



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Ministry of Housing

## **DECISION**

Dispute Codes      MNRL-S, FFL

### Introduction

The Landlord applied for dispute resolution (“Application”) and seeks the following:

- a Monetary Order for unpaid rent under sections 26 and 67 of the *Residential Tenancy Act* (the “Act”);
- to retain the security deposit under section 38 of the Act; and
- to recover the cost of the filing fee under section 72 of the Act.

The Landlord and their Agent, K.K., attended the hearing. The Tenant also attended the hearing. All parties who provided testimony affirmed to tell the truth during proceedings and were given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

The Landlord testified they served the Notice of Dispute Resolution Package (“Materials”) on the Tenants by registered mail. The Tenant confirmed receipt of the Landlord’s Materials. Given this, I find that pursuant to section 89 of the Act, the Landlord’s Materials were sufficiently served to the Tenants.

The Tenant confirmed they had not served their evidence to the Landlord. As Rule 3.15 of the *Rules of Procedure* states that a respondent must serve their evidence on the applicant and the evidence must be received by the applicant not less than seven days before the hearing, I exclude the Tenant’s evidence from consideration.

### Preliminary Issue: Jurisdiction

The issue of jurisdiction of the Residential Tenancy Branch was considered. If there is no tenancy agreement I must consider if I have jurisdiction to hear this matter. In addition to tenancy agreements, section 2(1) of the Act states that the Act applies to rental units and other residential property. Based on the evidence available I find that the matter before me does involve rental units and other residential property and therefore the Act applies, and therefore I have jurisdiction to hear this matter.

### Issues to be Decided

1. Is the Landlord entitled to a Monetary Order for unpaid rent?
2. Is the Landlord entitled to retain the security deposit?
3. Is the Landlord entitled to recover the cost of filing fee from the Tenant?

### Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this Decision.

The parties disagreed on many of the details regarding the tenancy. However, the parties did agree on the following:

- The Tenant never occupied the rental unit.
- The Tenant paid a deposit of \$1,500.00 to the Landlord in cash on April 2, 2022.
- The Landlord still retains the deposit.

K.K. testified as follows. There was no written agreement in place. The Tenant had paid a deposit to the Landlord on April 2, 2023 in cash to hold the property and they had a verbal agreement for the tenancy to start on May 1, 2022. Rent was to be \$3,000.00 per month, due on the first day of the month.

On April 8, 2022 the Tenant visited the rental unit and brought other people with them who would also occupy the rental unit. On April 9, 2023 there was a further visit to the rental property by the Tenant and they told the Landlord that eight people would be occupying the property, not five as had been agreed upon initially. The Tenant stated there would also be two further occasional occupants of the rental unit who would stay

from time to time. The Landlord told the Tenant that this number of occupants was not agreed to, and the Tenant left the rental unit.

The following day, on April 10, 2023 the Tenant telephoned the Landlord to say they no longer wanted to take on the tenancy for the rental unit.

The Landlord wishes to retain the deposit as they told the Tenant it was non-refundable, and they seek compensation equivalent to one month's rent as they received no rent for the month of May 2022. They had advertised the rental unit on April 22, 2022 and had been able to find alternative tenants who occupied the rental unit from June 1, 2022.

The Tenant never occupied the rental unit and, as a result, there was no issue of damage done to the rental unit by the Tenant and no condition inspection reports completed. No requests for the return of the deposit had been made by the Tenant.

The Tenant testified as follows. There was never a date agreed upon for when the tenancy would start. As the Tenant had not given notice to end their current tenancy, they were not able to commit to a date and did not want to be penalized by ending their current tenancy without giving proper notice. They were hoping to be able to leave their current tenancy by mid-May 2022, though they had not discussed this with their landlord. They had paid the deposit to hold the property but had not been informed that it was non-refundable.

On April 8, 2022 the Tenant went to look at the rental unit. The Tenant and their spouse signed a tenancy agreement whilst at the rental unit, though it did not provide the date the tenancy would commence. The Landlord had not signed the tenancy agreement at this point and a copy of the tenancy agreement was never provided to the Tenant. During the visit the Landlord had agreed to six occupants of the rental unit, plus a further two occasional occupants as they had family members who would stay periodically.

On April 9, 2022 during a telephone call, the Landlord said to the Tenant that they did not agree to six permanent occupants plus two occasional occupants and canceled the agreement. The Tenant asked for the deposit back and was told by the Landlord that it was non-refundable.

The Tenant then drove round to request the deposit back in-person and they were told by the Landlord they would “see them in court” and they would not speak with them any further. In August 2022 the Tenant provided their forwarding address in writing to the Landlord and requested the deposit in writing in an accompanying letter.

The Landlord entered into evidence a Tenant’s Notice of Forwarding Address for the Return of Security Deposit (form RTB-47) signed by the Tenant and dated April 14, 2022. A proof of service (form RTB-41) confirming the forwarding address was served on August 9, 2022 was also entered into evidence by the Landlord.

The Tenant stated they had not started their own application for dispute resolution and were waiting for the outcome of the hearing for the Landlord’s Application regarding the deposit. They reside in the same property as they did in April 2022 and have not given notice to end the tenancy for their residence.

### Analysis

#### *Claim for Unpaid Rent*

The Landlord asserts that the Tenant withdrew from the tenancy agreement, under which they were obligated to pay the Landlord rent in the amount of \$3,000.00 by May 1, 2022. The Landlord was able to enter into a tenancy agreement with a new tenant, effective June 1, 2022, so they seek \$3,000.00 in compensation which is the equivalent to one month’s rent.

Section 26 of the Act requires tenants to pay rent when it is due under the tenancy agreement. The obligation to pay rent on the part of a tenant arises when a tenancy agreement is entered into. In this case, the Landlord must prove, on the balance of probabilities, that there was a tenancy agreement in place between them and the Tenant, and therefore the contractual obligation to pay rent arose.

In this case, there is no signed tenancy agreement and no written correspondence between the parties to confirm their intentions regarding any agreement. I am therefore only able to consider the verbal testimony of parties provided to me during the hearing in determining if there is a tenancy agreement in place that required the Tenant to pay the Landlord rent.

The Act defines a tenancy agreement as 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, so it is possible to form an unwritten tenancy agreement whether express or implied.

Having carefully considered the testimony of both parties, I find that there is not a tenancy agreement in place between the Landlord and the Tenant. I accept that there was intention to contract from both parties, but I am not satisfied that specific terms of the contract, namely the date the agreement commenced and the number of occupants permitted in the rental property, were mutually agreed upon by the parties. Without this mutual agreement, I find there is not an enforceable tenancy agreement in this case.

I found the testimony of the Tenant to be clearer and more grounded in reality than that of the Landlord's. Accordingly, I give greater weight to the Tenant's testimony. I found the Tenant's assertions that the date the tenancy would commence was not agreed upon to be particularly convincing, given that it seems entirely logical that a notice period for their current residence would need to be finalized.

As I have found that the Landlord has not proven, on the balance of probabilities, that there is an enforceable tenancy agreement in place, I find the Landlord is therefore not entitled to compensation for unpaid rent and I dismiss their request without leave to reapply.

#### *Request to retain the security deposit*

Section 20(a) of the Act states that a landlord must not require a security deposit at any time other than when the landlord and tenant enter into the tenancy agreement. As I have found that a tenancy agreement was not entered into by the parties, the amount paid by the Tenant to the Landlord can not said to be a security deposit.

Based on the testimony of both parties, I found that both parties were of the understanding that the payment was a "holding" deposit. There is no provision for such a deposit under the Act. Section 7 of the Residential Tenancy Regulation sets out non-refundable fees that a landlord may charge and a "holding" deposit is not listed here. Given this, I dismiss without leave the Landlord's request to retain the security deposit. I find the Tenant is entitled to the return of the deposit. The Landlord is ordered to pay the

Tenant \$1,500.00 as reimbursement for the amount paid by the Tenant to the Landlord in cash on April 2, 2022.

The Landlord is cautioned that section 20(e) of the Act states that a landlord must not require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement. Essentially, saying that a deposit is non-refundable does not make it so. Section 15 of the Act also prohibits a landlord from charging a person for accepting an application for a tenancy, processing the application, investigating the applicant's suitability as a tenant, or accepting the person as a tenant.

As the Landlord's Application was not successful, they must bear the cost of the filing fee.

### Conclusion

The Landlord's Application is dismissed without leave to reapply.

The Tenant is provided a Monetary Order in the amount of \$1,500.00. This Monetary Order is attached to this Decision and must be served on the Landlord. It is the Tenant's obligation to serve the Monetary Order on the Landlord. The Monetary Order is enforceable in the Provincial Court of British Columbia (Small Claims 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 Act.

Dated: May 17, 2023

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Residential Tenancy Branch