



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### **Dispute Codes:**

MNDC, MNSD, FF

### **Introduction**

This hearing was convened in response to an application by the tenant pursuant to the *Residential Tenancy Act* (the Act) for Orders as follows:

1. An Order for the return of the security deposit - Section 38
2. A monetary order for compensation for damage and loss- Section 67
3. An Order to recover the filing fee for this application - Section 72.

Both parties attended the hearing and were given full opportunity to present all relevant evidence and relevant testimony in respect to the claims and to make relevant prior submission to the hearing and fully participate in the conference call hearing. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

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

Is the tenant entitled to the monetary amounts claimed?

### **Background and Evidence**

The tenancy began on March 01, 2011 and ended January 12, 2012 pursuant to the tenant acting on a Notice to End for Unpaid rent. Rent in the amount of \$1100 was payable under the tenancy agreement in advance on the 1<sup>st</sup>. (first) day of each month. At the outset of the tenancy, the landlord collected a security deposit from the tenant in the amount of \$550.00, which the landlord still holds. The tenant failed to pay rent in the month of January 2012 and the landlord served the tenant with a Notice to End

tenancy for non-payment of rent. The tenant opted to vacate rather than pay the rent. The landlord and tenant did not conduct a mutual condition inspection of the rental unit at the end of the tenancy.

The tenant testified that the rental unit became a site for mould – primarily in the master bedroom. The tenant notified the landlord and the landlord agreed to relocate the tenant and offered them another rental unit to be ready January 01, 2012. On December 15, 2011 the tenant could no longer tolerate the condition of the suite and determined to leave temporarily over the holiday season. Once the tenant was notified that they could not relocate on January 01, 2012, the tenant determined they could not wait and determined to vacate, and did not pay the rent for January 2012. The tenant sought return of December rent paid in compensation for the mould issue.

The landlord testified they acknowledged the mould problem with the suite and attempted to make amends and relocate the tenant. In part, the landlord testified that they *will not* seek the unpaid rent for January 2012 (\$1100) through Dispute Resolution process, despite their right to it. In the resulting discussion, the tenant acknowledged that, effectively, they are receiving compensation in the amount of \$1100, and therefore determined to withdraw their claim for compensation.

The tenant sought return of the security deposit in the amount of \$550.00. The tenant claims that the male tenant purportedly visited the landlord after they vacated, and provided the landlord with their written forwarding address – but the attending tenant was not wholly confident of this assertion, and the male tenant was not present to testify in this regard. The landlord testified they did not receive the tenant's forwarding address until they received the Notice of Hearing and the tenant's application. The tenant testified that they did not participate in the end of tenancy inspection of the rental unit. The landlord did not provide document evidence or testimony that they complied with Section 35 (2) of the Act, but made an inspection on their own after the tenant vacated.

## **Analysis**

The tenant effectively has withdrawn their claim for compensation pertaining to mould, and this portion of their claim is effectively **dismissed** without leave to reapply.

The landlord, by their testimony, and the tenant having acted on the landlord's testimony, has effectively waived any entitlement they may have in respect to unpaid rent for this tenancy via the principal of *Estoppel*.

Section 35 and 36 of the Act state as follows; **(emphasis for ease)**

**Condition inspection: end of tenancy**

- 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.

**Consequences for tenant and landlord if report requirements not met**

- 36** (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if
- (a) the landlord complied with section 35 (2) [*2 opportunities for inspection*], and
  - (b) the tenant has not participated on either occasion.
- (2) Unless the tenant has abandoned the rental unit, **the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord**
- (a) does not comply with section 35 (2) [*2 opportunities for inspection*],**

(b) having complied with section 35 (2), does not participate on either occasion, or

(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

I find that the landlord did not comply with Section 35(2), therefore the landlord's right to claim the deposit has been extinguished. I find that since the landlord is not entitled to make a claim to retain it they may not keep it. The tenant is not entitled to *double* the return of the security deposit as they have not established that they provided the landlord with a *written* forwarding address, as required by Section 38 of the Act. None the less, Residential Tenancy Policy #17, in part, states;

#### **RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH ARBITRATION**

The Arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:

- a landlord's application to retain all or part of the security deposit, or
- a tenant's application for the return of the deposit

unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

I find that as the landlord may not keep the security deposit it is only appropriate that the original amount of the deposit of \$550.00 be returned to the tenant. **I grant** the tenant the original security deposit in the amount of **\$550.00** without leave to reapply. As the tenant was partially successful in their claim they are entitle to recover the filing fee of **\$50.00**, for a total entitlement of **\$600.00**.

#### **Conclusion**

**I grant** the tenant an Order under Section 67 of the Act for the amount of **\$600.00**. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

This Decision is final and binding on both parties.

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: May 01, 2012

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Residential Tenancy Branch