



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

### Dispute Codes FFT MNDCT

#### Introduction

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

- a monetary order for compensation for 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 from the landlords, pursuant to section 72 of the *Act*.

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. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing by the attending parties. Both parties confirmed that they understood.

As the parties were in attendance I confirmed that there were no issues with service of the tenant's application for dispute resolution ('application') and amendment. In accordance with sections 88 and 89 of the *Act*, I find that the landlords were duly served with the tenant's application and amendment. As all parties confirmed receipt of each other's evidentiary materials, I find that these were duly served in accordance with section 88 of the *Act*.

#### Issues

Is the tenant entitled to a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement?

Is the tenant entitled to recover the cost of the filing fee from the landlords for this application?

### **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 began in September of 2016. This respondent landlords took over this tenancy in August 2018 when they had purchased the property. Monthly rent was set at \$1,025.00 at the end of the tenancy, payable on the first of the month. The landlords returned the tenant's security deposit to the tenant when the tenant moved out on September 30, 2019.

The tenant filed this application requesting the following monetary orders as outlined in their monetary order worksheet dated April 29, 2022.

<b>Item</b>	<b>Amount</b>
Refund of rent August 1, 2018-September 30, 2019	\$14,125.00
Prescriptions for symptoms	255.98
Optometry—eye care & consultation	93.00
Air purifier	119.99
Face Mask & second air purifier	372.62
Acupuncture treatments	725.00
Counselling	1,200.00
Filing fee	100.00
<b>Total Monetary Order Requested</b>	<b>\$16,891.59</b>

The tenant is seeking reimbursement of the rent paid for this tenancy for the period of August 1, 2018 to September 30, 2019, as well as the above losses and expenses as the tenant believes that the landlords had knowing concealed their knowledge of mould in the home. The tenant submitted detailed evidence of how they were physically and mentally affected by the mould spores in the home, which the tenant alleges the landlord had known about after they had an initial home inspection performed in the home in September of 2018. The tenant started their Masters program in January of 2019 which required the tenant to be home for approximately 20 hours every day, and in February 2019 the tenant started experiencing allergy and hay fever like symptoms. The tenant described in detail their suffering, which the tenant stated was both “physically and mentally BRUTAL”. The tenant noted that on July 26, 2019, the landlord RN requested access to the suite's attic to check the vent again. When questioned, the

landlord simply replied that they wanted to ensure that the vent was working properly. On July 27, 2019, the landlord informed the tenant that the vent was working fine, with no mentions of mould.

In August of 2019, the tenant started to suspect that the cause of their issues was the home when they had left for a short period of time and experienced relief of their physical symptoms. The tenant testified that their symptoms returned and worsened upon returning to the home, and believes that the landlords had knowingly and intentionally deceived the tenant by failing to disclose the extent of the mould in the home. The tenant messaged the landlord RN on August 16, 2019 to discuss their concerns about the suite and the mould issue. The tenant testified that this was the first time the landlord had confirmed that there was a mould issue, and that they had attended in September 2018 and July 2019 to treat the mould.

The tenant hired an air quality inspector who confirmed the mould issue. The tenant submitted a copy of the report in their evidentiary materials. The correspondence from the inspector stated the following:

“There is a Cladosporium mould contamination in the attic and the spores are getting into the suite. The bedroom air is elevated with Cladosporium mould and the Cladosporium mould is growing on the toilet tank. Any areas of visible mould in the suite are most likely caused by the attic. The windows, the entrance door frame etc”.

The tenant testified that RN agreed to remediate the suite after obtaining their own assessment with a different air quality inspector, but the tenant felt that they could no longer trust the landlord and moved out on September 30, 2019. The tenant further observed mould on their golf bag upon moving out, which the tenant testified was clean, and never used during the tenancy. The tenant submitted photos of the golf bag as well as mould spores on the door frame. The tenant also submits that mould was growing on the underside of the toilet.

The tenant testified that their symptoms had improved greatly after moving out. The tenant testified that the constant nasal and sinus irritation, and repeated use of prescription nasal steroid sprays permanently damaged the tenant's nasal passages, and surgery was recommended by their Ear, Nose, and Throat specialist. The tenant feels that they could have been spared this amount of suffering if the landlord was forthright about the mould in the home.

The tenant submitted receipts for the expenses claimed for treatment of the tenant's physical symptoms, as well as their mental anguish. The tenant testified that they had waited to submit these claims as they wanted to confirm that these issues were indeed caused by the mould and landlords' actions.

The landlords dispute the entirety of the tenant's claims. The landlords testified that they had taken possession of the home in August of 2018, and had taken immediate action to remedy the issues noted in the home inspection, which included an issue with the venting of the bathroom fan in the attic. The landlord testified that they had obtained an inspection report prior to purchasing the home, and the report made no mention of mould in the home.

The landlord testified that they investigated the venting issue in September 2018 after taking possession, and took the appropriate steps as recommended by two home inspectors, which was to immediately spray the affected area with a mould and mildew killer. The landlord testified that they had attended on December 4, 2018 to confirm that there were no further issues, and noted that the area was dry, and that the repairs appeared to have worked.

The landlord testified that they had attended the attic to inspect the attic for bees in July 26, 2019, and observed that the vent was still working perfectly after the repairs, and that the area was completely dry. The landlord testified that they had sprayed the area again with mould and mildew killer as an added precaution.

The landlord testified that they were cooperative with the tenant, and offered to pay for the testing. The landlord testified that they had informed the tenant in detail of the steps taken as noted in their letter to the tenant dated August 25, 2019. The landlord testified that although there was mould found in the home, the landlord believes that the affected areas were in the tenant's own suite, and caused by the tenant's living habits rather than the issue in the attic. The landlord testified that they observed the tenant's suite to be very humid, with mould on the window sills. The landlord BN testified in the hearing that they were shocked by the amount of mould on the window sills, and was concerned that the window sills had not been cleaned properly. The landlord testified that the attic was separated from the suite by vapour seal, and that the symptoms experienced by the tenant were not related to the attic despite the tenant's belief that they were.

The landlords are requesting that the monetary claims be dismissed as the landlords feel that they had fulfilled their obligations to inspect and repair any issues as required

by *Act*. The landlords argued that the tenant failed to prove that their symptoms were due to landlords' actions or noncompliance, and should therefore be dismissed.

### **Analysis**

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter the tenant 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 tenant bears the burden of establishing their claim on the balance of probabilities. The tenant 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 tenant must then provide evidence that can verify the actual monetary amount of the loss. Finally, the tenant must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

The landlord's obligations to maintain and repair facilities in a rental property are set out in section 32(1) of the *Act* which reads in part as follows:

**32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that**

**(a) complies with the health, safety and housing standards required by law,...**

I have considered the written and oral submissions of both parties, and while I am satisfied that the tenant had clearly established that they had suffered from significant health problems during this tenancy resulting in the losses claimed, I must still assess whether the tenant's issues can be attributed to the landlord's actions, or failure to comply with the *Act*.

Although the landlord does not dispute that they had attended the attic on at least two occasions after purchasing the property to perform repairs, the landlord denies that the attic had an ongoing mould issue, and furthermore, the landlord denies knowledge of any issues that would have exacerbated the tenant's health issues during this tenancy. The landlord acknowledges that the vent required repairs as noted in the home inspection, and the landlord's testimony is that they had followed the directions of the inspector to repair the vent, and use a mould and mildew spray out of precaution. The landlord testified that they had followed up to ensure that the repair was effective, and that the area was dry.

The landlord does not dispute that the tenant may have suffered from health issues during this tenancy, but the landlord argued that the tenant's health issues could have been caused by the presence of mould inside the tenant's own suite, which the landlord argued was caused by the tenant. The tenant felt that the landlord was being deceitful, and failed to disclose the truth of mould in the attic and home.

In light of the disputed claims brought forth by the tenant, I note that the burden falls on the tenant to support their claims. In this case, although I am extremely sympathetic about the immense suffering the tenant has experienced, I am not convinced that the suffering was the result of the negligent or intentional actions of the landlords. I find that upon possession of the home, the landlord took care and attention to inspect the home and perform repairs as suggested by the home inspectors. Although the tenant feels that the landlord had acted in a deceptive manner, I do not find that the evidence supports this. I find the landlord to be forthright and cooperative, as indicated by their willingness to investigate and perform repairs at their own expense during this tenancy.

As noted by the landlords, the tenant has failed to establish that their symptoms were caused by mould in the attic, especially when mould was observed in the tenant's own suite. As multiple factors could contribute to the presence of mould such as high humidity due to living conditions, or unknown leaks, I am not satisfied that the tenant has met the burden of proof to support that the presence of mould was caused by the landlords' actions or failure to comply with the *Act*. As the landlords' stated in their sworn testimony, they were shocked by the level of mould on the windowsills.

I do note that the inspector had found that there was in fact mould contamination in both the attic and the suite, but the inspector does not state with certainty that the mould was caused by the attic. Rather, the inspector stated that any areas of visible mould in the suite was most likely caused by the attic. I do not find that the inspector was able to confirm with certainty the cause the of the mould in the home. Regardless, in light of the evidence before me, I find that the tenant failed to establish that their health problems stemmed from the landlords' actions. In fact, I find that the landlords had expressed and demonstrated their willingness to work with the tenant to further investigate and fix the issue once they realized the extent of the tenant's suffering, and unfortunately in this case the tenant felt could not continue with the tenancy.

I find that the evidence and testimony supports that the landlord took the initiative to undertake and complete repairs as required by section 32 of the *Act*, with consideration for the health and safety standards as demonstrated by the steps taken by the landlords including obtaining a home inspection report, following steps as recommended by the home inspector, performing follow-up inspections and precautionary measures to ensure that the issue is addressed, offering to pay for further testing, and communicating and working with the tenant to perform further inspections to deal with the tenant's complaints.

I am not satisfied that the landlords have failed in their obligations nor am I satisfied that there has been a contravention of the *Act* or tenancy agreement. Accordingly, I dismiss the tenant's application for reimbursement of their losses without leave to reapply.

The tenant also requested the return of the rent paid for this tenancy after the landlords had taken possession. In the case of a Frustrated Tenancy, a tenant would normally be entitled to the return of the rent from the point where it is determined the contract was frustrated.

**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 15<sup>th</sup> 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.*

In consideration of the evidence and testimony before me, I am not satisfied that this tenancy meets the definition of a Frustrated Tenancy as clarified by RTB Policy Guideline 34. Despite the fact that there was mould in the rental unit, the evidence shows that the tenant continued to reside in the rental unit until September 30, 2019. Although I am sympathetic about the fact that the tenant was suffering from allergy symptoms and associated mental anguish during this tenancy, I am not satisfied that the cause of the tenant's suffering had been proven beyond speculation. I am not satisfied that this tenancy qualifies as a Frustrated Tenancy, and accordingly, I dismiss the tenant's claims for the reimbursement of their rent 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 tenant was



unsuccessful with their application, I find that the tenant is not entitled to recover the \$100.00 filing fee paid for this application. The tenant must bear the cost of this filing fee.

**Conclusion**

The tenant's entire application is dismissed 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: May 30, 2022

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Residential Tenancy Branch