



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes                      MNR, MNSD, MNDC, FF

### Introduction

This hearing dealt with the landlord's application for a Monetary Order for unpaid rent and utilities; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

### Preliminary and Procedural Matters

Despite filing the application in May 2016 the landlord's evidence package was not received by the Residential Tenancy Branch until November 2, 2016. The tenant stated she did not receive any evidence from the landlord or a notice card from Canada Post indicating she had mail waiting to be picked up. The landlord provided a registered mail tracking number as proof the evidence sent to the tenant on November 1, 2016 and stated that the Canada Post website shows that it was delivered on November 2, 2016. Upon closer examination of the Canada Post website, it showed that the address the registered mail was delivered to was in a City different than the tenant's address.

Rule 2.5 of the Rules of Procedure provide that an applicant is to serve all evidence that is available at the time of filing along with the hearing package. Rule 3.11 provides that evidence that is not available at the time of filing is to be served as soon as possible. Rule 3.14 provides that all evidence intended to be relied up by the applicant must be served no later than 14 days before the hearing and rule 3.17 provides an Arbitrator the discretion to accept evidence not served in time. I noted that all of the documents in the landlord's evidence package were dated in May 2016 or earlier. The landlord was asked to provide reasons for the delay in serving evidence. The landlord's agent stated the photographs and evidence had to be compiled but also acknowledged that the evidence should have been served sooner than it was.

Considering this hearing was scheduled for November 15, 2016 the latest date the tenant would be entitled to receive all of the landlord's evidence would have been October 31, 2016. Accordingly, if the evidence is going to be mailed, the landlord must provide adequate time for the mail to reach the tenant. Putting the evidence in the mail on November 1, 2016 in no way would have met the service deadline.

While I accept that it would take some time to develop and compile the photographs and evidence, the amount of evidence provided in this case is not over-whelming and I find the 5 ½ months to do serve the evidence is an unreasonable delay.

In light of the above considerations, I informed the parties that I had decided to exclude the landlord's evidence from further consideration since it was submitted late due to unreasonable delay on the landlord's part, and I was unsatisfied that the tenant had received the evidence. Having excluded the landlord's evidence I gave the landlord's agent the option to withdraw the application with liberty to reapply, but an order to return the security deposit to the tenant; or, proceed with the application without the benefit of documentary and photographic evidence. The landlord chose to proceed with the application.

#### Issue(s) to be Decided

1. Has the landlord established an entitlement to compensation from the tenant in the amounts claimed?
2. Is the landlord authorized to retain the tenant's security deposit?

#### Background and Evidence

I heard undisputed verbal testimony as follows: The fixed term tenancy agreement started on August 15, 2015 and was set to expire on August 31, 2016. The tenant paid a security deposit of \$625.00 and was required to pay rent of \$1,250.00 on the first day of every month plus a \$100.00 for hydro and gas. The tenant put a stop payment on the rent cheque for April 2016 and the landlord posted a 10 Day Notice to End Tenancy for Unpaid Rent on the tenant's door on April 5, 2016 with a stated effective date of April 15, 2016. Although the tenant filed to dispute the 10 Day Notice (file number provided on cover page of this decision), the tenant vacated the rental and the landlord regained possession of the rental unit on April 22, 2016.

The parties were in agreement that the move-out inspection was scheduled to take place on April 22, 2016 and on that date both parties attended the property for that purpose. However, the tenant left the inspection before the move-out inspection report was completed. The tenant explained that she did not stay to complete the move-out inspection because she asked the landlord to produce the move-in inspection report so that they could compare the condition of the property at the start and end of the tenancy and the landlord would not.

The tenant returned the keys to the landlord's office on April 25, 2016.

Below, I have summarized the landlord's claims against the tenant:

#### **Unpaid rent and utilities for April 2016: \$1,250.00 + \$100.00**

The landlord seeks to recover the unpaid rent and utilities for April 2016 since the tenant failed to pay these amounts without the right to withhold them from the landlord. The landlord also

pointed out that the tenant had filed to dispute the 10 Day Notice and seek compensation from the landlord but the tenant's application was dismissed (file number provided on cover page of this decision).

The tenant acknowledged that she withheld rent for April 2016 and was of the position that she had planned to move out on April 15, 2016, based on the 10 Day Notice, and the landlord could keep her security deposit for the rent for the first half of April 2016. The tenant also attempted to make submissions that she had to end the tenancy due to mould in the rental unit and the landlord's lack of adequate repairs; however, I did not permit the tenant to make further submissions since that was the subject matter of the previous dispute resolution proceeding and a decision had already been made on that issue, which was to dismiss the tenant's claims. As I informed the tenant, this was not an opportunity to re-argue a matter already heard and decided upon in an earlier proceeding.

**Unpaid Rent and Utilities for May 1 – 15, 2016: \$625.00 + \$50.00**

The landlord submitted that the rental unit was re-rented starting May 15, 2016 and the landlord seeks to recover the loss of rent and utilities from the tenant for the first half of May 2016.

The tenant pointed out that the date the unit was re-rented was not supported by evidence from the landlord.

**NSF fees and late fees: \$25.00 + \$25.00 for April 2016 and \$25.00 + \$25.00 for May 2016**

The landlord submitted that the tenancy agreement provides for the payment of a fee for returned cheques and late payment of rent of \$25.00 each. The landlord seeks to charge these amounts for the months of April and May 2016.

In the absence of a copy of the written tenancy agreement I was unable to determine that the term(s) to which the landlord referred comply with section 7 of the Residential Tenancy Regulations and I dismissed these claims summarily.

**Lease break fee and credit check costs: \$656.25 + \$42.00 + \$42.00**

The landlord submitted that the tenancy agreement provides that the landlord may charge the tenant a lease breaking fee of \$625.00 plus GST if the tenancy ends before the expiry date of the fixed term. The landlord seeks to hold the tenant responsible to pay this amount plus \$42.00 the landlord paid for each reference check the landlord performed on the incoming tenants.

In the absence of a copy of the written tenancy agreement I found I was unable to determine whether the tenancy agreement contained a valid liquidated damages clause. Nor did I have evidence in front of me to support the payments for reference checks. Therefore, I dismissed these claims summarily since the claims could not be verified.

**Cleaning - \$90.00**

The landlord submitted that the tenant did not leave the rental unit sufficiently clean and is seeking to recover cleaning costs from the tenant.

In the absence of evidence before me to show a lack of cleanliness, such as photographs and move-out inspection report, and evidence to support the amount claimed, I dismissed this claim summarily.

### Analysis

Under section 26 of the Act, a tenant is required to pay rent when due under their tenancy agreement, even if the landlord has violated the Act, regulations, or tenancy agreement, unless the tenant has a legal right to withhold rent. The Act provides very limited and specific circumstances when a tenant has a legal right to withhold rent. The tenant mentioned mould in the rental unit and lack of adequate repairs; however, such circumstances do not give the tenant the legal right to withhold rent. Rather, if the landlord does not give the tenant authorization to withhold rent, the tenant's remedy is to seek authorization from an Arbitrator to reduce rent payable by filing an application for Dispute Resolution and proving the entitlement during a hearing.

In this case, it is undisputed that the tenant did not pay the rent and utilities that she was required to pay on April 1, 2016 under her tenancy agreement. The landlord did not authorize the tenant to withhold rent for April 2016 and the tenant did not have an Arbitrator's authorization to withhold rent. Therefore, I find the tenant liable to pay the landlord rent and utilities for the month of April 2016 in the amounts of \$1,250.00 and \$100.00 respectively.

As for the landlord's request to recover unpaid or loss of rent and utilities for one-half of May 2016, the tenant questioned the veracity of this claim, and in the absence of evidence to establish when the next tenancy commenced I find the landlord failed to prove this loss. Therefore, I deny this claim due to a lack of evidence.

The remainder of the landlord's claims against the tenant were dismissed summarily due to the landlord's failure to provide evidence to support the claims.

Since the landlord was partially successful, I award the landlord recovery a portion of the filing fee, or \$25.00.

I authorize the landlord to retain the tenant's security deposit in partial satisfaction of the amounts awarded to the landlord.

In light of all of the above, I provide the landlord with a Monetary Order to serve and enforce upon the tenant, calculated as follows:

Unpaid rent and Utilities for April 2016

\$1,350.00

Filing fee (partial award)	25.00
Less: security deposit	<u>(625.00)</u>
Monetary Order for landlord	\$ 750.00

Conclusion

The landlord has been authorized to retain the tenant's security deposit and has been provided a Monetary Order for the balance of \$750.00 to serve and enforce upon the tenant.

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: November 29, 2016

---

Residential Tenancy Branch