



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDL-S, MNRL-S, FFL, MNSD, FFT

### Introduction

This hearing dealt with cross applications filed by the parties. On May 10, 2018, the Landlords made an Application for Dispute Resolution seeking a Monetary Order for lost rent, seeking a Monetary Order for compensation for repairs and damages, and to apply the security deposit towards this debt, pursuant to section 67 of the *Act*. The Landlords are also seeking to recover the filing fee pursuant to section 72 of the *Act*.

On May 31, 2018, the Tenants applied for a dispute resolution proceeding seeking a return of the security deposit pursuant to section 38 of the *Act* and seeking to recover the filing fee pursuant to section 72 of the *Act*.

L.N. attended the hearing on behalf of the Tenants and V.W. attended the hearing on behalf of the Landlords. All in attendance provided a solemn affirmation.

V.W. advised that he served the Notice of Hearing package to the Tenants by registered mail on May 13, 2018, and L.N. confirmed receipt of this package. L.N. advised that she served the Notice of Hearing package to the Landlords by registered mail on May 30, 2018, and V.W. confirmed receipt of this package. In accordance with sections 89 and 90 of the *Act*, I am satisfied that the Landlords and Tenants were served with the respective Notice of Hearing packages.

All parties acknowledged the evidence submitted and were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to a monetary award for unpaid rent pursuant to section 67 of the *Act*?
- Is the Landlord entitled to a monetary award for cleaning and damages pursuant to section 67 of the *Act*?
- Is the Landlord entitled to apply the deposits towards these debts, pursuant to section 67 of the *Act*?
- Is the Landlord entitled to recover the filing fee pursuant to section 72 of the *Act*?
- Is the Tenant entitled to a return of the security deposit pursuant to section 38 of the *Act*?
- Is the Tenant entitled to a monetary award for cleaning pursuant to section 67 of the *Act*?
- Is the Tenant entitled to recover the filing fee pursuant to section 72 of the *Act*?

Background and Evidence

L.N. advised that her evidence was served to the Landlords by registered mail in different packages but V.W. refused the package mailed on June 1, 2018. However, as the Tenants' evidence met the service requirements of section 88 the *Act*, I am satisfied that the Landlords were deemed served with the Tenants' evidence.

V.W. advised that his evidence was served to the Tenants by registered mail; however, L.N. stated that she did not receive any evidence. She advised that she just received an outline of the costs that V.W. was seeking and a letter regarding the smoke damage. V.W. stated that he was not aware that he was required to serve his evidence to the other party. As the Landlords' evidence did not meet the service requirements of Rule 3.15 of the Rules of Procedure, the Landlords' evidence was not considered; however, V.W. was still able to provide testimony with respect to this evidence.

V.W. stated that the tenancy started on October 1, 2017 as a fixed term tenancy ending on April 30, 2018. Rent was established at \$1,200.00 per month, due on the first day of each month. A security deposit of \$600.00, was paid. L.N. confirmed these details.

**Landlords' Claims**

Heat tapes

V.W.'s first claim was for compensation of \$250.00 for heat tapes that the Tenants purchased and then deducted from January 2018 rent. He stated that the Tenants did not provide receipts for the new heat tapes; therefore, he is owed this money as arrears for January 2018 rent. He alleged that the Tenants simply forgot to plug in the existing heat tapes and did not replace the old ones at all.

L.N. stated that there were emails sent back and forth with V.W. with respect to the frozen pipes and that new heat tapes needed to be purchased. She advised that as V.W. was an absentee landlord, his son authorized her to purchase the new heat tapes. She questioned why V.W. would ask for compensation for these heat tapes now if this incident happened in January and he did not ask for compensation then.

Lost Rent for April 2018

V.W.'s second claim was for compensation of \$1,200.00 for April's rent that was not paid. Both parties agreed that their main method of communication was through email and that there were many emails from both sides with respect to the tenancy ending. L.N. advised that she sought out information with respect to how a tenancy should be ended under the Act; however, she stated that she felt threatened by V.W.'s correspondence and was put in a position where it was her belief that she no longer was required to pay April 2018 rent as V.W.'s correspondence constituted a Two Month Notice to End Tenancy for Landlord's Use of Property.

Smoking

V.W.'s third claim was for compensation of \$250.00 as he alleged that the Tenants smoked in the rental unit and his tenancy agreement stipulated that there is a \$250.00 fine for smoking in the rental unit. V.W. stated that his son observed the Tenants smoking in the rental unit in December 2017; however, when he was pressed on why he did not address this issue in December, he stated that he did not want to end the tenancy over this issue because of the time of year.

L.N. refuted that they were smoking in the rental unit, but confirmed that they did smoke outside the rental unit. L.N. provided letters from witnesses confirming that they would

not smoke in the premises and that there was no indication that the rental unit had been smoked in.

*Loss of May and June 2018 rent*

V.W.'s fourth and fifth claims were for compensation of \$2,400.00 as he alleged that he was unable to re-rent the rental unit in May 2018 as any prospective tenants did not want to rent the premises due to a strong odour of cigarette smoke. He referred to comments by prospective tenants with respect to the smoke issue.

V.W. also requested June 2018 rent as compensation as the new tenants were concerned about the lingering smell of cigarette smoke and he "may have to pay back their June rent" due to this.

L.N. referenced their evidence of letters advising that V.W. occupied the premises in May 2018. V.W. confirmed that he occupied the rental unit for most of May as he had to paint and install a new deck. She advised that she was informed by the neighbour that the new tenants are smokers.

*Repairs and cleaning of the premises*

V.W.'s sixth claim was for compensation of \$2,000.00 as he alleged that he "spent 40 hours cleaning and painting almost everything including the kitchen cupboards to get rid of the strong cigarette smoke smell." He stated that he is a professional painter and charges \$45 per hour and has spent \$200 on paint. However, he also advised that he was only able to paint the walls as he was unable to paint the ceiling due to a fused neck.

L.N. stated that she provided proof and letters to rebut V.W.'s claims of damage. As well, she referenced a letter that outlined V.W.'s belligerent behaviour at the end of the tenancy when he was walking through the rental unit with the Tenants.

Both parties agreed that move in and move out inspection reports were not completed by V.W.

***Tenants' Claims***

*Return of the security deposit*

L.N. stated that they are requesting a return of their \$850.00 security deposit as they do not believe V.W.'s claims for damage are justified. During the hearing, it was L.N.'s belief that the security deposit paid was \$850.00; however, it was determined and confirmed through the tenancy agreement that the actual security deposit paid was \$600.00.

### Cleaning

L.N. stated that they are requesting monetary compensation for \$325.00 for compensation of their time and materials as they allege that the Landlords provided a rental unit that was in a state of disorder at the start of the tenancy.

### Analysis

### **Landlords' Claims**

### Heat tapes

V.W. stated in his outline of costs that "original heat tapes were still plugged in as of April 29<sup>th</sup>, 2018." However, the undisputed evidence is that V.W. was an absentee landlord and when the Tenants brought up their concerns with the heaters, he stated in an email dated October 19, 2017 "I have no idea, but I will ask the People who owned the place before." I find that this causes me to question how much knowledge V.W. had with respect to the heat tape issue in the first place. This also causes me to doubt how he could definitively state that the heat tapes left at the end of the tenancy were the "original heat tapes" or if they were new ones.

Based on the totality of the evidence before me, I do not find it reasonable that the Tenants would have brought up the issue of replacing heat tapes had there not been a problem with them. While it is not accepted under that *Act* that money be allowed to be deducted from the rent without written consent, there appears to be consistent evidence before me that V.W. had allowed the Tenants to deduct \$100.00 from the rent previously for a water issue. As the issue with the heat tapes was more likely than not necessary, and as V.W. did not bring up the issue of the \$250.00 being withheld from the January 2018 rent at the time, I find that I am satisfied that based on a balance of

probabilities, it was implied that V.W. consented to this amount being deducted from the rent. As such, I dismiss V.W.'s claims with respect to this issue.

#### Lost Rent for April 2018

There is no dispute that the parties entered into a fixed term tenancy agreement that started on October 1, 2017 with an end date of April 30, 2018. Even though there was a disagreement between the parties with respect to how the tenancy continued after the fixed term concluded, there was no vacate clause specifically included in the tenancy agreement. Furthermore, even if there were such a clause in the agreement, it would not be enforceable due to recent legislative changes. Regardless, the tenancy effectively ended when the Tenants vacated the rental unit at the end of April 2018.

Part 4 of the *Residential Tenancy Act* sets out all the ways a tenancy is permitted to end. As there is no evidence before me that V.W. served the Tenants with a Two Month Notice to End Tenancy for Landlord's Use of Property, I am not satisfied that the Tenants could have interpreted V.W.'s emails as a proper notice and as such, I do not find that the Tenants were entitled to withhold April's rent. Consequently, I am not satisfied that the Tenants ended the tenancy in accordance with the *Act* and, as a result of the Tenants' actions, I find that V.W. suffered a rental loss of \$1,200.00 for April 2018 rent. Therefore, I am satisfied that V.W. should be awarded a monetary claim in this amount.

#### Smoking

While the Landlord included a \$250.00 fine in the tenancy agreement if the Tenants smoked in the rental unit, I find it important to note that the *Act* does not allow for such a fine to be included in a tenancy agreement. Section 5 of the *Act* explains that any attempt to avoid or contract outside of the *Act* is void. In addition, V.W. testified that he was allegedly aware of smoking in the rental unit in December; however, the fact that he chose not to levy this fine at the time causes me to question the validity of this claim. As such, I dismiss this claim in its entirety.

#### Repairs and cleaning of the premises and loss of May and June 2018 rent

With respect to the next three claims, as the crux of the issues revolve around smoking in the rental unit and the condition with which the Tenants left the premises, I will address all of these issues below in one section.

When establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

The undisputed evidence before me is that V.W. did not conduct move in or move out inspection reports. This is a necessary step to document the condition of the premises before the tenancy started and the condition of the premises at the end of the tenancy. Without these reports, it is exceedingly difficult to prove any claims for damage, repairs, or cleaning.

Both parties have provided conflicting evidence with respect to the smoking issue. I find it important to note that when two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. As stated above, I determined that V.W. did not satisfy me with his evidence that the Tenants were smoking in the rental unit in December 2017. As well, I find it important to note that in V.W.'s online Application, he noted that "Damage from smoking being a main concern however hard to photograph". When weighing the conflicting evidence of both parties, I do not find that V.W. has provided any compelling evidence that substantiates, on a balance of probabilities, that the Tenants smoked in the rental unit and caused the damage that V.W. is alleging.

V.W. submitted that he spent "40 hours cleaning and painting" and he listed his cost for cleaning and painting as \$2,000.00 with \$200.00 of that spent on paint. Therefore, \$1,800.00 would have been attributed to the cost of labour. He stated that he generally charges \$45.00 per hour for labour as a professional painter but he spent 40 hours cleaning *and* painting. However, he has not provided any evidence specifying how many of the 40 hours he actually spent cleaning or identified precisely what needed cleaning. In addition, he has not provided any evidence to indicate how much of that 40 hours was dedicated to painting. I find it reasonable to conclude that the labour costs for cleaning would be different for painting. Consequently, I am not satisfied that V.W. has provided persuasive evidence outlining the precise costs of his claim. Furthermore, as I

am not satisfied that V.W. established that the Tenants smoked in the rental unit, I am not satisfied that V.W. has established that any cleaning and/or painting was necessary, especially without required inspection reports. Therefore, I dismiss this portion of the Landlords' claim.

With respect to any claim for physical damage to the premises, V.W. submitted pictures under a "Proof of Damage" claim in his online Application; however, he has not identified in his outline of costs that he was seeking a specific monetary amount for any particular repairs to the damage that the Tenants allegedly caused. As such, I did not address any of these concerns during the hearing.

With respect to the V.W.'s request for compensation for May rent, the undisputed evidence before me is that he occupied the rental unit in May. While V.W. alleged that this was necessary due to cleaning and repairs that were required, I have determined above that I have not been satisfied of these claims. Furthermore, V.W. stated in an email dated March 23, 2018 "I will move in on the 1 of May 2018 did[sic] is a fact." As such, I do not find that V.W. suffered the loss of rent that he alleged, and I dismiss his claim on this point.

With respect to V.W.'s request for compensation for June 2018 rent, he has not provided any evidence to indicate that he compensated the next tenants for any issues. As such, I dismiss this portion of V.W.'s claim as well.

### **Tenants' Claims**

#### **Damage deposit**

Section 38(1) of the *Act* requires the Landlord, within 15 days of the end of the tenancy or the date on which the Landlord receives the Tenant's forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlord to retain the deposit. If the Landlord fails to comply with section 38(1), then the Landlord may not make a claim against the deposit, and the Landlord must pay double the deposit to the Tenant, pursuant to section 38(6) of the *Act*.

The undisputed evidence before me is that the Tenants provided a forwarding address in writing by email and V.W. confirmed receipt of this. Furthermore, V.W. made an Application to claim against this deposit within the 15 days as required by the *Act*. As



such, I am satisfied that V.W. complied with the requirements of the *Act* with respect to dealing with the security deposit.

I find it important to note that under section 36 of the *Act*, V.W. extinguished his right to claim against the deposit for damage to the rental unit if he has not met the requirements with respect to inspection reports. However, under the offsetting provisions of section 72 of the *Act*, I allow V.W. to retain this \$600.00 security deposit in partial satisfaction of the April 2018 rent outstanding.

### Cleaning

With respect to this claim, I advised L.N. during the hearing that this was an issue that should have been brought up at the beginning of the tenancy. As such, I dismiss this portion of the Tenants' claim.

Based on the evidence before me, the only claim that I am satisfied of is that the Tenants were not authorized to withhold April 2018 rent based on a notice that they did not receive from V.W. As such, I grant a Monetary Order in the amount of \$1,200.00 for rent owing for the month of April 2018. As per the offsetting provisions of the *Act* mentioned above, I allow the Landlord to retain the security deposit in partial satisfaction of the amount awarded.

As V.W. was partially successful in his claim, I find that he is entitled to recover the \$100.00 filing fee paid for this application.

Pursuant to sections 67 and 72 of the *Act*, I grant the Landlords a Monetary Order as follows:

### **Calculation of Monetary Award Payable by the Tenants to the Landlords**

April 2018 rental loss	\$1,200.00
Recovery of filing fee	\$100.00
Less security deposit	-\$600.00
<b>TOTAL MONETARY AWARD</b>	<b>\$700.00</b>

Conclusion

The Landlords are provided with a Monetary Order in the amount of **\$700.00** in the above terms, and the Tenants must be served with **this Order** as soon as possible. Should the Tenants 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.

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: July 9, 2018

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Residential Tenancy Branch