



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, MNR, MNDC, MNSD, FF; CNR, MNSD, OLC, 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*, *Residential Tenancy Regulation* (the "*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 the filing fee for this application from the tenant pursuant to section 72.

This hearing also addressed the tenant's cross application for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") pursuant to section 46;
- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38;
- an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenant and landlord's two agents (collectively the "landlord") attended the hearing. The landlord confirmed they were each agents of the landlord's company named in this application, and had authority to speak on its behalf.

At the outset of the hearing, each party confirmed that they had received the other party's evidence. Neither party raised any issues regarding service of the application or the evidence.

Both parties were given full opportunity to provide affirmed testimony and present their evidence. I have reviewed all testimony and other evidence. However, in this decision I only describe the evidence relevant to the issues and findings in this matter.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent? If not, is the tenant entitled to cancel the landlord's 10 Day Notice?

Is the landlord entitled to a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord authorized to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested? If not, is the tenant authorized to obtain a return of all or a portion of the security deposit?

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

Is the tenant entitled to an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement?

Background and Evidence

On June 6, 2016 the tenant applied to rent the unit. The landlord accepted the tenant's application and agreed to have the rental unit repainted and cleaned prior to the tenant's occupancy.

On June 9, 2016 the parties signed a tenancy agreement which stipulated the landlord would paint all walls and baseboards and steam clean the carpets. As per the submitted tenancy agreement the tenancy was to begin on July 1, 2016 on a fixed term until July 1, 2017. Rent in the amount of \$5,200.00 was payable on the first of each month. The tenant remitted a security deposit in the amount of \$2,600.00 and a cheque in the amount of \$5,200.00 for the first month's rent.

Prior to July 1, 2016 the tenant gained possession of the keys, viewed the rental unit and discovered what he thought to be mold in the shower and on some carpeted area. The tenant communicated his concerns to the landlord and in the absence of an immediate resolution the tenant cancelled his cheque for the first month's rent.

In response to the cancelled cheque, the landlord served the tenant with the landlord's 10 Day Notice, dated July 5, 2016, on this same date, by way of posting to the rental unit door. This same date, the landlord also emailed a copy of the 10 Day Notice to the tenant. The tenant acknowledged receipt of the 10 Day Notice by way of email. The 10 Day Notice was issued on the basis that rent in the amount of \$5,200.00 remained outstanding.

In an email dated July 5, 2016, submitted by the tenant, the tenant wrote to the landlord that he rescinded the tenancy agreement dated June 9, 2015 because the landlord was in material breach of the tenancy agreement.

On July 9, 2016 a mold analysis was conducted on samples from the carpet and bathroom. The submitted reports conclude no mold growth in the carpet and a 1,052 spore count per cubic meter of air in the bathroom.

The tenant has not moved into the rental unit and maintains possession of the key. The tenant agreed to return the key in exchange for the return of his security deposit.

#### Landlord Claims

The landlord seeks a total of \$22,622.50 in damages.

##### *Rent*

The landlord seeks \$10,400.00 for unpaid rent from July 2016 to August 2016. The landlord claimed that the tenant did not pay any rent for the above two months. Due to the uncertainty of the status of this tenancy the landlord testified that he has been unable to advertise or show the rental unit and is therefore seeking \$5,200.00 to cover September's rent. In total the landlord is seeking \$15,600.00 in rent.

##### *Painting*

The landlord is seeking to recover the costs of painting in the amount of \$3,500.00. The landlord has submitted a copy of the painting invoice.

##### *Professional Cleaning*

The landlord is seeking to recover the cost of the carpet cleaning and general cleaning of the rental unit in the amount of \$400.00. The landlord has submitted a copy of the cleaning invoice.

##### *Replacement Fob Costs*

The landlord is seeking \$110.00 to replace a set of fobs. The landlord testified that the fobs have not been replaced to date.

#### *Door Lock Change*

The landlord is seeking \$150.00 to replace the door lock. The landlord testified that the lock has not been replaced to date.

#### *Finder's Fee*

The landlord explained that for every tenant he finds he receives compensation equivalent to half a month's rent. The landlord seeks to recover this finder's fee in the amount of \$2,600.00 from the tenant.

#### *Mold Inspection*

As a result of the tenant's allegations of mold, the landlord had a mold analysis conducted on July 9, 2016 and now seeks reimbursement in the amount of \$262.50. The landlord has submitted copies of the analysis along with the invoice.

The landlord is also seeking to recover the \$100.00 filing fee for this application from the tenant.

#### Tenant Claims

It is the tenant's position that despite him providing an address to the landlord, the landlord served the 10 Day Notice to the rental unit where the tenant clearly was not residing. The tenant contends that this notice was not served in accordance with the *Act* and therefore is invalid.

The tenant testified that the landlord breached the tenancy agreement and the tenancy never commenced, therefore he seeks the return of his security deposit.

#### Analysis

Pursuant to section 16 of the *Act*, the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

The tenancy, that is, the right to occupy the unit, often begins at a later date. In this case, the tenancy agreement began on June 9, 2016 and the tenancy was to commence on July 1, 2015. Because the tenancy agreement began on June 9, 2016,

this is when the provisions of the *Act* became enforceable in the relationship between the tenant and landlord.

Pursuant to the *Residential Tenancy Policy Guideline, 30: Fixed Term Tenancies* ("*Guideline 30*"), neither a landlord nor a tenant can end a fixed term tenancy unless for cause or by agreement of both parties.

The parties in this case did not mutually agree to end the fixed term tenancy. Instead each party alleged cause, resulting in the landlord's notice to end the tenancy and the tenant's notice of a breached material term of the tenancy agreement.

I find the tenant had insufficient evidence to prove mold growth at the time he gave notice of a breached material term. He had observed what he suspected was mold growth but received no confirmation of this until after he issued his notice. Based on an unconfirmed suspicion of a material breach, the tenant issued his notice and then withheld July's rent. The *Act* does not allow rent to be withheld in such circumstances, section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, whether or not the landlord complies with the *Act*, *Regulation* or the tenancy agreement.

As per the testimony of the parties the landlord posted the 10 Day Notice to the rental unit door, where the tenant does not reside, and sent a copy via email on July 5, 2016. Section 88 of the *Act* establishes that when a landlord serves a 10 Day Notice it must be served by leaving it directly with the tenant, by ordinary mail or registered mail to the address at which the person resides, a forwarding address provided by the tenant, in the mailbox where the tenant resides, by attaching to the door where the tenant resides or faxing to a number provided by the tenant. The tenant acknowledged receipt of the landlord's 10 Day Notice via email on July 6, 2016. Although the landlord did not serve the application in accordance with the *Act*, I find pursuant to section 71 (2)(b) of the *Act*, that the application was sufficiently served, on July 6, 2016, the day the tenant acknowledged receipt of it.

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for unpaid rent or utilities the tenant may, within five days, pay the overdue rent or dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch.

Although the tenant filed an application, the tenant did not contest the reason for the notice; instead the tenant acknowledged that he withheld rent. I find the tenant contravened section 26 of the *Act* by withholding rent and that the 10 Day Notice was

effective and sufficiently served to the tenant on July 6, 2016. Therefore, I find that the tenancy should have ended on the corrected effective date of July 16, 2016. As this has not occurred, I grant the landlord a **two (2) day order of possession, pursuant to section 55 of the Act.**

### Landlord Claims

Section 26 of the *Act* establishes that a tenant is obligated to pay rent on the date indicated in the tenancy agreement. Section 7(1) of the *Act* establishes that a tenant who does 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 a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

I find that the landlord proved that the current rent for this unit is \$5,200.00. Based on the tenant's own admission that July rent was withheld and not paid, I find the landlord is entitled to **\$5,200.00 in rent**. In relation to the landlord's claim for August and September rent, I find the landlord failed to mitigate his losses by advertising or showing the unit and therefore dismiss this portion of the landlord's claim without leave to reapply.

In respect to a monetary claim for damages or for a monetary loss to be successful an applicant must satisfy the test prescribed by Section 7 of the *Act*. The applicant must prove a loss actually exists and prove the loss happened solely because of the actions of the respondent in violation to the *Act*. The applicant must also verify the loss with receipts and the applicant must show how they mitigated or what reasonable efforts they made to minimize the claimed loss.

In regard to the landlord's claim for reimbursement for painting and professional cleaning, I find this was a condition of the tenancy which the landlord agreed to provide and therefore dismiss the landlord's application for reimbursement without leave to reapply.

Although the landlord testified to the anticipated cost of replacing the fobs and door lock, I find this portion of the landlord's claim premature as the work was not conducted prior to the hearing. For this reason I dismiss this portion of the landlord's claim with leave to reapply.

In relation to the landlord's claim to recover the finder's fee from the tenant I find the landlord has failed to provide sufficient evidence showing he mitigated this loss. The residential property management agreement submitted by the landlord indicates that the manager is paid an amount equal to half of one month's rent for each tenant found however if the tenant moves out within the first twelve weeks the manager is responsible for finding a new tenant and the finder's fee is waived for finding the new tenant. The landlord did not advertise or show the rental unit in an attempt to mitigate this loss of the finder's fee; therefore I dismiss this portion of the landlord's claim without leave to reapply.

Based on the tenant's allegation of mold and in an effort to salvage the tenancy, the landlord had a mold analysis done. For these reasons, I find the landlord is entitled to the recovery of **\$262.50 paid for the mold analysis.**

As the landlord was partially successful in this application, I find that the landlord is entitled to recover **\$50.00** of the \$100.00 filing fee paid for the application, for a **total award of \$5,512.50.**

#### Tenant Claims

Section 38 of the *Act* establishes that a landlord has fifteen days from the later of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to file an arbitration application claiming against the deposit, or return the deposit.

Although the tenant provided a forwarding address, the tenant maintained the keys and did not return the keys by the corrected effective date of the 10 Day Notice. For these reasons I find the tenant's application for the return of the deposit premature and dismiss this portion of the tenants claim.

The tenant's application for an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement was in relation to the service of the 10 Day Notice. As I have already deemed this notice sufficiently served I dismiss this portion of the tenant's claim.

As the tenant was not successful in this application, I find that the tenant is not entitled to recover the \$100.00 filing fee paid for the application.

#### Set Off of Claims

In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the security deposit in the total amount of \$2,600.00 in partial satisfaction of the \$5,512.50 monetary award and I grant an order for the balance due **\$2,912.50**.

Conclusion

I grant an order of possession to the landlord effective **two (2) days after service on the tenant**.

I issue a monetary order in the landlord's favour in the amount of **\$2,912.50**.

I dismiss the landlord's claim for August and September rent, painting and professional cleaning, and finder's fee without leave to reapply.

I dismiss the landlord's claim for fob and door lock costs with leave to reapply.

The tenant's entire application 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: August 29, 2016

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Residential Tenancy Branch