



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC, MNSD, FF

### Introduction

This hearing dealt with an application by the tenants for a monetary order and an order compelling the landlord to return their security deposit and a cross-application by the landlord for a monetary order and an order authorizing them to retain the security deposit. Both parties participated in the conference call hearing.

### Issues to be Decided

Are the tenants entitled to a monetary order as claimed?  
Are the landlords entitled to a monetary order as claimed?

### Background and Evidence

The parties agreed that on July 16, 2012, their agents signed a tenancy agreement on their behalf which provided that the tenancy was to begin on August 6, 2012 and continue for a fixed term ending on July 31, 2013. Rent was set at \$1,410.00 per month and the tenants paid a \$705.00 security deposit.

The parties inspected the rental unit on July 31, 2012 after the unit had been vacated by the previous tenants. On that date, the tenants observed a leak in the bathroom ceiling which they brought to the attention of the landlord's agents, both the handyman and to the agent with whom they had been dealing. The moisture spread to the ceiling outside the bathroom as well as the carpeted area outside the bathroom and the tenants testified that they were concerned that the existence and repair of the leak would prevent them from using the unit's only bathroom and would pose a health hazard to their 3 month old child. The landlord testified that after hearing the report from his handyman and from the tenants, he inspected the area and contacted the strata corporation's plumber on August 1.

The tenants testified that they requested that the landlord confirm when they would have the repair completed and further testified that on August 1, the landlord stated that the leak was the responsibility of the strata and he offered the tenants free rent until

August 15 as the leak would not be repaired when the tenants moved in on August 6. The landlord testified that because the strata was responsible for stopping the leak and repairing the damage, he could not make a commitment to the tenants as to when the leak would be repaired. In a letter dated August 1, the tenants advised the landlord in writing that they would not be moving into the unit and requested that their security deposit and rent be returned to them. The tenants placed a stop payment on their rent cheque.

In a letter dated August 11, 2012 and mailed according to the tenants on August 17, the tenants gave the landlord their forwarding address in writing and requested the return of their security deposit along with other monies. The landlord acknowledged having received that letter in August.

The tenants seek the return of their security deposit, \$2,600.00 as the cost of room and board for the month of August and \$192.74 as the cost of storing their belongings until September. The landlord seeks to recover the \$1,182.58 in rent which the tenants were obligated to pay in August as he was unable to re-rent the unit until September as well as \$336.00 in administrative fees pursuant to the following term of the tenancy agreement:

Should the tenant fail to complete the lease term, the tenant will be charged an administrative fee of \$300 (three hundred dollars) plus applicable tax, and the Agent is authorized to deduct this from the security deposit.

The landlord testified that this is a standard term in all of their tenancy agreements.

Both parties seek to recover the filing fees paid to bring their respective applications.

### Analysis

Section 45(3) of the *Residential Tenancy Act* outlines the means by which tenants may abruptly end a tenancy. The section provides that if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the notice is received by the landlord.

The tenants discovered the leak in the rental unit 6 days before they were to move in and the appropriate course of action would have been to give the landlord written notice that they considered the leak to constitute a breach of a material term of the tenancy and give the landlord a reasonable period in which to correct the problem. Instead, the

tenants ended the tenancy the following day without having followed the procedure outlined under the Act. Although the landlord did not commit himself to a specific time in which the repairs would be effected, the evidence shows that the landlord acted quickly and reasonably to address the required repairs.

I recognize that under contract law the tenants would have had the right to refuse to complete the contract if the landlord had delivered to them accommodation which was substantially different from what was agreed upon at the time the agreement was signed, but I find that the leak would have had a minimal effect on the use of the rental unit and bathroom and as the landlord had expressed a willingness to compensate the tenants for the inconvenience he anticipated, I find insufficient evidence to show that the landlord was unable to provide what was promised.

For these reasons, I find that the tenants did not have the right to refuse to complete the tenancy agreement. I therefore dismiss the tenants' claim for living and storage expenses and I find that the landlord is entitled to recover the rent which the tenants were obligated to pay in August. I award the landlord \$1,182.58.

The tenants seek the return of their security deposit. Section 38(1) of the Act requires the landlord to either return the deposit in full or make a claim against it within 15 days of the later of the end of the tenancy and the date the landlord receives the forwarding address in writing. The tenancy ended before it began and the landlord received the forwarding address on or about August 17, but failed to make a claim against the deposit until more than 2 months later. The landlord pointed out that the forwarding address in the August 11 letter is different from the address for service used in the tenants' claim and while this is true, it is irrelevant as the landlord made no efforts for 2 months to either return the deposit or make a claim.

Section 38(6) of the Act provides that if the landlord does not comply with section 38(1), he must pay the tenant double the amount of the security deposit. Although the tenants did not make a claim for double their deposit, Residential Tenancy Policy Guideline #17 provides that I must order the return of double the deposit unless the tenants have specifically waived the doubling of the deposit. Accordingly, I award the tenants \$1,410.00.

Turning to the landlord's claim for the administrative fee, the Regulations to the Act specify which types of fees are permissible and which are not. An administrative fee charged pursuant to the breach of a fixed term is not a permitted fee under the Regulations. The term authorizing the landlord to deduct the fee from the security deposit is specifically prohibited under section 20(e) of the Act.

I recognize that it is possible that the landlord intended that this provision act as a liquidated damages clause, although it is not identified as such. However, a liquidated damages clause is designed to pre-estimate the losses that will result from a breach of the agreement and there is nothing in the provision that indicates that the parties turned their minds to estimating the losses that will result. As the landlord has also made a claim for loss of income for August, it is clear that the landlord did not anticipate that the administrative fee was to operate as liquidated damages. For these reasons I find that the fee is not permissible under the Act and I dismiss the claim for the fee.

As each party has enjoyed some success, I find it appropriate that each party bear their own filing fees.

### Conclusion

The landlord has been awarded \$1,182.58 and the tenants have been awarded \$1,410.00. Setting off these awards as against each other leaves a balance of \$227.42 which I order the landlord to pay to the tenants forthwith. I grant the tenants a monetary order under section 67 for that sum. This order may be filed in the Small Claims Division of the Provincial Court 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: November 21, 2012

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Residential Tenancy Branch