



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding COLDWELL BANKER PRESTIGE REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNDC, MNR, MNSD, FF

Introduction

The landlord applies for a monetary award for unpaid rent due over the term of a fixed term tenancy agreement, for damages for cleaning and repair to the premises after the tenant vacated, and to keep security deposit money against any award.

The tenant acknowledges the landlord's claims for \$377.45 bill and \$180.58 for municipal water bills.

The tenant argues that there was a fundamental breach of the tenancy agreement entitling him to repudiate it. Alternatively, he argues that the landlord accepted the early end of the fixed term agreement. He denies that the premises required significant cleaning or repair.

Both parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Does the relevant evidence presented during the hearing show on a balance of probabilities that the tenant has breached the fixed term tenancy? If so, what damages is the landlord entitled to? Were the premises reasonably clean and free of damage at the end of the tenancy? If not, what damages is the landlord entitled to?

Background and Evidence

The rental unit is a four bedroom, plus office, home.

The tenancy started June 15, 2015. There is a written tenancy agreement. The term of the tenancy was to end June 30, 2016. The monthly rent was \$3300.00, due on the first of each month, in advance. The landlord continues to hold the tenant's \$1650.00 security deposit.

The tenant says the tenancy ended October 31, 2015. The landlord's representative Mr. Y. says that a move out inspection with the tenant was done November 22, 2015 and that the keys were returned by the tenant at that time.

On September 3, 2015 the tenant emailed the landlord giving notice that he would be moving out October 3, 2015 due to ongoing health issues from severe allergies.

The tenant's wife Ms. J.G. had developed a severe allergic reaction whenever she was in the home. She confirmed that it was caused by something in the home because she stayed elsewhere for periods of time. When she went away, the reactions would cease. When she returned to the home they would begin again.

Ms. J.G. determined that her reactions were caused by the carpeting in the home; particularly, lint in the carpet. The carpet was cleaned at the landlord's expense (or re-cleaned according to the landlord) but that did not resolve the problem.

At one point the tenant request the landlord to remove the carpeting and install laminate flooring, offering to pay for half the cost. The landlord consulted with the owner and the offer was declined.

Ultimately, Mr. J.G. could not continue to live in the home and stayed with her sister in law for approximately five months during this tenancy. She produced a doctor's note saying she was allergic to the carpet in the home. It does not appear the doctor ever saw or examined the carpet.

After the tenant's email notice, the landlord began to show the premises to prospective tenants. The parties exchanged numerous text messages arranging convenient times for showings.

Mr. Y. for the landlord testifies despite these showings, the landlord was not able to re-rent the premises until January 16, 2016 and then only for a rent of \$3000.00 per month; \$300.00 less that this tenant was paying.

Mr. Y. adduces a condition inspection report that he says the tenant refused to sign.

He also presents a series of black and white photographs of the premises which he says were taken on November 22, the day of the inspection. The photos show: an abandoned file holder on the lawn, two chips in the dining room wall, two more chips in the dining room wall, a misaligned drawer, a chip in the second floor hallway wall, scratches on the wall of a stairway, a missing closet door (located in another room), a chip in a door, four screw holes in a door frame, a bent window screen, a torn screen in a bedroom window (to accommodate an air conditioner), an area of a closet where racks had been removed, various light fixtures with burnt out bulbs, a discarded carpet in the yard, a mattress and box spring leaning against the garage wall, a carpet with debris and a small dark stain, a hair in a sink, a stain on a bedroom carpet, hairs in the bottom of a drawer, small debris and a napkin in the kitchen sink, a dirty door mat, a hair in the bathroom sink, a dirty microwave carousel, hair in a second drawer, a hair and a key on a windowsill, grease on the kitchen fan cover, small debris in the fridge and its freezer compartment, small debris in two kitchen drawers, abandoned spoons in a kitchen drawer, kitchen products left under the sink, debris on the side of and in the black kitchen sink, two cans of food abandoned in the fridge, debris on the stair carpet, another hair in a sink, a piece of debris on a bedroom carpet, a hair on the bathroom sink, four or five q tips on a floor, water marks on a glass shower door, an un-cleaned shelf under a sink in the bathroom and, last, two toilets with stains inside the bowls.

The landlord paid Ms. G.M. \$1000.00 to "paint repair" and to repair the drawer, reinsert the closet door, replace two closet shelves and two broken window screens, change 12 light bulbs and clean up garbage, including the mattress and box spring and "garbage next to the garbage." Her invoice is dated January 3, 2016.

The landlord paid a cleaning service \$787.50 on an invoice dated January 12, 2016 for cleaning, including steam cleaning the carpet and cleaning windows and blinds.

Mr. Y. testifies that the tenant damaged the head of the built in vacuum cleaner and either lost or took the "brush kit" associated with it. He produces a photograph showing a significant portion of the nozzle assembly plastic housing to be broken and missing, as well as a photo claimed to be from before this tenancy showing it to be in good condition, with the brush kit. He produces a bill in the amount of \$330.38 for its replacement.

The landlord also claims the amount of \$1650.00 as a re-rental fee anticipated in clause 9 of the tenancy agreement addendum in the event of "breaking the lease." Mr. Y. admitted at hearing that the management company charge for locating tenants, the

charge contemplated in clause 9, was actually \$1500.00 because the new rent was lower.

The tenant adduces 21 photos taken on a phone camera showing the date: November 22, 2015. The photos show general areas of the home with contents gone. The tenant testifies that he and his family physically moved from the home in early November. There are no stains in the toilet photographed. The fridge appears debris free, containing only a box of sweets the tenant says he left as a gift for the new occupant. A second fridge contains only a box of baking soda. The carpets appear freshly vacuumed. There is a photo of a chip in the wall near a staircase. The tenant says it occurred during move-out.

He says he didn't damage the vacuum and that he never used it, preferring his own floor vacuum and that he didn't take or loose the brush kit for the vacuum.

The tenant attended the November 22 inspection but neither signed the report agreeing or disagreeing with its contents, nor provided a forwarding address in writing in the space provided. He says he never received a copy of the move in report, though he does not appear to take issue with its contents.

Analysis

Material Breach

Residential Policy Guideline 8, "Unconscionable and Material Terms" provides:

Material Terms

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Under s. 32(1) of the *Residential Tenancy Act* (the “Act”) a landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and, having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

In this case it appears that Ms. J.G. had an allergic reaction to something in the home, likely the carpet. However, the fact that she was allergic to the carpet or something in it does not, in my view, mean that the landlord has failed to provide appropriate accommodation. There is no reasonable basis to find that the carpet contained a hazardous material. There has been no expert examination of the carpet. Ms. J.G.’s doctor’s letter cannot be considered authoritative. The doctor is clearly basing her opinion on what she has been told by her patient, and nothing more.

I cannot conclude that the landlord has been negligent or has somehow else fallen below its duty by installing that particular carpet. It was an unfortunate circumstance and that is all.

Nor can I find that the landlord was obliged to agree to have the carpet removed and replaced with laminate flooring. The landlord was entitled to take the view that the carpet was a reasonable one and that replacement was not required.

For this reason I conclude there was no material breach of the tenancy agreement.

In any event, the tenant did not comply with the requirements of the Policy Guideline. There is no correspondence warning the landlord of a “material breach” or giving a deadline for remedying the breach.

Landlord Acceptance of Ending the Tenancy

I find that the landlord either did accept the tenant’s ending of the tenancy or failed to take the steps necessary to preserve its right to claim the remainder of rent or damages for loss of rental income.

A tenant who purports to unilaterally end a tenancy before the expiry of the term is in fundamental breach of the tenancy agreement. In such a case, a landlord has four options:

1. Upon refusal to accept repudiation, the landlord could insist on performance of the lease and sue the tenant for rent owed each time it came due;
2. Upon acceptance of the repudiation and termination of the lease, the landlord could re-possess the premises and sue the tenant for rent owed or losses resulting from the tenant's breach of covenants to the date of termination; or
3. Advise the tenant that he proposes to re-let the property on behalf of the tenant and enter possession on that basis (thereby continuing the landlord-tenant relationship), and sue for shortfall in rent where it occurs.
4. The landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. (see *Highway Properties Ltd v Kelly, Douglas and Co Ltd.*, [1971] SCR 562)

In a residential tenancy setting, usually only two of these options are practical. They are summarized in Residential Tenancy Policy Guideline 3, "Claims for Rent and Damages for Loss of Rent."

Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:

1. Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;
2. Accept the abandonment or end the tenancy, **with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.**

These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the *Act* or tenancy agreement. Whether or not the breach is fundamental depends on the circumstances but as a general rule non-payment of rent is considered to be a fundamental breach.

If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances. Factors which the arbitrator may consider include, but are not limited to, the length of time since the end of the tenancy, whether or not the tenant's whereabouts was known to the landlord and whether there had been any prejudice to the tenant as a result of the passage of time. The landlord may also put the tenant on notice of the intent to make a claim of that nature by way of a term in the tenancy agreement. However, where a tenant has abandoned the premises and the tenancy has ended with the

abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.

(emphasis added)

In this case I find that the landlord did not announce to the tenant its election to accept the breach and its intention to seek damages from him for loss of rent for the remainder of the term.

The landlord did not present evidence that it did give the tenant notice of its intent to pursue him for lost rent and the tenant's evidence clearly indicates that he thought he could leave before the expiry of the fixed term because of the health problem created by his wife's allergic reaction to the carpet.

Following the tenant's notice, landlord immediately started showing the premises to prospective tenants and, in early November, asked the tenant when he was moving so that the landlord could "proceed with the contract with new tenant."

I find that the landlord accepted the end of the tenancy with the right to claim for unpaid rent to the date the tenant vacated but for nothing more. Its claims for loss of rental income and for the difference between this tenant's rent and that of the next tenant, must be dismissed.

The tenant owes the landlord \$3300.00 for October rent. As the tenant continued to possess the premises into the month of November, I find that he owes the landlord for the \$3300.00 for that month, as occupation rent.

Cleaning

There is a marked difference between the state of the premises shown in the tenant's photos and the photos presented by the landlord. It is difficult to accept that they were all taken in the same premises on the same day.

In my view the move out condition inspection report is the best source for a determination of the state of the premises as of November 22, the date when keys were returned and thus possession returned to the landlord.

I have examined the report and it does not come near to justifying \$550.00 worth of general cleaning charged to the landlord in the cleaner's invoice. In all the circumstances I award the landlord \$125.00 for cleaning noted as being required in condition report.

It had not been over a year since the carpets were shampooed. Having regard to Policy Guideline 1, "Landlord & Tenant: Responsibility for Residential Premises" I find

that the landlord has failed to show that professional cleaning of the carpets was required. I decline to award the landlord the cost to do so..

The landlord will have \$200.00 for cleaning, plus GST of \$10.00 for a total of \$210.00.

Repairs

The condition report claims six bulbs were missing or not working on November 22. For some unexplained reason the landlord's repairman charged \$200.00 to replace twelve bulbs.

This may appear to be a minor cost item, but it casts a shadow over the accuracy of the repairman's invoice of January 3, 2016. I find that without the repairman's testimony offering some explanation for the charges, I give the invoice little weight.

I find that there was damage to the wall at the stairwell. The drywall has been dented. The damage exceeds reasonable wear and tear. I consider \$75.00 to be reasonable charge for a workman to fill the dent and paint over it.

I find that there were two damaged window screens that had to be rescreened. I consider \$100.00 to be a reasonable charge for both.

I find that two racks in the closet had to be reinserted. This is simply a matter of putting the racks back onto their awaiting pins. I consider \$10.00 to be an appropriate cost.

For the replacement of six bulbs I award the landlord \$50.00, inclusive of the cost of the bulbs.

I find that the in house vacuum nozzle was irreparably damaged during this tenancy and that it was necessary to replace the complete unit. I award the landlord \$330.38, as claimed.

Utilities

I award the landlord \$558.03, admitted by the tenant.

Clause 9 Charge

As the ending of the tenancy was agreed to the by the landlord, I find that the tenant has not repudiated or breached the fixed term tenancy agreement, as contemplated by clause 9 of the Addendum and so the charge imposed by it is not applicable.

Conclusion

The landlord is entitled to a monetary award totalling \$8033.41, plus recovery of the \$100.00 filing fee for this application.

I authorize the landlord to retain the \$1650.00 security deposit in reduction of the amount awarded.

There will be a monetary order against the tenant for the remainder of \$6483.41.

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: September 28, 2016

Residential Tenancy Branch