



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding BAYWEST MANAGEMENT CORPORATION  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OPR, MNR, MNSD, MNDC, FF

### Introduction

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

- an order of possession for unpaid rent pursuant to section 55;
- 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 tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover its filing fee for this application from the tenants pursuant to section 72.

The tenants attended the hearing. The landlord was represented by its two agents: AG and YG. All parties were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The tenants did not raise any issues with service.

### Preliminary Issue – Amendment to Landlord's Application

At the hearing the parties agreed that at some point at the end of May, the tenants vacated the rental unit. As possession of the rental unit has returned to the landlord, there is no need for me to consider the landlord's request for an order of possession. The landlord asked to withdraw its request for an order of possession. I allow the amendment and withdraw the landlord's request for an order of possession.

Issue(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 tenants' security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

This tenancy began 15 January 2007. In January 2007, the former landlord collected a security deposit from the tenants in the amount of \$327.50. The landlord continues to hold this amount. The most recent monthly rent was \$655.00 and was due on the first of the month.

I was provided with a copy of the tenancy agreement. I was also provided with a copy of a locker agreement that set out a monthly charge of \$10.00 for use of a locker.

On 6 May 2015, the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) to the tenants. The 10 Day Notice set out that the tenants had failed to pay \$665.00 in rent that was due 1 May 2015. The agent AG testified that the current rent arrears at that time was actually \$1,120.00. The 10 Day Notice set out that the tenants had until 16 May 2015 to vacate the rental unit.

The agent AG testified that the tenants made two payments subsequent to the issuance of the 10 Day Notice and the arrears were reduced to \$480.00

The tenants did not vacate the rental unit by 16 May 2015 and continued to occupy the rental unit. The tenant DS testified that the tenants were looking for a new place to live. The tenant DS testified that on 15 May 2015 he told the landlord's agent that the tenants had found a new residence. The tenant DS testified that, at this time, the tenants made an offer to allow the landlord to retain the security deposit to allow the tenants to occupy the rental unit until 15 June 2015. The landlord did not provide written authorization to the tenants accepting this arrangement.

The landlord applied for dispute resolution on 19 May 2015. The agent YG discovered that at some point on 23 May 2015 the tenants had vacated the rental unit. The agent YG discovered this from another occupant of the residential building.

The agent YG testified that she posted two notices of times to inspect the rental unit. The agent YG testified that she posted the first of these notices on 27 May 2015 and the second on 28 May 2015. The notices set out proposed dates for the condition move out inspection of 1100 on 28 May 2015 and 29 May 2015 respectively. The tenants were no longer residing at the rental unit at that time. The agent YG testified that she did not telephone the tenants to alert them to the notices. The tenant testified that on 29 May 2015 the tenant attended at the rental unit to return the keys to the rental unit. The agent YG testified that the tenant TB said that she would be unable to attend the inspection at that time.

The agents both testified that the rental unit required 22 hours of cleaning. The agent AG testified that this cleaning was in relation to cigarette-smoke damage. The agent AG testified that smoking was permitted under the tenancy agreement. The tenant DS admitted that the tenants smoked in the rental unit.

The agent AG testified that, when the tenants became overholding tenants, there was uncertainty as to when possession of the rental unit would return to the landlord. As a result the landlord was unable to secure new tenants for 1 June 2015. The agent AG testified that the landlord has an ongoing advertisement that is posted online. I was not provided with a copy of this advertisement. The agent AG testified that the landlord has a waiting list of individuals to contact when rental units become available.

The agent AG testified that she did not know of any reason that would permit the tenants to deduct any amount from rent.

The tenant DS admitted that the tenants owed for May's rent; however, the tenant DS disputes the tenants' liability for June as they did not leave there. The tenant DS submitted that the landlord should have obtained the services of a bailiff to evict the tenants.

### Analysis

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

The tenants occupied the rental unit until 23 May 2015. Accordingly, the tenants were liable for rent due 1 May 2015. The tenants have not provided any evidence that they were entitled to deduct any amount from rent. Accordingly, the landlord has proven its entitlement to \$480.00, the remaining rent arrears.

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice. On the basis that the tenants failed to pay rent due 1 May 2015, the 10 Day Notice was validly issued. The tenants did not pay the rent arrears in full within five days of receiving the 10 Day Notice. Further, the tenants did not apply to cancel the 10 Day Notice. In accordance with subsection 46(5) of the Act, the tenants' failure to take either of these actions within five days led to the end of their tenancy on the effective date of the notice. In this case, this required the tenants to vacate the premises by 19 May 2015, the corrected effective date of the 10 Day Notice.

The landlord claims for a rental loss for June. I find that the tenants overheld the rental despite the valid issuance of the 10 Day Notice contrary to section 46 of the Act. I accept that by overholding the rental unit the tenants created uncertainty as to when the unit would be vacant, which in turn hampered the landlord's search for new tenants. The landlord testified that the cleaning took 22 hours to complete. I cannot find, on the evidence before me, that the smoking damage added any extra to the delay already caused by the uncertain return of possession.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

The landlord provided testimony through its agents that it posts a general advertisement at all times and keeps a wait list. I was not provided any evidence that indicates that the landlord attempted to find new tenants for mid-month. I find, on a balance of probabilities, that by failing to pursue specific mitigation in respect of this rental unit, the landlord has failed to mitigate its damages. I accept that by overholding the rental unit

the tenants were responsible for a delay in finding new tenants until at least 15 June 2015. Accordingly, I find that tenants are only liable for one half of June's rental loss.

The landlord has claimed for a late fee for May's rent.

Paragraph 7(1)(d) of the *Residential Tenancy Regulations* (the Regulations) provides that a landlord may charge an administration fee of \$25.00 for late payment of rent. Pursuant to subsection 7(2) a late fee charge may only be applied if the tenancy agreement provides for that fee. The tenancy agreement does provide for recovery in relation to returned cheques but does not provide for a late fee. As such, the landlord is not permitted to recover this amount from the tenants.

The landlord has claimed \$10.00 in storage locker fees for two months. I find that the tenants agreed to pay \$10.00 for use of the locker. I find that the landlord is entitled to recover the locker charge for May. However, the landlord has not shown that the landlord suffered a loss for June's locker rental as there was no guarantee that the next tenant would use such a locker. Thus, there is no entitlement to June's amount.

Section 35 of the Act provides that the landlord and tenant together must inspect the condition of the rental unit. Subsection 35(2) provides that that the landlord must offer the tenant two opportunities for inspection.

Paragraph 88(g) of the Act sets out that a document such as the notice of inspection may be given by attaching a copy to a door or other conspicuous place at the address at which the person resides. At the time the agent YG posted the notices the tenants no longer resided at the rental unit. Accordingly, those notices were not delivered in accordance with the Act. As such, the landlord did not comply with subsection 35(2) of the Act.

Pursuant to subsection 36(2) of the Act, the landlord's right to claim against a security deposit is extinguished if the landlord does not comply with subsection 35(2) of the Act. As the landlords failed to comply with subsection 35(2) of the Act, the landlord's right to claim against the tenants' security deposit was extinguished. This extinguishment does not prevent me from using the offsetting provisions in section 72. I order that the security deposit plus interest be offset against the monetary award; interest payable from 15 January 2007 is \$9.71.

As the landlord has been successful it is entitled to recover its filing fee from the tenants.

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$530.29 under the following terms:

<b>Item</b>	<b>Amount</b>
Unpaid Rent	\$480.00
½ June Rental Loss	327.50
Storage Amount	10.00
Offset Security Deposit Amount	-327.50
Offset Interest Amount	-9.71
Recovery of Filing Fee for this Application	50.00
<b>Total Monetary Order</b>	<b>\$530.29</b>

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial 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 subsection 9.1(1) of the Act.

Dated: July 08, 2015

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Residential Tenancy Branch

