# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

**Dispute Codes** TT: MNSDS-DR
LL: MNDL-S, MNRL, MNDCL, FFL

**Introduction**

The matter originally proceeded by way of a hearing on November 9, 2020 to deal with the following cross-applications by the parties pursuant to the *Residential Tenancy Act* (the "Act"):

The landlord requested:

- a monetary order for damage to the unit, site, or property, or for money owed or compensation for damage or loss pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant requested:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38.

The landlord was granted their application for review consideration on the grounds that they were unable to attend the original hearing due to circumstances beyond their control. The November 9, 2020 decision was suspended until this hearing was completed.

WS ("tenant") appeared as agent for the tenant in this hearing. Both parties attended this Review Hearing, and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

Both parties confirmed receipt of each other's applications for dispute resolution hearing package ("Applications") and evidence packages. In accordance with sections 88 and

89 of the *Act*, I find that both the landlord and tenant were duly served with each other's the Applications and evidentiary materials.

**Preliminary Issue: Application to Reverse or Reconsider the Review Consideration Decision:**

The agent for the tenant requested that the review hearing decision dated November 24, 2020 by another Arbitrator be re-considered on the grounds that the landlord did not disclose sufficient evidence of a ground for review on the basis that the landlord was unable to attend the original hearing because of circumstances beyond their control.

Although I acknowledge the agent's submissions, I note that I do not have the jurisdiction to consider this request as part of this hearing. Accordingly, I decline the agent's request for a reconsideration of the November 24, 2020 review consideration decision.

**Preliminary Issue: Did A Tenancy Exist?**

Agent for the tenant notes that there is no signed written tenancy agreement, and as notes that as per section 12(1) of the *Residential Tenancy Regulation*, the tenancy agreement must be in writing, and be signed and dated by both parties.

The agent argued that I cannot consider the applications before me as no tenancy agreement exists.

Although the agent is correct that there are specific requirements for a written tenancy agreement as set out in the *Act* and *Regulations*, in the absence of a signed and dated tenancy agreement, a tenancy agreement can still exist as noted below:

The definition of a "tenancy agreement" is outlined in the following terms in section 1 of the *Act*:

> **"tenancy agreement"** means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

Section 16 of the *Act* states the following about when a tenancy agreement takes effect.

**Start of rights and obligations under tenancy agreement**

> **16** 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.

A tenancy can exist in the absence of a written tenancy agreement. I find that in this case, it was undisputed by both parties that the landlord had collected a security deposit for this tenancy, and the tenant paid rent to the landlord in order to occupy the rental unit as of September 1, 2019. In light of the facts before me, I find that the both parties had entered into a tenancy agreement that commenced on September 1, 2019. Accordingly, I find that a tenancy did exist, and I have jurisdiction to render a decision on the matters before me.

**Preliminary Issue: Is this a Frustrated Tenancy?**

The agent for the tenant argued that the tenancy became frustrated due to pandemic. The agent argued that the pandemic was unforeseeable, and at the time it was quite uncertain what the future would hold for the tenant and the other students. The agent argued that the fear was high, and little was known, and that the pandemic should qualify as a frustration for health and safety reasons.

**Residential Tenancy Policy Guideline 34** states the following about a Frustrated Tenancy:

*A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.*

*The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.*

*A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.*

*The Frustrated Contract Act deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.*

I acknowledge that this tenancy ended during the early months of the global pandemic. Although I am highly sympathetic towards the parties that the pandemic had greatly affected the tenant, in consideration of the evidence and testimony before me, I am not satisfied that this tenancy meets the definition of a Frustrated Tenancy in contemplation of RTB Policy Guideline 34. Hardship, fear, and uncertainty is not sufficient for finding a contract to have been frustrated as I find that the contract could still be fulfilled according to its terms. Accordingly, I do not find that the contract was frustrated.

**Preliminary Issue: Request to Amend Tenant's Claim to add additional monetary claims:**

Agent for the tenant submitted a monetary order worksheet containing additional monetary claims that were not included in the tenant's original application. No amendments have been filed in accordance with the RTB Rules of Procedure by the tenant.

RTB Rules of Procedure 4.2 allows for amendments to be made in circumstances where the amendment can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made.

Rule 4.6 states the following:

***As soon as possible**, copies of the Amendment to an Application for Dispute Resolution and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by the applicable Act and these Rules of Procedure.*

*The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the Act and these Rules of Procedure.*

***In any event, a copy of the amended application and supporting evidence must be received by the* by the respondent(s) not less than 14 days before the hearing.**

It was undisputed that the tenant did not provide the landlord or the RTB with an Amendment to the Application for Dispute Resolution.

No amendments were received in accordance with RTB Rule 4.6. These rules ensure that a respondent is aware of the scope of the hearing and are prepared to respond, if they chose to do so. While the agent submitted a monetary order worksheet with these additional claims, this document does not constitute a proper amendment to the tenant's monetary claim.

Given the importance, as a matter of natural justice and fairness, that the respondents must know the case against them, I do not allow the tenant to amend their original application. The tenant remains at liberty to make a formal application for a monetary award for damages or losses arising out of this tenancy that were not considered as part of this application. Liberty to reapply is not an extension of any applicable limitation period.

**Issue(s) to be Decided**

Is the landlord entitled to a monetary award for losses arising out of this tenancy?

Is the landlord entitled to recovery of their filing fee?

Is the tenant entitled to the return of their security deposit?

**Background and Evidence**

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This tenancy commenced on September 1, 2019. The tenant argues that the landlord had changed or altered the tenancy agreement, which is undated and unsigned. The tenant provided two versions in their evidentiary materials. The tenant's agent testified that although the monthly rent was set at $2,550.00, payable on the first of every month, the landlord had charged the tenant an additional $150.00 per month for utilities, which was paid by the tenant as they felt that they did not have a choice. The tenant paid a security deposit in the amount of $1,250.00 the landlord, which was not returned to the tenant. The tenant submitted proof of service in their evidentiary materials that the

landlord was sent their forwarding address on June 10, 2020 by registered mail. The landlord filed their application for dispute resolution on September 13, 2020, and the tenant requested the return of their deposit plus compensation under section 38 of the *Act.*

The landlord testified that the tenant had entered into a fixed-term tenancy, and moved out before September 2020 when the fixed-term tenancy was to end. The landlord testified that the tenant had abandoned the rental unit, and left without providing the landlord with the code for the lock. The landlord also argued that the tenant did not clean the rental unit as required. The landlord is claiming the following losses:

| **Item** | **Amount** |
|---|---|
| Loss of rental income for May, June, July & August 2020 | $10,200.00 |
| Professional cleaning | 823.20 |
| Locksmith | 392.00 |
| New Lock | 88.48 |
| Filling holes/repairs to walls | 2,500.00 |
| Advertising Costs | 98.68 |
| **Total Monetary Order Requested** | **$14,102.36** |

The landlord is seeking compensation for the loss of rental income, as well as reimbursement for the cost of cleaning, locksmith, and painting. The landlord provided copies of the invoices for the locksmith and cleaning dated June 15, 2020 and June 5, 2020 respectively. Although the landlord testified that they had submitted a receipt for paining, neither the RTB nor the tenant had received a copy of that invoice. The landlord is also seeking reimbursement of the advertising costs spent in order to re-rent the suite. The landlord testified that despite the fact that they made efforts to re-rent to suite, due to the pandemic the landlord was unable to find a new tenant. The landlord testified that they eventually decided to rent out rooms instead of the entire suite in order to mitigate their losses.

The tenant's agent testified that the tenant had a discussion with the landlord in early April 2020 as the tenant lost their job and was worried about their health and safety during the pandemic. The agent testified that the tenant gave notice on April 9, 2020 to end the tenancy on April 30, 2020, and that the landlord was aware of this. The agent testified that the tenant did not abandon the suite, and that the landlord was given notice that the tenant could not stay. The tenant testified that the home was left in clean and

undamaged condition, as supported by the photos submitted, and that they did not change the code for the lock.

**Analysis**

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the party making the claim to prove, on a balance of probabilities, that the other party had caused damage and losses in the amounts claimed in their applications.

I have considered the sworn testimony as well as the documentary evidence before me. Despite the argument presented by the tenant that no tenancy existed, as I noted above my preliminary decision, I find that a tenancy did exist between the parties. The tenant presented two versions of the tenancy agreement, which the tenant argues was not signed, and was altered by the landlord. I find that there are discrepancies between both documents, although on both versions the tenancy is designated as a fixed term tenancy. Although the agreements were not signed, I find that a fixed-term tenancy existed between the parties.

It is also disputed as to whether the tenant gave proper notice to the landlord. The landlord testified that the tenant never gave proper notice, and simply moved out and changed the code, abandoning the rental unit. The tenant and her agent testified that the tenant had a discussion with the landlord, and gave formal notice on April 9, 2020 that the tenant was ending the tenancy effective April 30, 2020.

Section 44 of the *Residential Tenancy Act* states the following:

> **44** (1) A tenancy ends only if one or more of the following applies:
>
> (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
>
> (i) section 45 *[tenant's notice]*;
>
> (i.1) section 45.1 *[tenant's notice: family violence or long-term care]*;

(ii) section 46 *[landlord's notice: non-payment of rent]*;
(iii) section 47 *[landlord's notice: cause]*;
(iv) section 48 *[landlord's notice: end of employment]*;
(v) section 49 *[landlord's notice: landlord's use of property]*;
(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;
(vii) section 50 *[tenant may end tenancy early]*;

(b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
(c) the landlord and tenant agree in writing to end the tenancy;
(d) the tenant vacates or abandons the rental unit;
(e) the tenancy agreement is frustrated;
(f) the director orders that the tenancy is ended;
(g) the tenancy agreement is a sublease agreement.

(2) [Repealed 2003-81-37.]
(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Section 45(1) deals with a Tenant's notice in the case of a periodic tenancy:

**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.

Even if the tenancy was a month-to-month tenancy, the tenant is still required to give proper notice under section 45(1) of the *Act,* which requires that the effective date is not earlier than one month after the date the landlord receives the notice. I find that regardless of the disputed facts between the parties, the tenant and her agent's own testimony was that notice was given in April for the tenancy to end within the same month. The effective date given by the tenant does not comply with the Act, and even though the tenant's testimony was that notice was given, this tenancy was not ended in a manner that complies with the *Act*, as stated above.

The tenant did not give the landlord at least one month's notice. The landlord did not mutually agree to end this tenancy in writing, nor did the tenant obtain an order from the Residential Tenancy Branch for an early termination of this tenancy. No previous applications for dispute resolution have been filed by the tenant in regards to this tenancy, nor do I find this tenancy frustrated.

The evidence is clear that the tenant did not comply with the *Act* in ending this, and I therefore, find that the tenant vacated the rental unit contrary to Sections 45 of the *Act*.

The evidence of the landlord is that they were unable to re-rent the rental unit for the months of May 2020 through to August 2020. Residential Tenancy Policy Guideline #5 addresses a landlord's duty to minimize loss and states the following:

*"Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss[1]. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.*

*The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord*

*does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation[2]. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.*

*Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.*

*The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."*

The landlord's testimony was that they were not able to take possession of the rental unit as the landlord was awaiting proper notice from the tenant that the tenancy had ended. In this case, I am satisfied that the landlord took complete possession on June 5, 2020, the date the landlord had the locksmith change the locks. I note the landlord's testimony that it was difficult to find new tenants due to the pandemic. Despite the challenges the landlord faced, the landlord still has an obligation to demonstrate that they took steps to minimize the loss claimed. In this case, the landlord is claiming for loss of rental income for four months. In the landlord's application, the landlord submitted a monetary claim of $49.34 x 2 = $98.68 for advertising costs, which shows some effort on the landlord's part to minimize their losses by advertising the rental unit for at least two months. In the absence of invoices for the advertising costs, however, I am unable to determine which months the advertising costs were for.

I note that despite the landlord's testimony that they did not receive proper notice from the tenant, I find that the tenant did make it clear in her email dated May 8, 2020 that they had moved out. The tenant wrote "you are aware that we have moved out of the house…we are currently filing to have our damage deposit returned". Whether the landlord believed that they had proper notice or not at this point, I find that the tenant had communicated to the landlord that the tenant had moved out. Furthermore, I find the reference to return of the damage deposit shows that the tenant had ended the tenancy, regardless of whether the tenant had done this in a manner compliant with the *Act o*r not. As noted earlier, I made a finding that the tenant failed to end the tenancy in a manner compliant with the Act. I am satisfied that this did result in a delay the landlord's ability to advertise and re-rent the suite. On this basis, I am satisfied that the landlord suffered a monetary loss equivalent to the May 2020 rent due to lack of proper notice on the tenant's part, and I allow the landlord to recover this loss in the amount of $2,550.00. I also find the reimbursement of the advertising costs of $98.68 to be

reasonable, and allow this portion of the landlord's monetary claim. I am not satisfied that the landlord provided sufficient evidence to support their efforts to mitigate their loss of rental income for the remaining months as required by section 7(2) of the *Act,* and I dismiss the landlord's monetary claims for loss of rental income for June 2020 through to August 2020 without leave to reapply.

The landlord made a monetary claim to recover the cost of changing the lock due to the fact that the tenant had changed the door code, and did not provide the landlord with the new one. The tenant denies changing the code. In light of the disputed evidence before me, I am not satisfied that the landlord had provided sufficient evidence to support that the code was changed by the tenant. On this basis, I dismiss the claims by the landlord for recovery of the losses associated with changing the lock.

Section 37(2)(a) of the *Act* stipulates that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. The tenant disputes the landlord's testimony that the suite was not clean, and provided photos to support their testimony. In light of a disputed the claim, the party making the claim has the burden of proving their claim. In this case, I find the evidence falls short in supporting the landlord's testimony that the suite was not left in reasonably clean condition. Although I acknowledge the landlord's concerns about proper cleaning during a pandemic, I find that the landlord made the business decision to hire a professional cleaner. I am not satisfied that this loss was directly due to the tenant's failure to leave the suite in reasonably clean condition, and on this basis, I dismiss the landlord's monetary claim for cleaning without leave to reapply.

The landlord made a monetary claim for repairing and re-painting the walls. In light of the disputed testimony, I find that the landlord failed to properly support this portion of the claim. Accordingly, I dismiss this portion of the landlord's monetary claim without leave to reapply.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the landlord was only partially successful in their application, I find that the landlord is entitled to recover half of the $100.00 filing fee paid for this application.

The tenant filed an application under section 38 in relation to their security deposit, which the landlord still holds. Section 38(1) of the *Act* requires a 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 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 return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant."

In this case, I am satisfied that the tenant provided sufficient evidence to support that she had mailed the landlord her forwarding address on June 10, 2020. In accordance with sections 88 and 90 of the *Act,* the landlord is deemed served with this letter on June 15, 2020, 5 days after mailing. The landlord did not return the security deposit, and the landlord filed their application on September 13, 2020, well past the 15 days required by the Act. On this basis, I find that the tenant is entitled to the return of their entire deposit plus compensation equivalent to the original value of the deposit.

**Conclusion**

I find that the tenant is entitled to the return of their security deposit plus compensation equivalent to the value of the deposit under section 38 of the *Act.*

I issue a Monetary Order in the amount of $198.68 in the landlord's favour under the following terms which allows for the following monetary awards:

| **Item** | **Amount** |
|---|---|
| Loss of rental income for May 2020 | $2,550.00 |
| Advertising Costs | 98.68 |
| Recovery of Half of Filing Fee | 50.00 |
| Less Security Deposit Held | -1,250.00 |
| Less Monetary Award to Tenant under section 38 of the Act | -1,250.00 |
| **Total Monetary Order to Landlord** | **$198.68** |

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.

I dismiss the remaining claims without leave to reapply.

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 1, 2021

Residential Tenancy Branch