



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNR, MND, MNDC, MNSD, FF;    MNSD, FF

### Introduction

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

- a monetary order for unpaid rent, for damage to the rental unit and for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenants' security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

This hearing also dealt with the tenants' application pursuant to the *Act* for:

- authorization to obtain a return of double the amount of the security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenant, JB ("tenant") and the landlord attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The tenant confirmed that he had authority to represent "tenant SJ," the other tenant named in both applications, as an agent at this hearing. This hearing lasted approximately 42 minutes in order to allow both parties to fully present their submissions.

Both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I find that both parties were duly served with the other party's application.

### Issues to be Decided

Is the landlord entitled to a monetary award for unpaid rent, for damage to the rental unit and for money owed or compensation for damage or loss under the *Act, Regulation* or tenancy agreement arising out of this tenancy?

Is the landlord entitled to retain the tenants' security deposit in partial satisfaction of the monetary award requested?

Are the tenants entitled to a monetary award for the return of double the amount of their security deposit?

Is either party entitled to recover the filing fee for their application?

### Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of both parties' claims and my findings are set out below.

Both parties agreed that this tenancy began on April 1, 2015 and that the written tenancy agreement indicated a fixed term to end on March 31, 2016 after which it was to continue on a month-to-month basis. Both parties agreed that the tenancy ended on January 15, 2016. Both parties agreed that monthly rent in the amount of \$1,800.00 was payable on the first day of each month and a security deposit of \$900.00 was paid by the tenants and the landlord continues to retain this deposit. The tenant said that a pet damage deposit of \$350.00 was paid to the landlord. The landlord disputed this payment, stating that he could not recall whether the tenants paid it to him. A copy of the written tenancy agreement was provided for this hearing. The landlord confirmed that he used to own the rental unit and then sold it another "owner" and he was the agent for the owner.

Both parties agreed that no move-in or move-out condition inspection reports were completed for this tenancy. Both parties agreed that the tenants provided a written forwarding address by way of a letter, dated February 3, 2016, which was mailed to the landlord on February 5, 2016. The landlord agreed that he did not have written permission from the tenants to retain any amount from their security deposit. The landlord confirmed that his application to retain the deposit was filed on June 8, 2015.

The landlord seeks a monetary order of \$3,600.00 for a loss of rent, \$320.00 for repair and painting of walls, and \$676.60 for replacement of four French doors. The landlord also seeks to recover the \$100.00 filing fee paid for his application.

The tenants seek a monetary order of \$2,500.00 for a return of double the amount of their security deposit of \$900.00 and pet damage deposit of \$350.00. The tenants also seek to recover the \$100.00 filing fee paid for their application.

### Analysis

#### Landlord's Application

##### Fixed Term Tenancy

Section 45(3) of the Act states that if the landlord has breached a material term of the tenancy agreement and failed to correct it within a reasonable period after the tenants give written notice of the failure, tenants may end a tenancy effective on a date after the date the landlord receives the notice. I find that the tenants were not entitled to end their fixed term tenancy early pursuant to section 45(3) for breach of a material term of the tenancy agreement, regarding mold in the unit. I find that the tenants did not provide the landlord with a written notice to end the tenancy in accordance with the requirements of sections 45(4) and 52 of the Act.

However, I find that the tenants were effectively given permission by the landlord to end the fixed term tenancy early and that the landlord waived his right to enforce the written fixed term tenancy agreement.

The tenants produced text messages between the parties for this hearing, which the landlord agreed he had copies of and did not object to their authenticity. In an excerpt of text messages on December 21, 2015, the tenants stated the following at 1:34 p.m.:

*"I don't wana make you guys have to look for new place aswell so we will finish up our lease til april that gives us both time to figure something out."*

The landlord responded at 1:36 p.m. by saying:

*"I don't think that's a good idea. Your health is more important. I will just tell the landlord [owner] that if he's not going to deal with it, I won't be able to rent upstairs out and he will have to give me \$1800 of the rent."*

Although the landlord said that the mold problem was fixed in December 2015, the tenants disputed this. Regardless, I find that the landlord specifically induced the tenants to end their fixed term tenancy early by telling them that he did not think it was a "good idea" for them to complete the fixed term. The tenants said that they relied on the landlord's statement, assumed that the landlord was not surprised when they gave

notice to leave because they had already told him they were looking for a new place, and did not expect to be pursued by the landlord for a loss of rent.

Accordingly, I find that the landlord is not entitled to March 2016 rent of \$1,800.00 because the landlord waived the right to enforce the fixed term tenancy until March 31, 2016 and that rent was not due from the tenants for that month. I find that the tenants were only required to give the landlord one month's written notice, to end a periodic tenancy not a fixed term. The tenants were not living in the unit in March 2016 and it exceeded the one month's notice period.

### Loss of Rent

As noted above, I find that the tenants were required to abide by section 45(1) and provide the landlord with one month's written notice to end the tenancy. The notice must be given on the day before rent is due. Both parties agreed that rent was due on first day of each month, as noted in the tenancy agreement. The tenants gave notice on January 5, 2016 to leave by January 15, 2016, as per their text message to the landlord. Text message is not a permitted form of service under section 88 of the *Act*. However, in accordance with section 71(2)(c) of the *Act*, I find that the landlord was sufficiently served with the tenants' notice to vacate by text message on January 5, 2016, as the landlord said that he received the text message and a copy was provided for this hearing. This is less than one month's notice.

Section 7(1) of the *Act* establishes that tenants who do not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from tenants' non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Based on the evidence presented, I find that the landlord failed to mitigate his losses in his efforts to re-rent the unit to prospective tenants. The landlord did not provide a copy of any advertisements, confirmed that he increased the rent in the advertisement to \$1,900.00 monthly, and stated that he began advertising on January 15, 2016, rather than January 5, 2016. I find that this delay in advertising, after the landlord received notice on January 5, 2016, impacted the landlord's ability to re-rent. I also find that advertising at a higher price than what the tenants were paying for rent, despite the fact that the landlord said that he was willing to reduce it to \$1,800.00 for prospective tenants, as he did for these tenants, may have detracted potential tenants. Further, I find that advertising for a fixed term of one year, which the landlord said he did, rather than a month-to-month tenancy, may have detracted potential tenants.

Accordingly, for the reasons stated above, I dismiss the landlord's application for a rental loss of \$1,800.00 for February 2016, on the basis that I find that the landlord failed to fully mitigate his losses.

### Other Damages

Section 67 of the *Act* requires a party making a claim for damage or loss to prove the claim, on a balance of probabilities. In this case, to prove a loss, the landlord must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenants in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I award the landlord \$175.00 of the \$320.00 sought for repairing damage and painting the walls because the tenant agreed to pay \$175.00 during the hearing. I dismiss the remaining \$145.00 because the landlord failed part 3 of the above test, as he did not submit an estimate for the amount claimed.

I dismiss the landlord's claim for \$676.60 for the replacement of the four French doors in the rental unit. The tenants said that they did not cause any glass or scratch damage and it was pre-existing when they moved into the rental unit. I find that the landlord did not submit any photographs of the condition of the doors when the tenants moved in, only after they moved out. The landlord did not complete a move-in condition inspection report, showing the condition of the doors when the tenants moved in. The landlord did not submit an estimate for the above amount. I find that the landlord failed parts 2 and 3 of the above test.

As the landlord was only partially successful in his application, due to the tenant's agreement, I find that the landlord is not entitled to recover the \$100.00 filing fee from the tenants. The landlord must bear the cost of his filing fee.

### Tenants' Application

I find that the tenants did not provide documentary evidence to show that they paid the landlord a pet damage deposit of \$350.00. The landlord disputed this claim during the

hearing. Therefore, I find that the tenants did not pay a pet damage deposit to the landlord for this tenancy.

Section 38 of the *Act* requires the landlord to either return the tenants' security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenants' provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

The tenancy ended on January 15, 2016. The tenants mailed a written forwarding address on February 5, 2016, which was received by the landlord shortly thereafter. The tenants did not give the landlord written permission to retain any amount from their deposit. The landlord did not return the full deposit to the tenants. The landlord made an application for dispute resolution to claim against this deposit, within 15 days of the written forwarding address being provided. The landlord's application was made on February 12, 2016.

The landlord's right to claim against the security deposit for damages was extinguished as per section 36 of the *Act*, due to his failure to complete move-in and move-out condition inspection reports. However, the landlord also applied to retain the deposit for other amounts aside from damage, specifically a rental loss of \$3,600.00. Although the landlord was not successful in obtaining a rental loss from the tenants at this hearing, the landlord believed he was entitled to this amount and applied for it. Therefore, I find that the tenants are only entitled to the return of their original security deposit of \$900.00.

As the tenants were only partially successful in their application, I find that they are not entitled to recover the \$100.00 filing fee from the landlord.

The landlord continues to hold the tenants' security deposit of \$900.00. Over the period of this tenancy, no interest is payable. In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain \$175.00 from the tenants' security deposit of \$900.00, in full satisfaction of the monetary award. I order the landlord to return the remainder of the tenant's security deposit of \$725.00 to the tenants.

Conclusion

I issue a monetary order in the tenants' favour in the amount of \$725.00 against the landlord. The landlord must be served with this Order as soon as possible. Should the landlord 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.

Both parties' applications to recover their \$100.00 filing fees are dismissed without leave to reapply.

The landlord's application for a monetary award for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement, is dismissed without leave to reapply.

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: April 14, 2016

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Residential Tenancy Branch