



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MND, MNSD, FF

### Introduction

This hearing was convened by way of a conference call in response to an Application for Dispute Resolution (the “Application”) made by the Landlord for a Monetary Order for damages to the rental unit and to keep the Tenants’ security deposit. The Landlord also applied to recover the filing fee for the cost of making the Application.

The Landlord appeared for the hearing with an assistant and both Tenants also appeared. However, only the Landlord and the male Tenant provided affirmed testimony during the hearing.

### Preliminary Issues and Findings

The Tenant confirmed receipt of the Landlord’s Application and the Notice of Hearing documents. Both parties also confirmed receipt of each other’s documentary evidence served prior to the hearing in accordance with the Residential Tenancy Branch Rules of Procedure (the “Rules”).

During the Landlord’s testimony, she referred to photographic evidence that she claimed she had submitted with the Application. However, these photographs were not before me and the file records indicate that no photographic evidence was received by the Residential Tenancy Branch for this hearing. The Tenant confirmed that they had received the Landlord’s photographs but these were served to them for the previous hearing and they did not have these with them for this hearing.

If a party has cause to make an Application under a different file number, they are required to serve the respondent and the Residential Tenancy Branch with copies of any documentary evidence they intend to rely upon prior to the scheduled hearing. An applicant cannot rely on evidence that has been submitted for a previous closed file to be automatically considered and applied to a different hearing. As a result, I find that the Landlord failed to serve these photographs to the Tenants and the Residential Tenancy

Branch in accordance with the Rules and I continued to hear the remainder of the evidence in this case without adjourning the hearing. However, I did allow both parties to make submissions regarding the content of the photographs in verbal testimony.

The Landlord applied to keep all or part of the Tenants' security deposit. However, the Landlord was ordered to return the Tenants' security deposit during a previous hearing which was held by another arbitrator on March 19, 2014. Therefore, I dismiss the Landlord's Application to keep the Tenants' security deposit **without** leave to re-apply.

While the Landlord's remaining Application only elected to deal with damages to the rental suite, the Landlord did submit a Monetary Order Worksheet which details a breakdown of the Landlord's total monetary claim of \$9,956.88 which relates to claims for items other than damage to the rental unit.

The Landlord claims for loss of utilities in the amount of \$574.60 after the Tenants had ended and left the tenancy. A Tenant cannot be held responsible for utilities that they did not use. Therefore, this portion of the Landlord's monetary claim is dismissed **without** leave to re-apply.

The Landlord also applied for rental loss in the amount of \$7,180.00 based on her claim that the Tenants broke the fixed term tenancy and for the resultant costs for showing the rental suite to new renters. However, in the decision dated March 19, 2014, the arbitrator made a finding that the Landlord had breached a material term of the tenancy agreement and the Tenants had cause to end the tenancy and that the tenancy was ended in accordance with the *Residential Tenancy Act* (the "Act") on November 30, 2013. Based on these findings by the previous arbitrator, I find that the Landlord is not able to claim for rental loss for the remainder of the fixed term tenancy and I dismiss this portion of the Landlord's Application **without** leave to re-apply.

The Landlord also claims administrative costs and lost wages for preparing for and attending the hearings in the amount of \$543.00. The Act does not allow the awarding of such costs and each party is responsible to bear their own costs in preparation for Dispute Resolution proceedings. Therefore, I dismiss this portion of the Landlord's Application **without** leave to re-apply.

As a result, the hearing focused on the evidence from the parties in relation to the Landlord's claim for damages to the rental suite (\$2,013.58) and late rent payment and bank charges (\$495.00) which I heard during this hearing.

Both parties were given an opportunity to present evidence, both orally and in writing, and cross examine each other on the evidence presented throughout the hearing. Only the relevant portions of the evidence have been considered in this decision.

#### Issue(s) to be Decided

- Is the Landlord entitled to monetary compensation for damages to the unit?
- Is the Landlord entitled to late rent fees and bank charges?

#### Background and Evidence

This tenancy started on June 10, 2013 and was for a fixed term period of two years due to end on May 31, 2015. However, the tenancy ultimately ended on November 30, 2013. Rent was payable by the Tenants on the first day of each month in the amount of \$1,700.00.

The Landlord and Tenants completed a move in inspection report on June 10, 2013 and a move out condition inspection report on November 30, 2013. This was provided by the parties in written evidence for the hearing.

The Landlord testified that the Tenants had caused damage to the walls of the rental suite by hanging up pictures using construction nails which left the walls damaged beyond reasonable wear and tear that required them to be filled, sanded and painted over.

The Landlord pointed to the move out condition inspection report which refers to this damage as "nail holes". The Landlord testified and referred to the following number of nail holes in the different areas of the rental suite as follows: 10 in the kitchen area, 11 in the living room, 4 in the master bedroom, 6 in the sun room, 7 in the north bedroom, and 25 in the south bedroom.

The Landlord testified that she took photographs of the nail holes and that they were so big that she could put a key in them.

The Landlord testified that she obtained two quotes for repairing the damage to the walls but only submitted the invoice that was \$400.00 cheaper in written evidence. The invoice provided in the amount of **\$1,428.00**, indicates the work consisted of repairing the nail hole damage throughout the rental suite and included a list of amounts relating to costs for materials used in the repair process. The invoice also included costs for repainting the master bedroom and bathroom door and when the Landlord was asked to

explain this, the Landlord testified that this related to repainting the areas of the door around the door handle which had been scratched during use.

The Landlord claims a total amount of **\$585.58** for cleaning costs and testified that the Tenants had not cleaned the rental suite and had left garbage behind which had to be removed and disposed of, which included a go-cart.

The Landlord again pointed to the move out condition inspection report and testified that the Tenants had not left the stove and burners clean at the end of the tenancy and had not cleaned some of the window sills. The Landlord provided two invoices and testified that one related to \$97.87 for purchasing the paint for the nail hole damage and the other one, in the amount of \$15.18 related to cleaning supplies she had purchased to clean the rental unit. The remainder of the Landlord's claim of \$472.53 was attributed to her labour for cleaning and garbage removal which was charged at \$20.00 per hour.

The Landlord claims a total of **\$495.00** for late payment fees and non-sufficient funds ("NSF") charges. The Landlord testified that the Tenants provided her with a cheque for July, 2013 rent in the amount of \$1,700.00 which came back as dishonoured. The Landlord further testified that the Tenants were given permission to pay their pet damage deposit in incremental payments and that their July, 2013 contribution cheque for \$125.00 was also dishonoured. As a result, the Landlord was charged a fee from the bank in the amount of \$7.00 for each dishonoured cheque. The Landlord provided a copy of these bank charges as well as a copy of the dishonoured cheques.

The residential tenancy agreement contains an 'Additional Terms' document and section 12 on this document states "NSF cheques are subject to \$45.00 fee payable to the landlord".

However, the Landlord claims from the Tenants a total of **\$495.00** which relates to \$5.00 per day relating to June and July, 2013 even though the Landlord's claim only relates to dishonoured cheques in July, 2013.

The Tenant disagreed with the nail hole damage referred to by the Landlord in her testimony and pointed to the move out condition inspection report where he had initialled the nail hole damage recorded by the Landlord as "DA". The Tenant testified that they had hung up pictures using tiny nails but the remainder of the nail holes referred to by the Landlord were present at the start of the tenancy from the previous renters, but were so small that they were not even noted in the move in condition inspection report.

The Tenant submits that the photographs referred to by the Landlord were taken after they had left the rental suite and had given the keys back, suggesting that the damage shown, including the photograph of the Landlord putting a key inside the hole was not caused by them but by the Landlord in an effort to show that the holes were bigger than what they really were. The Tenant also pointed to the fact that the Landlord was attempting to go over the unit in much more detail than what they had done at the start of the tenancy and this was the reason why she was noting things like the deadbolt and a door sticking.

The Tenant testified that they left the rental suite clean including the stove and burners. The Tenant submitted that the stove was 34 years of age and this gives the appearance that it was not cleaned. The Tenant submits that the photographs provided by the Landlord for the previous hearing were taken well after they had left in an effort to pin blame on the Tenants for cleaning costs. The Tenant also testified that they had cleaned the window sills and removed their garbage.

The Tenant disputed the invoice for the cost of the nail hole damage and submitted that this was completed by the Landlord's boyfriend who was the person that was assigned to complete repairs to the unit which were not done and ultimately led to them ending the tenancy for this reason. The Tenant also submitted that the invoice for the cost of doing such repairs is grossly excessive and unreliable, and further that the portion on the invoice for painting costs for the master bedroom and bathroom doors was not even noted on the report.

The Tenant also pointed out that the damage to the stove top and window sill noted on the move out condition inspection report by the Landlord is also marked as good.

The Tenant did not dispute the fact that they had given the Landlord a rent cheque and a pet damage deposit contribution cheque for July, 2013 which had both subsequently bounced. However, the Tenant claims that the Landlord's claim is again excessive and there is no evidence of any late rent payments for June or August, 2013 as claimed by the Landlord in her written submissions. In addition, the Tenant testified that they had not been made aware of these late fees at the time they were incurred and instead the Landlord's Application is the first that they learnt of this claim.

The Tenant submitted that the Landlord's claim is frivolous and is a mere attempt at getting an award from the Residential Tenancy Branch to offset an amount awarded to the Tenants from the previous hearing, for which they have already been to several Small Claims court payment hearings.

## Analysis

In my analysis of the evidence presented by the parties during this hearing, I have considered the following provisions and I have based my findings on the balance of probabilities.

- A party that makes an Application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the Act. Accordingly, an applicant must prove the following:
  1. That the other party violated the Act, regulations, or tenancy agreement;
  2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
  3. The value of the loss; and,
  4. That the party making the application did whatever was reasonable to minimize the damage or loss.

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 Act, regulation, or tenancy agreement on the part of the Landlord. Once that has been established, the Landlord must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord did everything possible to minimize the damage or losses that were incurred.

- Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.
- In dispute resolution proceedings, Section 21 of The Residential Tenancy Regulation states that a condition inspection report is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the Landlord or the Tenant has a preponderance of evidence to the contrary.

By using the above provisions I have made the following determination of the Landlord's monetary claim for damages to the rental suite as follows:

Firstly, I find that I am unable to use the condition inspection report as conclusive evidence of the state of repair of the rental suite at the end of the tenancy. The Tenants marked on the move out inspection report that they disagreed with the damages, namely the nail holes in the wall, and disputed the Landlord's testimony in relation to this damage. As a result, I find that in the absence of further supporting and corroborative evidence, the Landlord has failed to provide sufficient evidence to prove that the Tenants had caused the damage claimed by the Landlord.

Furthermore, I find that the Landlord has failed to establish the value of the loss in relation to the above test for damages. The Tenant claimed that the one invoice provided by the Landlord was not independent as it was completed by the Landlord's boyfriend and was excessive.

I accept the Tenant's testimony and I find that the amount claimed by the Landlord in relation to the damages presented as evidence is excessive. In addition, I find that the Landlord failed to provide an independent comparison invoice for the repair costs which the Landlord testified that she had obtained for an amount that was \$400.00 more than the invoice provided. As a result, I find that the Landlord's evidence is no more compelling than the Tenants' evidence and therefore, I dismiss the Landlord's claim for damages to the rental suite in the amount of \$1,428.00.

In relation to the disputed testimony that the Tenants failed to clean the rental suite at the end of the tenancy, I again find that the Landlord has failed to provide sufficient evidence to prove that the Tenants had failed to clean the window sills and the stove and burners at the end of the tenancy. These items were marked as 'good' on the move out condition inspection report even though comments around the fact that they were not cleaned were recorded by the Landlord. This conflicting evidence is not sufficient for me to award costs associated with the cleaning of the rental suite.

I also find that the Landlord's claim in relation to the cleaning costs of \$472.53 are excessive when compared to the Landlord's testimony and evidence of the amount of cleaning that was required. As a result, I find that the Landlord has failed to meet the burden of proof in relation to her cleaning costs which I accordingly dismiss.

Section 7(1)(c) of the *Residential Tenancy Regulation* (the "Regulation") states that a Landlord may claim a service fee charged by the Landlord's financial institution for the return of a Tenant's cheque. Section 7(1)(d) of the Regulation also states that a Landlord may charge a fee of no more than \$25.00 for late payment of rent or the return of the Tenant's cheque by a financial institution **which is documented in a tenancy agreement.**

As a result, I accept the undisputed testimony of the Landlord that the Tenants issued the Landlord with a cheque for July, 2013 rent and a cheque for a contribution to the pet damage deposit in the same month, which were both dishonored, and for which the Landlord incurred a \$7.00 charge by her bank for each cheque.

The tenancy agreement for this tenancy allowed for a charge of \$45.00 for the insufficient funds cheque. However, as the amount charged was in excess of that allowed under the Regulation, this term of the tenancy agreement is contrary to the Act and is therefore void. I do not allow any late fees in this circumstance. Under Section 7(1)(c) of the Act, I do allow the Landlord the bank service fee of **\$7.00 each**, as this amount is not required to be set out in the tenancy agreement. Furthermore, the Regulation does not allow a Landlord to charge fees on a daily basis after a Tenant's cheque has been returned as NSF. Therefore, I dismiss the remainder of the Landlord's monetary claim for these fees.

As the Landlord has only been successful in proving a very small portion of her total monetary claim and could have sought to recover the late fees she was awarded in this hearing during the tenancy, I dismiss the Landlord's claim to recover the filing fee.

### Conclusion

For the reasons set out above, I grant a Monetary Order in the amount of **\$14.00** in favor of the Landlord for the bank charges, pursuant to Section 67 of the Act. This order must be served on the Tenants and may then be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

The remainder of the Tenant's monetary claim is dismissed without leave to re-apply.

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 15, 2014

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Residential Tenancy Branch



