



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes

For the tenant – DRI, MNDC, MNSD, FF

For the landlord – MNR, MNDC, MND, MNSD, FF, O

Introduction

This decision deals with two applications for dispute resolution, one brought by the tenant and one brought by the landlord. Both files were heard together.

The landlord seeks a Monetary Order for unpaid rent, for money lost or compensation for damage or loss under the Act, for damage to the rental unit and to recover the filing fee. The landlord has also applied to keep the tenants security deposit and to deal with some other issues. The tenant disputes an additional rent increase, and seeks a Monetary Order for Money owed or compensation for damage or loss under the Act for and to recover the filing fee. The tenant also seeks the return of the security deposit.

Both Parties served the other by registered mail with a copy of the Application and Notice of Hearing. I find that both Parties were properly served pursuant to s. 89 of the *Act* with notice of this hearing. This hearing started on November 13, 2009 and was reconvened to December 22, 2009 to allow more time for evidence to be presented.

Both Parties appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in written form, documentary form, to cross-examine the other Party, and make submissions to me. A substantial amount of documentary evidence, photo evidence, and written arguments has been submitted by the Parties. I have thoroughly reviewed all submissions. On the basis of the solemnly affirmed evidence presented at the hearing I have determined:

Issues(s) to be Decided

- Has the landlord established a monetary claim due to the loss of rent and damage to the rental unit?

- Is the landlord entitled to keep all or part of the security deposit and interest?
- Is the landlord entitled to recover filing fees from the tenant for the cost of the application?
- Are either party entitled to money owed or compensation for damage or loss under the *Act* and if so how much?
- Has the tenant provided sufficient evidence to dispute an additional rent increase?
- Is the tenant entitled to receive the security deposit back?
- Is the tenant entitled to recover the filing fee from the landlord for the cost of the application?

Background and Evidence

This tenancy started on September 01, 2008. This was a fixed term tenancy however the date in which it was due to expire is in dispute. On the landlord's tenancy agreement it shows the fixed term expires on August 31, 2009 and on the tenant's agreement the fixed term expires on August 31, 2010. The landlord has explained that this was an error on his part and is happy to accept the tenant's agreement dates. The tenant paid rent of \$1,700.00 which was due on the 1st of each month. The tenant paid a security deposit of \$800.00 on December 18, 2006 and \$50.00 on September 01, 2008. The tenant also paid a deposit for utilities of \$150.00 on December 18, 2006. A move in condition inspection was completed by both Parties; however the move out condition inspection was completed in the tenant's absence. The tenant moved from the rental property on June 21, 2009. He gave the landlord his forwarding address on July 15, 2009.

The tenant states that he was charged an unlawful rent increase from September, 2008 to June, 2009. The landlord increased the tenant's rent by \$100.00 per month which is above the allowable amount for 2008.

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The tenant states that there was a flood caused by an upstairs toilet backing up which had been a continually issue throughout his tenancy and despite numerous telephone calls to the landlord no action was taken by the landlord to rectify the problem. The tenant claims to have called the landlord in Israel on his cell phone at a cost of \$215.00 because the landlords' son who was left in charge could not deal with his issues concerning the toilet back up and an issue with some trees. He claims that the landlord did not take steps to rectify this problem and on June 16, 2009 a water leak came through the tenants' ceiling from the toilet in the upstairs unit and caused damage to his bedroom suite at a cost of \$3,408.86 and to his duvet which cost \$39.20 to be cleaned and his pillows which cost \$50.00 to be cleaned. The tenant called the landlord and an insurance assessor came to assess the damage and indicated they could start work to rectify the damage to the unit on June 22, 2009. The tenant claims that at first he was told by the landlord that the work would take five days and then he was told by a member of the restoration company that the work would take three to four weeks to complete. The tenant also claims that he was told that there was a high level of contamination of nearly three times the acceptable levels. The tenant claims he spent three nights sleeping on his sofa as he could not use his bed. The tenant claims the landlord treated this flood as a minor event and expected the tenant to move into a spare bedroom. The tenant claims that the landlord did little to help him and did not offer him alternative accommodation.

The tenant also claims the return of double his security deposit plus interest because it was not returned to him within 15 days of the landlord receiving his forwarding address in writing. The tenant claims half of the rent back for June, 2009 of \$800.00 as he was forced to move from the rental unit on June 21, 2009 due to the contamination. The tenant also claims \$500.00 for having to cut, pile and remove trees and hedges he cut from the property at a cost of \$75.00 per hour for five hours work and the cost of the dump. The tenant is also claiming \$45.00 paid to a Notary for work completed for this hearing.

The tenant further claims that the landlord has falsified his signature and initials on the tenancy agreement. The tenant also claims the landlord did not meet him as arranged to complete the move out condition inspection. The tenant again arranged with the landlord to meet on July 15, 2009 to do the inspection and found that the landlord had already completed it. The tenant also



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claims that the landlords' insurance assessor told him that the landlords' insurance claim was a full claim and all his costs would be covered. The tenant feels that this would also cover his loss of rent for July, 2009 while the work was taking place.

The landlord did not dispute the rent increase given to the tenant in September 2008.

The landlord agrees that there was a flood caused by a toilet backing up in the unit upstairs and he took immediate steps to rectify the problems. The landlord claims he offered the tenant alternative accommodation of a higher standard which the tenant refused to accept. The tenant and landlord held a meeting where the tenant told the landlord he wanted to move out. The landlord also claims and has provided evidence from the restoration company that the levels of contamination were generally lower than the acceptable levels and is unsure where the tenant got his advice from that these levels were above the acceptable level. The tenant stated that he was told the contamination levels were 375 where the landlords' evidence shows that the contamination levels were 178 with one area being at 230. This evidence from the restoration company also states that the area registering at 230 was just above an acceptable level. A typical swop test in a contaminated area would be 3,800 to 4,000. If the tenants unit had registered this sort of high level then it would have been uninhabitable. The landlord claims that this was a three bedroom unit and the tenant would have been able to move into one of the other bedrooms while the work was taking place or take his offer of alternative accommodation. Instead the tenant chose to end the tenancy early. The landlord stated that he tried to come to an agreement with the tenant that he could end the tenancy early if he paid one months' rent; however the tenant refused this offer also.

The landlord argues that it was the tenants' bed and bedding which was damaged by the flood and not the remainder of his bedroom suite. The landlord has provided in evidence a copy of the tenancy agreement addendum which states that a tenant is expected to have his own insurance in the event of problems such as this. As the tenant does not have insurance should the landlord be libel for his costs when the landlord has not been negligent. The landlord has also provided letters from previous and current tenants stating that they have never had any issues with the sewer blocking as stated by the tenant.



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The landlord claims that the tenant called him very late on Sunday 20, 2009 and left a message to complete the move out condition inspection. The landlord did not get this call until the next day and called the tenant back and left a message about coming to do the move out condition inspection. The tenant did not return his call at that time. As the restoration company workers needed to get in and start the work the landlord asked a third party to carry out an inspection in all areas other than those areas damaged by the flood. This report indicates damage to the rental unit as follows. Filling and painting areas with hole marks at \$286.56 and cleaning services at \$30.00. The landlord also claims unpaid rent for July 01 to 16, 2009 of \$877.42 (as he re-rented the unit on July 17, 2009) \$25.00 for a returned cheque fee for July, 2009 rent and \$178.50 for his costs to a rental company to find a new tenant.

The landlord claims that the tenancy agreement states that the tenant is responsible for snow clearance. The tenant has claimed for cutting trees and hedges because they came down in the heavy snow and he had to remove these to the dump. However, the landlord has provided a statement from another tenant who states that the tenant cut down the tree branches because they became heavy with snow and he did not like them touching his truck roof. This letter also states that it was this tenant who took the branches to the dump at no charge, not the tenant as he claims.

The landlord states that when he went to Israel he left his son to act as the property manager. It was the tenants' choice to call him in Israel when he should have dealt with his son. The landlord also points out that the tenant is claiming \$215.00 for this phone call where his phone bill shows that the call cost was in fact \$154.15. He also claims that this phone call dealt with the issues of the hedge and snow clearance not issues with the sewer.

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Analysis

I have carefully considered all the evidence before me, including the affirmed evidence of both parties and witnesses. The burden of proving a claim lies with the applicant and when it is just the applicants' word against that of the respondent that burden of proof is not met. In the matter of the tenants application I find he has not provided sufficient corroborating evidence to support the majority of his claim. The tenant has the burden of proof that there was negligence on the

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part of the landlord that caused the flood to occur. As the tenant has not met this burden of proof the landlord cannot be held liable as he had no way of knowing that the flood would occur. The tenancy agreement addendum does state that the tenant is expected to hold his own tenants insurance for his belongings. As the tenant has failed to take out this insurance I find he cannot expect the landlord to compensate him for his loss. Therefore, this section of the tenants claim is dismissed without leave to reapply.

With regards to the tenants claim for a return of half his month's rent for June, 2009, I find the landlords evidence more compelling with regards to the contamination levels and the offer of alternative accommodation for the duration of the restoration work. Therefore, I find the tenant did end his tenancy early and by his own admission the tenancy agreement was a fixed term agreement until August 2010. As the landlord mitigated his loss for a loss of revenue for July, 2009 by re-renting the unit for July 17, 2009 I find the tenant is responsible for rent up to that time. Therefore, this section of the tenants claim is dismissed without leave to reapply.

With regards to the tenants claim for his telephone call to Israel I find the landlord did leave his son as the property manager and the tenant did telephone the landlords son. Therefore, it was the tenants' choice to call the landlord in Israel and he must therefore bear the cost of this phone call. This section of the tenants claim is dismissed without leave to reapply.

With regards to the tenants claim for \$45.00 for Notary fees I find as this was the tenants choice to use the services of a Notary he must bear this cost. The tenant has also claimed that the landlord has forged his name and initials on the tenancy agreement. I find this has no bearing on the outcome of this hearing as the tenancy has ended and the landlord admits he made an error on the end of tenancy dates.

With regards to the tenants claim for \$500.00 for tree and hedge cutting and a trip to the dump. I find that the tenant was responsible for snow clearance on the rental property. Therefore, this would also apply to removing snow from the hedges if it created an additional problem by bending the branches down. I also find I prefer the landlords' evidence from the other tenant that

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it was not the tenant that carried out a trip to the dump. Therefore, this section of the tenants claim is dismissed.

With regard to the tenants claim to dispute a rental increase. I find the amount of rent the landlord could have charged the tenant for 2008 was 3.7%. Therefore, this would have increased the tenants rent by \$59.20 not by the \$100.00 the landlord did increase the rent by. Therefore, I find the tenant is entitled to recover the difference of \$40.80 for the 10 months to a sum of **\$408.00**

With regards to the landlord claim for a loss of rental revenue from July 01 to July 16, 2009, I find the landlord is entitled to be reimbursed for this amount as the tenant did not give the landlord any notice to end the tenancy and the tenancy was for a fixed term. Therefore, I find the landlord is entitled to recover rent to the amount of **\$877.42**. The landlord has also claimed **\$25.00** for a returned cheque fee for the July, 2009 rent cheque that was returned as insufficient funds were available. I find that the landlord is entitled to recover this amount.

With regards to the landlords claim for damage to the rental unit, I find that the landlord's evidence is contradicted by the tenants' evidence as to the agreement concerning the dates and times to carry out the move out condition inspection. Sections 35 of the Act say that a Landlord must complete a condition inspection report at the beginning of a tenancy and at the end of a tenancy in accordance with the Regulations and provide a copy of it to the tenant (within 7 to 15 days). A condition inspection report is intended to serve as some objective evidence of whether the tenant is responsible for damages to the rental unit during the tenancy or if he has left a rental unit unclean at the end of the tenancy.

The purpose of having both parties participate in a move in and move out condition inspection report is to provide evidence of the condition of the rental unit at the beginning of the tenancy so that the Parties can determine what damages were caused during the tenancy. In this event the landlord claims that he did attempt to call the tenant to meet with him to do the move out condition inspection. Section 35 (2) of the Act states: that a landlord must give a tenant at least two opportunities to attend an inspection. I find the landlord did not do this as he was concerned

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about the restoration men starting work and he got a third party to complete the inspection in the tenants' absence. Section 36 of the Act states unless a tenant has abandoned the rental unit the right of a landlord to make a claim against the security deposit for damages is extinguished if the landlord has not complied with section 35(2). Therefore, I find the landlord is not entitled to keep the tenants security deposit for damages to the rental unit. However, the landlord has provided additional evidence to support his claim for damages and cleaning of the rental unit and I find that as the tenant did move from the unit before the end of the tenancy he did not do the repairs and final clean of the unit. I therefore find the landlord is entitled to recover the amount of \$316.56 from the tenant. I further find that as the tenant ended the tenancy without proper notice the landlord is entitled to recover his costs of **\$178.50** paid to the rental company to secure new tenants.

With regards to the tenants claim for the return of double his security deposit I find that as the landlord has been successful in his claim to retain the security deposit for unpaid rent for half of July, 2009 the tenant is not entitled to have this amount doubled or returned.

As the landlord has been successful with his claim he is entitled to recover the filing fee of \$50.00 from the tenant pursuant to section 72(1) of the Act. I further find the tenant must bear the cost of filing his own application.

I find the landlord is entitled to the following amounts:

Portion of rent for July, 2009 and returned cheque fee	\$902.42
Repair and cleaning costs	\$316.56
Filing fee	\$50.00
Subtotal	\$1,447.48
Less security deposit, utility deposit and accrued interests	(-\$1,029.15)
Less amount owed to the tenant	\$408.00



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Total amount due to the landlord	\$10.33
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Conclusion

I HEREBY FIND in favor of the landlords monetary claim. A copy of the landlord's decision will be accompanied by a Monetary Order for **\$10.33**. The order must be served on the tenant and is enforceable through the Provincial Court as an order of that Court.

I HEREBY FIND in partial favor of the tenants monetary claim. The amount of **\$408.00** has been offset against the amount owed by the tenant to the landlord.

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: December 23, 2009.

Dispute Resolution Officer