2 dogs belonging to the tenant's friend as well as the tenant's dog.

The landlord further testified that the tenant was a very good tenant, and gave the landlord post-dated cheques for rent 3 or 4 at a time. The landlord did not ask the tenant for the additional rent because the landlord did not want to lose the tenant.

The landlord also testified that before the tenant moved out of the rental unit, the landlord gave the tenant a move-out information sheet. On January 30, 2012 the landlord attended the rental unit. The tenant was not there but the tenant's friend was there still moving and a coy pond was in the living room. A move-out condition inspection report could not be completed until the pond was removed, however, the information sheet stated that the move-out condition inspection report would be completed on January 31, 2012 at 1:00 p.m. The landlord went to the rental unit on that date but the tenant was not there and had already gone to another city. A second opportunity to conduct the move-out condition inspection report was not given.

The landlord also testified that during the tenancy the tenant had asked to erect shelving in the kitchen and was told that when the shelves come down at the end of the tenancy the holes would have to be filled and painted, and the tenant agreed. The landlord's business partner is a contractor and part owner of the rental unit, a painter was hired, and the landlord claims \$150.00 or \$50.00 per hour for 3 hours to complete the repairs.

The landlord also testified that the carpet in the rental unit was about 1 ½ years old at the outset of this tenancy. At the end of the tenancy the landlord noticed a wrinkle which required the landlord to have the carpet stretched. The landlord's business partner had a carpet person complete the stretching, and the landlord claims \$75.00, although no receipt was provided. When asked how the tenant may have caused the wrinkle, the landlord had no response other than to state that perhaps it was caused by the tenant's dog.

The parties agree that the landlord received the tenant's forwarding address in writing on February 8, 2012.

The landlord's witness is the landlord's business partner and testified that the parties had a great relationship with the tenant.

The witness testified that the tenant's friend moved into the rental unit but the witness is not sure when.

The witness also testified that when the tenant wanted shelving erected in the kitchen the witness advised the tenant that the tenant would have to pay for painting one full wall and one partial wall once the shelving was removed. The witness bills out \$32.00 per hour and charges \$50.00 per hour for paper-work. The witness was at the rental unit and spoke to the tenant's friend stating that the wall would have to be repaired and painted. The tenant had removed the shelving.

The tenant testified that the first time the tenant's friend stayed in the rental unit was on March 7, 2012 but the friend never moved into the rental unit. The tenant provided a copy of a letter provided by a witness which states that the tenant's friend resides at the witness' home as a house-sitter and has done so from April, 2008 to January 31, 2012 and is required to stay at that residence a minimum of 2 to 3 nights per week to care for animals at that residence. Also, the tenant works 2 night shifts from 7:00 pm until 7:00 am and then 2 day shifts from 7:00 am until 7:00 pm, and has spent about 2 nights per week at the rental unit for the last 3 months of the tenancy. All other nights were spent at the tenant's friend's residence. Only one piece of mail belonging to the tenant's friend was delivered to the rental unit, and that was from a party who was specifically given the rental unit as an address for a specific purpose. No other mail was delivered there for the tenant's friend and the address was not used by the tenant's friend. The friend's truck was parked in the tenant's parking spot because they both have horses and use the truck for that purpose and the tenant's friend also has a car. The tenant agrees that they have 3 dogs among them and bring the dogs when they visit back and forth.

The tenant also testified to misreading paragraph 13 of the tenancy agreement and believed that the number of nights stay was 14 consecutive days, not accumulative over a 12 month period. In any event, the tenant testified that the tenant would not have agreed to pay \$150.00 per month for a friend who did not reside in the rental unit. If the landlord had advised the tenant, the tenant may have moved out or stayed at the friend's house, but the friend did stay in the rental unit for more than 14 days during the course of the tenancy.

The tenant also testified that the landlord knew that the tenant was moving to another city to attend school and the tenant told the landlord that the tenant's friend would be the tenant's agent. The landlord made no mention of damages, nor did the landlord provide the friend with any paperwork to sign.

With respect to the wrinkle in the carpet, the tenant testified that the tenant's dog is a 10 pound poodle and could not have caused the wrinkle. The wrinkle was noticed a year before the tenancy ended, the landlord was told, who said it was likely caused by not stretching it properly when it was new.

The tenant agrees that the parties had a conversation about repairing the kitchen wall after the tenancy ended and the shelving was dismantled, but the tenant testified that the landlord at that time said it would be about half an hour at \$30.00 per hour, so the

tenant agreed. The tenant did not agree to \$50.00 per hour or for the whole kitchen to be painted.

The tenant also testified that the pet damage deposit ought to have been returned to the tenant because no damage was caused by a pet.

### Analysis

Firstly, with respect to the landlord's claim for additional rent, the onus for proving such a claim lies with the landlord. The tenant has disputed that the tenant's friend ever moved into the rental unit, and I find that the landlord has failed to establish that the friend did move in. The tenancy agreement is clear that if a friend stays for longer than 14 days accumulated over a 12 month period the tenant is liable to pay the landlord an additional \$150.00 per month. The tenant does not deny that the friend stayed at the rental unit for in excess of 14 days, however, the landlord's testimony was that the friend stayed there commencing March 17, 2011 but there is no evidence to suggest when the 14 days ended. Presumably, the fee would be payable after the friend had stayed in the rental unit for 14 days. Further, the *Residential Tenancy Act* states:

**7 (2)** A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

The landlord testified that the tenant paid rent by delivering to the landlord post-dated cheques for the full amount of rent for 3 or 4 months at a time, and that the landlord never mentioned to the tenant that more money was required because the landlord did not want to lose the tenant. The tenant testified that if the landlord had mentioned the fee, the tenant may have moved out or stayed at the friend's house. In the circumstances, I find that the landlord has failed to mitigate any loss. The landlord continued to collect rent at the agreed rate and then after the tenant moved out, the landlord decided to sue for additional rent. I find that to be unreasonable, and I find that the landlord has failed to comply with Section 7 (2) of the *Residential Tenancy Act*. Further, the tenancy agreement provides that, "Failure to comply and obtain the necessary approval of the landlord in writing is a breach of a material term of the Agreement, giving the landlord the right to end the tenancy after proper notice." The landlord did not give the tenant a notice to end the tenancy for not having the tenant's friend approved, even though the clause is stated to be a material term of the tenancy. The landlord's application for additional rent is hereby dismissed without leave to reapply.

With respect to the landlord's claim for damages, the onus is on the landlord to satisfy the 4-part test for damages:

1. that the damage or loss exists;
2. that the damage or loss exists as a result of the other party's failure to comply with the *Act* or the tenancy agreement;
3. the amount of such damage or loss; and
4. what efforts the landlord made to mitigate, or reduce such damage or loss.

In the circumstances, I find that the landlord has failed to establish that the wrinkle in the carpet was caused by the tenant or the tenant's pet or guest. The landlord testified that the carpet was about a year and a half old at the commencement of the tenancy, and the tenant testified that the wrinkle appeared about a year before the end of the tenancy and the landlord told the tenant at that time that it was likely caused by not stretching it well enough when it was installed. I fail to see how the tenant could have caused such damage, and I find that it is normal wear and tear. The landlord's application for damage to the carpet is hereby dismissed without leave to reapply.

With respect to the painting in the kitchen, I find that the landlord has claimed an excessive amount as against the tenant. The landlord's witness testified that the witness is a contractor and bills out \$32.00 per hour and charges \$50.00 per hour for paperwork. The witness is also a business partner of the landlord in the business of renting apartments. Regardless of the landlord's or the landlord's business partner's other occupations, I find that they are not related to the tenancy. The tenant testified that the landlord and the landlord's business partner told the tenant that the repair would be about a half hour at \$30.00 per hour. The landlord did not dispute that testimony. If the tenant had been told then that the amount would be \$50.00 per hour for 3 hours, the tenant may not have erected the shelving. The *Act* requires that any alterations done by the tenant must be returned to its original state at the end of the tenancy, and I find that three hours of labour in the amount of \$32.00 per hour is justified in the circumstances, or \$96.00.

The landlord currently holds \$550.00 for a security deposit and \$550.00 for a pet damage deposit in trust on behalf of the tenant. Section 38 (1) of the *Residential Tenancy Act* requires the landlord to return the security deposit and pet damage deposit, or apply for dispute resolution claiming against the deposits, within 15 days of the later of the date the tenancy ends or the date the tenant provides a forwarding address in writing. If the landlord fails to do either, the landlord must pay the tenant double the amount of the security deposit or pet damage deposit. I find that the landlord received the tenant's forwarding address in writing on February 8, 2012.

Further, the *Act* places the onus on the landlord to ensure that move-in and move-out condition inspection reports take place, and the regulations go into detail of how that is to happen. The landlord is required under the *Act* to give the tenant at least 2 opportunities to conduct the inspections, and must provide the tenant with the 2<sup>nd</sup> opportunity in the approved form if the tenant is not available at the first time offered. In this case, the tenant's friend was at the rental unit on January 30, 2012 but the move-out condition inspection report was not completed at that time. The landlord testified that the move-out information sheet provided to the tenant stated that the move-out condition inspection report would be completed on January 31, 2012 at 1:00 p.m. At no time did the landlord offer the tenant the second opportunity nor did the landlord use the approved form. The *Act* states that if a landlord fails to offer the tenant at least 2 opportunities, as prescribed, for the inspection, the landlord's right to claim against the security deposit is extinguished.

Having found that the landlord has failed to offer 2 opportunities, there is no discretion and I must find that the landlord's right to claim against either deposit was extinguished. The *Act* also states that if a landlord does not comply with Section 38 (1), 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 those deposits as applicable. Therefore, the landlord must pay the tenant double the amount of such deposits.

The *Act* also states that a landlord may not make a claim against a pet damage deposit for anything other than damage caused by a pet. The landlord made the claim in the amount of \$75.00 for stretching a carpet that the landlord stated may have been caused by the pet, but the landlord had no reason to withhold the remaining \$475.00.

The *Act* also permits me to set off amounts that I find are payable to the parties. The tenant is entitled to \$2,200.00 for double the amount of the deposits, and the landlord is entitled to \$96.00 for painting the kitchen. The difference is \$2,104.00, and I order the landlord to pay that amount to the tenant.

### Conclusion

For the reasons set out above, the landlord's application for a monetary order for damage to the unit, site or property is hereby allowed at \$96.00.

The landlord's application for a monetary order for additional rent is hereby dismissed without leave to reapply.

The landlord's application for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit is hereby dismissed without leave to reapply.

I hereby grant a monetary order in favour of the tenant pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$2,104.00.

This order is final and binding on the parties and may be enforced.

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: April 13, 2012.

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Residential Tenancy Branch