



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MNR MNSD FF

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held, by teleconference, on May 28, 2019. The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for damage to the unit, for unpaid rent, and for damage or loss under the Act;
- 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,
- to recover the cost of the filing fee.

Both parties attended the hearing and provided testimony. The Tenant acknowledged receiving the Landlord's application and evidence. The Tenant did not submit any documentary evidence.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Are the Landlords entitled to a monetary order for unpaid rent or utilities?

- Are the Landlords entitled to compensation for money owed or damage or loss under the Act?
- Are the Landlords entitled to keep the security deposit to offset the amounts owed by the Tenant?

Background and Evidence

Both parties agree that the tenancy began on January 15, 2019, and ended on February 4, 2019, which was the day the Tenant returned the keys. The parties agree that rent was \$4,200.00 per month, due on the first of the month, with the first month January 15-31, 2019, being a half month's rent. The Landlords hold a security deposit in the amount of \$2,100.00.

The condition inspection report provided into evidence contains both a move-in inspection as well as a move-out inspection component. The parties agree that a move-in inspection was done at the start (on January 10, 2019) and there does not appear to be any dispute over the condition of the suite or the contents indicated at the start of the tenancy. The Tenant (as listed on the Tenancy Agreement) acknowledges being present, and signing this portion of the condition inspection report. However, when the move-out inspection was completed, it was done with another occupant of the rental unit, and not the Tenant listed on the tenancy agreement. The Tenant stated he was never made aware of the move-out inspection date. The Tenant stated that the Landlord only notified the other occupant of the rental unit and did the move-out inspection with her. The Tenant stated that he should have had the chance to be there. The Landlord was unable to present any further evidence that he offered the Tenant an opportunity to be present for the inspection. The Landlord was also unable to explain when the move-out inspection occurred.

The Landlords also uploaded several photos, which they took after the Tenant moved out, and it shows a significant amount of debris, filth, stains, marks, and holes in the walls.

The Landlords are seeking \$8164.00 for 7 different items as outlined on their monetary order worksheet. These items are reproduced here, in the same order, as follows:

- 1) \$2,100.00 – Rent for January 15 - January 31, 2019
- 2) \$4,200.00 – Rent for February 2019

The Landlords pointed to the Tenancy Agreement, which was provided into evidence, to show that the Tenants were under a fixed term tenancy agreement for one year. The Landlords stated that the Tenant had financial issues from the start, and he had issues with his cheques bouncing. The Landlords stated they never got any rent from the Tenant, despite him living in the rental unit for almost a month. The Landlords provided a copy of some of the bounced cheques.

The Tenant acknowledges that he was having financial issues, and that his cheques bounced. The Tenant stated that, as of this date, he has not paid for rent for this period. The Tenant stated that after getting a 10 Day Notice from the Landlord due to non-payment of rent, he tried to pay, but was turned away. The Tenant stated that his relationship with the Landlords went sideways, so he moved out, rather than dispute the 10 Day Notice. The Tenant does not feel he should have to pay for all of February 2019, since he only lived there for 3-4 days in February.

The Landlord stated he was unable to re-rent the unit until March 15, 2019.

3) \$750.00 – Agent Fee for re-renting of property

The Landlord provided a receipt showing he had to pay his agent this fee so that he could find new tenants after this tenancy was ended early. The Landlord stated that the Tenants are responsible for this amount, as liquidated damages, because they agreed to this in the addendum of the Tenancy Agreement. The addendum was provided into evidence and states the following:

“if the lease is broken, subject to the Landlord’s consent, the Tenant will lose their damage deposit and agrees to reimburse the Landlord for any losses, such as vacancy or tenancy replacement fees. These fees include but are not limited to: the cost of advertising to re-rent the rental unit; the cost of credit checks of new prospective Tenants....”

The Tenant stated he should not have to pay this because it is not his fault the Landlord chose to hire an agent, when he could have done the work himself.

4) \$388.00 – Repair costs – Paint/patch

The Landlord provided a copy of an estimate to repair the damaged walls. The Landlord stated he has not yet paid for this work to be done, but plans on it. The Landlord stated

that the Tenant mounted a TV to the wall, and left large bolt holes. The Landlord also stated that the Tenant left large scuff marks and, chips in the walls, and some small patching is needed. The Landlord provided some photos of the damage (bedroom downstairs, hallways), taken after the Tenant moved out. The Landlord stated that this amount is only to patch the holes, and repaint the scuffed areas, and the areas where fill was required.

The Tenant stated that this is an estimate only, and isn't an actual expense. The Tenant stated he is not disputing the holes he made for mounting the TV, but stated that any marks left were from normal wear and tear.

5) \$458.00 – Cleaning fees

The Landlord stated that this amount is for \$90.00 for carpet cleaning, which was not done at the end of the tenancy, and also for \$368.00 in cleaning costs. The Landlord provided a photo of the carpet stain which required cleaning, and also provided photos of the garbage, and the mess left behind. The Landlord also provided receipts for these two items.

The Tenant noted there is no tax charged on one of the receipts, and he "disputes" the invoices. However, he did not elaborate further on this matter.

6) \$100.00 – Filing fee

The Landlord is seeking to recover the filing fee for this application

7) \$150.00 – NSF fees for bounced cheques

The Landlord stated that there were 3 cheques in total that bounced, the first time the Tenant attempted to pay his security deposit, the first month's rent (January), and the second month's rent (February). The Landlord provided copies of 2 of these bounced cheques, showing the bank returned them as insufficient funds.

The Tenant does not dispute the fact that his cheques bounced. However, he pointed out that the bank only charged \$7.00 for each bounced cheque, and it is not fair he is being asked to pay \$50.00 to the Landlord for each bounced cheque.

Analysis

The Landlord is seeking monetary compensation for several items, as laid out above. These items will be addressed in the same order for my analysis. A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Landlords to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Tenants. Once that has been established, the Landlords must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord did everything possible to minimize the damage or losses that were incurred.

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.

Based on all of the above, the evidence (move in inspection, photos and invoices) and the testimony provided at the hearing, I find as follows:

Condition Inspection Report

Sections 23 and 35 of the Act states that a Landlord and Tenant together must inspect the condition of the rental unit on the day the Tenant is entitled to possession of the rental unit, and at the end of the tenancy before a new tenant begins to occupy the rental unit. Both the Landlord and Tenant must sign the condition inspection report and the Landlord must give the Tenant a copy of that report in accordance with the regulations.

In this case, I note that the parties do not dispute the contents of the move-in portion of the condition inspection report. As such I find this part of the condition inspection report provides reliable evidence with respect to the condition of the rental unit at the start of the tenancy.

With respect to the move-out portion of the condition inspection report, I find it is of limited value in determining the condition of the unit at the end of the tenancy. I note the Landlord has provided no evidence to show that they informed the Tenant as to when the move-out inspection was happening. The Tenant stated he was not made aware

and believes he should have been there for the final walkthrough, not the other occupant, who was not on the Tenancy Agreement. I find the Landlord failed to sufficiently give the Tenant (not another occupant) at least 2 opportunities for final inspection. There is insufficient evidence to show the occupant was acting as an agent for the Tenant. As such, I find the move-out inspection was not conducted properly, and is of limited value. Ultimately, I am not satisfied the move-out portion of the condition inspection is sufficiently reliable. I have placed little weight on this part of the inspection report. That being said, I will rely on testimony from both parties, the Landlord's photo evidence from the end of the tenancy, as well as the move-in portion of the condition inspection report to make my determinations.

The Landlords are seeking \$8164.00 for 7 different items as outlined on their monetary order worksheet. These items are reproduced here, in the same order, as follows:

- 1) \$2,100.00 – Rent for January 15 - January 31, 2019
- 2) \$4,200.00 – Rent for February 2019

The Landlord pointed to the Tenancy Agreement, which was provided into evidence, to show that the Tenant was under a fixed term tenancy agreement for one year (until January 2020), and that rent was \$4,200.00 per month, due on the first of the month. I note the Tenant had financial issues at the start, which triggered the Landlord to issue a 10 Day Notice to end Tenancy. I also note the Tenant says he tried to pay after getting the Notice, but he was turned down. However, if the Tenant wanted to continue the tenancy, and dispute the Notice, he could have done so, filed an application with our office and explained at that time that he tried to pay, within 5 days, but was refused. The Tenant chose to accept the Notice, and move out, rather than dispute it, which he could have done.

I further note the consistent evidence is that no rent was actually paid for January or February of 2019. The Tenant accepted the Notice and moved out on February 4, 2019. I note the Tenant was under a fixed term lease, and the only reason the tenancy was ending was because he failed to reliably pay rent.

I find the Tenant is responsible for January rent (half month rent totalling \$1,500.00), as he was living in the rental unit for that period. I also find the Tenant is responsible for February 2019 rent, as the Landlord was unable to re-rent the unit until the following month. In making this determination, I note the Tenant was under a fixed term tenancy agreement, he had issues paying rent, he accepted the 10 Day Notice rather than

dispute it, and he left part way through the rental month, which would have made it difficult to fill the rental unit for the remainder of that month. Although the Landlord was the one who issued the Notice to End Tenancy, I find it was done because of a fundamental breach of the tenancy agreement (unpaid rent). I award the Landlord the full amount for these two items (\$5,300.00).

3) \$750.00 – Agent Fee for re-renting of property

I note the Landlord stated in the hearing he was seeking to recover liquidated damages and the fees he incurred to re-rent the unit.

Residential Tenancy Policy Guideline 4 provides for liquidated damages. A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the fixed term by the Tenant. If a liquidated damages clause is determined to be valid, the Tenant must pay the stipulated sum unless the sum is found to be a penalty.

In this case, I find the Tenant breached his fixed term tenancy agreement by moving out prior to the end of his fixed term. I also note the Tenant signed an addendum and agreed to the following:

“if the lease is broken, subject to the Landlord’s consent, the Tenant will lose their damage deposit and agrees to reimburse the Landlord for any losses, such as vacancy or tenancy replacement fees. These fees include but are not limited to: the cost of advertising to re-rent the rental unit; the cost of credit checks of new prospective Tenants....”

However, I also note the following portion of the Residential Tenancy Policy Guideline #4 – *Liquidated Damages*, which states as follows:

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

Since the Landlord has used this clause as a way to keep the deposit, plus recover costs to re-rent, I find this to be a penalty. As such, I find it is not an enforceable item, and I dismiss the Landlord’s request for compensation based on this item, and for liquidated damages.

4) \$388.00 – Repair costs – Paint/patch

I note the Tenant stated he is not disputing the holes he made for mounting the TV. However, he stated that any marks left were from normal wear and tear.

With respect to the condition of the rental unit, I note, as stated above, that the condition inspection report has parts that are of limited value. More specifically, the move-out section of this document is afforded little weight. That being said, the move-in portion of the report is uncontested, and it shows the rental unit was freshly painted. Then, at the end of the tenancy, the Landlord took photos, which reveal some walls damage, scuffs, and significant dings, to walls that were very recently painted.

I turn to Policy Guideline #1, which states:

Nail Holes:

[...]

2. *The tenant must pay for repairing walls where there are an excessive number of nail holes, or large nails, or screws or tape have been used and left wall damage.*
3. *The tenant is responsible for all deliberate or negligent damage to the walls.*

I find the holes and marks, as evidenced by the photos taken after the Tenant moved out, go beyond reasonable wear and tear. Some of the holes from mounting the TV are sufficiently large as to warrant patching and repainting, which is the responsibility of the Tenant. Although this expense has not been paid by the Landlord, I find the estimate is sufficient to define the scope, and cost to do the work (patch the holes and repaint those areas). As the unit was freshly painted, I find the Tenant is responsible for this amount, in full.

5) \$458.00 – Cleaning fees

The Landlord stated that this amount is for \$90.00 for carpet cleaning, which was not done at the end of the tenancy, and also for \$368.00 in cleaning costs. The Landlord also provided receipts for these two items. I note the Tenant signed, in the addendum, that he would steam clean the carpets at the end of the tenancy. I also note the Landlord provided photos showing a carpet had a stain, there were spills, spots, and debris on the floor, and in various locations (fridge, stove). The Tenant did not dispute that he didn't clean the carpets. He also did not dispute that he failed to remove

garbage, some of his belongings and properly clean up. He only pointed to the invoices, and noted that no tax was charged. The Tenant did not further explain the importance of why tax not being charged would impact this item, nor did he dispute that he left a mess behind (as shown in the photos).

The Landlord provided several photos of the mess left behind (garbage, debris, spills). I find this evidence is sufficient to show cleaning would have been required, prior to re-renting it to another party. I find the Tenant is responsible for these cleaning fees, in full.

6) \$100.00 – Filing fee

This will be addressed further below.

7) \$150.00 – NSF fees for bounced cheques

The Landlord stated that there were 3 cheques in total that bounced. They were as follows: the first time the Tenant attempted to pay his security deposit, the first month's rent (January), and the second month's rent (February). The Landlord provided copies of 2 of these bounced cheques, showing the bank returned them as insufficient funds.

The Tenant does not dispute the fact that his cheques bounced. However, he pointed out that the bank only charged \$7.00 for each bounced cheque, and it is not fair he is being asked to pay \$50.00 to the Landlord for each bounced cheque.

Although the bank fees may only have been \$7.00 per cheque that bounced, I find the Tenant is responsible to pay the agreed upon amount for NSF cheques, as laid out in the Tenancy Agreement addendum. This amount is \$50.00 per cheque, which I find is not an unreasonable amount, given the extra time and effort involved in dealing with an NSF cheque. That being said, the Landlord only provided two of the bounced cheques, so I will only award 2 of the 3 he is seeking (2x \$50.00).

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. As the Landlords were substantially successful with the application, I order the Tenant to repay the \$100.00 fee that the Landlords paid to make application for dispute resolution. Also, I authorize the Landlord to retain the security deposit to offset the other money owed.

In summary, I find the Landlords are entitled to the following monetary compensation, as outlined above:

Item	Amount
Rent	\$5,300.00
Paint/ Wall damage	\$388.00
Cleaning	\$458.00
NSF cheque fees (2x\$50.00)	\$100.00
PLUS: Filing Fee	\$100.00
Subtotal:	\$6,246.00
LESS: Security/Pet Deposit	\$2,100.00
Total Amount	\$4,146.00

Conclusion

The Landlord is granted a monetary order in the amount of **\$4,146.00**, as specified above. This order must be served on the Tenant. If the Tenant fails to comply with this order the Landlord may file the order in the Provincial Court (Small Claims) and be 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: May 31, 2019

Residential Tenancy Branch