



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNR, MNSD, MNDC, FF

### Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that he received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail September 13, 2013. I am satisfied that the landlord served this package and evidence in accordance with the *Act*.

The tenant sent his written evidence to the landlord by mail on December 13, 2013. The tenant's legal counsel, who was also directly involved in this matter because he lived in the rental property and assumed the rental space previously occupied by the tenant, also noted that the evidence was sent to the landlord by email. In accordance with section 90 of the *Act*, I find that the tenant's written evidence was deemed served on the fifth day after its mailing, December 18, 2013. While this did not leave the landlord the optimal opportunity to review the tenant's written evidence, the landlord said that he had received the tenant's written evidence and had reviewed the most important portions of that evidence, much of which entailed emails exchanged between the parties, which were already in the landlord's possession. Since the landlord has received this evidence, I have considered it in arriving at my decision.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

The landlord testified that this tenancy for one room in a three bedroom rental unit began as a fixed term tenancy on June 1, 2013. Although a written tenancy agreement was created by the landlord, the landlord could no longer find a copy of that agreement. The tenant said that the tenancy was a periodic tenancy. The parties agreed that monthly rent was set at \$975.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$475.00 security deposit.

On August 12, 2013, the tenant telephoned the landlord to tell him that he was planning to vacate the rental unit by August 31, 2013. The parties agreed that the tenant did not send any written notice to end this tenancy.

After some discussion, the landlord agreed to allow the legal counsel who represented the tenant at this hearing to move from the "solarium" rental bedroom in this rental unit to the tenant's rental unit as of September 1, 2013. By allowing the legal counsel to occupy this rental unit, the landlord's loss of rent for September 2013 was reduced from the \$975.00 that the tenant was paying to the \$750.00 that the legal counsel had been paying for the solarium bedroom in this rental unit.

Since the landlord was not in the country in the last weeks of August 2013, the landlord asked the tenant to take the initiative to try to re-rent the solarium bedroom unit, which would become vacant as of September 1, 2013, if the moves proposed by the tenant and the legal counsel were to happen.

The tenant submitted a lengthy list of potential tenants who contacted the tenant shortly after the tenant advertised the availability of the solarium unit on a popular rental website. The tenant provided these names and contact information to the landlord, but the landlord did not locate a tenant he found suitable through that process. The tenant's counsel stated that the tenant identified one very suitable tenant who was very interested and motivated to rent the solarium unit, but the landlord rejected that rental candidate.

The landlord said that he also advertised on Craigslist, although he provided no written evidence of any advertisements, nor any specifics as to showings, etc.,

The tenant and his legal counsel submitted that emails exchanged between the tenant and the landlord advised that the landlord had identified a tenant who was to take occupancy of the solarium unit as of September 1, 2013. When the landlord advised the tenant that his female friend had looked after this matter, the tenant's counsel asserted that the tenant was effectively prevented from seeking out any other options for mitigating the landlord's loss of rent for September 2013.

I remain at a loss to understand why the landlord applied for a monetary award of \$975.00 instead of the \$750.00 that he claims to have lost as a result of his inability to re-rent the solarium unit for September 2013. He testified that he was able to find some temporary renters who paid \$24.00 per night to live in the solarium unit. Although he did not have exact records, he believed that he had one rental for two people from September 5-7, 2013, and a second rental from September 11-17, 2013. He believed that he received \$48.00 for the first rental and another \$73.00 for the second rental.

The tenant's counsel who by September 1, 2013 was living in the tenant's rental unit testified that the landlord moved into the solarium unit himself for the first portion of September. Although the tenant's counsel did not keep a thorough list of the comings and goings of those staying in the solarium unit, he maintained that there were far more than two sets of occupants for the solarium unit during September 2013.

The landlord testified that no joint move-in or move-out condition inspections were conducted for this tenancy. He also said that the tenant's actual room was left in acceptable condition at the end of this tenancy. He was not pursuing a damage claim.

Although I told the landlord that it had little bearing on the matters properly before me, the landlord entered sworn testimony and written evidence regarding the dispute between the landlord and the tenant about which areas the tenant was to clean before he ended his tenancy. The landlord said that he had offered to return all of the tenant's security deposit if the tenant had agreed to clean the common area of the three bedroom unit. If he would not clean this area, the landlord said that he asked the tenant to accept \$50.00 less than the full value of his security deposit. I noted at the hearing that tenants are not responsible to clean common areas unless that is expressly included in their tenancy agreement, a copy of which was never entered into written evidence for this hearing.

### Analysis

While I have turned my mind to all the documentary evidence, including miscellaneous letters and e-mails, affidavits, documents and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. I find that much

of the sworn testimony and written evidence has little real bearing on the issues before me. Despite the multiple deficiencies in how both sides conducted their responsibilities as landlord and tenant, the consideration of the landlord's claim reduces to two essential issues. First, did the tenant end this tenancy in accordance with the *Act*? Second, has the landlord taken proper measures to mitigate his losses?

Despite the landlord's claim that this was a fixed term tenancy agreement, he provided no evidence other than his sworn testimony, which even then seemed uncertain, that this was so. It is the landlord's responsibility to keep a copy of a written tenancy agreement between the parties. If that has not happened and there is a dispute between the oral testimony of the parties as to the nature of their agreement, the benefit of the doubt goes to the tenant as the agreement is to be prepared and drafted by the landlord. For these reasons, I find that this was a periodic tenancy and not a fixed term tenancy as maintained by the landlord.

Section 45(1) of the *Act* requires a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for September 2013, the tenant would have needed to provide his notice to end this tenancy before August 1, 2013. Section 52 of the *Act* requires that a tenant provide this notice in writing.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. As the tenant did not comply with sections 45(1) and 52 of the *Act*, I find that the landlord is entitled to compensation for losses he incurred as a result of the tenant's failure to comply with the terms of his tenancy agreement and the *Act*.

There is undisputed evidence that the tenant did not pay any rent for September 2013. However, as was noted by the tenant's counsel, the *Act* also places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss. This responsibility is established in section 7(2) of the *Act*.

In this case, I find that the landlord has taken some measures to reduce his losses. For instance, he did agree to the tenant's proposal to allow the tenant's counsel to occupy the tenant's rental unit. However, this still left the landlord missing \$750.00 in rent, and not \$975.00 as claimed in his application. The landlord also testified that he was able to reduce the \$750.00 loss by \$125.00 or so by renting the solarium space to travellers on a daily basis. This would reduce the landlord's eligible claim to approximately \$625.00.

Although I recognize that the landlord did take some steps to mitigate the tenant's exposure to the landlord's loss of rent for September 2013, I find that the landlord provided far too little information regarding his steps to mitigate losses. He provided no copies of any advertisements placed as to the availability of the solarium unit for prospective renters. While he claimed to have spoken with some of the people referred to him by the tenant, he was doing this from outside the country and had few details on why he rejected some of these potential renters. By first occupying the space himself, and then allowing travellers to stay there for a daily rate, the landlord restricted the availability of the premises to those interested in renting for the entire month or longer. I also find the sworn testimony of the tenant's counsel who was living in this rental property throughout has at least some credibility in that the landlord failed to provide any exact details or receipts as to who he rented to during the month of September and how much he received from these rentals.

I also find that the landlord's emails of August 27, 2013, in which he advised the tenant's counsel that his female friend had "filled the room and it is all taken care of" had the effect of leading the tenant to believe that he had no reason to be concerned about trying to find other prospective tenants or to mitigate his losses for September 2013. I find the landlord's explanation at the hearing that his email was sent in frustration because he had tired of this process inadequate. This email was followed by another from the landlord on September 4, 2013, in which the landlord stated that he had not approved of the person the tenant referred to him "and found someone more suited for the room." His claim that the tenant kept his key beyond the date when his tenancy ended is curious in that the tenant's counsel was now living in the room the tenant formerly occupied. At the hearing, I also noted that the landlord was not so concerned about this key problem such that it prevented him from renting to daily travellers who used the solarium room for parts of September 2013.

Based on the above reasons, and in particular on the emails sent by the landlord and his failure to show what he was doing to try to mitigate the loss of rent for September 2013, I find that the landlord has not submitted sufficient evidence that he has taken adequate measures to mitigate the losses he has claimed from the tenant. As I find that the landlord has not adequately fulfilled his responsibilities under section 7(2) of the Act, I dismiss his application without leave to reapply.

As I find that the landlord has no authority to retain the tenant's security deposit, I order the landlord to return that deposit forthwith.

### Conclusion

I dismiss the landlord's application without leave to reapply.

I Issue a monetary Order in the tenant's favour requiring the landlord to return the tenant's \$475.00 security deposit plus applicable interest forthwith. No interest is payable over this period. I

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: December 19, 2013

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Residential Tenancy Branch

