



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNR, 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 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 tenant's security deposit, pursuant to section 38; and
- authorization to recover the filing fee for her application from the tenant, pursuant to section 72.

This hearing also dealt with the tenant's cross-application pursuant to the *Act* for:

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

Both parties 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 landlord intended to call her brother as a witness but both parties advised me at the end of the hearing, that they did not require his testimony or want to ask any relevant questions. This hearing lasted approximately 90 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.

At the outset of the hearing, the tenant said that he was not pursuing his application for a return of February 2016 rent in the amount of \$975.00. I advised the tenant that this

portion of his application was dismissed without leave to reapply and he would not be able to pursue this claim at a later date. The tenant agreed to and understood the above.

### Issues to be Decided

Is the landlord entitled to a monetary award for unpaid rent 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 tenant's security deposit?

Is the tenant entitled to a monetary award for the return of his 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 February 1, 2016 and that the written tenancy agreement indicated a fixed term to end on July 31, 2016, after which the tenant was required to move out. The tenant said that he vacated the rental unit on February 24, 2016, while the landlord said that the tenant gave notice on February 25, 2016 and left on February 28, 2016. Both parties agreed that monthly rent in the amount of \$975.00 was payable on the first day of each month and a security deposit of \$487.50 was paid by the tenant and the landlord continues to retain this deposit. A copy of the written tenancy agreement was provided for this hearing. The landlord said that the rental unit is the basement of a house, and the landlord occupies the main floor of the same house.

Both parties agreed that no move-in or move-out condition inspection reports were completed for this tenancy. Both parties agreed that the tenant provided a written forwarding address to the landlord by way of a letter, dated March 26, 2016. A copy of the letter was provided for this hearing. Initially, the landlord said that she received the forwarding address letter on March 26, 2016. However, after I advised the landlord that she could be liable to pay the tenant double the value of the security deposit if she filed her application more than 15 days after the receipt of the forwarding address, the

landlord changed her testimony to indicate that she did not know when she received the letter because it came in the mail and that she was only referring to the date of the letter initially. The landlord agreed that she did not have written permission from the tenant to retain any amount from the security deposit. The landlord confirmed that her application to retain the deposit was filed on April 12, 2016.

The landlord seeks a monetary order of \$975.00 for a loss of March 2016 rent and to retain the tenant's security deposit of \$487.50 in addition to the above amount. The landlord also seeks to recover the \$100.00 filing fee paid for her application.

The tenant seeks a return of his security deposit of \$487.50 and to recover the \$100.00 filing fee paid for his application.

### Analysis

Overall, I found the tenant to be a more credible and forthright witness than the landlord. I found that the landlord changed her testimony throughout the hearing, particularly when I asked her questions or when I informed her about different provisions of the *Act*.

### 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 tenant gives written notice of the failure, the tenant may end a tenancy effective on a date after the date the landlord receives the notice. The tenant testified that the landlord breached a material term of the tenancy agreement because the place was furnished and the tenant required an unfurnished unit in order to move his belongings in to the unit. The tenant said that the landlord advertised an unfurnished unit but the landlord disagreed, saying she advertised a furnished unit and the tenant was well aware of it.

I find that the tenant did not provide the landlord with a proper written notice to end the tenancy for breach of a material term, in accordance with the requirements of sections 45(4) and 52 of the *Act*. The tenant testified that he provided a handwritten note to the landlord on February 24, 2016 and moved out on the same day, which is not a "reasonable period" of time as per section 45(3) of the *Act*. Further, the tenant's note indicates that he is moving and that there were a number of problems in the unit including "existing furniture," no internet access and the landlord's failure to "disclose the landlords name" (sic). I do not find this to be a proper written notice of a breach of a

material term, as the tenant does not identify which of the above issues are “material terms” and the other issues above were not mentioned by the tenant during the hearing.

### Loss of Rent

As noted above, I find that the tenant was not permitted to end the fixed term tenancy prior to July 31, 2016.

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.

Based on the evidence presented, I find that the landlord failed to mitigate her losses in her efforts to re-rent the unit to prospective tenants. The landlord did not provide a copy of any advertisements for re-rental. The landlord did not know when she posted the advertisements, stating that it was “right away or the next day.” The landlord did not know how many showings she conducted of the unit to prospective tenants and said that it was shown within the “next couple of days” after advertising began. Further, the landlord stated that she advertised the unit for a fixed term of six months, rather than a month-to-month tenancy, which may have detracted potential tenants. The landlord also stated that the new tenant moved in at the end of March and when I asked her why she was claiming for a full month of March 2016 rent, the landlord changed her testimony to say that the new tenant moved items in early but actually began occupying the unit on April 1, 2016.

Accordingly, for the reasons stated above, I dismiss the landlord's application for a rental loss of \$975.00 for March 2016, on the basis that I find that the landlord failed to fully mitigate her losses.

### Security Deposit

I dismiss the landlord's application to keep the tenant's security deposit of \$487.50 in addition to a loss of rent. The landlord said that the tenant forfeited this deposit because he breached the fixed term tenancy agreement. The landlord produced an addendum to the tenancy agreement signed by both parties, indicating the above.

As per section 20(e) of the *Act*, the landlord cannot require or include as a term of the tenancy agreement, that the landlord automatically keeps the security deposit. I find that the landlord has no entitlement to keep the tenant's security deposit.

### *Tenant's Application*

Section 38 of the *Act* requires the landlord to either return the tenant's 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 tenant's 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 tenant's 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 tenant to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

The tenancy ended sometime between February 24 and 28, 2016. I find that the tenant provided the landlord with a written forwarding address on March 26, 2016, as the landlord originally testified. I find that the landlord only changed her testimony about the date of receipt of the forwarding address in order to avoid the doubling provision. The tenant did not give the landlord written permission to retain any amount from his deposit. The landlord did not return the full deposit to the tenant. The landlord filed an application for dispute resolution to claim against the deposit more than 15 days after receiving the written forwarding address from the tenant. The landlord's application was filed on April 12, 2016. The landlord's application was due by April 10, 2016, but since this fell on a Sunday, the landlord was required to file her application no later than April 11, 2016, the next business day when the Residential Tenancy Branch offices were open.

The landlord continues to hold the tenant's security deposit of \$487.50. Over the period of this tenancy, no interest is payable. As per section 38(6) of the *Act* and Residential Tenancy Policy Guideline 17, I am required to double the value of the return of the tenant's security deposit, totalling \$975.00, even though the tenant did not apply for this, as he did not specifically waive this right.

As the tenant was mainly successful in his application, I find that he is entitled to recover the \$100.00 filing fee from the landlord.

Conclusion

I issue a monetary order in the tenant's favour in the amount of \$1,075.00 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.

The tenant's application for a monetary order of \$975.00 for the return of February 2016 rent, is dismissed without leave to reapply.

The landlord'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: September 06, 2016

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Residential Tenancy Branch