# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MNSD, MNDC, FF

Introduction
This hearing dealt with two related applications. File T is the tenant's application for a monetary order. File L is the landlord's application for a monetary order and an permitting retention of the security deposit in partial satisfaction of the claim. Both parties appeared and had an opportunity to be heard. As the parties and circumstances are the same for both applications, one decision will be rendered.

Preliminary Issue
The tenant filed her application for dispute resolution on September 23, 2013. She did not mail it to the landlord until October 22. It was received by the landlord on October 25, more than six weeks before the date set for the hearing. When asked about the delay in serving her application for dispute resolution the tenant explained that she had been a member of the Canadian Armed Forces, that she suffers from PTSD which causes her difficult with memory, and she forgot to mail the application.

Section 59(3) of the *Residential Tenancy Act* states that a person who makes an application for dispute resolution must give a copy of the application to the other party within three days of making it, or within a different period specified by an arbitrator.

Considering the tenant's stated health difficulties and the fact that although the landlord was served with the tenant's application and the notice of hearing much later than he should have been he was still able to prepare and serve his evidence in time for this hearing, I order that the time for service of the tenant's application for dispute resolution be extended to October 25, 2013.

Issue(s) to be Decided
Is either party entitled to a monetary order and, if so, in what amount?

Background and Evidence

*The tenancy and the move-out*

This tenancy started August 1, 2011 as a one-year fixed term tenancy and continued thereafter as a month-to-month tenancy. The rent of $950.00 was due on the first day of the month. The tenant paid a security deposit of $475.00 and a pet damage deposit of $475.00. The tenancy agreement specified that there was to be no smoking in the rental unit.

A move-in inspection was conducted and a move-in condition inspection report completed on July 31, 2011. The tenant testified that she was never given a copy of the condition inspection report, the tenancy agreement, or the strata bylaws. The landlord testified that these documents were given to the tenant at the start of the tenancy.

The rental unit is a two bedroom suite in a four unit building. Before renting it to the tenant the landlord had lived in it for some time.

The tenant gave notice to end tenancy effective August 31, 2013.

Between August 18 and August 21 there were a series of e-mails between the landlord and the tenant about arranging showings of the unit and the move-out inspection. The landlord started by telling the tenant that he would be away until September 3 and his friend would be in contact with her if the unit needed to be shown. The tenant responded by asking whether the friend would be doing the move-out on August 31 to which the landlord responded that he would do the inspection when he returned. The tenant replied: “I will have moved out by then and according to the Rental Tenancy Act must be done when both parties are present. I will be out and gone by 31 August at 1200 hrs.” The landlord answered: “Well aware of the act. We will set up a time when I return to take the tour.”

The tenant testified that form this exchange she concluded that the move-out inspection would occur on September 3.

On August 28 and 29 the landlord and tenant exchanged e-mails about showing the rental unit. The landlord wrote: “We will send e-mail only as I have not reached by phone for 2 mons.”

The tenant’s evidence is that she had been without a telephone for several months because the telephone she had been using was supplied with her previous job and

when that job ended she had to return the telephone. Her evidence was that the landlord knew she did not have a telephone.

The tenant did move out at the end of the month. She left a note on the refrigerator which gave her forwarding address. The address given was for her new work place; not her new place of residence. In fact the tenant had just moved into another unit in the same building; across the sidewalk and up the stairs from the rental unit.

The tenant's Internet and cable connections were terminated on August 31. They were supposed to be reconnected on September 1 but the tenant's service provider lost her work order and rescheduled the installation for September 16.

On September 1 the tenant injured her knee. She spent most of the day at the hospital and when she was released it was with a large brace on her leg. She spent most of September 2 in bed. Because of her injury she was not able to go up and down the stairs. Her written submission stated that her neighbour's son helped her with walking her dog and other neighbours helped her with anything else over the next few days.

Meanwhile the landlord testified that he returned early from his trip to conduct the move-out inspection because of the tenant's concerns. He went to the rental unit in the afternoon of August 31. There tenant was not there but he did find her note on the refrigerator. He sent the tenant an e-mail that said: "Walk through can be done on September 1 form 9:00 am to 11:30 am what time works for you."

The landlord was at the rental unit on September 1 but the tenant did not appear. He sent the tenant another e-mail: "I need to do walk through this is second try to set up time now Sept 2 9 am to 4 pm please let me know what works for you."

The tenant's written submission is that on September 2 she could hear banging noises from the rental unit. When she asked her neighbour about the noises the neighbour told her that landlord was renovating the rental unit. The tenant says she wondered about this because she though the move-out inspection had been set for September 3. There is no evidence that she made any effort to have someone speak to the landlord on her behalf or make any other communication with him on her behalf.

On September 3 the tenant went to work. She says this was the first time she was able to check and her –e-mail and that's when she saw the messages from the landlord. There were also some message about missing keys, items in the dumpster, and a motor vehicle. There is no evidence of any reply to the landlord from the tenant.

The tenant says the landlord called her place of work on September 3 and she spoke to him at that time. She testified that they only spoke about the keys and nothing else. The landlord testified that he did not recall this conversation.

The tenant testified that she followed up this conversation by sending the landlord a letter. A copy of a letter dated September 1 was filed as part of the tenants' evidence. In this letter she states: "I left you the forwarding address on the fridge . . .on 31 August 2013, I spoke to you on the phone and confirmed you had the forwarding address . . I e-mailed you the forwarding address and now I am confirming it by letter."

A copy of the e-mail referred to in this letter was not filed in evidence,

When questioned, the tenant said the date on the letter had been added later and was incorrect. She explained that because her PTSD dates are particularly problematic for her.

The landlord testified that the first time he saw the letter was when he received the tenant's evidence package.

On September 3, at 10:00 pm, HE, sent the landlord an e-mail. HE lives in the unit across from the rental unit and below the tenant's new residence. She owns the unit that the tenant is now renting. She also sold the rental unit to the landlord. In her e-mail to the landlord HE advised that the tenant was renting her upstairs unit.

On September 5 the tenant sent the landlord an e-mail telling him about her difficulties with her service provider and confirming that the keys had been mailed to his home address. The only address on this e-mail is the tenant's work address.

The landlord did complete the move-out inspection report and mailed it to the forwarding address provided by the tenant. It was returned to him. The tenant explained that the mail for her place of employment is actually delivered to the business next door. If the receptionist at that office did not recognize her name she may have refused to accept any mail addressed to the tenant.

On September 16 the landlord e-mailed the condition inspection report and photographs to the tenant.

As stated earlier the tenant filed an application for dispute resolution on September 23. The address for service shown on the application for dispute resolution was the tenant's new residential address.

On November 21, 2013, the landlord filed his application for dispute resolution claiming against the security deposit and pet damage deposit. He served it by registered mail sent to the tenant's new residential address.

*Claim for Cleaning*

The landlord claims $127.50, 8.5 hours at $15.00/hour, for cleaning. He filed photographs of the unit once it had been vacated. The tenant and her witness HE challenged the authenticity of the photographs, which had been e-mailed to the tenant in September. The basis of their argument is stated in the following e-mail to the tenant from HE: "I did a walk through with you at Unit 107 on August 30th and it looked very clean. . . Any pictures [landlord] took were after you move out and he had had access to and been in the unit for several days. You could probably check the date taken in the photo properties."

HE testified that she walked through the unit on August 31 with the tenant. She pointed out some corners that needed cleaning which the tenant promptly addressed. She said that the unit was clean.

The tenant testified that she and the cleaning person she had hired had thoroughly cleaned the unit. An invoice and description of work was filed by PJ that stated that she had spent four hours on August 31 cleaning. She described the work done. The rate charged by PJ is $30.00/hour. She also states that she was there at 1:00 pm when the note and keys were taped to the refrigerator by the tenant.

An e-mail from another of the tenant's friends, AH, was also filed in evidence. This e-mail says that AH was present when the tenant cleaned the unit and it was clean.

The tenant also challenged the invoice filed by the landlord for cleaning on the grounds that the cleaner is the landlord's wife. The landlord never denied this allegation in his testimony.

*Claim for Painting*

The landlord testified that the unit was painted three or four months before the start of this tenancy. After the tenant moved out there was a strong smell of cigarette smoke in the unit and the walls were stained yellow. There was at least one fist hole in a wall that the tenant had tried to fix – very inexpertly. There were also scrapes and chips to some of the trim and corners.

The landlord testified that the only way to eliminate the smell of smoke was to paint the entire unit with two coats of a product called Kilz. He testified that the entire unit was repainted: two coats of Kilz, two coats of flat paint on the ceilings; and two coast of paint everywhere else. In addition, two holes in the drywall had to be repaired. He filed a receipt from a painting contractor in the amount of $2800.00. According to the receipt $1500.00 had been paid on September 6 and $1300. 00 on November 1.

The tenant's evidence is that she did not smoke in the unit and that any smoke damage in the unit was caused by the faulty fireplace. She used the fireplace often as a supplementary source of heat. The tenant said she always had a problem with the fireplace. Inversions would be created and smoke from the upstairs unit would fill her unit. She also testified that if she did not open a door or window when lighting a fire there would be smoke.

The tenant testified that both she and the cleaning person she hired washed all the walls with TSP.

The landlord agreed that inversions can happen.

The tenant agreed that there were two holes that needed to be repaired and she was prepared to pay something for those repairs.

The tenant questioned the validity of the receipt filed by the landlord. She argued that the painter does not appear to be listed anywhere and the telephone number on the receipt does not appear to be linked to a business. She stated that the landlord was the only person seen by the neighbours working at the rental unit; that the landlord has his own construction/renovation company; and that no other company trucks were ever seen at the rental unit.

HE stated that the paint in the living room and two bedrooms was the same paint that was on the walls when she sold the unit to the landlord. She testified that she did not smell any smoke. She is also a smoker but she only smokes outside.

*Claim for the Laminate Floor*

The landlord testified that the laminate flooring had been installed just before he bought the property. There is now a scratch on the floor about 1.5" by 3" in size. The landlord filed an estimate to replace the entire floor in the amount of $994.11. According to the landlord the issue is that the material can no longer be matched. The landlord acknowledged that the estimate is on the high side. He has not gone ahead with any work to the floor because he cannot afford to.

The tenant's position is that the floor was not damaged and even if it was, the landlord has extra flooring on hand to make any necessary repair.

*Closet Door*

The landlord testified that the closet door in the hallway was damaged. It has not yet been replaced. HE also testified that the door is original to the unit so is at least thirty years old.

The tenant's position is that she never touched the door during the tenancy and that it is not damaged.

*Bathroom Door*

The landlord testified that a new door had been installed prior to the start of this tenancy. The issue is that the door is swollen and he does not know what caused the damage. The cost to replace the door is $159.00 plus painting and installation. He has not yet made this repair.

The tenant and HE testified that humidity was always a problem in this bathroom because it does not have a fan; the only ventilation is when the window is left open. They also testified the paint flaked off when the door was washed.

*Loss of September Rent*

The landlord testified that he had someone interested for September 1 but when he told them there might be some problem with the move-in date they were no longer interested. He found a new tenant who moved in on or about September 20. This person did not pay any rent for September.

The tenant had filed copies of e-mails between herself and the landlord about arranging showings on August 30.

*New Deadbolt*

The tenant acknowledges that when she moved out of the unit she took one copy of the deadbolt key with her by accident. The landlord acknowledges that he received the key from the tenant on September 14.

*NSF Fee*

The tenant's rent cheque for May was returned by her bank marked NSF. The landlord says his bank charged him $35.00 as a result. The tenant says she paid the landlord the $35.00 in cash and did not receive a receipt for the payment. The landlord says he did not receive any payment.

Analysis

*Test for Damages*

On any claim for damage or loss the party making the claim must prove, on a balance of probabilities:

- that the damage or loss exists;
- that the damage or loss is attributable solely to the actions or inaction of the other party; and,
- the genuine monetary costs associated with rectifying the damage.

In a claim by a landlord for damage to property, the normal measure is the cost of repairs or replacement cost (less an allowance for depreciation), whichever is lesser. The Residential Tenancy Branch has developed a schedule for the expected life of fixtures and finishes in rental units. This depreciation schedule is published in *Residential Tenancy Branch Guideline 40: Useful Life of Building Elements* and is available on-line at the Residential Tenancy Branch web site.

*Cleaning*

Although the tenant and her witnesses all say the unit was clean the photographs filed by the landlord tell a very different story. The reveal marked and streaked walls, dirty baseboards, dirty windowsills. I do not accept the tenant's suggestion, which is basically that the landlord went into the unit and spent time marking up the walls, putting dirt in corners and taking other measures to falsify the condition of the unit. I accept that the tenant and her cleaning person did some cleaning as the kitchen appliances and bathroom fixtures appear to have been left reasonably clean but I find that this unit had not been cleaned to the standard set out in *Residential Tenancy Branch Policy Guideline 1: Landlords & Tenants – Responsibility for Residential Premises.*

The tenant also challenged the invoice filed by the landlord on the grounds that the cleaner is his wife. As the landlord did not dispute this statement I accept that it is true. However, it is not that relevant. A landlord who is required to clean a rental unit is entitled to compensation for that work whether they do it themselves or hire someone else. The rate claimed by the landlord of $15.00/hour is much less that the amount usually awarded to landlords and is half what the tenant said she paid. 8.5 hours is a reasonable amount of time for the work required to be done. Accordingly, I allow the landlord's claim of $127.50 for cleaning in full.

*Painting*

The staining above the fireplace is black; the stains on the walls are yellow. Black is consistent with wood smoke; yellow is consistent with nicotine. Washing the walls with TSP should have removed any wood smoke stains yet it clear in the photographs that the walls were stained at the end of this tenancy.

I discount HE's testimony that she did not smell cigarette smoke for two reasons: she is not a disinterested party and secondly, she is a smoker, hardly the best person to say whether a place smells of cigarette smoke or not.

The tenant's arguments have not convinced me that an independent painter did not do the work. An individual can do business under a business name without a marked truck, special advertising or dedicated telephone number. I would also note that the amount stated on the receipt is consistent with the invoices filed on other claims for similar sized jobs. Interestingly, neither the tenant or her witness, both of whom live next door to this unit disputed whether the unit had been painted; they only questioned whether the landlord had done the work himself.

Even if the landlord, or someone employed by the landlord, did the work he is entitled to compensation for the cost of repairing the holes in the walls, damage to the trim, and eliminating the smoke smell. Depreciation will be applied to the cost of repainting as that is a routine maintenance task, but not to the other work done. The expected useful life of interior paint in a rental unit is four years. This tenancy lasted two years so the depreciation rate is 50%.

The receipt filed by the landlord does not provide any breakdown between labour and materials nor does it provide any breakdown between the various tasks performed by the painter. I am only able to award general damages for wall repair and repainting. Considering similar evidence filed in other cases I have heard and the evidence before

me I award the landlord $2200.00 for this item; $400.00 for drywall repair, $1200.00 for the application of Kilz; and $600.00 for painting.

*Laminate Floor*

The scratch is not that large and the cost of repairing the floor is disproportionate to the actual damage done. In any event, the landlord has not taken any steps to repair the floor nor did the mark prevent him from re-renting the unit. Accordingly, nothing will be allowed for this item.

*Closet Door*

The expected useful life of an interior door in a rental unit is twenty years so the depreciated value of this door is nil. Nothing will be allowed for this item.

*Bathroom Door*

From the photographs it appears that the door has been damaged by moisture. Based on the evidence I cannot conclude that the tenant's neglect was the only reason for damage to the door. Nothing will be allowed for this item.

*Loss of September Rent*

First of all, any loss of income after the new tenant moved in was the result of a decision made by the landlord so no claim could be made for this portion of the September rent. With respect the claim for the loss of income for the first three weeks of September there is no evidence such as a written tenancy agreement, offer to rent or even a letter from the people the landlord says may have been interested in renting this unit as of September 1. The landlord has not met his burden of proof and this claim is dismissed.

*Deadbolt*

A large portion of the tenant's evidence was devoted to this key and the mailbox key. The issue is not whether the landlord could enter the rental unit but whether he could be assured that he had all the keys in his possession at the end of the tenancy. Section 25(1) states that if an incoming tenant asks a landlord to rekey the locks at the start of a new tenancy the landlord must do so at its own cost. As the landlord may have had to change the deadbolt anyway nothing will be allowed for this item.

*NSF Fee*

The only evidence before me is the conflicting oral testimony of the parties. There is no other evidence to tip the balance of probabilities in the landlord's favour. Accordingly, nothing will be allowed for this item.

*Security Deposit and Pet Damage Deposit*

The *Residential Tenancy Act* and the *Residential Tenancy Regulation* set out a very detailed and technical protocol to be followed by landlords and tenants; with consequences for both if any part of the protocol is not followed exactly.

Section 23 requires a landlord to give the tenant a copy of the move-in condition inspection report. If the landlord does not do so, he loses the right to claim against the security deposit, pet damage deposit, or both. The landlord says he gave it to the tenant; she says she never got it. During the hearing the tenant frequently stated that her medical condition causes her a lot of difficulty with her memory. As a result I am not prepared to trust the tenant's account of an event that occurred more than two years ago.

Section 35 requires a landlord to give a tenant at least two opportunities to attend the move-out inspection. Section 17(2) of the *Regulation* states that he landlord must offer the second opportunity by serving the tenant, by one of the means specified in the legislation, with a notice in the approved form. Although the landlord did attempt on two occasions to set a time for the move-out inspection the second attempt was by e-mail, not by service of the approved form. Section 36 states that a landlord who does not comply with this procedure loses the right to claim against the security deposit, pet damage deposit or both.

Section 38(1) provides that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit to the tenant or, if the landlord has the legal right to do so, file an application for dispute resolution claiming against the deposit.

In this case, the landlord has lost the legal right to claim against the security deposit and pet damage deposit so his only option was to return both to the tenant in full to the forwarding address provided in writing by the tenant with fifteen days. It does not matter that mail sent to the address had been returned to the landlord unclaimed; he was still obliged to attempt to return the money to the tenant. Further, his only obligation was to send the money to the forwarding address provided in writing by the tenant – in this case her place of employment – not to any other address he may have subsequently learned about or obtained for her.

Section 38(6) provides that if a landlord does not comply with section 38(1), the landlord must pay the tenant double the amount of the security deposit. The legislation does not provide any flexibility on this issue. Accordingly, I find that the landlord must pay the

tenant $1900.00, which is double the security deposit and double the pet damage deposit.

*Filing Fees*

The landlord was only partially successful on his application so I order that he is entitled to reimbursement from the tenant of half the fee he paid to file his application, $50.00. The tenant was successful on her application so is entitled to reimbursement from the landlord of the fee she paid to file her application, $50.00. As these two awards are offsetting, no further order will be made.

*Set-Off*

I have found that the tenant must pay the landlord the sum of $2327.50 for cleaning and repairs. I have found that the landlord must pay the tenant the sum of $1900.00 representing double the security deposit and pet damage deposit. Setting one amount off against the other I find that the tenant must pay the landlord the sum of $427.40 and I grant the landlord a monetary order in that amount.

Conclusion

A monetary order in favour of the landlord in the amount of $427.50 has been made. If necessary, this order may be filed in the Small Claims 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: January 16, 2014

Residential Tenancy Branch