



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      Landlords: MND, MNSD, FF  
Tenant: MNDC, MNSD, FF

### Introduction

This hearing dealt with cross Applications for Dispute Resolution with both parties seeking monetary orders.

The hearing was conducted via teleconference and was attended by one of the named landlords; an agent for the landlord; the tenant; her witness; and her legal counsel.

I note that during the hearing the tenant's legal counsel pointed out and the landlord confirmed that despite listing the tenant and her witness as tenants on the Tenancy Agreement it was signed only by the landlord's agent and the tenant. As such, I find the tenant's witness is not a party to this tenancy and cannot be named as an applicant in the tenant's claim or as a respondent in the landlords' claim. As a result, I amend both Applications to exclude the respondent RL as a party to this dispute.

I also note that the landlord confirmed during the hearing that the former on-site agent for the landlord is no longer employed by the landlord as he was not fulfilling his duties. As a result, he was not available to participate in this hearing.

### Issue(s) to be Decided

The issues to be decided are whether the landlords are entitled to a monetary order for damage to and cleaning of the rental unit; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 37, 38, 67, and 72 of the *Residential Tenancy Act* (Act).

It must also be decided if the tenant is entitled to a monetary order for return of double the amount of the security and key deposits; for the return of an overpayment for parking; and to recover the filing fee from the landlords for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 67, and 72 of the *Act*.

### Background and Evidence

Both parties submitted the following relevant documents:

- A copy of a tenancy agreement signed by an agent for the landlord and the tenant on August 9, 2013 for a 1 year fixed term tenancy beginning on September 1, 2013 that converted to a month to month tenancy on September 1, 2014 for a monthly rent of \$1,000.00 due on the 1<sup>st</sup> of each month with a security deposit of \$500.00 and a key deposit of \$25.00 paid. The tenancy agreement does not include any clauses that stipulate the inclusion of or cost of parking. I also note the tenancy agreement contains a clause that required the landlord to either return the deposit (unless the tenant agrees in writing to allow the landlord to retain it) or file a claim with the Residential Tenancy Branch if the landlord wants to retain some of the deposit within 15 days of the end of the tenancy and receipt of the tenant's forwarding address. The parties agreed the tenancy ended on August 31, 2016; and
- A copy of a document entitled "Residential Rental Application" completed and signed by the tenant on August 6, 2013. In the Application form there is a section entitled "Other Terms and conditions". In this section, one of the other terms listed states: "Parking is an extra \$25.00/month, if space is available".

In addition, the landlord has submitted additional relevant evidence including:

- A copy of a document entitled "Suite Inspection Report" that lists only the tenant as a party to the tenancy; does not include a date of occupancy; a date that any inspection was completed; or any indication of agreement by the landlord or their agent of the condition of the unit at the start of the tenancy. While this "Report" does have space for the landlord to record the condition of each room there is only one handwritten remark and applied to all rooms: "Cleaned and new painted. In addition the document states: "I/We hereby accept the condition of the suite as indicated herein and agree that the cost of cleaning and/or repairs (normal wear and tear excepted) may be deducted from the security deposit when I/We vacate the premises" [reproduced as written];
- A copy of an invoice for cleaning dated October 1, 2016 for cleaning that the landlord submits is for cleaning of this rental unit in the amount of \$150.00;
- A copy of a receipt dated September 16, 2016 in the amount of \$90.00 that indicates "roll over painting" for the rental unit. It is noted specifically that the kitchen, all rooms, all hallways, closets and cupboards were painted but that doors; mouldings; and the ceiling were not painted. However, I also note that the invoice also indicates that the invoice is for the neighbouring unit;
- A receipt dated September 9, 2016 for 1 can of paint in the amount of \$33.85; and
- Several photographs that the landlord stated were taken sometime after September 6, 2016.

Both parties agreed that the landlord was provided with the tenant's forwarding address by text message on September 2, 2016. While the landlord could not confirm the specific date it was received he had no reason to believe it was any later than September 2, 2016. I note also that the landlord acknowledged receipt of the tenant's

Application for Dispute Resolution with her address in mid-October 2016 and that the landlord did not submit an Application for Dispute Resolution seeking to claim against the deposit until March 17, 2017.

The landlord submitted that a move out condition inspection was not completed with the tenant but rather their agent inspected the unit by himself several days after the tenant vacated the rental unit. They determined that they needed to do some cleaning and to complete some repairs and so they provided the tenant with a cheque for return of \$340.00, dated September 13, 2016. The tenant agrees that she had received this cheque from the landlord in mid-September.

The landlord also submitted that the tenant had not returned a mail box key and so they also retained the key deposit. The parties agree that after the tenant returned the mail box key, the landlord sent another cheque to the tenant for \$25.00 for return of the key deposit.

The tenant's legal counsel confirmed, and the landlord agreed, the tenant has not cashed either one of those cheques. Based on the dates of the cheques and the date of this hearing, I am satisfied that these cheques are likely stale-dated are no longer negotiable.

The tenant seeks return of double the amount of the security deposit and key deposits for the landlord's failure to return them within 15 days of the end of the tenancy and receipt of the tenant's forwarding address.

The tenant also submits that the Residential Rental Application forms an agreement between the parties for parking in the amount of \$25.00 per month. However, the tenant submits, the landlords' on site agent actually collected \$40.00 per month for the duration of the tenancy. The tenant's son made the payments to the landlord's on site agent and was unaware of any written agreements between the landlord and the tenant regarding the amount of the monthly charge. The tenant seeks the return of \$415.00 of these payments.

The tenant submits that the landlords' on site agent never provided receipts for the parking payments. However, in support of this issue the tenant has provided a copy of a text message, dated May 16, 2015, sent to the landlords' onsite agent stating: "Anytime tomorrow after say 11am? So I have 200 \$ for u which covers next 5 month, and 6 checks. So I have paid for both rent and parking for next half a year" [reproduced as written]. In response, the landlords' agent stated "Is 2 pm ok."

The landlord submits that they have no record of any agreement or payments made by the tenant or her son in regard to parking.

The landlord submits that the tenant had agreed to the condition at the start of the tenancy that it was freshly painted and in clean condition as evidenced by the above noted "Suite Inspection Report".

The landlord submitted that the photographs provided as evidence of condition of the rental unit at the end of the tenancy were taken after September 6, 2016 and provide evidence that the rental unit required additional cleaning to the stove, sink, and bathroom walls as well as touch up painting. The landlord seeks \$30.00 for the cleaning of the sink and oven; \$30.00 for the cleaning of the bathroom walls; and \$100.00 for painting.

### Analysis

Section 1 of the *Act* defines a security deposit as money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:

- (a) post-dated cheques for rent;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97 (2) (k) [regulations in relation to fees].

Section 97(2)(k) of the *Act* allows the director to create regulation respecting refundable and non-refundable fees that a landlord may or may not impose on a tenant and limiting the amount of a fee that may be imposed. Section 6(1) of the Residential Tenancy Regulation allows that if a landlord provides a tenant with a key or other access device, the landlord may charge a fee that is refundable upon return of the key or access device, and no greater than the direct cost of replacing the key or access device.

As such, I find the landlord is allowed to request both a security deposit and a key deposit in this tenancy. I accept that the tenant paid a \$500.00 security deposit and a \$25.00 key deposit. However, as noted under Section 1 of the *Act*, a key deposit is not included as part of a security deposit.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit in full or less any mutually agreed upon (in writing) any amounts or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit. I note that the tenancy agreement provided by both parties reiterates these requirements.

As Section 38 is the only section of the legislation that allows for the doubling of a deposit and I have determined above that the key deposit is not included in the definition of a security deposit, I find the doubling provisions only apply to the security deposit of \$500.00.

I accept that the landlord had provided the tenant with a cheque in the amount of \$25.00 for return of the key deposit and that the tenant has not to date cashed this cheque. I

do find that the tenant is entitled to the \$25.00 as per the landlord's assessment that all keys were returned.

In regard to the return of the security deposit itself, I find, pursuant to both the requirements set out in the tenancy agreement and Section 38 of the *Act* the landlord does not have the unilateral authority to retain any amounts from the deposit unless they have agreement in writing from the tenant as to the amounts to be withheld.

As such, I find that the Suite Inspection Report document where the tenant agreed prior to the start of the tenancy that "the cost of cleaning and/or repairs (normal wear and tear excepted) may be deducted from the security deposit when I/We vacate the premises" is not enforceable because it does not include any amounts that have been agreed to by both parties.

As a result, I find the landlord had no authority under the tenancy agreement or the *Act* to withhold any portion of the security deposit and was required to either return the entire deposit to the tenant or file an Application for Dispute Resolution to claim against the deposit no later than September 17, 2016. As the landlord did not submit an Application until March 17, 2017 I find the landlord has failed to comply with the requirements of Section 38(1) of the *Act* and the tenant is entitled to return of double the amount of the security deposit pursuant to Section 38(6).

In regard to the tenant's claim for the return of an overpayment of parking I am not satisfied that the Residential Rental Application constitutes an agreement of the parties that the tenant will be entitled to parking at \$25.00 per month because it states "if space is available". However, I am satisfied that by having the tenant sign this document implies that if the tenant did need parking and there was space available the landlord would provide it at a cost of \$25.00 per month.

When one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position.

In the case before me the tenant submits the landlords' on site agent agreed to allow the tenant a parking space and that despite the commitment noted in the Residential Tenancy Application of \$25.00 per month, the landlord's agent collected \$40.00 per month from the tenant's son who did not have any knowledge of any of the documents signed by the tenant herself relating to parking.

The landlord submits that they have no record of any agreement or payments made by the tenant or her son for parking. However, I am satisfied by the text message of May 16, 2015 and the response provided by the landlord's onsite agent implies that the tenant's son was paying the landlord's on site agent \$40.00 per month. Whether or not the landlord's on site manager made the landlord aware of this agreement is a matter between the landlord and their former agent.

Based on the above, I am satisfied that the landlord's on site manager collected parking fees in excess of the amount promised when the tenant applied for tenancy and as such, the landlord is responsible for return of this overpayment. In the absence of any evidence to the contrary, I am satisfied the tenant has established the value of that overpayment to be \$415.00.

Section 37 of the *Act* states that when a tenant vacates a rental unit at the end of a tenancy the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear and give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

Section 35 of the *Act* requires that the landlord and tenant must complete an inspection of the condition of the rental unit before a new tenant begins to occupy the rental unit on or after the day the tenant ceases to occupy the rental unit or on another mutually agreed upon date. The landlord must offer the tenant at least 2 opportunities with the second offered time being offered in writing and in the approved form.

Section 17 of the Residential Tenancy Regulation stipulates that the landlord must offer a first opportunity to schedule the condition inspection by proposing one or more dates and times. If the tenant is not available at the time proposed the tenant may propose another time that the landlord must consider. If the time proposed by the tenant is not acceptable the landlord must propose a second opportunity by providing the tenant a notice in the approved form. The approved form is available on the Residential Tenancy Branch website.

As the landlord has confirmed that neither he nor any agents on his behalf scheduled or completed a move out condition inspection with the tenant and that the photographs submitted as his evidence were taken at least 5 days after the tenant had returned possession of the rental, I find that the photographs cannot be considered as a valid record of the condition of the rental unit at the end of the tenancy.

As a result, I find the landlord has provided insufficient evidence to establish that any part of the rental unit required any additional cleaning or that the tenant has caused any damage to the rental unit in excess of reasonable wear and tear. As such, I find the landlords have failed to establish that they have suffered a loss as result of the tenancy.

### Conclusion

Based on the above, I dismiss the landlords' Application for Dispute Resolution in its entirety without leave to reapply.

Also based on the above, I find the tenant is entitled to monetary compensation and I grant a monetary order pursuant to Section 67 in the amount of **\$1,540.00** comprised of

\$1,000.00 double the security deposit; \$25.00 key deposit; \$415.00 parking overpayment and the \$100.00 fee paid by the tenant for this application.

This order must be served on the landlord. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

I note, since the tenant has cheques from the landlord totaling \$365.00 that she may still be able to negotiate, that if the tenant is successful in cashing those cheques I order that this will partially satisfy the above noted order.

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 27, 2017

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Residential Tenancy Branch