



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

INTERIM DECISION

Dispute Codes MNR, MNDC, MNSD, FF

Introduction

This hearing dealt with applications from both the landlords and the tenants under the *Residential Tenancy Act* (the *Act*). The landlords applied for:

- a monetary order for unpaid utilities pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover their filing fee for this application from the tenants pursuant to section 72.

The tenants applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38; and
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

Both parties were represented at both hearings and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to discuss their applications. At the December 10, 2012 hearing (the reconvened hearing), the female tenant (the tenant) testified that the tenants handed the landlords a copy of the tenants' dispute resolution hearing package, including the Notice of Hearing for the October 31, 2012 hearing on September 30, 2012. The tenants' counsel said that he sent a copy of the Notice of Hearing for the December 10, 2012 hearing to the landlords' counsel by an email attachment on November 19, 2012. Although service of documents such as a Notice of Hearing by email is not one of the prescribed ways of serving such documents under section 89(1) of the *Act*, the landlords' counsel confirmed that he had received the Notice of Hearing for the reconvened hearing and as such I found no unfairness in proceeding with the reconvened hearing.

Preliminary Matters

At the October 31, 2012 hearing, the parties discussed the written request from the tenants' lawyer to obtain an adjournment of this hearing to enable him to participate in this hearing. The tenant confirmed that the tenants and their lawyer were seeking an adjournment of this hearing. After considering the request for an adjournment, I issued

an adjournment as reported in my Interim Decision of November 7, 2012, which read in part as follows.

In order to take maximum advantage of this adjournment and to enable me to make an informed decision with respect to the parties' applications, I ordered the parties to submit the original signed Residential Tenancy Agreement that they have in their possession. I did so as it appears to me that the tenants have questioned the authenticity of the copy submitted into written evidence by the landlords...

I also advised the parties to serve a copy of that Residential Tenancy Agreement (the Agreement) to one another. I noted that I would not consider any other submissions of new written evidence with respect to the parties' applications.

At the December 10, 2012 hearing, counsel for both parties and the female tenant (the tenant) confirmed that a number of issues had been resolved with respect to the two applications.

The landlords' counsel withdrew the landlords' application for dispute resolution. He did so as there is undisputed evidence that the tenants have sent payments to the landlords to look after the landlords' claim for unpaid utilities arising out of this tenancy and that the landlords have returned the tenants' \$1,000.00 security deposit in full shortly after this tenancy ended. The tenant testified that the tenants have cashed the landlords' cheque for the return of their security deposit. The landlords' application for dispute resolution is withdrawn.

The tenants' counsel withdrew the tenants' application for a return of the security deposit, thus reducing the amount of the tenants' application for a monetary award from \$4,999.00 to \$4,000.00. The tenants' application to recover the security deposit is withdrawn.

Issues(s) to be Decided

Are the tenants entitled to a monetary award arising out of this tenancy? Are the tenants entitled to recover their filing fees from the landlords?

Background and Evidence

The tenant testified that she and her husband first moved into this rental unit by way of a one-year fixed term tenancy agreement on May 1, 2011. When that fixed term tenancy ended, the parties entered into a new 7-month fixed term tenancy commencing on March 1, 2012. According to the terms of the Agreement entered into between the parties, the fixed term tenancy was scheduled to end on September 30, 2012. Monthly

rent was set at \$2,000.00, payable in advance on the first of each month. The parties agreed that the tenants vacated the rental unit by September 30, 2012.

The tenants' amended application for a monetary award of \$4,000.00 was for the equivalent of two month's rent. This portion of the tenants' application for a monetary award was described in the following terms in the Details of the Dispute section of the tenants' application:

...LL failed to give sufficient Notice to End Tenancy. Deficient Notice given, which induced the Tenant to have to move under guise of "close family member" moving into Premises. Representation of LL relied upon to detriment/expenses of Tenant. LL then advised that close family member in fact no moving. Seeking Damages, costs.

The parties entered into written evidence a copy of the following July 26, 2012 email from the male landlord to the tenants.

As we discussed my wife will be moving back to L(the community) as of October 1 2012, our rental agreement is until September 30 2012. Please reply that you received this email and understand that as of September 30 2012 our agreement for (the rental unit) will end. Thank you.

On September 11, 2012, the male landlord advised the tenants in another email that his wife was no longer planning to move to the rental unit in their community and that the landlords had made arrangements to seek new tenants for the rental home. A few days later, the landlords placed advertisements on a popular rental website as to the availability of the rental home.

At the hearing, the tenants' counsel asserted that the male landlord's July 26, 2012 email was a *de facto* notice to end this tenancy for landlord use of the property. Since the landlords did not in fact follow through with their stated intention to use the rental home themselves, the tenants' counsel maintained that the tenants were entitled to a monetary award pursuant to section 49(3) of the *Act*.

Both parties confirmed that they had exchanged written evidence packages with one another in advance of this hearing. However, I note that neither party followed the specific orders provided in my Interim Decision with respect to the service of documents between the original and reconvened hearing dates. As noted in my Interim Decision, both the oral and written evidence of the parties indicated that there was a disagreement as to the contents of page 2 of the fixed term Agreement. In the interest of ensuring that I had the same documents to which the parties were referring in their

submissions, I ordered the parties to provide the Residential Tenancy Branch (the RTB) with the originals of their copies of the Agreement.

The tenants' counsel did not send the tenants' original of the Agreement, as the tenant maintained that she never received a copy of the signed Agreement until she (or her counsel) requested one in mid to late September 2012. Although I ordered both parties to send me the original of the Agreement they were referring to in their submissions, tenants' counsel interpreted this to mean that it was only necessary to send a copy of the Agreement if the tenants had the original of that document. While the landlords' counsel did comply with my order to provide the RTB with the original of the Agreement, he did not forward a copy of that original to counsel for the tenants. By ordering both parties to submit the most original documents they had in their possession to the RTB and copy the other party with these documents, I was attempting in my Interim Decision to avoid the very issue raised by the tenants' counsel as to whether the documents submitted were indeed originals and identical to one another.

After some discussion and with the agreement of the respective counsel, it does appear that we were all discussing the same documents. However, I do note that although there is little doubt that page 6 of the Agreement is the original signed by all four parties, I have less certainty that page 2, the most contentious of the pages of the Agreement, is the original of this Agreement. While I am not a handwriting expert, it does appear to me on a balance of probabilities that it is more likely than not that page 2 of the Agreement submitted by the landlord is the original of this document.

The tenant testified that the landlords sent her the unsigned Agreement by email in mid-February 2012, requesting that the tenants sign it and return it to the landlords for signing. She said that the tenants signed the Agreement on February 26, 2012 and returned it to the landlords by mail. She said that the tenants did not retain a copy of the Agreement they signed. She confirmed that the Agreement called for the commencement of a seven month tenancy on March 1, 2012, ending on September 30, 2012. She also testified that the tenants had an oral agreement with the landlords whereby this tenancy would convert to a month-to-month tenancy after the expiration of the fixed term on September 30, 2012.

The following section appears below section (b) of the Length of Tenancy section of page 2 of the Agreement:

...At the end of this fixed length of time (please check one option, i or ii)

- i) the tenant may continue on a month-to-month basis or another fixed length of time*

- ii) *the tenancy ends and the tenant must move out of the residential unit*
If you choose this option, both the landlord and tenant must initial in the boxes to the right...

In all copies of the Agreement and the original submitted to the RTB by the landlords' counsel, there is a very clear check mark in only the box immediately preceding option (ii). There is no check mark in the box immediately preceding option (i). The boxes to the right of option (ii) has initials in both the landlord's and tenant's boxes. The tenant testified that she was certain that the tenants did not initial section (b)(ii) of page 2 of the Agreement she and her husband signed on February 26, 2012. She gave sworn testimony that the initial in the tenant's box beside option (ii) is neither hers nor that of her husband, the other tenant.

Counsel for the tenants maintained that this portion of the Agreement was ambiguous. He noted that the landlord had initialled in front of option (i) and after option (ii) in this section of the Agreement. He observed that there was some type of other notation beside the landlord's initial in front of option (i), a notation which could be an initial or could be a crossed out check mark. The landlords' counsel also remarked on this point as he speculated that there may have been an initial intent to continue this tenancy as a periodic tenancy after September 30, 2012, an intention modified by the parties. The tenant's counsel maintained that the best evidence submitted was that of the tenant's sworn testimony that neither she nor her husband initialled the box following option (ii) and neither agreed that the tenants would have to vacate at the end of the fixed term. He also attached significance which escapes me to the absence of initials from both landlords and tenants in the boxes beside option (ii) of this portion of the Agreement. He also noted that the tenants' signature on page 6 of the Agreement is in blue, while the initials are in black.

Under questioning from the landlords' counsel, the tenant said that she did not remember if the tenants received a copy of the Agreement before the end of their tenancy. As the landlords did not attend the reconvened hearing, the landlords' counsel had little knowledge as to the timing of the landlords' provision of the Agreement to the tenants.

Analysis

Much of the oral and written evidence submitted by the parties centered on the tenants' allegation that they did not initial the provision of the Agreement whereby the landlords claimed that they agreed to end their tenancy and vacate the rental unit by September 30, 2012, the scheduled end date for this Agreement. I also heard disputed evidence

as to whether or not the initials after option (ii) on page 2 of the Agreement were in fact those of one of the tenants or whether they were added after the tenants signed this Agreement.

I would agree with the observation of the tenants' counsel that there is a certain amount of ambiguity in the way that the relevant portions of page 2 of the Agreement were completed. If I were to find that this ambiguity led to different interpretations of the Agreement, the legal principle of *contra proferentem* would apply, a principle that would be interpreted against the party drafting the clause, in this case the landlords. However, I find that the only clear check mark on this portion of the Agreement is the one preceding option (ii), which {in concert with the initials after option (ii)}, signified the intention of the parties to yield vacant possession of the rental home to the landlords at the end of the fixed term Agreement.

The tenant provided the best evidence with respect to her claim that the landlords did not provide the tenants with a signed copy of the Agreement until well after the landlords signed the Agreement. However, this evidence was somewhat weakened by the tenant's admission that the tenants did not retain a copy of the Agreement that they had signed, nor could she remember with any certainty when the landlord actually sent the tenants a copy of the Agreement. There is also little evidence before me to suggest that the tenants questioned the male landlord's July 2012 claim that the Agreement required the tenants to vacate the rental unit until the final month of this tenancy.

Although confronted with considerable disputed evidence regarding the terms agreed to by the parties, the tenants' claim before me is for a monetary award of \$4,000.00. The tenants and their counsel referred to moving expenses that the tenants have incurred. They provided no receipts or invoices. Rather, counsel for the tenants cited section 49(3) of the *Act* as the legal authority for the tenants' application for a monetary award.

Section 49(3) of the *Act* reads as follows:

49 (3) *A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.*

As set out below, section 51 is the actual section of the *Act* which sets out compensation to tenants when a landlord issues a valid notice to end tenancy for landlord's use of the property under section 49 of the *Act*.

Tenant's compensation: section 49 notice

51 (1) *A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.*

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord...

(2) In addition to the amount payable under subsection (1), if

(a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or

(b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,

the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

Section 52 of the Act provides the following very specific direction as to the form and content of a notice to end tenancy:

52 *In order to be effective, a notice to end a tenancy must be in writing and must*

(a) be signed and dated by the landlord or tenant giving the notice,

(b) give the address of the rental unit,

(c) state the effective date of the notice,

(d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy, and

(e) when given by a landlord, be in the approved form.

I find that the July 26, 2012 email by the male landlord fails to meet most of the above requirements, and in particular, the requirement that any notice to end a tenancy issued by a landlord **must** be given in the approved form. I find no merit whatsoever to the assertion made by the tenants' counsel that the male landlord's July 26, 2012 email (or any other email) constituted a notice to end tenancy for landlord's use of the property.

Section 44(1) of the *Act* establishes that a tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i) section 45 [tenant's notice];

(ii) section 46 [landlord's notice: non-payment of rent];

(iii) section 47 [landlord's notice: cause];

(iv) section 48 [landlord's notice: end of employment];

(v) section 49 [landlord's notice: landlord's use of property];

(vi) section 49.1 [landlord's notice: tenant ceases to qualify];

(vii) section 50 [tenant may end tenancy early];

(b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;

(c) the landlord and tenant agree in writing to end the tenancy;

(d) the tenant vacates or abandons the rental unit;..

There is undisputed evidence that this tenancy ended on September 30, 2012, the same date identified in the Agreement as the end date for this fixed term tenancy. Without any legal notice to end this tenancy having been provided to the tenants by the landlords, I find on a balance of probabilities that this tenancy ended on September 30, 2012 because the tenants accepted that their tenancy ended on that date in accordance with their fixed term tenancy agreement with the landlords. The evidence is that they did so after seeking and receiving legal advice from their legal counsel, and despite their assertion that their Agreement enabled them to continue this tenancy on a month-to-month basis as per section 44(3) of the *Act*. The landlords did not issue any formal notice to end this tenancy by September 30, 2012, and did not apply for dispute resolution to seek an Order of Possession on the basis of the tenants' non-compliance with the fixed term tenancy provisions of their Agreement. If they had remained in the rental unit after September 30, 2012, the landlords would have required an Order of Possession from an arbitrator appointed under the *Act* in order to end their tenancy. Their decision to end their tenancy and vacate the rental unit on the date specified as the end date in their fixed term tenancy Agreement and after receiving legal advice

leads me to the conclusion that the tenants ended their tenancy in accordance with section 44(1)(b) of the *Act*.

In the event that I am wrong on my determination that the Agreement was a fixed term tenancy in which both parties agreed that the rental premises would be vacated by September 30, 2012, I find that this tenancy ended without the landlords' issuance of a notice to end this tenancy. As such and if I were to have accepted the claim by the tenants and their counsel that this tenancy was to have converted to a periodic tenancy after September 30, 2012, it remains unclear as to whether or not the tenants ended their tenancy after having given their own written notice to do so as required by the *Act*. If they did not provide such written notice, the landlords and not the tenants may be entitled to compensation for losses arising out of this tenancy.

As I find that this tenancy ended on the basis of section 44(1)(b) of the *Act*, I dismiss the tenants' application for a monetary award for losses and damages arising out of this tenancy without leave to reapply. As the tenants have been unsuccessful in their application, they bear the cost of their filing fee.

Conclusion

The landlords' application for dispute resolution is withdrawn. The tenants' application to recover their security deposit is withdrawn. I dismiss the tenants' application for a monetary award 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: December 11, 2012

Residential Tenancy Branch