



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION - CORRECTION**

Dispute Codes      MND, MNSD, FF

### Introduction

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

- a monetary order for damage to the rental unit, site or property 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.

The tenant and 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 receipt of the landlord's application and supporting documents for dispute resolution. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was duly served with the application and supporting documents.

### Preliminary Issue –Tenant's Evidence

The tenant testified that on January 21, 2017, she forwarded a 17 page evidence package via registered mail to the landlord. The tenant provided a Canada Post receipt and tracking number as proof of service. The landlord confirmed receipt of the package and initially testified he received it January 27, 2017. The landlord then changed his testimony and testified he received the evidence package on Monday January 30, 2017.

Upon review of the Canada Post tracking number provided by the tenant it becomes evident that notification of the registered mail package was left for the landlord on January 23, 2017 however the landlord did not retrieve the package until one week later, on January 30, 2017. Where a document is served by registered mail, the refusal of that party to accept or pick up the registered mail, does not override the deeming provision.

Based on the above and in accordance with sections 88 and 90 of the *Act*, I find that the landlord was deemed served with the evidence package on January 26, 2017, the fifth day after its registered mailing.

#### Preliminary Issue – Adjournment Request

The landlord testified he did not have sufficient time to review the tenant's 17 page evidence package. Based on the above finding that the evidence package was deemed served January 26, 2017, I find the landlord had ample opportunity to review the evidence package and therefore declined the landlord's request for an adjournment.

#### Issue(s) to be Decided

Is the landlord entitled to a monetary order for damage to the rental unit, site or property?

Is the landlord authorized to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested?

Is the landlord authorized to recover the filing fee for this application from the tenant?

#### Background and Evidence

As per the submitted tenancy agreement and testimony of the parties, the tenancy began on August 1, 2015 on a fixed term until July 31, 2016. Rent in the amount of \$1,250.00 was payable on the first of each month. The tenant remitted a security deposit in the amount of \$625.00 at the start of the tenancy. The tenancy ended by agreement and the tenant vacated the rental unit on July 28, 2016.

The parties agreed that written condition inspection reports were completed at the start and end of the tenancy. The tenant testified that she provided her forwarding address in writing via fax to the landlord on June 27, 2016. The landlord testified that he was "not sure" whether he received the tenant's forwarding address this date or any other date.

On May 21, 2016 the tenant's guest and his accompanying dog became trapped in the building elevator. There were no other parties in the elevator at this time. The parties

provided testimony which indicate the guest pressed the panic button and within 20 to 30 minutes the guest was in communication with either the elevator maintenance worker or firefighters. The parties provided conflicting testimony in regards to how long the guest was trapped, the landlord estimated one hour whereas the tenant testified two hours.

### Landlord's Claim

The landlord applied for a monetary order in the amount of \$4,368.00 for damages sustained to the elevator on May 21, 2016 by the tenant's guest. The landlord alleges the guest's behaviour inside the elevator caused the elevator to stop between floors and while stopped, the guest knocked the interior elevator door off its track leaving the door at an angle.

In an effort to support his claim, the landlord has provided a letter from the elevator maintenance worker, photographs of the elevator and an invoice from the elevator repair company.

### Tenant's Reply

In reply, the tenant testified that she disputes the landlord's claim because the damage was not caused by the actions of her guest but rather the damage stemmed from the faulty elevator. She testified that the elevator had a history of frequent disrepair and had trapped several residents prior to the May 21, 2016 incident.

The tenant has submitted a sworn affidavit of her guest, witness statements regarding the ongoing disrepair of the elevator, and an email regarding trapped residents.

### Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party.

In this case, the onus is on the landlord to prove, on a balance of probabilities, 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 tenant's guest 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.

There is no dispute the elevator stopped and the tenant's guest remained inside. I find the landlord has provided insufficient evidence to establish any action of the guest caused the elevator to stop. The letter from the elevator maintenance worker indicates that such instances sometimes occur "when somebody bounces up and down in the car or some form of horseplay has taken place." In the absence of video footage or witness testimony I find the landlord cannot prove the tenant's guest engaged in such actions.

Having said that I am satisfied based on the evidence presented that the tenant's guest damaged the elevator door in his attempt to open it and free himself. However, I do not find the guest's actions unreasonable in such circumstances. In his sworn affidavit the guest states he "...received no emergency response after repeatedly pushing the elevator Emergency Call Button for over 20 minutes." I find that after 20 minutes a reasonable person would find they had no alternative but to attempt to free themselves, just as the guest did. I am satisfied the event that triggered the guest's response was the stoppage of the elevator. In other words, I find the damage or loss occurred due to the elevator stopping and not the guest's subsequent action. Had the elevator not stopped, the likelihood is the tenant would have exited the elevator without attempting to manually open the doors. For these reasons, I find the landlord has failed to meet the second ground of the test above and dismiss this portion of the landlord's claim.

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. The tenant may waive their right to the return of the security deposit through written authorization to the landlord. In the absence of written authorization from the tenant, the landlord must return the security deposit or file an application within fifteen days. Should the landlord fail to do this, the landlord must pay the tenant double the amount of the security deposit.

The tenant provided a copy of her notice to end a fixed term tenancy which included her forwarding address dated June 27, 2016. The tenant included a copy of the fax transmittal. During the hearing the landlord confirmed the fax number listed on this transmittal as his. In accordance with section 88 and 90 of the *Act*, I find the landlord was deemed served with the tenant's forwarding address on June 30, the third day after it was faxed.

The landlord received the forwarding address on June 30, 2016, **and the tenancy ended July 28, 2016.** The landlord ~~did not file~~ filed an arbitration application to retain the deposit until on August 8, 2016, which is past within the fifteen days allowable under the *Act*. ~~The landlord did not return the full deposit and the landlord did not receive written authorization to retain it.~~ **Because the landlord has failed to establish a monetary claim, I order the landlord to return the** ~~Based on this, I find the tenant is entitled to double the value of her security deposit in the amount of \$1,250.00~~ **\$625.00.**

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

### Conclusion

The landlord's entire application is dismissed without leave to reapply.

I grant the tenant a monetary order in the amount of ~~\$1,250.00~~ **\$625.00.**

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: February 03, 2017

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Residential Tenancy Branch