



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNR MNSD FF

### **Introduction:**

This hearing dealt with an application by the landlord pursuant to the Residential Tenancy Act (the Act) for orders as follows:

- a) That the application of the tenant be dismissed for lack of jurisdiction under section 4 of the Act, or in the alternative;
- b) A monetary order pursuant to Sections 46 and 67 for unpaid rent;
- c) An Order to retain the security deposit pursuant to Section 38; and
- d) An order to recover the filing fee pursuant to Section 72.

This hearing also dealt with an application by the tenant pursuant to the Residential Tenancy Act (the Act) for orders as follows:

- d) For a return of twice the security deposit pursuant to section 38; and
- e) An Order that the landlord obey the provisions in the Act

### **SERVICE**

Both parties attended the hearing. The landlord confirmed receipt of the tenant's Application for Dispute Resolution by registered mail. However, the tenant said he had not received the landlord's Application. On checking online, I found the postal service had returned the landlord's Application as the "Recipient was not located at the address provided"; therefore, I find the landlord did not serve the Application as required by section 89 of the Act. I find the tenant's documents were legally served pursuant to section 89 of the Act for the purposes of this hearing.

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

Have I jurisdiction in this matter?

Has the tenant proved on the balance of probabilities that he was entitled to break the fixed term lease and is entitled to the return of his security deposit?

**Background and Evidence:**

Both parties attended the hearing and were given opportunity to be heard, to present evidence and to make submissions. It is undisputed that the tenancy commenced in May 9, 2013 on a fixed term to August 31, 2013, that rent is \$650 a month and a security deposit of \$325 was paid. It is undisputed that the tenant paid rent for May 2013 and then vacated the unit without paying further rent. He said the unit kitchen was not properly functional. He gave his forwarding address in writing to the landlord and on the telephone as unit 904 in his building but the post office records show he was not located at that address when the landlord sent the Application by registered mail. It was noted as "unknown". I advised him to inform the building management and/or check his mail boxes to make sure he is registered in the building.

The landlord submitted that I did not have jurisdiction in this matter as they are owners and shared a kitchen and bathroom with the tenant. The tenant said his unit was downstairs, was shared with two other room mates and was totally self contained and not shared with the landlord. The landlord agreed that they had a separate bathroom and kitchen upstairs but said they often used the second bathroom downstairs and sometimes used the electric range in the downstairs kitchen as their gas range upstairs is slower.

In evidence are some photographs of the facilities by the tenant, a rental history of another tenant and an extension request from that tenant, registered mail receipts and envelopes showing the landlord tried to send the Application to two different apartment numbers in an effort to serve the tenant, a log of dates and events by the landlord, copies of advertisements, the lease, and receipts.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

**Analysis:**

I dismiss the application of the landlord with leave to reapply for lack of service as required under section 89. I find the weight of the evidence is that the tenant never received the application and on the principles of Natural Justice, a person must be informed of the case against them and have the opportunity to respond.

In respect to the tenant's claim, the onus is on the tenant to prove on a balance of probabilities their claim. I find the tenant's evidence credible and prefer it to that of the landlord regarding the issue of jurisdiction. I find the fact that the home has a separate unit downstairs with its own bathroom and kitchen supports the tenant's evidence that it is a self contained unit and the bathroom and kitchen are not shared with the

owners/landlords. I find the landlord's explanation that they sometimes use the facilities downstairs to not be a "shared use" as defined in section 4 of the Act. Therefore, I find I have jurisdiction in this matter.

On the tenant's application, the onus is on him to prove on the balance of probabilities that the security deposit should be refunded in accordance with section 38 of the Act. I find the tenant vacated on May 31, 2013 but did not provide a proper forwarding address in writing to the landlord as items sent to that address are returned showing he is not located there. Also, I find there was a fixed term lease with the tenancy ending on August 31, 2013. Section 38 of the Act provides that the landlord must refund the tenant's security deposit within 15 days of the later of the end of the tenancy and the tenant providing their forwarding address in writing. As neither of these events has taken place yet, I dismiss the tenant's application as it is premature and I give him leave to reapply.

I decline to consider whether or not the unit was habitable and conformed to the criteria in section 32 of the Act as this will be part of the application of the landlord for unpaid rent during the term of the lease which was unable to be heard today due to lack of service. Both parties, after proper service and timing, will likely have another hearing where this issue will be considered together with the landlord's claim for unpaid rent.

**Conclusion:**

I dismiss the application of the tenant as it is premature and I give him leave to reapply.

I dismiss the application of the landlord for lack of service under section 89 of the Act and I give him leave to reapply.

I find neither party entitled to recover filing fees for their applications as neither was successful.

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: August 15, 2013

