



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

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

### **Introduction**

This Dispute Resolution hearing was set to deal with an Application by the landlord for a monetary order for rent, utilities owed, liquidated damages and an order to keep the security deposit.

The hearing was also convened to deal with an application by the tenant for a refund of the \$850.00 security deposit and reimbursement for the cost of placing stop-payments on post-dated rent cheques still in the possession of the landlord.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

### **Preliminary Matters**

#### **Amend Landlord's Application Amount of Claim**

At the outset of the hearing the landlord requested an amendment to the application to remove the claim for compensation for rent or loss of rent, being sought for the months of May and June 2013, as the unit was re-rented on May 1, 2013. The landlord is only claiming rent owed for April 2013. The amendment was allowed.

#### **Amend Landlord's Application from Claiming Rental Arrears to Loss of Revenue**

On March 31, 2013, the tenant had terminated the fixed term tenancy prior to the expiry date of the term and the landlord was claiming rent owed for April 2013. However, at the outset of the hearing, it became apparent that the landlord's

claim seeking rental arrears relate to a period *after* the tenant had already vacated.

Therefore, the landlord's claim for *rental arrears*, under section 26 of the Act, is not applicable to this situation. Under the Act, the tenancy was terminated by the tenant on the date that the tenant permanently vacated the rental unit and no rent would be owed after the tenancy ends.

I find that the landlord's claim is, in fact, a claim for *loss of revenue* for the month following the tenant's premature termination of the fixed term tenancy, not a claim for rental arrears. The claim for loss of revenue is a claim in damages under section 7 and 67 of the Act. Therefore, the landlord's application will be amended to include a claim for damages, comprised of loss of revenue, not rental arrears owed.

#### Amend Landlord's Application to Include Claim for Repairs

Although the landlord did not indicate within the application that the landlord was making a claim for monetary compensation for repairs to the suite, the evidence submitted by the landlord indicated that the landlord was seeking \$400.00 for damage to the suite, allegedly caused by the tenant.

The parties agreed to amend the application to include the landlord's claim for the cost of repairs as well.

#### Issue(s) to be Decided

Is the landlord entitled to compensation under section 67 of the *Act* for rent, damages and loss of rent?

#### Background and Evidence

The landlord testified that the fixed term tenancy began on July 1, 2011 and was to expire on June 30, 2012, but was extended for one more year to expire on June 30, 2013. The rent was set at \$1,450.00, due on the 1st day of each month. A security deposit of \$725.00 was paid.

The landlord testified that the tenant vacated the unit on March 31, 2013, terminating the tenancy prior to the expiry date of the fixed term tenancy. The landlord testified that the tenancy agreement provides that liquidated damages of \$500.00 must be paid if the tenant terminates the agreement prematurely. The landlord is claiming this amount.

The landlord testified that after the tenant vacated, he did not return the tenant's post-dated cheques, and attempted to cash the cheque for April 1, 2013. However, the cheque did not clear as a stop payment had apparently been imposed by the tenant.

The landlord testified that, despite advertising and showing the unit to prospective renters during March and April 2013, the unit was not re-rented until May 1, 2013 and the landlord therefore lost revenue of \$1,450.00 for the month of April 2013, which is being claimed. The landlord testified that, during March 2013, the tenant denied access which impeded the showings.

The landlord testified that the tenant also owes utilities for the month of April 2013 in the amount of \$8.42.

The landlord testified that he repeatedly attempted to schedule the final move-out condition inspection with the tenant by telephoning her or sending emails on March 31, April 3, April 4 and April 5, 2013. The landlord testified that he received no acknowledgement of the email communications and delivered a "Notice of final Opportunity to Schedule a Condition Inspection" to the tenant's mailbox at her new residence on April 6, 2013.

The landlord testified that he conducted the move-out condition inspection in the tenant's absence on April 8, 2013.

The landlord testified that the tenant left the unit damaged and unclean and the landlord is claiming compensation of \$400.00. The landlord made reference to the move-out condition inspection report that indicated a damaged mirror, door and floor.

In addition to the above, the landlord is claiming entitlement to the tenant's \$750.00 security deposit which, according to the landlord was forfeited by the tenant for not cooperating in the move-out condition inspection.

The total claim is for \$4,850.00.

The tenant acknowledged that the tenancy agreement was terminated prior to the expiry date. The tenant feels that the \$500.00 liquidated damages charge is excessive and does not reflect a genuine pre-estimate of the costs of re-renting. The tenant pointed out that the landlord did not incur any cost for the advertising.

The tenant testified that the landlord failed to return the remainder of her post dated cheques as required under the Act and this forced the tenant to incur a cost of \$75.00 to place stop payments on the outstanding cheques, in order to ensure that the landlord did not illegally cash them in the future. The tenant is claiming compensation for the \$75.00 cost.

The tenant disputes the landlord's claim that reasonable efforts were made to re-rent the unit in a timely manner. The tenant pointed out that the landlord did not furnish copies of the advertisements as proof, nor did he submit copies of the subsequent tenancy documents to verify the date that the new tenants were to move in.

The tenant denied interfering with the showings of the suite and testified that there was full cooperation permitting access that the landlord requested. The tenant testified that the tenant only requested no showings on March 13 and 14, which was a two-day period during which the tenant was in the process of physically moving out.

The tenant testified that they felt the landlord was not making a reasonable attempt to show the unit to prospective renters during the first 2 weeks in March, after their formal Notice to move was given. The tenant testified that they then moved and left the unit vacant for the final 2 weeks of their tenancy giving the landlord free access to show the unit at any time after March 15, 2013.

With respect to the move-out condition inspection report, the tenant's position is that the *landlord* did not cooperate in scheduling the inspection.

The tenant stated that they anticipated that the unit would be inspected by the parties between March 15 and March 31, 2013, as soon as the tenant had removed all of the furnishings and possessions. The tenant testified that during March 2013, repeated efforts were made by the tenant to find out when the landlord intended to schedule an inspection.

The tenant pointed out that the landlord failed to attempt to schedule the inspection immediately following the move-out and instead waited until April 6, 2013 to finally issue a written request to schedule the inspection. The tenant pointed out that, in fact, the landlord did not do the inspection until April 8, 2013, which was more than 3 weeks following the tenant's departure. The tenant testified that, at that time, the landlord completed the move-out inspection form in the tenant's absence.

With respect to the cleaning and damage charges, the tenant argued that no damage was left to the rental unit, beyond normal wear and tear. The tenant testified that some of the deficiencies pointed out by the landlord pre-dated the tenancy. The tenant also pointed out that the landlord did not give proof that he incurred the expenditures being claimed.

In regard to the utility costs being claimed, the tenant takes the position that bills for utilities during April 2013 relate to costs that were not incurred by the tenant as the unit was not occupied by the tenant during the last 2 weeks of March nor the entire month of April 2013.

### **Analysis -Liquidated Damages**

With respect to the landlord's claim for the liquidated damages, I find that this claim relates solely to a term in the tenancy agreement that the landlord seeks to have enforced. Section 58(1) of the Act states that a person may make an application for dispute resolution in relation to a dispute about any of the following:

(a) rights, obligations and prohibitions under this Act;

(b) rights and obligations under the terms of a tenancy agreement that

- are required or prohibited under the Act, or
- relate to the tenant's use, occupation or maintenance of the rental unit,  
or; the use of common areas or services or facilities.

(my emphasis)

I find the term in the agreement imposing liquidated damages in the amount of \$500.00, to be a valid term in the tenancy agreement that was agreed upon by both parties. I find that the amount is based on genuine estimated administrative costs of re-renting factoring in the landlord's time and labour. Therefore I find that it does not constitute a penalty. I find that there is no justifiable reason not to enforce this tenancy term and the landlord is therefore entitled to be compensated in the amount of \$500.00 for liquidated damages.

### **Analysis Landlord's Damage Claim**

In regard to the claims for damage and losses, section 7(a) of the Act permits one party to claim compensation from the other for costs that result from a failure to comply with this Act, the regulations or their tenancy agreement. Section 67 of the Act grants an arbitrator the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to satisfy each component of the test below:

#### **Test For Damage and Loss Claims**

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the Respondent's violation of the Act or agreement,

3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage,
4. Proof that the claimant followed section 7(2) of the Act by taking reasonable steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent.

In the case before me, I find that the tenant did violate the agreement by ending the tenancy before the expiry date.

I find that the tenant challenged the landlord's claim that he made a reasonable effort to mitigate his loss as required under section 7(2) of the Act.

Although the landlord gave verbal testimony that immediate attempts were initiated to re-rent the unit without undue delay, I find that the landlord did not submit any verification such as copies of advertisements showing that the unit was marketed during March 2013, nor copies of any written Notices to the tenant requesting access to the unit for showings.

With respect to the landlord's claim that a loss of revenue was suffered because the unit remained vacant during the month of April 2013, I find that the landlord did not supply any documentation, such as a copy of the subsequent tenancy agreement, to verify the date that the unit was finally re-rented to the new tenants.

Because the verbal testimony given by the landlord was disputed by the tenant, I find that the burden of proof is on the landlord to submit proof that elements 3 and 4 of the test for damages were satisfied to support the claim.

In this regard, I find that the landlord did not furnish sufficient proof to verify that reasonable measures were taken to minimize the loss, nor proof that the monetary loss for the one-month vacancy for the month of April 2013 had genuinely occurred. Given the above, I find that the landlord's claim for compensation of \$1,450.00 loss of revenue must be dismissed.

In regard to the landlord's claim for reimbursement of utilities for a period during which the tenant no longer resided in the unit, I find that under the Act and agreement, the requirement to pay utilities exists only as long as both parties are bound by the tenancy agreement.

I find that, once the agreement has been terminated, tenancy terms such as cost of utilities are no longer applicable beyond the final end date of the agreement. For this reason, I find that the landlord is not entitled to be reimbursed for utility costs for the month of April 2013 and dismiss this portion of the application.

In regard to the landlord's claim for damages to the unit, I find that Section 37 (2) of the Act states that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

In this instance I find that the parties did not mutually participate in a move-out condition inspection as required under the Act and Regulation. I find that section 17 in Part 3 of the Residential Tenancy Regulation states that: a landlord must offer the tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times. I find that this offer should be made in written form and take place as soon as the furnishings have been removed.

If the tenant is not available at a time offered by the landlord, the tenant may propose an alternative time to the landlord, who must consider this time prior to acting and the landlord must propose a second opportunity, different from the opportunity described to the tenant by providing the tenant with a notice in the approved form. Also, the Act states that, when providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

I find that during the final month of the tenancy, there was no evidence confirming that the landlord communicated in writing with the tenant to formally schedule the inspection during the period from March 15, 2013, after the tenant vacated, until the end of March. I find that the landlord offered testimonial evidence that he made phone calls and sent email messages, but these efforts occurred in April and the messages were apparently never acknowledged by the tenant. I find that although the tenant had vacated by mid-March, the landlord did not send a written notice of final opportunity to inspect the unit until approximately three weeks later.

As the landlord did not strictly follow the move out condition inspection process detailed in the Act and Regulation, the evidentiary weight of the condition inspection report has been impacted. The tenant disputed the contents of the report and I find that the landlord has not sufficiently met the burden of proof to prove that the tenant should reimburse the landlord for the cost of cleaning and repairs being claimed.

For this reason, I dismiss the portion of the landlord's application claiming compensation of \$400.00 in damages for cleaning and repairs.

**Analysis Tenant's Damage Claim**

In regard to the tenant's claim for the cost of placing a stop payment on each cheque that the landlord failed to return, I find that by April 1, 2013 the tenancy had already been terminated. Residential Tenancy Regulation, paragraph 5(4) of the Schedule, provides that a landlord is required to return all post-dated cheques to the tenant on the final day that the tenant is in possession of the rental unit or sent to the forwarding address left by the tenant. I find that a landlord is not permitted under the Act to retain and cash any post-dated cheques once either party has terminated the agreement.

In this instance, I find that the landlord did not return the post-dated cheques, and in fact attempted to cash one after the tenancy was terminated by the tenant.

Accordingly, I find that the landlord did not comply with the Act and I accept the tenant's claim for compensation of \$75.00 for the cost of placing stop payments on cheques not returned by the landlord.

With respect to the tenant's \$725.00 security deposit, I find that these funds are always held in trust as a credit to the tenant's account.

Given the above, I find that the landlord is entitled to be compensated \$550.00 in compensation comprised of \$500.00 for liquidated damages and the \$50.00 cost of this application.

I find that the tenant is entitled to total compensation of \$75.00 for the cost of placing stop payments on the post-dated cheques that were not returned by the landlord.

In setting off these two amounts I find that the difference still owed to the landlord is \$475.00.

I order that the landlord retain \$475.00 from the security deposit being held in full satisfaction of the claim, leaving \$250.00 still held in trust for the tenant.

The remainder of the landlord's application is dismissed.

Based on the testimony and evidence presented during these proceedings, I hereby grant the tenant a monetary order under section 67 of the Act for \$250.00 representing the remainder of the tenant's security deposit. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.



**Conclusion**

The tenant is successful and the landlord is partially successful in the respective applications. The landlord ordered to retain a portion of the tenant's security deposit in full satisfaction of the claim and the tenant is granted a Monetary Order for the remainder of the deposit.

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: July 12, 2013

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Residential Tenancy Branch