Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to sections 51(2) and 67; and
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

At the commencement of this hearing, I advised the landlord and the landlords' agent that I was aware that the tenants' agent had formerly worked for the Residential Tenancy Branch (the RTB) as arbitrator. I noted that his time at the RTB, pre-dated my own time there and that I had never worked with the tenants' agent in any capacity. I advised the parties that I wanted to disclose the tenants' agent's prior working relationship with the RTB at the beginning of this hearing to ensure that the landlords and the landlords' agent were aware of that prior working relationship. Although I had met the tenants' arbitrator once, I assured the parties that I was confident that I could make a fair decision without bias. The landlords' agent assured me that they had no concerns about my proceeding to hear this matter.

At the commencement of the hearing, the tenants' agent noted that they had recently learned that they had an incorrect understanding of the timing of recent changes to the relevant section of the *Act*. The tenants' agent asked to ignore their amended application for a monetary award of $35,000.00, as the tenants were relying on their original application for a monetary award of $6,000.00 in addition to the recovery of their

filing fee from the landlords. The amount of the requested monetary application has reverted to the original amount cited in the tenants' initial application, totalling $6,000.00 plus the recovery of the tenants' $100.00 filing fee.

Preliminary Issues - Service of Documents

The tenants' agent testified that they sent each of the landlords separate copies of the tenants' dispute resolution hearing package, including copies of the Notice of Hearing, the tenants' application, and the tenants' written evidence as it then existed by registered mail on May 24, 2018. The tenants' agent testified that the Canada Post Online Tracking System confirmed that the landlords received this package on May 25, 2018. Although the landlords' agent confirmed that the landlords received these packages, they testified that the Notice of Hearing documents were missing from this package. The landlords' agent maintained that the only way that they were able to obtain information to connect with this teleconference was by contacting the Residential Tenancy Branch (the RTB) directly to obtain this information.

The tenants' agent also testified that additional written evidence was sent to the landlords by registered mail on June 2, 2018, which Canada Post's Online Tracking System showed was received by the landlords on June 4, 2018. The landlords' agent confirmed receipt of all of the tenants' written evidence. However, the landlords' agent questioned why the RTB had not contacted the landlords directly about this hearing, noting that the only documents the landlords received were from the tenants. In this regard, I noted that it is the responsibility of the Applicant and the Respondent to serve one another with documents related to a hearing; the RTB has no role in the service of documents between the parties.

The landlords' agent testified that they attended at the RTB offices and entered written evidence for this hearing on June 21, 2018, and sent a copy of that written evidence to the tenants' agent by registered mail that same day. In this regard, the tenants' agent testified that he had learned that a package had been received by another office of the tenants' firm, the day before this hearing. The tenants' agent testified that he had not yet received that package of written evidence.

I advised the parties that the RTB has no record of this written evidence having been submitted by the landlords or their agent into the RTB's online evidence service portal. In addition and in accordance with sections 88 and 90 of the *Act*, I find that any written evidence sent to the tenants' agent five days before this hearing would only have been deemed served to the tenants' agent on the day of the hearing. The RTB's Rule of

Procedure 3.15 requires that all written evidence from a Respondent is to be served to the Applicant not less than seven days before the hearing. As that has not occurred, I advised the parties that I would be exercising the discretion allowed to me in not considering this very late written evidence from the landlords.

As the key landlord was in attendance at the hearing, with an agent, and was aware of this hearing and the issue in dispute well in advance of this hearing, I proceeded with this hearing. In doing so, I find that the landlords were either deemed served with the hearing package on June 4, 2018, as was claimed by the tenants' agent, or was sufficiently served for the purposes of this *Act* (pursuant to the powers delegated to me under paragraph 71(2)(b) of the *Act*).

Preliminary Issues - Effect of Previous Decision and Clarification Decision Related to this Tenancy

Both parties drew my attention to the previous decision identified above that was rendered by another Arbitrator appointed pursuant to the *Act* on December 20, 2017. At the hearing conducted by that Arbitrator on December 20, 2017, the details of a settlement agreement reached between the parties was outlined and recorded as part of that decision. Of particular note for the purposes of the current hearing are the following details:

> *1. That the tenancy will end and the tenant will vacate by no later than on **January 15, 2018** and the landlord will receive an **Order of Possession** effective on the agreed date...*
>
> *4. That the tenant withdraws their monetary claims on application, and for all time no further claims will be made by the tenant whatsoever arising from this tenancy...*

Both parties at the current hearing confirmed that the tenants surrendered vacant possession of the rental unit to the landlords by January 15, 2018, as per Term 1 of their settlement agreement, as outlined above.

Although Term 4 of the settlement agreement would have prevented the tenants from initiating their current claim, the tenants' agent referred to a Clarification Decision issued by the original arbitrator on January 8, 2018. This Clarification Decision and amendment to the original decision was in response to a December 22, 2017

application for a clarification of the original decision by the tenants' agent. The original arbitrator issued the following clarification of the original decision:

> *...Together with copy of the Decision the tenant submits a 1 page narrative seeking clarification of paragraph 4 of the Decision vis a vis entitlements under Section 51(2) of the Act. I concede to the tenant's request in that paragraph 4 was for the purpose of addressing the parties' agreed term that the tenant would not make further claims respecting the tenant's period of occupancy in the manner of their application before the hearing. Paragraph 4 is appropriately corrected to more accurately state the above with a view to its clarification. Any entitlement following the tenant's period of occupancy pursuant to Section 51(2) is not extinguished.*
>
> *Pursuant to Section 78 the Decision and Record of Settlement is amended, and is provided to both parties.*
>
> *The Decision and Record of Settlement is clarified...*

At that time, the original arbitrator amended the wording of Term 4 of the settlement agreement as reported in his decision as follows:

> *4. That the tenant withdraws their monetary claims on application, and for all time no further claims will be made by the tenant whatsoever arising from <u>their period or time of occupancy...</u>*

Although a copy of this January 8, 2018 clarification and amended decision were sent to both the tenants' agent and the landlords by the RTB, the landlords' agent maintained that the landlords never received this clarification or amendment. However, the landlords' agent confirmed that the clarification and amended decision were included in the written evidence provided by the tenants' agent to the landlords for the purposes of the current hearing.

While it is unfortunate that the landlords may not have received a copy of the clarification decision and amended decision directly from the RTB, I confirm that the copy of the clarification decision and amended decision as outlined above and as entered into written evidence by the tenants' agent is accurate.

Based on the amended wording of Term 4 of the amended decision and the clarification decision issued by the original arbitrator on January 8, 2018, I find that the tenants' agent is correct in maintaining that the tenants are not prevented from seeking the

additional compensation they are requesting pursuant to section 51(2) of the *Act*. I find that the previous decision for this tenancy as amended and clarified on January 8, 2018 does not bar me from considering the tenants' current application for a monetary award.

Issues(s) to be Decided

Are the tenants entitled to a monetary award for the landlords' failure to comply with the provisions of section 51 of the *Act* in using the rental suite for the purposes stated on their 2 Month Notice to End Tenancy for Landlord Use of Property (the 2 Month Notice) issued on September 26, 2017? Are the tenants entitled to recover the filing fee for their application from the landlords?

Background and Evidence

While I have turned my mind to all of the relevant documentary evidence, including exterior photographs of the rental property, and other miscellaneous documents submitted by the tenants' agent, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenants' claim and my findings around each are set out below.

This tenancy began in 2016. Monthly rent by the time that the landlords issued their 2 Month Notice to the tenants on September 26,l 2017 was set at $3,000.00, payable in advance at the first of each month. Both parties agreed that the sole reason cited for the landlords' 2 Month Notice was as follows:

- *The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse...*

Although the landlords' 2 Month Notice called for an end to this tenancy by November 30, 2017, the tenants applied to cancel that Notice. The tenants' application to cancel that Notice resulted in the December 20, 2017 hearing, at which the parties agreed to settle their dispute on the basis of the terms outlined above.

At the current hearing, the landlords' agent maintained that the tenants gave their own notice to end this tenancy by January 15, 2018, which was confirmed at the December 20, 2017 hearing. However, the landlords' agent did not deny that the landlords had issued the 2 Month Notice in September 2017.

The tenants' current application for a monetary award of $6,000.00 seeks a payment pursuant to section 51(2) of the *Act*, as the tenants allege that the landlords have not

used the premises for the purposes set out in their 2 Month Notice to end this tenancy. The tenants' agent provided considerable written and photographic evidence to support their claim that neither the landlords nor a close family member have lived in the rental unit in the five plus months since the tenants vacated the rental unit. The tenants' agent also supplied undisputed written evidence that the landlords listed the property for sale on April 30, 2018, for an asking price of $1,598,00.00. The tenants' agent noted that this listing of the property for sale was also at odds with the landlords' stated reason for seeking an end to this tenancy. The tenants' agent claimed that this rental home has remained empty, since the tenants vacated the premises in January. The tenants' agent provided evidence from a person who visited the rental property with a real estate agent once the property was listed for sale, and they confirmed in writing and through photographs that the premises remain vacant and unoccupied. The tenants' agent also entered into evidence an undisputed written statement from the neighbour who lives next to the rental property in which that neighbour confirmed that no one had been residing in the rental property since the tenants vacated it in mid-January 2018.

The tenants' agent gave sworn testimony regarding written decisions as to how other arbitrators have interpreted this section of the *Act.* The tenants' agent noted that decisions from other arbitrators have defined occupancy to extend beyond mere possession of the premises by a landlord and, as was noted by a Supreme Court Decision, require the landlord (or a close family member) to move into the premises, establishing an element of permanency as to their usual place of habitation. The tenants' agent asserted that the landlords or their close family members have made no effort to live there. The tenants' agent claimed that the landlords have allowed the grass in the lawn to grow "a foot high" and that a reasonable period of time has passed to enable the landlords to use the premises for the purpose stated in their 2 Month Notice.

The landlords' agent gave undisputed sworn testimony that the tenants were the previous owners of this property. They claimed that at the end of this tenancy the tenants took all kinds of belongings, including the blinds, that were to have remained in this rental home. The landlords' agent claimed that there was so much damage to the rental home that the landlords have had to spend upwards of $10,000.00 so far to repair damage caused by the tenants. The landlords' agent also said that the landlords continue to consider submitting their own claim for damage arising out of this tenancy. The landlords' agent maintained that the tenants had left the rental home in such "disgusting" condition that it has impacted the landlords' plans to have their daughter live there when she gets married. When asked for details as to when the wedding for the landlords' daughter was planned, the landlords' agent did not respond. The landlords' agent only stated that the damage caused to the rental home had caused lots

of problems within the landlords' family as their daughter no longer wished to reside there when she is married.

The landlords' agent confirmed that the landlords listed the property for sale at the end of April 2018. However, they maintained that this was only to find out what the house was worth. Later, after consulting with the landlord who was in attendance at this hearing, she said that the landlords were now offering to move into the rental home "right away."

Analysis

I should first remark, as I noted at the hearing, that previous decisions on applications to obtain monetary awards pursuant to this section of the *Act* are not precedent setting and in no way bind my ability to apply the legislation to the current set of circumstances, Section 64(2) of the *Act* establishes that each decision is to be made on the merits of the case by the evidence admitted "and is not bound to follow other decisions."

Section 49(3) of the *Act* provides the statutory authority whereby a landlord may end a tenancy for landlord's use of the property under the following circumstances:

> *(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.*

The following portions of section 51 of the *Act* have a bearing on the tenants' eligibility for compensation after receipt of the 2 Month Notice from the landlords:

> ***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 the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement...*
>
> *(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...*

The tenants would have already received the equivalent of one month's rent during the latter part of their tenancy as a result of having received the 2 Month Notice from the landlords. Whether or not the tenants issued their own notice to end their tenancy or whether they delayed vacating until after the effective date of the 2 Month Notice, their entitlement to compensation pursuant to section 51(1) flows from having "received" the 2 Month Notice from the landlords. The clarification and amended decision of January 8, 2018 by the original arbitrator who heard the tenants' earlier application to cancel the 2 Month Notice did not preclude the tenants from making a further claim against the landlords pursuant to section 51(2) of the *Act*. In fact, the clarification decision noted that the settlement agreement between the parties did not extinguish the tenants' right to submit a further claim pursuant to section 51(2). This clear statement from the original arbitrator who recorded the details of the settlement agreement between the parties and the wording of section 51(1) of the *Act* leave little doubt that the tenants' entitlement to compensation under section 51 flows from their receipt of the 2 Month Notice from the landlords and not on the basis of the tenants' own notice to end their tenancy.

The tenants' agent also referred to RTB Policy Guideline 2. The relevant section of this Policy Guideline reads as follows:

> *...If a tenant can show that a landlord who ended their tenancy under section 49 of the RTA or section 42 of the MHPTA has not:* •
>
> *taken steps to accomplish the stated purpose for ending the tenancy within a reasonable period after the effective date of the notice to end tenancy, or* •
>
> *used the rental unit for that stated purpose for at least six months beginning within a reasonable period after the effective date of the notice (RTA only), the tenant may seek an order that the landlord pay the tenant a set amount of additional compensation for not using the property for the purpose stated in the Notice to End Tenancy...*

In considering this application, I have taken into account the assertion of the landlords' agent that the landlords' plans to use the rental home for the purposes stated in the 2 Month Notice have been hampered by the damage that occurred during the course of

this tenancy. Other than the sworn testimony of the landlords' agent, the landlords provided no other evidence that could be considered for the purposes of this hearing. The landlords' agent did claim that the landlords could supply receipts in excess of $10,000.00 if needed; however, as noted above produced no written evidence that could be considered for the purposes of this hearing. Repairs may have been necessary following the end of this tenancy and the tenants may have removed items from the rental home which the landlords believe should have remained there as per the terms of their original purchase of the property from the tenants and as part of this tenancy agreement. However, I also note that the tenants' agent stated that the tenants asked the landlords repeatedly to undertake necessary repairs. From the testimony provided on this point, there is little way of assessing who is responsible for the repairs and damage that the landlords' agent has identified as the principal reason for the landlords' delay in using the rental home for the purposes stated in the 2 Month Notice. I note that the landlords' agent confirmed that the landlords have not launched any claim for damage against the tenants arising out of this tenancy.

I accept that there may be an understandable delay in undertaking repairs and upgrading a rental property to the condition where a family member would consider the premises suitable for habitation. However, given the landlords' apparent awareness that at least some repairs and upgrades would be necessary, I find little validity to the claim by the landlords' agent that the necessary repairs could not have been accomplished in the more than five months that have transpired since this tenancy ended.

I find the sworn testimony provided by the landlords' agent lacked consistency and did not align logically with at least some of the sequence of events. For example, at one point in this hearing, the landlords' agent claimed that the landlords were "using" the rental home; however, this description was clarified later when the landlords' agent said that they were using it to repair the premises. This testimony was at odds with the confirmation by the landlords' agent that the landlords entered into an MLS listing of the rental property for sale at the end of April 2018. I attach little credibility to the assertion by the landlords' agent that the landlords listed the property for the purposes of finding out what the property was worth. There are any number of qualified real estate agents and appraisers available who would be able to provide the landlords with an estimate of what the property would bring on the open housing market without having to resort to listing the property for sale on an MLS listing and showing it to prospective purchasers. The reality is that the landlords listed this property for sale, three and a half months after obtaining possession of the premises from the tenants for the sole purpose of occupying the premises themselves or having a close family member occupy the premises.

The landlords' agent did not dispute the claim by the tenants' agent that the real estate viewing confirmed that no one was living in the rental unit. In fact, at no time did the landlords' agent contest the considerable evidence offered by the tenants' agent that no one had actually lived in the tenants' rental unit since they vacated it in January 2018. Instead, the landlords' agent asked repeated questions as to who allowed the person taking the photographs into the property for the real estate viewing. The issue before me was not whether the person taking the photos was legally entitled to do so, but was whether the premises appear to have been lived in by the landlords. As the landlords' agent did not deny the claim that neither the landlords nor their close family members have lived in the rental unit since the end of this tenancy, and the rental property has been listed for sale, there is no dispute as to the issue that was portrayed in the photographs within the house, which the tenants' agent presented. Since there was no need to consider these interior photographs, I have not taken them into account, nor have I looked at them in coming to my decision.

I also find that the deficiencies in the evidence provided by the landlords' agent extended to the claim that the landlords had intended to let their daughter live in the rental home after she was married. Neither the landlord who was in attendance at this hearing, nor the landlords' daughter provided any sworn testimony or written evidence regarding these plans. As noted earlier, I received no response from the landlords' agent as to when the wedding of the landlords' daughter was planned, whether she lives or has ever lived in this community, and whether the daughter or her prospective spouse had ever agreed to reside in this property.

Very late in the hearing and despite all of the other claims made by the landlords' agent as to the unsuitability of the rental home for habitation, the landlords' agent changed testimony yet again to announce that the landlord in attendance had just committed to move into the rental home "right away." I attach little credibility to this last minute change of heart regarding the intentions of the landlord in attendance as this could clearly have happened in the five plus months since this tenancy ended. I also find the timing of this reversal in testimony had more to do with their fears as to the anticipated outcome of this hearing than any real commitment by the landlords to finally abide the terms of the reasons stated in their 2 Month Notice for ending this tenancy.

In conclusion, I find little valid explanation as to why the landlords have failed to occupy the rental premises for the purposes stated in their 2 Month Notice issued in September 2017, by late June 2018, more than five months after the landlords obtained possession of the rental unit. The type of activity described by the landlords' agent in the

intervening months by no means meets the definition of occupancy as established in section 49 of the *Act*. Obtaining possession of a rental property pursuant to section 49(3) of the *Act* and opposing a claim for compensation pursuant to section 51(2) of the *Act* requires something beyond "using" the property to conduct repairs in preparation for listing the property for sale. It requires "occupancy" of the premises within a reasonable period of time and continuing that occupancy of the premises for a period of at least six months.

Based on a balance of probabilities, I find that the tenants have demonstrated that they are entitled to a monetary Order of double their monthly rent pursuant to section 51(2) of the *Act* because the landlord has not occupied the rental unit for the stated purpose in the landlord's 2 Month Notice. More than five months have passed since the tenants vacated the rental unit. I consider this to have been ample time to allow the landlord to fix what needed repair and occupy the premises themselves or arrange for it to be occupied by a close family member as they committed to when they issued the 2 Month Notice in September 2017. They have not done so and, based on the undisputed evidence before me, the landlords have instead listed the premises for sale.

For the reasons outlined above, I find that the tenants are entitled to compensation as set out in section 51(2) of the *Act*. I therefore find that the tenants are entitled to the recovery of the equivalent of two month's rent. As the normal monthly rent for this tenancy was set at $3,000.00, I find that the tenants are entitled to a monetary Order in the sum of $6,000.00 as claimed.

Since the tenants have been successful in their application, I allow them to recover their $100.00 filing fee from the landlords.

Conclusion

I issue a monetary award in the tenants' favour in the amount of $6,100.00, which allows the tenants to recover the equivalent of two month's rent from the landlords and the recovery of their filing fee.

The tenants are provided with these Orders in the above terms and the landlord(s) must be served with this Order as soon as possible. Should the landlord(s) fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: June 27, 2018

Residential Tenancy Branch