



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF

Introduction

This hearing was convened by way of conference call in response to the tenants' application for a Monetary Order for money owed or compensation for damage or loss under the *Residential Tenancy Act (Act)*, regulations or tenancy agreement; and to recover the filing fee from the landlord for the cost of this application.

The tenants, the landlord and Council for the landlord attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other and witnesses on their evidence. The landlord and tenant provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are considered in this decision.

Issue(s) to be Decided

Are the tenants entitled to a Monetary Order for money owed or compensation for damage or loss?

Background and Evidence

The parties agree that this tenancy started on March 01, 2007 and ended on August 30, 2012 after the landlord served the tenants with a Two Month Notice to End Tenancy for

landlord's use of the property. Rent for this two bedroom unit was \$1,190.00 and was due on the first day of each month.

The tenants testify that they were served the Two Month Notice to End Tenancy on or about June 28, 2012 and it was posted to the tenant's door. This Notice gave the tenants the reason to end the tenancy because the rental unit will be occupied by the landlord or the landlords spouse or a close family member (mother, father or child) of the landlord or the landlord's spouse. The tenants testify that the rental unit has in fact been occupied by the landlords niece and the tenants have provided documentary evidence in the form of a transcript of a conversation between the tenants and the new tenant in which the new tenant gives the tenants her name and informs them that she and a friend are renting the suite. The tenants have also provided documentary evidence from an article which documents the full names of the landlord's three children and this new tenant is not among them. The tenants therefore state that the landlords notice was issued without merit and the tenants seek compensation equivalent to two months' rent as specified under the *Act* to the sum of \$2,380.00.

The tenants testify that due to the Notice they incurred additional costs and seek to recover these from the landlord. The tenants testify that they lost wages from having to find a new apartment, to move and to clean both the new apartment and the one they vacated from. RO testifies that he had not intended to move and had taken a contract for work out of town. Because they then had to find alternative accommodation RO testifies that he had to take nine days off work. Of these, four days was to search for a new apartment and the next five days was spent cleaning, painting and moving. RO has provided two letters from his employer which state that the tenant asked for time off work and a letter showing the tenant's daily wage of \$425.00 for an 11.5 hour day. The tenant states he is only seeking to recover the lost wages for an eight hour day and has adjusted his claim to reflect that. RO therefore seeks to recover the sum of \$2,661.12.

KO testifies that she lost four and a half days from work to clean their unit and move to a new unit and they have based their claim for lost earning to the sum of \$1,843.13 on

KO's average earning over a four month period. KO explains that as she is a self employed in the beauty industry she could have taken clients on these days if she did not have to vacate the rental unit. KO has provided a breakdown of her monthly earnings.

The tenants testify that they had to spend additional sums for food and drink due to the move. The tenants testify that instead of hiring a moving company they did the move themselves with the help of friends but provided food and drink to their friends to repay them for their help over a period of four days. The tenants have provided Visa statements highlighting the items purchased. The tenants seek to recover the sum of \$582.52.

The tenants testify that they incurred costs with Canada Post to change their address and for registered mail costs. The tenants have provided invoices from Canada Post for each tenant which shows a cost of \$168.00 for the change of address and a receipt for the registered mail for documents sent to the landlord of \$14.28.

The tenants seek compensation from the landlord for having to downsize their home to a one bedroom suite but pay a higher rent of \$1,890.00 per month. The tenants testify that they could not afford to rent another apartment with two bedrooms in the area and have provided some rental advertisements for comparables in evidence. The tenants seek to recover the difference between what their rent was at the landlord's rental unit and what they pay now at their new unit for a period of one year. The tenants seek to recover the sum of \$8,040.00. The tenants' testify that their new apartment is a penthouse on the fourth floor and has no other units on the floor and no one above them. Their previous unit was on the second floor and had three other units on that floor.

The tenants testify that during their tenancy the cable was included in their rent. The landlord sent the tenants a letter to inform the tenants that from September 01, 2011 Shaw cable service would no longer be provided by the owners and the tenants must

arrange their own cable service. The tenants testify that they received no rent reduction from the landlord for this loss of a facility and therefore seek to recover the costs of \$50.00 per month paid for the cable they had to install in their name to a total sum of \$550.00.

The tenant RO testifies that his wife originally rented this unit and had the use of the rooftop patio which was a shared area for the building. The tenants have provided photographic evidence showing tenants enjoying this area. The tenant RO testifies that on March 01, 2009 his wife noticed that the doors to the rooftop had been locked and the landlord said it was for safety reasons however the landlord's daughter still had sole access to this area for her private use. The tenants seek compensation to the sum of \$2,802.45 for the loss of this facility.

The tenants also seek to recover their \$100.00 filing fee paid for this application from the landlord.

Council for the landlord states that with respect to the Notice the landlord did comply with the *Act* as the landlord's son was going to move into the tenants unit on September 01, 2012. The landlord's son had moved back from the East and advised his mother that he wanted to move into the rental unit. He at first moved in with his sister until the tenants vacated. Council for the landlord states that the landlord's daughter moved overseas in early August 2012 and the landlord son then decided to stay in his sister's unit but did not notify this mother until the second week of August, 2012 of his intent to not move to the tenants unit. Therefore, at the time the Notice was given to the tenants it was given in good faith.

Council for the landlord calls their first witness EM who is the tenant who moved into the tenants' rental unit. EM testifies that she was living in a different unit in the building at around August 10, 2012 the landlord informed her that the landlord's son was not going to be moving into this unit so an arrangement was made for the witness and her friend to rent the unit in dispute. This was agreed on August 10, 2012.

Council for the landlord questions the witness and asks if the witness had a conversation with the tenants. The witness responds that yes she had; the previous tenants asked the witness to pass on some letters they were expecting. This conversation took place at the end of August and after the witness had found out the landlord's son was not going to be living in the dispute rental unit.

The tenant cross examines the witness and ask was the witness aware that they were being evicted to have the landlords family move into the unit. The witness responds that she was not aware of this.

Council for the landlord calls their second witness the landlord's son GM. The witness testifies that he moved from Ontario and had discussions with his mother and asked her for an apartment in a building she owned. The witness testifies that he thought he would be taking over the apartment from the tenants on September 01, 2012. In early August when his sister decided to move overseas the witness thought it would make sense to stay in his sister's apartment as it had then become available. The plans were not changed until August, 2012.

Council for the landlord questions the witness and asks why his sister's place was not suitable. The witness responds that during the time he was there he got a dog and decided to move to a different building on the second or third week of September as his sister's apartment was on the third floor and was not suitable for house training a dog.

The tenant cross examines the witness and asks why if his sister had two dogs was her place not suitable for one dog. The witness responds that when the place is on the third floor it's hard to train a dog. The tenant asks the witness when he got the dog. The witness responds around September.

The tenants dispute the landlord's good faith intent in issuing the Two Month Notice. The tenants testify that they do not feel the landlord's son ever had any intent to move into their unit and the landlord has provided no documentary evidence relating to his

sisters move overseas or a time line for any of her children's moves. The tenants ask why was the eviction Notice not reversed as soon as her son notified her that he was not going to be moving into their unit. The tenants state that they did not sign a new rental agreement until July 17, 2012 and they could have got out of that lease agreement if they had been given the option. The tenants have provided a copy of their new rental agreement in evidence.

Council for the landlord states the landlord disputes the reminder of the tenants' claims on the grounds that the tenants are not entitled to compensation because the landlord acted in good faith that her son was moving into the rental unit when the Two Month Notice was served. Council for the landlord states the tenants had a duty to mitigate their losses and should not have scheduled viewings for alternative accommodation on work days if they could have seen units on evenings and weekends. This would have minimized their time away from work. Council for the landlord also draws the attention to the tenants' calculation in which they have calculated HST on their lost earnings when no HST has or will be charged on earnings.

Council for the landlord cross examines the tenant KO about her earnings and asks about her work schedule. KO responds she has work when she has clients as she freelances and works out of people's homes. Council for the landlord asks the witness, on the four months detailed on your documentary evidence for work is this the hours you work? KO responds that yes this is her work schedule for that time period and would be used to send to her accountant for tax purposes. Council for the landlord asks how many days a week does KO work. KO responds four to five days a week. Council for the landlord asks KO why her schedule shows that she worked 14 out of 21 days in June; 14 out of 22 days in July; 18 out of 23 days in August; and 14 out of 23 days in September. KO responds that in June they had a week's vacation; in July it shows days taken off to move, in August days taken to pack and move and in September it was a slow time of year. KO testifies that she had the potential to work on the days she had to take off but did not book work into these days.

Council for the landlord asks KO if it is possible she may have not had any work on the days she took off. KO responds that she could have scheduled work in for these days but booked them off to move. KO responds that they came back from a vacation on July 02, 2012 and found the eviction Notice and on June 5 and June 6, 2012 they started to look for a new apartment. KO responds that she would have booked work into that week if they did not have to look for a new place. Council for the landlord asks KO if any clients had wanted work done on those days. KO responds that she would not have scheduled them for those days.

Council for the landlord states that over a four month period the tenant KO only worked three days a week and had full control over her bookings to arrange viewings outside her scheduled work. Therefore KO did not mitigate the loss in this matter.

The landlord testifies that she had spoken to the tenants' new landlord to give a reference and was told the tenants had an agreement from July 04, 2012 with their new landlord. Council for the landlord states this was prior to the tenants' claim they had to take time off work to find a new rental.

Council for the landlord states that the tenants Visa statements for food have no bearing to a rental as they are for cold beer shops, wine stores and restaurants.

Council for the landlord states that the tenants must mitigate their loss with regards to their claim for the difference in rent. Council for the landlord states the landlord has provided evidence showing comparable rentals in the area and one bedroom units go for between \$900.00 to \$1,500.00 and two bedroom units go for \$1,200.00 to \$1,900.00 with the more expensive rental being a penthouse with un-obstructive views and only one unit on the floor.

Council for the landlord states with regard to the tenants claim for loss of cable. The lease agreement signed was between KO and the previous landlord. This landlord gave the tenants one months notice that the cable would be withdrawn and did not increase

their rent for that year. The landlord also gave the tenants permission to use the garage to store personal items.

The tenants dispute this and state there was no agreement that the landlord would not increase their rent in exchange for a loss of cable service. The tenants argue that the garages were already common areas for the tenants to use.

The landlord testifies with regard to the tenants claim for loss of the roof top patio; the previous owner had shut down the rooftop patio because someone had thrown a sofa from it. The landlord testifies that she took over as owner on November 24, 2008 but did not put locks on the patio access. The landlord agrees that her daughter had private access to the rooftop patio but as from the Fall of 2012 it has been opened up to all tenants again as the landlord has put higher railings around it for safety.

The tenant cross examines the landlord why they could not have access to the rooftop patio. The landlord responds because tenants were denied access after the sofa incident. The tenant asks if this is the case why tenants can have access now. The landlord responds because it is her decision.

Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties and witnesses. The tenants seek compensation from the landlord equivalent to two months' rent as the landlord has not complied with the *Act* with regard to the reason given on the Two Month Notice that the landlord, the landlords spouse or a close family member will occupy the rental unit. The tenants have testified that the landlord's niece and a friend have moved into the rental unit. The landlord argues that when the Notice to End Tenancy was given to the tenants the landlord acted in good faith because the landlord's son was going to move into the rental unit.

I have considered both arguments in this matter and find the good faith requirement under the Residential Tenancy Policy Guidelines is used when a tenant disputes a Two Month Notice to End Tenancy. At that time the landlord would then be required to demonstrate good faith intent in issuing a Two Month Notice. However the tenants did not dispute the Notice but moved from the rental unit to later find the landlord's son did not move into the unit.

I direct the parties' attention to s. 51(2) of the Act which states:

(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.

Consequently it is my decision that the tenants are entitled to compensation equivalent to two months' rent as the landlord did not use the rental unit for its stated purpose. The tenants are therefore entitled to a Monetary Order to the sum of **\$2,380.00** pursuant to s. 67 of the Act.

With regards to the tenants claim for further compensation due to the Two Month Notice and costs incurred in moving such as lost wages, costs for food and drink, change of address costs, registered mail costs and the difference in rent. The

compensation tenants are entitled to if the landlord has not used the rental unit for its stated purpose is the amount equivalent to two months' rent and there is no further provision for any further costs to be awarded under the *Act*. Consequently, these sections of the tenants claim are denied.

With regard to the tenants claim for loss of use of the rooftop patio, while I accept that the tenant did have access to this area from at least March 2009. The tenants should have attempted to mitigate the loss at that time by filing an application for the loss of a service or facility. I find it would be unfair now for the tenants to file a claim for compensation for the loss of this area as the matter should have been dealt with in 2009 therefore reducing the loss until such a time as a hearing could have been scheduled. This section of the tenants claim is therefore denied under s 7(2) of the *Act*.

With regard to the tenants claim for the loss of their cable service from September 01, 2011 until the day the tenants' vacated on August 30, 2012. I have considered the documentary evidence concerning this matter and direct the parties to s.37 of the *Act* which states:

27 (1) *A landlord must not terminate or restrict a service or facility if*

(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or

(b) providing the service or facility is a material term of the tenancy agreement.

(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord

(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and

(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

The tenants have provided a copy of their tenancy agreement in which it states cable is included in the rent. The landlord argues that she gave the tenants sufficient notice to terminate this service and did not increase their rent for the year. A landlord is required to reduce the rent if a service that is considered to be non essential to the tenants' use of the rental unit as living accommodation is terminated. By simply stating that the tenants rent was not increased that year is not a sound argument if the landlord has not given the tenants a rent increase on an approved form and then withdraw that rent increase effectively reducing their rent by the same amount as the cable service. Consequently, I am satisfied with this portion of the tenants claim for loss of the cable service and find in favor of the tenants claim for compensation. The tenants are therefore entitled to a Monetary Order to the sum of **\$550.00** pursuant to s. 67 of the *Act*.

As the tenants have been partially successful with their claim I find the tenants are entitled to recover half their filing fee to the sum of **\$50.00** pursuant to s. 72(1) of the *Act*. A Monetary Order has been issued to the tenants for the following amount:

Compensation for non compliances with s. 51(2) of the <i>Act</i> .	\$2,380.00
Compensation for loss of cable	\$550.00
Filing fee	\$50.00
Total amount due to the tenants	\$2,980.00

Conclusion

I HEREBY FIND in partial favor of the tenants' monetary claim. A copy of the tenants' decision will be accompanied by a Monetary Order for **\$2,980.00**. The order must be served on the Respondent and is enforceable through the Provincial Court 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: January 21, 2013

Residential Tenancy Branch

