



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNDC, FF

Introduction

This hearing concerns an application by the tenants for a monetary order as compensation for damage or loss under the Act, Regulation or tenancy agreement / and recovery of the filing fee. Both parties attended and / or were represented and gave affirmed testimony.

Issue(s) to be Decided

Whether the tenants are entitled to the above under the Act, Regulation or tenancy agreement.

Background and Evidence

The unit which is the subject of this dispute is within a 4 storied building which accommodates 26 units. Pursuant to a written tenancy agreement, a copy of which is not in evidence, the fixed term tenancy was from February 28, 2014 to February 28, 2015. Monthly rent was \$1,550.00 and a security deposit of \$775.00 was collected.

On May 02, 2014 a blocked drain pipe located beneath the unit resulted in water backing up into the drain(s) in the unit's kitchen sink. Water overflowed from the sink, over the countertop(s), and onto the kitchen floor and a portion of the surrounding area within the unit. Tenant "PB" discovered the flooding upon arriving at the unit around 5:00 p.m. and promptly notified the landlord. A call was made by the landlord and after approximately 15 minutes the backup of water into the unit had been stopped. The tenants concluded that restoration would require them to vacate the unit, and that the tenancy agreement was "frustrated." They began looking for alternate accommodation and had removed most if not all of their possessions from the unit by May 08, 2014.

By emails on or about May 14 & 16, 2014 the tenants communicated to the landlords their intent to end the tenancy. They put a stop payment on post-dated rent cheques for July, August and September 2014, and the landlords returned the tenants' security deposit. Keys for the unit were later mailed to the landlords on June 12, 2014.

The landlords take the position that the tenancy was not frustrated, and that the tenancy could have continued despite the inconveniences arising from limited flooding. Further, the landlords consider that the tenants gave them a 1 month notice to end tenancy, and that the landlords are therefore entitled to retain rent for May and June. The landlords began advertising for new renters in mid-May, and following the completion of restoration new renters took possession of the unit effective from July 01, 2014.

There is no conclusive evidence before me in relation to exactly when the restoration began in earnest, and how long it lasted before completion. Neither is there any conclusive evidence before me in regard to the outcome of any contact either of the parties may have had with their respective insurance providers.

In addition to recovery of the filing fee, the tenants seek reimbursement of rent for the period from May 09 to 30, which they calculate to be \$1,085.00, in addition to rent for June in the full amount of \$1,550.00 [total sought: \$2,635.00 + \$50.00 = \$2,685.00].

Analysis

Section 44 of the Act addresses **How a tenancy ends**, in part:

44(1) 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]*;
- (e) the tenancy agreement is frustrated;

Section 45 of the Act addresses **Tenant's notice**, in part:

45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice,
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

- (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Residential Tenancy Policy Guideline # 34 speaks to “Frustration,” in part:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.

Section 7 of the Act addresses **Liability for not complying with this Act or a tenancy agreement**:

7(1) 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.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other’s non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Section 28 of the Act addresses **Protection of tenant’s right to quiet enjoyment**, in part:

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (b) freedom from unreasonable disturbance

Residential Tenancy Policy Guideline # 6 speaks to “Right to Quiet Enjoyment,” in part:

It is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Claim for damages

In determining the amount by which the value of a tenancy has been reduced, the Arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed.

Residential Tenancy Policy Guideline # 22 speaks to "Termination or Restriction of a Service or Facility," in part:

Where there is a termination or restriction of a service or facility for quite some time, through no fault of the landlord or tenant, an Arbitrator may find there has been a breach of contract and award a reduction in rent.

Based on the affirmed testimony and documentary evidence which includes, but is not limited to, photographs, text messages and email exchanges, I find that the tenants have failed to meet the burden of proving that the tenancy agreement was "frustrated" and that the unit was uninhabitable as a result of flooding and restoration. Despite this, I find that the flooding and intervention of persons assessing the damage and commencing remedial action led to a breach of the tenants' right to quiet enjoyment, and that the value of the tenancy was diminished through the fault of neither party.

As I have found that the tenancy agreement was not frustrated, but that the value of the tenancy was diminished, as to the month of **May** I find that the tenants have established entitlement to compensation totaling **\$750.00**, which is calculated as follows:

\$1,550.00: *monthly rent*

\$50.00: *per diem rent* ($\$1,550.00 \div 31$)

\$750.00: *½ day's rent for each of the 30 days from May 02 to 31*
[(30 x \$50.00) ÷ 2]

I find that notice given by the tenants in May to end the fixed term tenancy "earlier than the date specified in the tenancy agreement as the end of the tenancy," does not comply with section 45 of the Act, and that the tenants are therefore liable for June's

rent. As the tenants did not return the keys until June 12, 2014, I find that they had possession of the unit until that time. As earlier noted, there is no conclusive documentary evidence before me as to when the restoration began and how long it was before it was completed. I find on a balance of probabilities that restoration had not been completed by June 12, 2014, and that as to the month of **June**, the tenants have established entitlement to compensation of **\$310.02**, which is calculated as follows:

\$1,550.00: *monthly rent*

\$51.67: *per diem rent* ($\$1,550.00 \div 30$)

\$310.02: *½ day's rent for each of the 12 days from June 01 to 12*
[(12 x \$51.67) ÷ 2]

I further find that the landlords undertook to mitigate the loss of rental income by advertising for new renters in a timely manner, after such time as the tenants gave notice to end tenancy in mid-May. In the result, I find that the landlords are entitled to retain the full rent paid for the 18 day period from June 13 to 30, 2014, and that the tenants' application to recover that portion of the rent is hereby dismissed.

As the tenants have achieved a measure of success with their main application, I find that they have also established entitlement to recovery of the full **\$50.00** filing fee.

Conclusion

Pursuant to section 67 of the Act, I hereby issue a **monetary order** in favour of the tenants for **\$1,110.02** (\$750.00 + \$310.02 + \$50.00). This order may be served on the landlords, filed in the Small Claims Court and enforced 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: May 13, 2015

Residential Tenancy Branch

