



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

<u>MND</u>	For Damage to the Unit/Site/Property
<u>MNDC</u>	Money Owed or Compensation for Damage or Loss
<u>FF</u>	Recover the Filing Fee for this Application from the Respondent

Introduction

This Dispute Resolution hearing was convened to deal with an application by the landlord for a monetary claim for damage to the unit/site/property in the amount of \$1,736.69 including \$161.70 for water and garbage utilities under the tenancy agreement, \$440.00 for a locksmith, \$55.99 for failure to return the garage door opener, \$1,029.00 for paint touch up, repairs and cleaning costs.

The hearing was also convened to deal with the tenant's application for \$25,000.00 including \$12,200.00 for the landlord's failure to return the tenant's jewellery and \$12,800.00 for a portion of the business losses suffered by the tenant and moving costs incurred because of the termination of the tenancy by the landlord.

Both the landlord and tenant were present and each gave affirmed testimony in turn.

Issues to be Decided for the Landlord's Application

The landlord was seeking to receive a monetary order for damages, cleaning and utilities. The issues to be determined based on the testimony and the evidence are:

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act* for loss of rent and damages. This determination is dependant upon answers to the following questions:
 - Has the landlord submitted proof that the specific amounts being claimed are validly owed by the tenant to this landlord?
 - Has the landlord submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the *Act* by establishing on a balance of probabilities that the costs were incurred due to the actions of the tenant?
 - Has the landlord proven that the amount or value being claimed is justified and that the landlord made reasonable effort to minimize the damages?

The burden of proof is on the landlord to prove these claims.

Issues to be Decided for the Tenant's Application

The tenant was seeking to receive a monetary order for the missing possessions that were under the care of the landlord and for losses in business that resulted from the eviction.

The issues to be determined based on the testimony and the evidence are:

- Has the tenant submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the *Act* by establishing on a balance of probabilities that the losses were incurred due to the actions of the landlord that were in violation of the *Act*?
- Has the tenant proven that the amount or value being claimed is justified and that the tenant made reasonable effort to minimize the damages?

The tenant has the burden of proof to establish that these claims are justified.

Background and Evidence: Landlord Application

The landlord testified that the tenant occupied the unit in February 2009 and vacated on July 21, 2009 leaving the unit in a condition that required clean-up and repairs. The landlord did not submit a move-in inspection report nor a move-out inspection report but provided testimony and submitted other evidence including invoices for the expenses incurred..

The landlord testified that the tenant also owed the landlord for costs of water and garbage charges by the municipality. The landlord submitted into evidence a copy of the tenancy agreement that verified that the parties had agreed that the tenant would be responsible for the cost of water and garbage collection. The landlord presented a copy of an invoice from the city for water charges for one billing period of 120 days from January 1, 2009 to April 30, 2009 in the amount of \$79.96. According to the landlord, the tenant's portion for the 89 days from February 1, 2009 to April 30, 2009 was \$59.30. The landlord submitted a copy of a second invoice from the city for the 122-day billing period from May 1, 2009 until August 31, 2009 in the amount of \$152.60 of which the tenant's pro-rated portion would be \$101.32 for the 81 days during which the tenant occupied the unit.

The landlord was also claiming reimbursement for the cost of a locksmith hired on July 22, 2009 on the basis that the tenant had vacated but failed to return the keys and evidently the landlord did not have copies of the keys. The landlord testified that the landlord had obtained an Order of Possession on July 10, 2009 and that the tenant had been over-holding since that time. The landlord testified that by looking into the windows of the unit, it was discovered that the tenant had abandoned the unit on July 21, 2009. This was determined based on the fact that it appeared that all of the tenant's furnishings and personal possessions were gone except for some food items, dishes and baby toys and equipment. The landlord contacted a locksmith to change the locks on July 22, 2009. The cost of the service call and labour was \$440.00. The landlord acknowledged that on the evening of July 22, 2009 the same day that the locks were

changed, an email communication was received from the tenant advising the landlord that the tenant had been locked out before the tenant had finished moving and that the tenant wanted access to retrieve some valuable items still left in the unit. The landlord testified that the landlord continued to refuse access to the tenant and did not release the tenant's remaining possessions until after a hearing held on September 11, 2009, on the tenant's application, during which the landlord evidently agreed to relinquish possession of the tenant's belongings being withheld on September 14, 2009. According to the landlord, all of the items owned by the tenant were retrieved.

The landlord testified that the tenant had failed to return the garage door opener and submitted an invoice showing a cost of \$55.99 for the replacement opener.

The landlord was claiming compensation for other charges including \$450.00 for wall repair and touch-up, \$380.00 for garbage disposal and cleanup and \$150.00 for carpet cleaning costs. The landlord submitted an invoice showing the charges along with GST of \$49.00 for a total of \$1,029.00. The invoice did not contain a detailed breakdown to indicate what was done, how many hours of labour and the hourly rate, nor material costs.

The tenant disputed all of the above claims. The tenant testified that the tenant should not be responsible to pay \$160.62 for all of the garbage and water utilities during the tenancy and that the landlord should be responsible for paying a portion of these costs.

The tenant disputed the \$440.00 paid for the locksmith and testified that the landlord had or should have had a key to the unit and did not need to call in a locksmith. The tenant testified that, in fact, the costs incurred by the landlord were due to the landlord's intention to lock up the tenant's remaining possessions and hold them for "ransom", in violation of the Act. The tenant testified that when the tenant demanded access so that they could take the rest of their belongings, the landlord refused and stated that the landlord had validly taken possession of the unit and the items on order of the Supreme Court. The tenant testified that it was discovered that the landlord had not obtained a

writ from the Supreme Court and had merely taken physical possession of the unit without going through the proper process. This prompted the tenant to seek an order of possession in order to gain access to the unit and retrieve the property being held by the landlord.

The tenant stated that the garage door opener was left in the garage when they vacated.

In regards to the \$1,029.00 for paint touch up, repairs and cleaning costs, the tenant testified that the tenant was prevented from completing any cleaning or repairs because of the landlord's action in taking illegal possession and changing the locks prior to the tenant fully vacating the unit. The tenant testified that, despite their emailed message sent on July 22, 2009, the landlord still neglected to afford the tenant an opportunity to arrange cleaning or repairs and is therefore not entitled to be reimbursed.

Background and Evidence: Tenant Application

The tenant testified that the tenant was in the process of moving out all of their possessions and had left some items in the unit for the final trip on July 22, 2009, which the landlord was aware would occur. The tenant testified that, however, upon arrival they found that the landlord had changed the locks and they could not access their possessions. The tenant stated that some valuable items had been left in the unit, including expensive jewelry that were gifts from a parent and the tenant was anxious to access these personal possessions. The tenant testified that an email was immediately sent to the landlord protesting the lock-out and asking for access but the landlord refused to relinquish the tenant's possessions. A copy of this email dated July 22, 2009, was submitted into evidence. The tenant testified that, because the landlord had illegally taken physical possession of the unit, without first obtaining a writ from the Supreme court, the tenant then made an application for dispute resolution seeking an Order of Possession for the tenant. A copy of the decision from this hearing, held under file ##### on September 11, 2009, was in evidence and indicated that the tenant's

application for an Order of Possession was dismissed based on the fact that a prior hearing had already dealt with the issue of possession. However during these proceedings on September 11, 2009, the landlord and tenant evidently reached a mutual agreement that the tenant would be given access to retrieve the wrongfully withheld possessions on Monday September 14, 2009 at 1:00 p.m. The tenant testified that this agreement for access was honoured by the landlord and the tenant removed all the remaining items that were surrendered by the landlord. The tenant testified that, however, there were three valuable pieces of jewelry missing from the tenant's possessions that had been under the control of the landlord from July 22, 2009 until September 14, 2009. These consisted of a diamond ring valued at \$2,800.00, a gold necklace valued at \$3,200.00 and a diamond necklace valued at \$6,200.00 for a total value of \$12,200.00. The tenant testified that these items were gifts from a parent and submitted receipts attesting to the value. The tenant is seeking reimbursement for the missing items.

The landlord disputed the claim. The landlord argued that:

- the tenants had abandoned the unit and their property
- the property left in the unit was worth less than \$500.00 and could therefore have been legally disposed of under the Act
- all of the tenant's property was returned and nothing was kept by the landlord
- there were no jewelry items left with the tenant's possessions and the landlord has an inventory list confirming exactly what was left
- the receipts for the items in question are not in the tenant's name
- the matter of the tenant's claim for the jewelry was already dealt with at the previous hearing held on September 11, 2009 under file ##### and could not be heard again.

The landlord testified that the locksmith was called to change the locks on July 22, 2009, because it was concluded that the tenant had completely moved out and the landlord did not have a key to the unit. When asked how the landlord knew that the tenant had finished moving out prior to being able to enter, the landlord testified that he had looked through the window and had seen that there was virtually nothing left but some baby things, food and dishes. In answer to the question of why the landlord did not revise his assumption that the unit and the possessions were "abandoned" once he had received an email from the tenant on the same day, July 22, 2009 at 11:23 p.m., advising the landlord that the tenants had not fully moved out yet, the landlord stated that they did not allow the tenant access because they decided to await the outcome of a dispute resolution on the issue. The landlord did not explain how they knew that there would be a future dispute resolution hearing on this matter.

The landlord's stated position was that, indeed there was a dispute resolution on the tenant's application on September 11, 2009, and that the tenant's claims in regards to the tenant's possessions had been resolved at that hearing. According to the landlord, the claim for the loss of the jewelry could therefore not be heard again in the dispute before me today. The landlord testified that, in any case, the tenant's claim was fraudulent because the items in question were never left in the landlord's possession. The landlord stated that an inventory list was compiled by the landlord. Although this list was not submitted into evidence in the case before me, the landlord testified that the inventory list was submitted into evidence for the previous hearing held on September 11, 2009. However, the tenant denied ever being served with this documentary evidence in the past.

The tenant was also claiming \$12,800.00 partial business losses and the cost of relocating based on the fact that the landlord ended the tenancy and that being forced to relocate had resulted in financial losses for the tenant. The tenant submitted financial records verifying that there was a loss.

The landlord disputed this claim on the basis that the landlord had legally ended the tenancy and obtained an order of possession at a hearing held under file number ### & ####, on July 10, 2009, authorizing the landlord to terminate the tenancy based on the tenant's violation of the Act.

Analysis: Landlord's Application

In regards to an Applicant's right to claim damages from the another party, Section 7 of the Act states that 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. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred.

In regards to the landlord's claim for compensation for the utility charges, I find that the tenancy agreement signed by the parties clearly assigns responsibility to the tenant to pay for these utility costs. I do not accept the tenant's argument that this should not be enforced. I find that the landlord is entitled to monetary compensation in the amount of \$160.62 including \$59.30 for the 89 days from February 1, 2009 to April 30, 2009 and \$101.32 for the 81 days from May 1, 2009 until July 21, 2009, during which the tenant occupied the unit.

In regards to the claimed \$440.00 reimbursement for the cost of a locksmith hired on July 22, 2009, I find that the landlord had no legal right to change the locks on July 22, 2009 without a writ of possession, whether or not this action was based on an erroneous presumption that the tenant had abandoned the unit. I find that the landlord showed a wanton disregard for its legal obligations at that time which were further aggravated by the landlord's continued noncompliance with the Act in denying the tenant access, even after the tenant had contacted the landlord later that same day. Given the above, I find that the landlord is not entitled to be compensated for the cost of prematurely hiring a locksmith and I dismiss the portion of the landlord's application for locksmith charges of \$440.00

In regards to the claim for replacement of the garage door opener for \$55.99, I find that on a balance of probabilities, this item was not returned by the tenant and I find that the landlord is entitled to be compensated for \$55.99.

In regards to the claims for \$450.00 for wall repair and touch-up, \$380.00 for garbage disposal and cleanup and \$150.00 for carpet cleaning costs plus GST of \$49.00 for a total of \$1,029.00 I find that this monetary claim failed to meet elements 2 and 3 of the test for damages. Moreover, I find that by locking the tenant out of the unit on July 22, 2009 before the tenant had completely moved out, the landlord neglected to afford the tenant an opportunity to clean or make repairs. Therefore I find that the portion of the landlord's application seeking compensation for the repairs and cleaning must be dismissed.

The total monetary entitlement of the landlord is \$216.61 comprised of \$160.62 for municipal utilities and \$55.99 for the replacement door opener.

Analysis: Tenant's Application

In this claim for loss and damages, the tenant must meet all elements in the test for damages. The burden of proof is on the claimant to prove that there was some quantifiable damage/loss caused by a violation of the agreement or the Act by the landlord and , once that has been established, the claimant must verify the amount of the loss or damage and prove that reasonable steps were taken to minimize the losses incurred.

In regards to the tenant's claim for business losses caused by the termination of the tenancy, I find that his claim fails to meet element 2 of the test for damages because it does not stem from a violation of the Act by the landlord. In fact, it was determined that the tenant was not in compliance with the Act or agreement and the landlord was legally authorized to terminate the tenancy. Accordingly, I find that this portion of the tenant's application must be dismissed.

In regards to the claim for \$12,200.00 compensation for lost property retained in the care of and under the control of the landlord, I do not accept the landlord's argument that the tenant's claim for reimbursement was already dealt with at the hearing held under file ##### on September 11, 2009. This hearing was convened solely to deal

with the tenant's application requesting an order of possession of the rental unit, which was not successful as the matter was determined to be res judicata. An agreement was evidently reached during these proceedings that the landlord would finally release the tenant's property. However there was no application made by the tenant either for the return of property nor for a monetary claim of any kind. In fact no findings were made in the decision of September 11, 2009 in regards to the existence of the jewellery in question nor in regards to the value of any property being held by the landlord. I accept the tenant's testimony that they discovered that the jewellery was missing when they were finally allowed to retrieve their remaining contents on September 14, 2009.

I find that the Act imposes certain obligations on a landlord in relation to how a tenant's property is handled.

Section 24(1) of the Residential Tenancy Regulation, (the Regulation), states that a landlord may only consider that a tenant has abandoned personal property if (a) the tenant leaves the personal property on residential property that he or she has vacated after the tenancy agreement has ended, or leaves personal property in the rental unit that the tenant has not occupied for a continuous period of one month and for which he or she has not paid rent, or from which the tenant has removed substantially all of his or her personal property.

However, section 24(2) states that a landlord is not entitled to consider the above circumstances in section 24(1) unless the landlord has received an express oral or written notice of the tenant's intention not to return to the residential property, or there is some indication that the tenant could not reasonably be expected to return to the residential property.

In this instance I find that, while the landlord concluded that the property was abandoned, this was not a reasonable presumption. The tenant did not provide an express written or oral notice that they would not be returning. In fact the tenant was impeded from removing the last of their property by the landlord's actions. I find that the

tenant had advised the landlord that they would be finishing up the move on July 22, 2009 and after the change of locks had sent an email to the landlord objecting to being locked out and confirming that they were not finished moving their possessions. I find that the landlord knew or should have known that the tenant's possessions were not abandoned and would be retrieved by the tenant.

However, even if the property was genuinely abandoned, I find that the landlord was still required to comply with section 25 of the Regulations which states that the landlord must store the tenant's personal property in a safe place and manner for a period of not less than 60 days following the date of removal and keep a written inventory of the property. In this instance I find that the landlord did not submit the required written inventory.

According to section 30 the landlord also owes a duty of care to the tenant when dealing with a tenant's personal property and must exercise due diligence and caution as required by the nature of the items to ensure that the property is not damaged, lost or stolen. Given the above, it follows that the landlord should not purposely deny the release of this property back to the owner of that property. I find that the landlord's insistence on retaining the tenant's property instead of giving it back to its rightful owner is not consistent with the duty of care obligations in the regulations.

In addition, section 26(3) of the Act states that, whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not:

- (a) seize any personal property of the tenant, or
- (b) prevent or interfere with the tenant's access to the tenant's personal property.

I find that, despite the tenant immediately advising the landlord of the existence of the valuable items being withheld, along with an urgent request to be granted an opportunity to retrieve these items, the landlord deliberately ignored or denied the tenant's request for a period of over seven weeks, during which items in question remained under the care, control and responsibility of the landlord.

Based on the above facts, I find that the landlord was in violation of the Act. I find that the tenant suffered a loss of property and that the tenant's claim fully meets all elements in the test for damages. Accordingly, I find that the tenant is entitled to monetary compensation in the amount of \$12,300.00 comprised of \$12,200.00 for the two necklaces and ring and the \$100.00 fee for the application.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord is entitled to total monetary compensation of \$216.61 and the tenant is entitled to monetary compensation of \$12,300.00. I find that after reducing the tenant's monetary entitlement by \$216.61 compensation owed to the landlord, there is a remaining balance of \$12,083.39 for the tenant.

I hereby issue a monetary order in favour of the tenant in the amount of \$12,083.39. This order must be served on the landlord and may be enforced by Small Claims Court.

Other than the above, all remaining claims in both the landlord's application and the tenant's application are dismissed.

December 2009

Date of Decision

Dispute Resolution Officer