



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### **Dispute Codes**

Landlord: MNDL-S, MNDCL-S, FFL  
Tenant: MNSDB-DR, FFT

### **Introduction**

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

- a Monetary Order for the return of the security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

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

- a Monetary Order for damages, pursuant to section 67;
- a Monetary Order for damage or compensation under the Act, pursuant to section 67;
- authorization to retain the tenant's security and pet damage deposits, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 1:40 p.m. in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 p.m. The landlord's agent (the "agent") attended the hearing and was 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 agent and I were the only ones who had called into this teleconference.

Rule 7.1 of the Residential Tenancy Rules of Procedure states that the dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator.

Rule 7.3 states that 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.

Pursuant to the above, in the absence of any evidence or submissions from the tenant, I order the tenant's application for dispute resolution dismissed without leave to reapply.

The agent testified that the tenant was served with the landlord's application for dispute resolution and evidence via registered mail on March 4, 2022. A Canada Post Registered mail receipt stating same was entered into evidence. I find that the tenant was deemed served with the above documents on March 9, 2022, five days after their registered mailing, in accordance with sections 88, 89 and 90 of the *Act*.

The agent was advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. The agent testified that she was not recording this dispute resolution hearing.

The agent confirmed the landlord's email address for service of this Decision.

### **Issues to be Decided**

1. Is the landlord entitled to a Monetary Order for damages, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to retain the tenant's security and pet damage deposits, pursuant to section 38 of the *Act*?
4. Is the landlord entitled to recover the filing fee for this application from the tenant, pursuant to section 72 of the *Act*?

### **Background and Evidence**

While I have turned my mind to the documentary evidence and the testimony of the agent, not all details of the agent's submissions and arguments are reproduced here.

The relevant and important aspects of the agent's claims and my findings are set out below.

The agent provided the following undisputed testimony. This tenancy began on September 5, 2020. The parties signed a new one year fixed term tenancy agreement on August 11, 2021 with a term of October 1, 2021 to September 30, 2022. Monthly rent in the amount of \$3,900.00 was payable on the first day of each month. A security deposit of \$1,950.00 and a pet damage deposit of \$1,950.00 were paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The agent testified that an agent for the landlord and the tenant completed joint move in and out condition inspection reports. The reports are signed by the tenant and an agent of the landlord and were entered into evidence.

The agent testified that the tenant provided the landlord with their forwarding address via email on February 12, 2022. The landlord filed for dispute resolution on February 23, 2022.

The agent testified that in November of 2021 the tenant gave notice to end tenancy effective December 31, 2021. The agent testified that the landlord is seeking to recover a tenant replacement fee from the tenant in the amount of \$2,047.50 because the tenant breached the fixed term tenancy agreement.

Section 37 of the tenancy agreement states:

If the tenant ends the fixed term tenancy before the end of the original term or if the tenant fails to give one full calendar months' notice on a month-to-month tenancy, the Landlord, may, at the Landlord's option treat this Agreement as being at an end. In such event, the sum of half a month's rent plus GST will be paid by the Tenant to the Landlord as Liquidated Damages and not as a penalty to cover the administrative costs or re-renting the rental unit. The Landlord and Tenant acknowledge and agree that the payment of [sic] Liquidated Damages will not preclude the Landlord from exercising any further right of pursuing another remedy available in law or equity, including, but not limited to damage of the rental unit or residential property and damages as a result of lost rental income due to the Tenant's breach of any term of this agreement.

The agent entered into evidence a Placement Invoice from the landlord's property management company which charges the landlord a tenant placement fee in the amount of \$1,950.00 plus GST of \$97.50 for a total of \$2,047.50.

The agent testified that utilities were not included in the rent. The agent testified that for the duration of the tenancy the tenant paid their utility bills but did not pay the last city utility bill for the period of October 1, 2021 to December 31, 2021, in the amount of \$522.55. The landlord entered into evidence a city water, sewage and garbage bill for the above period totalling \$522.55. The invoice is in the landlord's name. The agent testified that the landlord has paid this bill and is seeking to recover the above amount from the tenant.

The tenancy agreement states that utilities are not included in the rent.

The agent testified that the tenants did not clean the subject rental property at the end of the tenancy to the standards of the new tenants. The agent testified that at the move in condition inspection of the subject rental property with the tenants who moved in after the tenant moved out, the new tenants asked for a full home clean, which was granted by the landlord. The agent entered into evidence a receipt for cleaning as follows:

- Cleaning-detailed clean bathroom kitchen: \$210.95
- Re-do cleaning whole property: \$800.00
- GST 5%: \$50.55
- Total: \$1,061.50

The move out condition inspection report states that the subject rental property was the same condition on move out as on move in and does not make any notation regarding the subject rental property needing cleaning.

The agent testified that the move out condition inspection report does not state that the subject rental property is dirty or required cleaning because the agent for the landlord who completed the move out condition inspection report felt that the tenant did a full clean and thought the tenant met the required cleanliness standard.

The agent testified that the new tenants had a very high cleanliness standard. The agent testified that the tenant did general cleaning at the subject rental property but did not meet the standards of the new tenants.

The agent entered into evidence eight photographs of a bathroom which show that it is dirty and there is hair in the drain.

The agent testified that other photographs were not entered into evidence because it was hard to show the dirty areas. The agent testified that the kitchen was greasy, and the floors were a little greasy.

## **Analysis**

### **Damages- General**

Section 67 of the *Act* states:

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.

Policy Guideline 16 states that it is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To be successful in a monetary claim, the applicant must establish all four of the following points:

1. a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
2. loss or damage has resulted from this non-compliance;
3. the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Failure to prove one of the above points means the claim fails.

### **Liquidated Damages**

Policy Guideline #4 states that 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.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally, clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

Based on the undisputed testimony of the agent, I find that the tenant breached the fixed term tenancy by ending the tenancy prior to the end of the fixed term.

Based on the agent's testimony and the signed tenancy agreement in evidence, I find that the tenant signed the tenancy agreement and is liable to pay liquidated damages for causing the tenancy to end prematurely. I find that the liquidated damages clause was clearly and carefully laid out in the tenancy agreement and detailed the consequences of breaking the fixed term tenancy agreement to the parties.

I find that the amount of ½ a month's rent plus GST stipulated to cover the administration costs that the landlord would have likely incurred at the time the tenancy agreement was entered into is reasonable and not extravagant or exorbitant in relation to the rent payable in this tenancy. I find that the tenant is liable to pay liquidated damages in the amount of \$2,047.50 which is ½ month's rent plus GST.

#### Utility Invoice

Upon review of the tenancy agreement, I find that the tenant was responsible for the cost of all utilities at the subject rental property including water, sewage and garbage. I accept the agent's undisputed testimony that the agent did not pay the last water/sewage/garbage invoice totaling \$522.55. I accept the agent's testimony that the landlord paid the above invoice and I find that this loss was suffered due to the tenant's

breach of the tenancy agreement. Pursuant to section 67 of the *Act*, I order the tenant to pay the landlord \$522.55 for unpaid utilities.

### Cleaning

Section 37(2)(a) of the *Act* states that when tenants vacate a rental unit, the tenants must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Section 21 of the Residential Tenancy Act Regulation states:

In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

Upon review of the landlord's evidence, namely the photographs of the bathroom, I find that the landlord has provided a preponderance of evidence that the bathroom was not clean, despite the fact that the dirty bathroom was not noted on the move out condition inspection report. I find that the dirty bathroom left by the tenant breached section 37(2)(a) of the *Act*.

I find that the landlord has not provided a preponderance of evidence to prove that the rest of the subject rental property required cleaning as no photographs to establish the level of cleanliness were provided and the move out condition inspection report does not note any dirty areas. I find that the agent's testimony alone is not a preponderance of evidence that would override the move out condition inspection report, especially since another agent of the landlord believed the cleaning job of the tenant was adequate.

The cleaning invoice does not state how much it cost to clean the bathroom alone. As the landlord has not provided a preponderance of evidence to override the move out condition inspection report, I find that the landlord has not proved that the landlord suffered a loss totalling \$1,061.50 from the tenant's breach of the *Act*.

Residential Tenancy Policy Guideline 16 (PG #16) states that 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

that the landlord has proved that the tenant breached the *Act* by failing to adequately clean the bathroom; however, the landlord has not proved the value of that loss as the invoice does not list that cost separately. Pursuant to PG #16, I award the landlord \$100.00 in nominal damages for the dirty bathroom.

### Security Deposit

I accept the agent's undisputed testimony that the landlord received the tenant's forwarding address via email on February 12, 2022.

Section 38(1) of the *Act* states that within 15 days after the later of:

- (a) the date the tenancy ends, and
  - (b) the date the landlord receives the tenant's forwarding address in writing,
- the landlord must do one of the following:
- (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
  - (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord made an application for dispute resolution claiming against the security deposit pursuant to section 38(1)(a) and 38(1)(b) of the *Act*.

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$100.00 filing fee from the tenant, pursuant to section 72 of the *Act*.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain \$2,770.05 from the tenant's security and pet damage deposits. I Order the landlord to return the remaining \$1,129.95 to the tenant.



Conclusion

I issue a Monetary Order to the tenant in the amount of \$1,129.95.

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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: October 17, 2022

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Residential Tenancy Branch