



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes:** FFL MNDCL-S MNDL-S MNRL-S

### **Introduction**

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

- a monetary order for unpaid rent and compensation for monetary loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing. In accordance with section 89 of the *Act*, I find that the tenant duly served with the landlord's application. All parties confirmed receipt of each other's evidentiary materials, and that they were ready to proceed.

### **Issue(s) to be Decided**

Is the landlord entitled to monetary compensation for unpaid rent and losses?

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

### **Background and Evidence**

This month-to-month tenancy began on December 1, 2015, and ended on September 30, 2019. Monthly rent was set at \$1,330.00 at the end of the tenancy. The landlord

collected a security deposit in the amount of \$600.00 and a pet damage deposit in the amount of \$300.00, and still holds both deposits.

The landlord is seeking monetary compensation as follows:

|  |                   |
|--|-------------------|
| Unpaid Rent for September 2019               | \$1,330.00        |
| Loss of Rental Income (Half of October 2019) | 665.00            |
| Cleaning                                     | 415.02            |
| <b>Total Monetary Award Requested</b>        | <b>\$2,410.02</b> |

The landlord testified that she had served the tenant with a 2 Month Notice for Landlord's Use on April 28, 2019, which indicated an effective date of July 1, 2019. The landlord testified that she called the tenant the next day to rescind the 2 Month Notice, which the tenant confirmed. The tenant testified that she was instructed to "rip it up", but did not feel comfortable doing so. The landlord considered the 2 Month Notice to be cancelled, and the tenant continued.

The landlord testified that the tenant had paid the monthly rent for May 2019 thorough to August 2019, but did not pay any rent for September 2019. The landlord testified that she had received written notice from the tenant on September 2, 2019 that the tenant would be moving out on September 30, 2019. The landlord testified that the notice was dated August 31, 2019. The tenant confirmed that she did not pay any rent for September 2019 as she felt entitled to a month's rent pursuant to the 2 Month Notice served to her on April 28, 2019.

The tenant testified that she had informed the landlord in August 2019 that she would be moving out, and confirmed that she personally served the landlord with written notice on September 2, 2019, which she determined to be sufficient as she was only required to give 10 days' notice as stated on the 2 Month Notice. The tenant provided an email from the landlord which shows that she had contacted the landlord in August 2019 about moving out.

The email dated August 19, 2019 reads: "Hi J, I have not heard from you yet as you told me on August 1, 2019 that you would let me know if you were staying until September 15 of September 30. In order for me to move forward I need to know. I have tried to

contact you through text and a phone call with no luck, please respond with an answer. If not, I will ask that you give written notice for the end of September. Thank you”.

The landlord testified that she was unable to re-rent the unit until October 15, 2019 for \$1,500.00, due to insufficient notice and cleaning. The landlord testified that the home was not clean and smelled of smoke. The tenant disputes the landlord’s testimony, stating that she had left the home in clean and undamaged condition. The tenant testified that despite the fact that move-in and move-out inspections were completed, the tenant was not provided a copy of these reports. The landlord did not dispute that the tenant was not provided with a move-out inspection report. The landlord provided a copy of the move-in and move-out inspection report in evidence for this hearing as well as photos, a detailed summary of what had taken place, as well as the receipt for the cleaning in the amount of \$350.70 with a description of the cleaning completed by the cleaning company. The landlord testified that in addition to the professional cleaning, the landlord, her family, and boyfriend performed additional cleaning and repairs in order to be able to re-rent the home. The landlord is seeking reimbursement for the cleaning, and loss of rental income due to tenant’s failure to return the rental unit in reasonably clean and undamaged condition. The tenant also provided in her evidence package, photos and a receipt for carpet cleaning, and disputes the landlord’s claims.

### **Analysis**

Residential Tenancy Policy Guideline #11 states the following about withdrawal of notices.

*A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.*

*The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.*

*If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:*

- *whether the receipt shows the money was received for use and occupation only.*

- *whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- *the conduct of the parties.*

*There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.*

In this case the landlord had attempted to withdraw her 2 Month Notice after the day she had issued it. As stated in the Policy Guideline, a party cannot unilaterally withdraw a notice to end tenancy. I find that it was undisputed that the tenant did not move out by the effective date of the 2 Month Notice, which was July 1, 2019. It was also undisputed that the tenant had continued to pay rent until August 2019.

Section 53 of the *Act* allows automatic correction of effective dates stated on a Notice to End Tenancy. Section 53 (2) and (3) of the *Act* states:

“If the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section. In the case of a notice to end a tenancy, other than a notice under section 45 (3) [tenant's notice: landlord breach of material term], 46 [landlord's notice: non-payment of rent] or 50 [tenant may end tenancy early], if the effective date stated in the notice is any day other than the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, the effective date is deemed to be the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement

- (a) that complies with the required notice period, or
- (b) if the landlord gives a longer notice period, that complies with that longer notice period.”

In this case, even if the effective date is corrected pursuant to section 53 of the *Act* to July 31, 2019, the tenant still paid the landlord rent for August 2019, after the corrected

effective date of the 2 Month Notice. I find that the payment and acceptance of the August 2019 payment implied the waiver of the 2 Month Notice, and the continuation of the tenancy beyond the effective date of the 2 Month Notice. As the 2 Month Notice was no longer in effect, and as the tenant failed to pay rent for September 2019 despite residing there until September 30, 2019, I find that the landlord is entitled to a monetary order in the amount of \$1,330.00 for September 2019 rent.

The tenant testified that her written notice, which was served on the landlord on September 2, 2019, to be done in accordance with the Act, as she was served with the 2 Month Notice.

Section 50 of the *Act* states:

**50** (1) *If a landlord gives a tenant notice to end a periodic tenancy under section 49 [landlord's use of property] or 49.1 [landlord's notice: tenant ceases to qualify], the tenant may end the tenancy early by*

*(a) giving the landlord at least 10 days' written notice to end the tenancy on a date that is earlier than the effective date of the landlord's notice, and (b) paying the landlord, on the date the tenant's notice is given, the proportion of the rent due to the effective date of the tenant's notice, unless subsection (2) applies.*

By giving written notice on September 2, 2019, I find that the tenant failed to give at least 10 days' written notice to end tenancy on a date that is earlier than the effective date of the landlord's notice as required section 50 of the *Act*. Even if I were to accept the testimony of the tenant that she first gave notice to the landlord in August of 2019 , the notice would still be insufficient under section 50 of the *Act* as the effective date had passed.

Section 45 of the *Act* states the following:

**45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice, and
- (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

The evidence is clear that the tenant did not comply with the *Act* in ending this tenancy, and I therefore, find that the tenant terminated this tenancy contrary to Section 45 of the *Act*. The evidence of the landlord is that she was able to re-rent the home, but not until October 15, 2019. The landlord is seeking half a month's rent for loss of rental income for October 2019, as well as compensation for cleaning for this tenancy.

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter the landlord must satisfy each component of the following test for loss established by **Section 7** of the *Act*, which states;

***Liability for not complying with this Act or a tenancy agreement***

**7** (1) *If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

(2) *A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the landlord)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (tenant) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss.*

Therefore, in this matter, the landlord bears the burden of establishing their claim on the balance of probabilities. The landlord must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party. Once established, the landlord must then provide evidence that can verify the actual monetary amount of the loss. Finally, the landlord must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

Although the landlord did demonstrate that she was unable to re-rent the home until October 15, 2019, I find that the landlord failed to provide sufficient evidence to support that the monetary loss claimed was directly due to the tenant's actions. Although the tenant did not give sufficient notice as required by section 45 of the *Act*, I find that the landlord failed to show what reasonable steps were taken to mitigate or minimize the loss incurred such efforts to advertise and re-rent the home as soon as she was given notice by the tenant.

Furthermore, I find that the tenant had provided detailed evidence that contradicts the landlord's claims that the tenant failed to leave the home in reasonably clean and undamaged condition. I find the tenant's evidence supports her testimony that she had left the home in reasonably clean condition. In light of the contradictory evidence, the burden of proof falls on the landlord. I am not satisfied that the evidence presented sufficiently supports the landlord's claims for losses, and accordingly I dismiss the landlord's monetary claim for cleaning and loss of rental income without leave to reapply.

As the landlord was partially successful with her claim, I allow her to recover half of the filing fee for this application.

The landlord continues to hold the tenants' security deposit and pet damage deposit. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlord to retain the tenant's deposits in partial satisfaction of the monetary claim.

## **Conclusion**

I allow the landlord's monetary order to recover the rent for September 2019 as well as half of the filing fee. The remaining portion of the landlord's application is dismissed without leave to reapply.

I issue a Monetary Order in the amount of \$480.00 in the landlord's favour as set out in the table below.

|                             |                 |
|-----------------------------|-----------------|
| September Rent              | \$1,330.00      |
| Filing Fee                  | 50.00           |
| Less Security Deposit Held  | -900.00         |
| <b>Total Monetary Award</b> | <b>\$480.00</b> |

The tenant(s) must be served with this Order as soon as possible. Should the tenant(s) 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: December 12, 2019

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Residential Tenancy Branch