



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Plaza 500 Hotels Ltd. c/o AWM-Alliance
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for damage or compensation pursuant to Section 67;
- To retain the security deposit; and
- Reimbursement of the filing fee pursuant to Section 72.

The landlord attended through their agent LM (“the landlord”). The tenant NM attended on behalf of both tenants (“the tenants”). Each party acknowledged receipt of the other party’s materials. The tenants acknowledged service of the Notice of Hearing and Application for Dispute Resolution. No issues of service were raised.

Each party was given a full opportunity to provide affirmed testimony, submit documents, question the other party, and make submissions.

Issue(s) to be Decided

Are the landlords entitled to a monetary order for damage or compensation pursuant to Section 67?

Are the landlords entitled to retain the security deposit?

Are the landlords entitled to reimbursement of the filing fee pursuant to Section 72?

Background and Evidence

The parties agreed on the following:

- The parties entered a fixed term tenancy agreement commencing September 11, 2017, for one year for \$2,450.00 rent, payable on the first of the month, with an end date of September 30, 2018;
- A copy of the agreement was submitted as evidence which states in paragraph # 3 that many items are included in the lease, including a refrigerator;
- The agreement contains a Lease Addendum which states in part as follows:

2. Term: Your lease agreement is for a FIXED term. Should you terminate early, liquidated damages must be paid by certified funds.

- The tenants provided a security deposit in the amount of \$1,225.00 at the beginning of the tenancy;
- On November 7, 2017, the tenants provided notice of their intention to vacate the premises effective December 31, 2017, in an email to the landlord stating:

Please note that I would like to terminate the rental contract for the apartment and therefore please consider this message as my one month advance notice.

- The tenants vacated the premises on November 30, 2017;
- The tenants paid rent until the end of December 2017;
- The tenants provided a forwarding address in writing to the landlord on December 31, 2017 which was acknowledged by the landlord at the hearing;
- The tenants did not agree to any portion of the security deposit being retained by the landlord; and
- The landlord rented the unit commencing February 1, 2018, for rent of \$2,560.00, \$110.00 more each month than the monthly rent paid by the tenants.

The landlord claims to have made all reasonable efforts to find replacement tenants for the unit, but was unable to find suitable tenants to rent before February 1, 2018.

The landlord stated that, to the best of her knowledge, the unit was advertised on the website of the marketing agent as soon as the tenant submitted a notice to end the tenancy. However, the landlord acknowledged she had no direct knowledge of any efforts to find suitable replacement tenants. The landlord did not submit any evidence of efforts to locate replacement tenants or copies of the advertisements. The landlord did not provide any information about the advertising, such as the dates or the amount of rent publicised. The landlord did not know if the unit had been offered for rent at the same rate paid by the tenants. The landlord had no information regarding the number of applicants, dates of showing, or correspondence exchanged with prospective tenants.

The landlord claimed compensation for liquidated damages in the amount of \$978.60 for the fee paid to the marketing agent to re-rent the unit. This claim was made by the landlord pursuant to the term in the Addendum referenced earlier which stated the tenant was responsible for liquidated damages.

In summary, the landlord claimed the following for compensation of damages:

ITEM	AMOUNT
Loss of revenue – January 2018	\$2,450.00
Fee paid to marketing agent	\$978.60
Total =	\$3,428.60

The tenants testified the reason for vacating the premises was that the refrigerator did not work and the landlord failed to fix or replace it for several weeks after being notified of the problem. The tenants submitted a copy of an email dated October 17, 2017, to the landlord advising the refrigerator was not working. The landlord acknowledged the email in writing that day, and copied the response to the property manager and the concierge. A copy of this email was also submitted as evidence.

The tenants stated they each mentioned the non-functioning refrigerator almost daily after this to the concierge. Each time, the concierge promised he would do something about it. No repair person came to inspect the refrigerator and it continued to be non-functioning.

As a result, the tenants decided they could not continue to live in the unit without a functioning refrigerator. They submitted their notice to vacate the unit to the landlord on November 7, 2017, one month after notifying the landlord of the non-functioning

appliance. A copy of the notice was entered as evidence along with the landlord's acknowledgement in writing.

The tenants claim they gave the landlord ample opportunity to fix the refrigerator. As a result, the tenants claim they are not responsible for any of the expenses for which reimbursement is requested by the landlord.

A Condition Inspection Report was prepared on moving in and on moving out dated December 31, 2017. The report was signed by both parties. On the moving out column was written, "The suite is in excellent condition".

In the moving-in column, the words appeared, "fridge acting up". The tenants stated these words were inserted on the moving-out inspection by the concierge, not at the time of moving in. They state the concierge knew the refrigerator was not working. However, the phrase was inserted as the concierge was concerned for his personal accountability.

The landlord stated she did not know if the refrigerator was working during the tenancy or what efforts, if any, had been made to fix or replace it.

Analysis

I have considered all the submissions and evidence presented to me, including those provided in writing and orally. I will only refer to certain aspects of the submissions and evidence in my findings.

The parties entered into a fixed term tenancy agreement that was set to expire on September 30, 2018. A tenant may not legally end a fixed term tenancy agreement except in a few limited and specific circumstances provided under the *Act*, which are cases where the landlord has violated a material term of a tenancy agreement; a tenant is fleeing domestic violence or going into a care home; or, as authorized by the Director.

The tenants notified the landlord of the problem with the refrigerator on October 7, 2017. The landlord failed to address the problem and the tenants vacated at the end of November 2017, after waiting for repairs for a period of seven weeks. The tenants reasonably expected to have a functioning refrigerator.

Residential Tenancy Policy Guideline 30: Fixed Term Tenancies provides guidance on when a tenant may end a fixed term tenancy.

A tenant may end the tenancy if the landlord has breached a material term of the tenancy agreement. The tenant must give proper notice under the Legislation. Breach of a material term involves a breach which is so serious that it goes to the heart of the tenancy agreement.

Section 45(3) of the *Act* states as follows:

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

I find that the failure of the landlord to provide a working refrigerator is a breach of a material term of the tenancy. I also find the landlord did not correct the situation within a reasonable time after provision of the notice of October 7, 2017. Based on my findings, the tenants were entitled to end the tenancy at the end of December 2017. As the landlord is in breach of a material term of the tenancy agreement, I dismiss the landlord's application for compensation for damages without leave to reapply.

As stated in section 38 of the *Act*, the landlord is required to either return the tenants' deposit in full or file for dispute resolution for authorization to retain the deposit fifteen days after the later of the end of a tenancy and receipt of the tenants' forwarding address in writing. If the landlord fails to do this, the doubling provisions of section 38(6)(b) apply.

I find the tenants provided their forwarding address in writing pursuant to section 38(1)(b) on December 30, 2017 and have not provided consent to the landlord to keep any portion of the security deposit pursuant to section 38(4)(a).

I find the landlord brought proceedings on January 10, 2018 claiming against the security deposit pursuant to section 38(1)(d) of the *Act* within the fifteen-day period.

As the landlord's claim has been dismissed, the landlord is required to return the security deposit to the landlord. I award the tenants a monetary order in the amount of \$1,250.00, the amount of the security deposit.

The landlord's claim for reimbursement of the filing fee is dismissed without leave to reapply.

A monetary order is accordingly granted to the tenants in in the amount of \$1,250.00

Conclusion

The landlord's claims are dismissed without leave to reapply.

The tenants are granted a monetary order in the amount of \$1,250.00. The landlord is ordered to pay this sum forthwith. The landlord must be served with a copy of this Order as soon as possible. Should the landlord fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial 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: August 22, 2018

Residential Tenancy Branch