



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter of Centurion Properties  
and [tenant name suppressed to protect privacy]

## **DECISION**

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

### Introduction

This was a cross application hearing that dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an order for the landlord to return the security deposit pursuant to section 38;
- a monetary order for compensation for damage or loss under the Act, Residential Tenancy Regulation ("Regulation") or tenancy agreement pursuant to section 67 of the Act; and
- authorization to recover the filing fee for this application, pursuant to section 72.

This hearing also dealt with the landlord's application pursuant to the *Act* for:

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

I left the teleconference connection open until 2:00 P.M. to enable the tenant to call into this teleconference hearing scheduled for 1:30 P.M. The tenant did not attend the hearing. The landlord's representatives AM (building manager) and AH (property manager) and their legal counsel HF (the landlord) attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord's representatives and legal counsel and I were the only ones who had called into this teleconference.

I accept the landlord's testimony that the tenant was served with the notice of hearing, and evidence (the Materials) by registered mail on November 26, 2019, in accordance with section 89(1)(d) of the Act (the tracking number is recorded on the cover of this decision).

Section 90 of the Act provides that a document served in accordance with Section 89 of the Act is deemed to be received if given or served by mail, on the 5th day after it is mailed. Given the evidence of registered mail I find the tenant is deemed to have received the Materials on December 01, 2019.

### Preliminary Issue – Tenant's Application

Rules 7.1 and 7.3 of the Rules of Procedure provide as follows:

Rule 7 – During the hearing

7.1 Commencement of the dispute resolution hearing

The dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator.

[...]

7.3 Consequences of not attending the hearing

If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply.

Accordingly, in the absence of any attendance at this hearing by the tenant, I order the tenant's application dismissed without leave to reapply.

### Issues to be Decided

Is the landlord entitled to:

- a monetary order for unpaid rent, utilities and for compensation for damage or loss under the Act, the Regulation or the tenancy agreement?
- authorization to recover the filing fee for this application from the tenant?

### Background and Evidence

While I have considered the documentary evidence and the testimony of the landlord's representative, not all details of his submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claim and my findings are set out

below. I explained to the attending party it is their obligation to present the evidence produced.

The fixed-term tenancy started on May 01, 2019 and was supposed to end on April 30, 2020. Monthly rent was \$1,200.00, due on the first day of the month. At the outset of the tenancy the landlord collected a security deposit of \$600.00 and still holds it in trust.

A copy of the written tenancy agreement was provided and indicates a different landlord. The landlord testified the previous landlord was succeeded by the current landlord in August 2019.

Clause 8 of the tenancy agreement states:

**Liquidated Damages:** If the Tenant breaches a material term of this Agreement that causes the Property Manager to end the tenancy by vacating or the Tenant gives notice before the end of the fixed term and does vacate before the end of any fixed term, the Tenant will pay to the Property Manager the sum of \$1,200.00 as liquidated damages and not as penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the Property Manager from claiming future rental revenue losses that will remain unliquidated.

On September 23, 2019 the tenant served a notice to end monthly tenancy and provided her forwarding address. The notice indicates the tenant will move out on or before 30 days from September 30, 2019. The landlord testified the tenant moved out on October 30, 2019.

A move-in inspection form was submitted into evidence. Both parties signed it on April 09, 2019. The move-out inspection did not happen. The landlord testified a move-out inspection was scheduled at the tenant's request for October 30, 2019. As the rental unit was not vacant, both parties agreed to postpone the move-out inspection to October 31, 2019. The landlord testified the tenant informed the landlord by e-mail she would not attend and the keys were left in the mailbox.

The landlord testified the tenant left the rental unit dirty. There was dirt inside the refrigerator, behind the fridge and in the exhaust fan. Photographs were upload into evidence showing the rental unit's condition upon the end of the tenancy. The bathroom needed to be painted and patched as the tenant caused damage to the walls. The rental unit was brand new when the tenancy started.

The landlord testified the cleaning cost was \$110.25 and provided a receipt for this amount. The landlord also provided a receipt for painting in the amount of \$126.00.

The landlord testified a new tenancy started the day after the tenant left the rental unit. The landlord testified the unit was advertised during the last month of the tenancy and several applicants visited the rental unit.

A ledger and a monetary order worksheet (RTB form 37) were provided. Both indicate the tenant did not pay October's 2019 rent (\$1,200.00), liquidated damages (\$1,200.00), cleaning (\$110.25) and painting (\$126.00). The total amount the landlord is claiming is \$2,636.25.

### Analysis

Sections 7 and 67 of the Act state:

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.

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;

- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

The testimony provided by the landlord during the hearing was cohesive and convincing.

### **Unpaid rent for October 2019**

The signed tenancy agreement indicates monthly rent was \$1,200.00, due on the first day of the month.

The landlord testified the tenant did not pay the rent in October 2019. The ledger submitted into evidence indicates no payment for rent in October 2019.

Section 26(1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act. Pursuant to section 26(1) of the Act, I find that the tenant was obligated to pay the monthly rent in the amount of \$1,200.00 on the first day of each month.

Based on the testimony of the landlord and the ledger, I find that the tenant did not pay rent in accordance with section 26(1) of the Act and owes the landlord \$1,200.00 for October 2019 rent.

### **Liquidated damages**

Residential Tenancy Branch Policy Guideline 04 provides clarification of liquidated damages with a definition in part as follows:

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 tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

In this matter, I find that the liquidated damage from clause 08 of the tenancy agreement is more along the lines of a penalty than a genuine pre-estimate of costs associated with re-rental of the unit. The liquidated damage established is equivalent to one full monthly rent and should be paid if the tenant “breaches a material term of this Agreement”, including ending the tenancy before the fixed term. No explanation was provided by the landlord about the amount established for liquidated damages and if the same amount would be due if the tenant breached another material term of the agreement.

As such, I am not satisfied the amount of \$1,200.00 is a genuine pre-estimate of the costs associated with re-rental of the unit and it is more along the lines of a penalty. Thus, I dismiss the landlord’s claim for liquidated damages.

Residential Tenancy Branch Policy Guideline 16 states:

An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:

“Nominal damages” are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

I find the tenant, by ending the fixed term tenancy before the agreed period, failed to comply with the tenancy agreement and this resulted in a loss to the landlord, as the landlord had to advertise the rental unit earlier than would have otherwise been required. As such, I award the landlord nominal damages in the amount of \$600.00.

## **Cleaning**

Section 37(2) of the Act states:

Leaving the rental unit at the end of a tenancy

37(2) When a tenant vacates a rental unit, the tenant must

(a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear

Residential Tenancy Branch Policy Guideline 1 states:

The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises)<sup>2</sup>, or for cleaning to bring the premises to a higher standard than that set out in the Residential Tenancy Act.

Based on the testimony, photographs and invoice of \$110.25 for cleaning, I find the tenant did not leave the rental unit reasonably clean and the landlord was required to undertake extensive cleaning at the end of the tenancy. I find the landlord had a loss of \$110.25 for cleaning the rental unit.

As such, I award the landlord \$110.25 in compensation for this loss.

## **Wall damage (painting)**

Residential Tenancy Branch Policy Guideline 1 states:

### **WALLS**

Cleaning: The tenant is responsible for washing scuff marks, finger prints, etc. off the walls unless the texture of the wall prohibited wiping.

### **Nail Holes:**

1. Most tenants will put up pictures in their unit. The landlord may set rules as to how this can be done e.g. no adhesive hangers or only picture hook nails may be used.

If the tenant follows the landlord's reasonable instructions for hanging and removing pictures/mirrors/wall hangings/ceiling hooks, it is not considered damage and he or she is not responsible for filling the holes or the cost of filling the 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.

### **PAINTING**

The landlord is responsible for painting the interior of the rental unit at reasonable

intervals. The tenant cannot be required as a condition of tenancy to paint the premises.

The tenant may only be required to paint or repair where the work is necessary because of damages for which the tenant is responsible.

Based on the landlord's testimony and invoice of \$126.00 for painting, I find the tenant is responsible for wall damage in the bathroom and the landlord was required to paint the walls of the bathroom due to damages caused by the tenant. I find the landlord had a loss of \$126.00 for painting the rental unit's bathroom walls.

As such, I award the landlord \$126.00 in compensation for this loss.

As explained in section D.2 of Policy Guideline #17, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord. I order the landlord to retain the tenant's security deposit of \$600.00 in partial satisfaction of the monetary losses incurred in this tenancy.

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

In summary:

Unpaid rent October 2019	\$1,200.00
Nominal damages	\$600.00
Cleaning and painting	\$236.25
Filling fee	\$100.00
Sub-total	\$2,136.25
Security deposit	\$-600.00
<b>Total</b>	<b>\$1,536.25</b>

### Conclusion

Pursuant to sections 38, 67 and 72 of the Act, I authorize the landlord to retain the tenant's security deposit of \$600.00 in partial satisfaction of losses incurred and grant the landlord a monetary order in the amount of **\$1,536.25**.

The landlord is provided with this order in the above terms and the tenant must be served with this order as soon as possible. Should the tenant 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: April 17, 2020

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Residential Tenancy Branch