



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes                      MNR, MNSD, FF

### Introduction:

A hearing was convened under the *Residential Tenancy Act* (the “Act”) to deal with the landlord’s application for a monetary order for unpaid rent, authorization to retain the tenant’s security deposit, and recovery of the application filing fee.

Both the landlord and the tenant attended the hearing and were given a full opportunity to be heard, to present documentary evidence, to make submissions, and to respond to the submissions of the other party.

Service of the landlord’s application and notice of hearing was not at issue. The tenant acknowledged receipt of the landlord’s evidence. The landlord had received the tenant’s evidence in support of another application by the tenant for return of the security deposit, but had not received the tenant’s evidence in response to this application. The tenant advised that the evidence for both applications was identical, and the landlord was content to allow the tenant to rely on that evidence rather than adjourning this hearing. The tenant’s application for return of the security deposit is scheduled for a later date, and the file number for that application is reproduced on the cover page of this decision.

### Issues to be Decided

Is the landlord entitled to compensation?

If so, is the landlord entitled to retain the security deposit toward the compensation owing?

Is the landlord entitled to recover the application filing fee?

### Background and Evidence

It was agreed that the parties entered into a tenancy agreement on February 14, 2017 for a tenancy beginning on March 1, 2017 for a 12 month term. A copy of the tenancy agreement was in evidence. It was signed on February 14, 2017 by both parties and indicates a rent of

\$1,500.00 due on the first of each month. A security deposit of \$750.00 was paid by the tenant on February 14, 2017 by electronic transfer and remains in the landlord's possession. The landlord testified that the tenant had applied to rent the unit on February 9, 2017 and a copy of a Strata Form K signed by the tenant on that date was in evidence. All of the emails and texts referred to below were also in evidence.

On February 17, 2017 the tenant emailed the landlord as follows:

I just found I'm needed get home. I have a bit of a family situation at home and have to move back there for awhile. I feel terrible asking but would you please give me my damage deposit back? I know it's only been about a day so I'm hoping this won't be too much trouble for you.

The landlord responded by email the same day as follows:

Sorry to hear something has come up at home. The lease agreement is legally binding for the lease period signed for, so you're liable for rent owed up until the end of the lease or until another tenant is found (whichever comes first). I've reposted the ad and will try to find someone for the first, in which case you'd get the deposit back, but it's closer to the end of the month and that leaves me with limited time to find someone (I'm also due to have a baby in a few days). I had turned down another applicant after we signed the lease and cancelled further viewings. Those people are being contacted to see if they're still interested so we'll do our best to try to have another lease in place by the 1<sup>st</sup> at which point yours would be cancelled and your deposit returned.

By email dated February 17 from the landlord to the landlord's prior renter, who showed the unit for the landlord, the landlord advised that the applicant tenant had just emailed to say "she has to move home unexpectedly and is not moving in. I am re-posting the ad right now. Are you able to get in touch with people who contacted you for viewings and let them know it's still available and get those scheduled ASAP, so we can still try to have someone for March 1<sup>st</sup>?"

In text correspondence between the tenant and the landlord's prior renter, the prior renter commented on February 22 that he is doing 3-4 viewings a day in an attempt to locate a replacement tenant. However, no applications were received as a result of those efforts.

The landlord testified that she posted advertisements for the rental on Craigslist and Facebook and also advertised through her own contacts, making the rental available for March 1 or March 15.

The landlord further testified that as of February 23 she was 40 weeks pregnant and unable to continue coordinating viewings and marketing the unit for a rental. She therefore contracted a property management company to take over. A copy of the contract with that company was in evidence. The company charged half of one month's rent to advertise for, locate, screen, and place a tenant. The company found a new tenant for April 1.

The landlord also testified that the tenant contacted her many times daily for the next while to inquire about whether a new tenant had been found. The landlord stated that the frequency of the tenant's inquiries amounted to harassment, and that criminal reports were filed in Canada and the UK as a result.

An email in evidence from the tenant shows that on February 22, 2017 the tenant emailed the landlord to inquire into the status of the search for a new tenant. In that email the tenant advises that she understood the former renter was leaving that day and then states: "If you're not giving me my damage deposit back I need to get the keys now. Which is pretty brutal."

The landlord responded by email on the same day by advising that viewings were ongoing but that a new tenant hadn't been found. The landlord continued: "I understood that you rented another apartment in the building, and so would not be moving in or collecting the keys. I will let you know if another lease is signed for March 1."

In an email dated February 27 the tenant says to the landlord: "My family is all very upset over this. I told you of my terrible news only a few days after signing. I'm begging you to please release me from the contract and return my deposit. I'm leaving today to take care of my mother. I'll call you later."

On February 28 the tenant emailed the landlord again: "Please organize the key handover asap." The landlord responded: "you have not paid rent for March 1, so you are not the tenant and will not be getting the keys."

The landlord testified that around this time the tenant twice sent her rent by electronic transfer and then withdrew it before the landlord accepted it. The landlord also said that she would not have accepted it in any event. The tenant provided evidence of \$1,500.00 "sent" (but not accepted) on February 28 and again on March 1.

At another point on this same the tenant emailed the landlord as follows:

To reiterate . . . I never cancelled the lease. We never legally cancelled ANYTHING. We didn't even INFER it. We only agreed to find a replacement and only in that case, forfeit the lease. Since we haven't, I have the right to the apartment. It's actually my property as of tomorrow at 1 pm. I am willing to let it go if you return my deposit and refuse my \$1500 rent that I sent you.

There are other emails between the parties to the same effect as those quoted above. There is also a letter from the tenant to the landlord dated February 28 that includes the following:

We have a contract to rent your unit . . . for a tenancy of one year. I asked if you could try re-renting the apartment as I have a family medical emergency at home. You agreed to return the deposit should you find a tenant. Should you not, you informed me I would be held to the one-year lease. It is now the last day of the month. I paid you rent starting March 1, which you have refused for whatever reason. You have also refused to return my damage deposit. You can't have it both ways.

In this letter the tenant also provided the landlord with an address in writing for return of the security deposit.

Based on the same evidence outlined above, the tenant says that the landlord agreed to allow her to continue on with the tenancy agreement if the landlord could not find another renter for March 1, but that at some soon after point the landlord decided that she did not want her as a tenant, and only then refused to let her move in. The tenant submitted evidence of her texts

with the landlord's prior tenant, which she says establish that her intention was to move into the rental unit if the landlord could not secure another renter for March.

### Analysis

Section 16 of the Act provides that 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." Here, the rights and obligations of both parties began when they signed the tenancy agreement and the tenant paid the security deposit.

Accordingly, when the tenant advised that she had to move home and asked that her security deposit be returned on February 17, 2017, she broke an agreement that had already been made. I find that the tenant breached the contract by asking for the security deposit back and indicating that she would not be moving in. Section 45(2) of the Act makes clear that a tenant may not end a fixed term contract earlier than the end of the term. I also find that the landlord accepted that breach and is entitled pursuant to s. 67 of the Act to losses caused by the tenant's breaches of the Act and the tenancy agreement.

Although the tenant may have preferred that the landlord refunded the security deposit and simply act as though the agreement had never been made, the landlord was unwilling to do so and was entitled to claim against the tenant for losses. In the February 28 email cited above, the tenant contends that the agreement as of February 17 was that the lease would be "forfeited" by the tenant only if a replacement renter could be found. This was not clearly articulated on February 17, however.

The tenant may have misunderstood the landlord's comment that she was liable for the term of the lease. By this the landlord meant that the tenant would be responsible for loss of rental income for the term of the lease, subject to the landlord's obligation to secure a new tenant. This is consistent with the law of contract and with Residential Tenancy Branch Policy Guideline #3, which states that the landlord may accept such a breach and claim losses arising from it. Once the landlord accepted the tenant's breach, the contract was over and the landlord was entitled to claim for losses due to the breach, and the landlord put the tenant on notice that this was her intention by way of her email in response on February 17. The tenant was also aware the landlord was attempting to secure another renter, which would be inconsistent with the tenant's still having some conditional right to rent the unit.

There is no evidence that the landlord agreed to the arrangement that the tenant suggests was in place. Although the tenant submitted evidence of her exchanges with the prior renter that suggest that she did want to move in, the tenant's evidence of her own intention is not determinative, and she would not have been legally entitled to move in even if she had actually intended to do so. Additionally, the tenant's evidence in this regard is inconsistent. In the space

of a day she alternates between insisting that she will be relocating to live with her mother and insisting that she be allowed to move in to the rental unit.

Sections 7 and 67 of the Act establish 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. The landlord claims lost rent for March, and I accept that claim. If the tenant had not breached the lease agreement, she would have paid the landlord rent for at least March. The landlord's loss is a direct result of the tenant's breach of the tenancy agreement and the Act.

A landlord is required to mitigate, or minimize, her losses, and this landlord did so by securing a new tenant for April 1, 2017. This is why the landlord claims lost rent only for March. I accept that the landlord's mitigation efforts were reasonable.

The landlord also asks for the cost of hiring a rental agent, which I decline to award for several reasons. One, the tenant is not responsible for the landlord's business decisions. The landlord was pregnant and unable or unwilling to occupy herself at that stage with securing a new tenant. It also appears that she was not living in the country, and that her prior tenant, who vacated on or about February 22, 2017 and who had been involved in showing the unit until then, was no longer available. This is not the tenant's fault. Lastly, the cost of the rental agent was not a direct result of the tenant's breach.

As the landlord was successful in this application, I find that the landlord is also entitled to recover the \$100.00 filing fee.

The landlord continues to hold the tenant's security deposit of \$750.00. In accordance with the offsetting provisions of section 72 of the Act, I authorize and order the landlord to retain the tenant's security deposit of \$750.00 in partial satisfaction of the monetary claim.

### Conclusion

I issue a monetary order for the landlord in the following terms, which allows the landlord to obtain a monetary award for unpaid rent and the filing fee, and to retain the security deposit for this tenancy:

Item	Amount
Unpaid rent	\$1,500.00
Filing fee	\$100.00
Less security deposit	-\$750.00
<b>Total Monetary Order</b>	<b>\$850.00</b>

I issue a monetary order in the landlord's favour in the amount of **\$850.00** against the tenant. The tenant must be served with this order as soon as possible. Should the tenant fail to comply with this order, it may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act. Pursuant to s. 77 of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: May 31, 2017

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Residential Tenancy Branch