Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LANDONE DEVELOPMENTS INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, FFT

Introduction

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

- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 9:47 a.m. in order to enable the landlord to call into this teleconference hearing scheduled for 9:30 a.m. The tenants attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. During the hearing, I also confirmed from the online teleconference system that the tenants and I were the only ones who had called into this teleconference.

Tenant AC (the tenant) gave undisputed sworn testimony, that they handed the landlord a copy of the dispute resolution hearing package and written evidence on November 19, 2018. The other tenant testified that they saw Tenant AC hand this material to the landlord on that date. Based on this testimony, I find that the landlord was served with a copy of the tenants' dispute resolution hearing and written evidence packages on November 19, 2018, in accordance with sections 88 and 89 of the *Act.* The landlord did not submit any written evidence for this hearing.

At the commencement of this hearing, the tenant testified that the tenants vacated the rental unit on December 15, 2018, at which time they surrendered their keys to the landlord. They advised the landlord at that time that they were ending this tenancy early because they believed that the landlord's failure to attend to the repairs that they had

requested constituted a breach of a material term of their tenancy agreement. The tenants asked for a determination that their actions in ending this tenancy before the scheduled termination date for their tenancy was, as they maintained, on the basis of the landlord's breach of a material term of their tenancy agreement.

Issues(s) to be Decided

Should any orders be issued against the landlord arising out of this tenancy? Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This one-year fixed term tenancy began on April 1, 2018 and was scheduled to run until March 31, 2019. Monthly rent was set at $2,550.00, payable in advance by the first of the month, plus utilities. The landlord continues to hold the tenants' $1,275.00 security deposit.

The tenants provided written evidence, supported by undisputed sworn testimony, that the landlord failed to address their concerns about a host of problems they were experiencing with respect to their tenancy. The tenants supplied written and photographic evidence to support their assertion that water leaks that the landlord had failed to repair had led to serious incursions of black mould in a number of different parts of this rental unit. The tenants also alleged that there were a number of leaks to taps within the rental unit as well as a leaking bathtub that the landlord had failed to repair. The tenants maintained that they first alerted the landlord to these problems on October 2, 2018, and that it took the landlord until November 6, 2018 to even inspect the rental unit. The tenants asserted that the landlord failed to take the necessary action to repair these deficiencies after receiving their November 15, 2018 letter advising that they would be ending their tenancy for the landlord's breach of a material term of their tenancy agreement by December 1, 2018 if the problems remained unresolved. The tenants said that the problems identified in their November 15 letter and in their application for dispute resolution were not addressed by the landlord by the time they vacated the rental unit on December 15, 2018.

Analysis

As discussed with the tenants, there is no doubt that the circumstances of their application have changed since they applied for dispute resolution. The tenants' November 15, 2018 letter notified the landlord that they were planning to end their tenancy if the landlord did not undertake repairs by December 1, 2018 for the landlord's alleged breach of a material term of their tenancy agreement.

Residential Tenancy Branch (RTB) Policy Guideline #8 provides the following information regarding allegations that a party has breached a material term of the tenancy agreement:

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.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof....

While there is undisputed evidence that the landlord knew that the tenants were considering ending their tenancy early on the basis of their claim that the landlord had breached a material term of their tenancy agreement, the tenants only entered into written evidence a single page of that agreement. More importantly, the tenants' application made no mention of the tenants' intention to obtain an order that the landlord had breached a material term of their tenancy agreement. Their application requested only orders that the landlord be ordered to comply with terms of their tenancy

agreement, the *Act* or the *Regulation*s. Their application identified problems that they wished addressed by the landlord as part of their tenancy that was still in place on November 15, 2018, when they applied for dispute resolution. They did not apply for an order that the landlord's actions constituted a breach of a material term of their tenancy agreement.

Separate from the legislative provisions in section 89 of the *Act* requiring an applicant for dispute resolution to notify the respondent of the issue that was subject to the matter to be heard by an arbitrator appointed pursuant to the *Act*, the legal principle of natural justice ensures that those who are subject to quasi-judicial proceedings against them know the case against them so as to afford them an opportunity to respond to the case presented by an applicant. In this case, there is a distinct possibility that the landlord failed to attend this hearing because the tenants have ended their tenancy and, as such, the landlord considered their application to be moot given that none of the repair remedies identified in their application were relevant now that the tenancy has ended. For these reasons, I find that the tenants' request at this hearing for a determination that their action in ending their tenancy on the basis of the landlord's breach of a material term of their tenancy agreement was not an issue that was included in their original application for dispute resolution or one that the landlord would have known the tenants were seeking.

The circumstances of this tenancy have clearly changed since the tenants submitted their original application. I find that the tenants' application did not put the landlord on adequate notice that they would be seeking a determination that would affect the landlord's ability to claim for losses arising out of this tenancy.

The tenant testified that the landlord advised them when they returned their keys that the landlord would be seeking a monetary award for losses arising out of their ending this tenancy before the scheduled termination date for this fixed term tenancy. I find that the proper time to consider the tenants' claim that they ended this tenancy on the basis of the landlord's breach of a material term of their tenancy would be in the context of either a claim by the landlord for monetary losses or in the context of a new application from the tenants. To accomplish the latter, the tenants would need to clearly identify their request for a determination that their tenancy ended on the basis of the landlord's breach of a material term of their tenancy agreement.

Under the circumstances and as the landlord did not attend this hearing, I find that when the tenants applied for dispute resolution this was the next logical step in attempting to obtain the remedies they were seeking with respect to their then still ongoing tenancy.

For this reason, I allow the tenants' application to recover their $100.00 filing fee from the landlord.

The tenants said that they have not yet provided the landlord with their forwarding address in writing for the return of their security deposit. The tenants have up to one year after the end of their tenancy to provide this information to the landlord. This request for the return of their security deposit needs to be provided in a separate written request to the landlord. Including a forwarding address in an application for dispute resolution does not constitute this requirement outlined in section 38 of the *Act* regarding the return of a security deposit.

Conclusion

I issue a monetary Order in the tenants' favour in the amount of $100.00 for the recovery of their filing fee.

As I find that the tenants' application for the issuance of orders that the landlord comply with the tenancy agreement, the *Act* or the *Regulations* has become a moot point given that this tenancy has ended. I dismiss this element of the tenants' application. The tenants remain at liberty to apply for a determination that there tenancy ended on the basis of the landlord's breach of a material term of their tenancy agreement.

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: December 20, 2018

Residential Tenancy Branch