



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

### Dispute Codes

For the tenant: MNSD, FF

For the landlord: MNSD, OPB, MNR, MND, FF

### Introduction

This hearing dealt with the cross applications of the parties for dispute resolution under the Residential Tenancy Act (the "Act").

The tenant applied for a return of his security deposit and for recovery of the filing fee.

The landlord applied for authority to retain the tenants' security deposit, a monetary order for damage to the rental unit and unpaid rent, and for recovery of the filing fee.

The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally, refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me.

The parties each submitted evidence; however the landlord said that he did not receive the evidence submission of the tenant. The tenant said that he faxed his evidence to the landlord's office and the landlord said he no longer has that office. Additionally the landlord stated that he has gone by that office and no one has contacted him about receiving the evidence. I note that the tenancy agreement listed the landlord's fax number for service of documents, which is one method listed in the Act for service of documents.

The tenant acknowledged having received the landlord's evidence.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

*Preliminary Issue:* The landlord in his application asked for an order of possession based upon an alleged breach of the tenancy agreement by the tenant; however, the tenancy ended quite some time prior to the landlord filing his application. I have therefore excluded his request seeking an order of possession for the rental unit.

*2<sup>nd</sup> Preliminary Issue:* The parties herein are presently before both the Supreme Court of British Columbia and the British Columbia Provincial Court, Small Claims division, with the tenant having filed petitions in both courts.

I examined the issues to determine whether or not I had jurisdiction to resolve the matters and the hearing was conducted prior to making a final decision on this issue.

Issue(s) to be Decided

Is the tenant entitled to a monetary order for a return of his security deposit and to recover the filing fee?

Is the landlord entitled to a monetary order and to recover the filing fee?

Background and Evidence

The three year, fixed term tenancy began on October 1, 2010 and monthly rent was \$1950.00.

The parties disagreed as to the date the tenancy ended, with the tenant saying the tenancy ended on May 31, 2012, and the landlord saying the tenancy ended on April 30, 2012.

**Tenant's claim and evidence-**The tenant's monetary claim is \$1025.00, which is his security deposit of \$975.00 and the filing fee of \$50.00.

The tenant stated that the landlord was provided with his forwarding address verbally 6 months prior to vacating the rental unit.

When questioned, the tenant said that he did not pay a separate payment of \$975.00; rather the security deposit was included in work performed by the tenant on the landlord's home to which the landlord agreed to compensate the tenant.

**Landlord's response-**The landlord denied having any agreement, written or verbal, with the tenant regarding employment in lieu of paying a security deposit. The landlord also argued that the tenant was never his employee.

**Landlord's claim and evidence-**The landlord's monetary claim is \$14058.00, partially consisting of 2 months of unpaid rent, \$1950.00 for each of those two months, during the tenancy.

The landlord stated that several rent cheques were returned to him by his bank for NSF reasons. As evidence, the landlord submitted what he phrased a "*sample of 4 of the returned cheques*," those being December 2010, May 2011, April 2012 and May 2012, in the amount of \$1950.00.

The landlord also claimed that he is entitled to loss of revenue of \$1950.00 for May 2012 and half a month loss of revenue for June 1-15, 2012, in the amount of \$975.00. The landlord stated that the tenant terminated the fixed term tenancy agreement early,

by vacating on April 30, 2012, causing him loss of revenue until June 15, 2012, when the home became "occupied by a third party."

In support of this claim, the landlord said that he was unaware the tenant was vacating the rental unit until he received a phone call from him when he (the landlord) was out of the country. Following this phone call, the landlord had his real estate agent pick up the rental unit keys from the tenant and to list the home for rent for May 2012.

Thereafter, when the rental unit did not rent out in May, the landlord said he placed the home on the market for sale, at which time it sold, effective June 15, 2012.

As to the balance of his monetary claim, the landlord stated that the amount of \$7233.00 was the amount for which the tenant claimed in his application to the Supreme Court of British Columbia for work performed.

The landlord confirmed that he could not produce a receipt or any evidence that he has suffered a loss in this amount.

#### **Testimony of the landlord's witness-**

The witness, the landlord's former girlfriend, testified that the tenant did a "fantastic job" in making the rental unit look good and that she tried to talk the tenant into buying the home.

The witness also stated that she and the landlord met with the tenant in February, at which time they were told the tenant was moving out.

The witness also stated that as a result, the home was placed on the market for sale by May 2012.

#### **Tenant's response-**

The tenant agreed that some rent cheques were "bounced," but that when this happened, he immediately put cash in those amounts into the landlord's bank account. The tenant claimed that as an accountant, the landlord would never let a month of rent go without it being paid.

The tenant claimed he received a receipt for these cash payments, but did not produce them as it never occurred to him they would be needed as he and the landlord were friends at one point.

The tenant stated he gave the landlord six months' notice of his intent to vacate and that the home went on the market for sale by May 2012. The tenant also said he talked to the landlord's real estate agent on April 11, 2012, who asked if he, the agent, could show the home.

## Analysis

Based on the relevant oral and written evidence, and on a balance of probabilities, I find as follows:

### **Jurisdiction-**

As to whether or not I have jurisdiction to decide all the matters contained in the parties' respective applications, section 58 of the Act gives the Director of the Residential Tenancy Branch ("RTB"), or designate, authority to decide disputes between landlords and tenants unless the dispute is linked substantially to a matter that is before the Supreme Court.

In the case before me, I find upon a balance of probabilities that I do not have jurisdiction to decide the issue of the tenant's security deposit or the landlord's claim for damage to the rental unit. I find these issues are directly related to the tenant's petition to the Supreme Court of British Columbia for a judgment relating to compensation for work, or alleged work, performed by the tenant for the landlord, whether true or not.

The tenant argued that the security deposit was part of his employment contract with the landlord and the landlord argued that the amount he claimed as damage was the amount listed by the tenant in another petition before the Provincial Court, interrelated with the Supreme Court claim.

In light of the above, I decline to find jurisdiction to resolve these disputes. The parties are at liberty to continue seeking the appropriate legal remedy to this dispute already filed in the Supreme Court and the Provincial Court of British Columbia.

I proceeded only upon the landlord's claim for unpaid rent and loss of revenue.

### **Landlord's remaining application:**

I find upon a balance of probabilities that the tenancy ended on April 30, 2012.

In a claim for damage or loss under the Act or tenancy agreement, the claiming party, the landlord in this case, has to prove, with a balance of probabilities, four different elements:

**First**, proof that the damage or loss exists, **second**, that the damage or loss occurred due to the actions or neglect of the respondent in violation of the Act or agreement, **third**, verification of the actual loss or damage claimed and **fourth**, proof that the party took reasonable measures to mitigate their loss.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

**Unpaid rent for 2 months during the tenancy-** The landlord said that the tenant failed to pay rent for 2 months during the tenancy. The tenant argued that when the cheques bounced, he immediately placed the cash into the landlord's bank account.

I find the landlord submitted insufficient evidence that the tenant failed to pay 2 months of rent during the tenancy. In reaching this conclusion, I found that the landlord's evidence to be inconsistent. For instance, the landlord supplied evidence of four returned cheques, but his own statement said that these cheques were a "sample" of returned cheques, without being able to state with certainty for which two months during the tenancy the landlord claimed.

I find it unlikely that an accountant would not be able to supply accurate records as to the exact month in which rent was not paid if in fact that were the case and the representative cheques were not designated by the landlord for a month in which rent was allegedly not actually paid.

This led me to conclude that the tenant was being truthful when he stated he placed the cash for the rent cheques into the landlord's bank account.

Further, the landlord claimed the home was first placed on the market for re-rental by his real estate agent during the month of May, but as this was not successful, the home was placed on the market for sale. The landlord's own witness, who was not present in the hearing during his testimony, contradicted the landlord's statement by informing me that the home was listed for sale by the beginning of May.

I therefore found the landlord's evidence lacked reliability and therefore, credibility.

As I have found that the landlord's evidence lacked credibility, I do not accept the testimony of the landlord that his real estate agent attempted at first to re-rent the home during May 2012 before placing the home for sale; rather I accept the testimony of the tenant and the landlord's witness that the home was immediately placed on the market for sale at the end of the tenancy, and not for rent, which would be a reasonable attempt to mitigate his loss. Therefore, I find the landlord failed to meet the fourth step in his burden of proof.

Also, Residential Tenancy Branch Policy Guideline 3 states that where a tenant has abandoned the premises and the tenancy has ended with the abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.

I agree with this policy and I find the landlord unreasonably delayed in putting the tenant on notice of his intent to make a claim for loss of revenue within a reasonable time after the tenancy ended when he failed to file his application for nearly four months, and after the tenant made application for dispute resolution and file petitions in the Supreme Court and Provincial Court of British Columbia.

Conclusion

Due to the above reasons, I have declined to determine the merits of the tenant's application and the portion of the landlord's application for damage to the rental unit as I find I lack authority under the Residential Tenancy Act to make a decision.

Due to the above, I find the landlord has submitted insufficient evidence that the tenant failed to make two rent payments during the tenancy and I therefore dismiss his claim for \$3900.00, without leave to reapply.

I also find the landlord submitted insufficient evidence that he took reasonable steps to mitigate his loss for May and June 2012, and I therefore dismiss his claim for \$1950.00 for May and \$975.00 for June 1-15, 2012, without leave to reapply.

As I have dismissed the landlord's remaining application, I therefore dismiss his request to recover the filing fee.

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 12, 2012.

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Residential Tenancy Branch