# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PORTE REALTY LTD.
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes: MNDC MNSD OLC FF

**Introduction**:
Both parties attended the hearing and agreed they were served with the documents. Both parties had made applications pursuant to the *Residential Tenancy Act* (the Act) for monetary orders for damages. The landlord requests a monetary order pursuant to Sections 7 and 67 for to compensate the landlord for their costs, for liquidated damages for breach of a fixed term lease, to retain a portion of the security deposit pursuant to Section 38 and to recover the filing fee pursuant to Section 72. The landlord had male and female representatives to discuss the claims.

The tenant seeks a return of twice the security deposit pursuant to section 38 and a monetary order as compensation for moving expenses, rent rebates, and exposure to hazardous health conditions causing stress, anxiety, pain and suffering which costs were all allegedly incurred due to actions or neglect of the landlord.

**Issue(s) to be Decided**:
Has the landlord proved on the balance of probabilities that the tenant's actions caused them to incur costs for which they are entitled to compensation? If so, what is the amount of the compensation and is the landlord entitled to recover filing fees also?

Are the tenants entitled to twice their security deposit refunded and to recover compensation for damages suffered due to actions or neglect of the landlord? If so, to how much have they proved entitlement?

**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 January 15, 2015 on a fixed term lease expiring on January 14, 2016. Rent was $885 per month and a security deposit of $442.50 was paid on December 29, 2014.

The landlord claims $367.50 for air quality testing done by professionals after the tenants vacated. They said they needed this to counter the tenants' claim. They also claim $350 in liquidated damages for breach of the fixed term lease. This amount is specified in their tenancy agreement and it is to cover costs of advertising, showings, telephone calls and small fix ups needed in order to re-rent. They re-rented for August 1, 2015 and suffered no loss of rent. They also request $700 to compensate for employee time to review the evidence of the tenants and prepare a response. They submitted time sheets and invoices in support of this claim.

The tenants claim $22, 522.62 in total. Included in this is twice the security deposit as it was not returned within 15 days. They list moving expenses of $230, mail forwarding costs of $54.55, moving supplies $16.79, cab fare and translink $67.20 to look at other apartments(they don't have a car), $43.36 for ink to prepare pictures and documents for evidence, $73.34 for food costs incurred because they had to eat out to escape from the fumes, $5,752.50 for a refund of 6.5 months of rent, $3,780 to cover increased rent at their new rental unit, $5,200 for exposure to cancer causing toxins, $3250 for stress and anxiety and $3250 for pain and suffering at their unit due to fumes, $44.18 for medication for inflamed and itchy eyes, $25 cost to set up a new gas account, $13.02 to move their hydro account and $95.18 interest on the money they had to borrow to move.

The tenants said their claim, except for the security deposit, is based on the noxious fumes that invaded their unit and caused them to vacate. Their theory was that these noxious fumes originated in the underground parking lot and came up through a vent located on their patio (which looked like a planter) or up the elevator shaft because staff left a door open to the lot. They described the fumes as coming from harsh chemicals used to clean the underground lot and from exhaust from vehicles. They said these fumes were intermittent and they began to investigate when they started having health problems. They said they could smell them through the vent and cracks in the patio and they were worst in the area between their front door and patio door where they believe the fumes from the vent and the elevator shaft concentrated due to gaps under their doors. They criticized the consultant's report and noted it said there were no cars idling on page 6 when the test was done, they said the report was erroneous as some indoor and outdoor readings of numbers were reversed. They also queried the other tenant's letter and said he could have lived there many years ago when the 43 year old building was in better condition. They described their health issues as itchy, inflamed eyes and problems with breathing and said they cleared up when they left the building.

They said the landlord looked at the vent on June 29, 2015 and when the tenants asked if they could seal around their doors, the landlord said the building needs to breathe.

The vent was covered briefly but then was uncovered again because the landlord claimed it was necessary due to fire regulations.

The male representative of the landlord pointed out that the tenants have the onus of proving their claim. He said they only criticized the landlord's professional report but submitted no independent evidence of their own. He pointed out that the tenants had previous medical issues as stated on their Application to Rent and there is no evidence that fumes or anything in this building caused their problems. He said the building has 30 suites and about 15 cars use the parking lot. They go in and out as tenants go to work or return home. They do not sit idling. There is a laneway behind the building where trucks sometimes travel but he said the landlord is not responsible for any smells which might come from passing traffic. The female representative said that some decks got a new membrane and the bathtub was redone and as is her policy, she told tenants that there may be fumes from these works and they were fine with that. She pointed to the several letters from other tenants provided in evidence stating that they had no complaints about the building and two (a previous tenant of this unit and another present tenant on the same floor) mentioning they smelt no fumes. She said management was there for 25 years and this was the first complaint they had had about fumes and furthermore, these tenants did not complain until they had lived in the building for 6 months.

In respect to the security deposit, the tenant vacated July 31, 2015 and provided a forwarding address on July 31, 2015. The landlord sent a refund of $257.50 which she mailed on August 14, 2015; the tenants said they should have received it by August 15 and did not. They agreed to a $100 deduction for the screen door but disagreed with the $85 charge for carpet cleaning and said the landlord had no permission to withhold the extra $85. They claim $442.50 x 2 = $885 less deposit received of $257.50 on August 19, 2015.

In evidence are photographs and emails from both parties, a letter of complaint regarding fumes dated May 29, 2015, letters explaining why the vent cannot be covered permanently but will be covered for a time to accommodate the tenants, a tenancy agreement, a professional consultant's report on air quality in the underground parking lot and the suite, the tenant's application to rent this unit, their new tenancy agreement elsewhere, prescription costs for an allergic reaction and statements from the parties.

**Analysis:**

As explained to the parties in the hearing, the onus is on each applicant to prove on a balance of probabilities their claim. They both seek compensation.

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 a recent court decision, the judge pointed out that Section 67 of the Act does *not* give the director the authority to order a respondent to pay compensation to the applicant if damage or loss is not the result of the respondent's non-compliance with the Act, the regulations or a tenancy agreement.

In respect to the security deposit, I find the tenant gave the landlord permission to withhold $100 for damage to the screen door but not permission to withhold $85 for carpet cleaning. Section 38 of the Act provides:

*38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of*
*(a) the date the tenancy ends, and*
*(b) the date the landlord receives the tenant's forwarding address in writing,*
*the landlord must do one of the following:*
*(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;*
*(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.*
*(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,*
*(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or*
*(b) after the end of the tenancy, the director orders that the landlord may retain the amount.*
*(6) If a landlord does not comply with subsection (1), the landlord*
*(a) may not make a claim against the security deposit or any pet damage deposit, and*
*(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable*.

I find in this case, the landlord had permission in writing on the condition inspection report to withhold $100 for a damaged screen. Therefore, I find the maximum security deposit remaining was $342.50. I find the landlord did not make an Application to claim against this amount and only returned $257.50 of it. Whether or not the landlord

returned the $257.50 within the 15 days or later, pursuant to section 38 and Residential Policy Guideline 17, I find the tenant entitled to double $342.50 less the $257.50 which was returned.

In respect to the claim of $85 for carpet cleaning, I find their tenancy agreement clause 23 obligates the tenants to pay for professional cleaning at the end of their tenancy whether they stayed for 6 months or another period. I find the landlord entitled to recover $85 for carpet cleaning.

Regarding other claims of the landlord, as explained in the hearing, my jurisdiction to award costs for preparation and process of the hearing is limited to recovery of the filing fee pursuant to section 72. Therefore I dismiss the landlord's claim for reimbursement of the cost of professional air testing which was done some months after the tenant left and as stated in the hearing was to defend against the tenant's claim. I likewise dismiss the claim for $700 for preparing response to the hearing.

I find the landlord entitled to $350 for liquidated damages for breach of the fixed term lease as agreed to in clause 5 of the lease. I find this was a genuine pre- estimate of their costs of re-renting including showings, telephone calls, checking on applicants and additional preparation for a new tenant. In accordance with section 7 of the Act, I find the tenant breached the lease; the landlord incurred loss due to the breach and mitigated their damages by diligently advertising and re-renting as soon as possible. Although the tenant contended the landlord had agreed to waive this cost, I find the weight of the evidence is that this promise was based on the tenant moving and not making further claims and this settlement did not happen.

Regarding the remainder of the tenant's claim, I find it is mainly based on a claim of toxic or noxious fumes emanating from an underground garage into their unit. I find insufficient evidence to support their claim. I find insufficient evidence that noxious fumes were emanating from the garage and/or that the landlord through act or neglect caused them to suffer the problems they describe. Their health issues are described as itchy and inflamed eyes and difficulty breathing. I note their Application for Tenancy submitted as evidence by the landlord states their reason for leaving their previous unit where they resided for two years was "noise and allergies" and the reason for leaving their 4 year residence before that was "noise and allergies to mold, smokers next door".

When one party provides evidence of the facts in one way and the other party provides an equally probable explanation of the facts, without other evidence to support the claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails. It appears from the evidence that the tenants have had

ongoing problems with allergies and it is just as likely this previous condition continued to affect them. I find the professional report provided by the landlord is persuasive that there were no air quality problems in the underground garage or their suite. I find the tenant has not met the burden of proof and I dismiss their claim in its entirety.

In respect to their claims for printer ink, I find this was for preparation for the hearing and, as explained previously, my jurisdiction on hearing costs and preparation of evidence is limited by section 72 o the filing fee. I dismiss this portion of their claim.

**Conclusion:**

I find the parties entitled to monetary awards as calculated below and for the landlord to recover filing fees. The balance is in favour of the landlord ($57.50)and they are issued a monetary order for this amount. The tenant did not pay a filing fee. I dismiss the remainder of their claims in their entirety without leave to reapply.

Calculation of Monetary Award:

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| Tenant balance of security deposit doubled (2x342.50) | 685.00 |
| Less carpet cleaning cost | -85.00 |
| Less amount of security deposit returned | -257.50 |
| Less liquidated damages for breach of lease | -350.00 |
| Less filing fee to landlord | -50.00 |
| Monetary Order to Landlord | -57.50 |

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 14, 2016

Residential Tenancy Branch