



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFL

Introduction

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

- a monetary order in the amount of \$18,600.00 representing 12 times the amount of the monthly rent pursuant to sections 51 and 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

All parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord was represented by counsel.

The tenants testified, and the landlord confirmed, that the tenants served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord testified, and the tenants confirmed, that the landlord served the tenants with their evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Issue(s) to be Decided

Are the tenants entitled to:

- a monetary order for \$18,600.00; and
- recover the filing fee for this application from the landlord pursuant to section 72?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The tenants rented the rental unit, which a basement suite, from the prior owner of the rental unit (the "**Prior Owner**"). Monthly rent was \$1,550.00.

On October 26, 2018, the Prior Owner served the tenants with a Two Month Notice to End Tenancy for Landlord's Use of the Property (the "**Notice**"). The effective date of the Notice was December 31, 2018.

The Notice listed that the reason for the end of tenancy as "all of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing to give this Notice because the purchaser or close family member intends in good faith to occupy the rental unit."

The landlord took possession of the rental unit December 2, 2018.

The tenants testified they moved out of the rental unit on November 29, 2018 in an effort to comply with the 2 Month Notice issued October 26, 2018.

The tenants testified that on January 14, 2019, they discovered an advertisement on Craigslist listing the rental unit for rent of \$2,300.00 per month. They provided a screenshot of the advertisement in their documentary evidence. The landlord agrees that she posted this advertisement.

The tenants argue that the landlord did not act in good faith when asking the Prior Owner to issue the Notice. They argue that the landlord did not have the intention to move into the rental unit. Rather, they argue that at the time the Notice was issued, and at the time they moved out of the rental unit, the landlord intended to rent out the rental unit, as evidenced by the craigslist ad.

Additionally, the tenants testified that the rental property (rental unit plus upper floors) has six bedrooms and that the landlord (who lives alone) has no need of that amount of space, and always intended to rent out the rental unit, rather than occupying it for her own use.

The landlord testified that she always intended on moving into the rental unit. She testified that she, in fact, did move into the rental unit in early February 2019 (February 2 or 3, she believes, but is not certain).

Counsel for the landlord stated that in early December 2018 the landlord attended the rental property and noticed a strong odour. Counsel stated that the landlord attempted to remediate this smell by placing carbon filters around the rental property, and by having the carpets cleaned, but that, despite this, the odour persisted.

The landlord testified that she tried to move into the rental property on December 24, 2018, but that she could not, again due to the odour. The landlord then arranged for a contractor (who she called as a witness at this hearing) to attend the rental property to see if he could determine the cause of the odour.

Counsel for the landlord stated that, in early January, the landlord arranged for the air vents to be cleaned. He stated that the odour continued to linger until late January, 2019.

The landlord testified that she has a medical condition that makes her sensitive to strong smells, and that this contributed to the reason why she did not move into the rental property in the days following the tenants leaving. She entered into evidence a letter from her family physician which states:

[The tenant] suffers from Mitral Valve Prolapse and multiple chemical sensitivities (which make her more sensitive to strong odours). The strong smell emanating from her suite prohibited her from moving into the suite as previously planned.

The tenants objected to this note, stating that the doctor has no knowledge of whether the smell actually exists, and as such, I should not rely on this letter as proof the smell was actually present.

The tenants deny that there was any foul odour in the rental property.

In any event, the alleged foul odour was not the only issue the landlord claims to have confronted after taking possession of the rental property. The landlord called her contractor as a witness. He testified that he could smell an odour at the rental property. He also testified that, when he visited the rental property to examine the source of the odour, he noticed cracks in the interior plaster of the upper floors. He testified that the house was of an age which made it likely that the plaster contained asbestos, and the cracking indicated a risk of the asbestos becoming airborne, and therefore was extremely dangerous.

The witness testified that he recommend the landlord have the plaster tested for asbestos. He also testified that he advised against the landlord moving into the rental property before the testing was done, and it was determined that it would be safe for her to do so.

The landlord entered into evidence two reports from an asbestos remediation company (one dated January 4, 2019, and the other dated February 1, 2019) which state that asbestos was found in the plaster from the walls of the rental property.

The landlord's witness testified that in early February 2019, the asbestos remediation company advised the landlord that she could move into the rental unit while they conducted the remediation (he testified that measure would be put in place by the company to ensure it was safe for the tenant to move in). The landlord testified that she began to move into the rental unit shortly thereafter, and that the asbestos remediation commenced on February 4, 2019.

The landlord admits to have posted the rental advertisement on craigslist. She testified that she did not do so because of a desire to rent the rental unit out, but rather to get a sense of the market value of the rental unit. She testified that, in January 2019, she was distressed due to the mounting costs of remediation, and at the time, she did not know if or how she would be able to pay them. She testified she wanted information, but did not actually intend to rent out the rental unit. (She testified that subsequent to posting the advertisement, she obtained financing to allow her to pay for the remediation.)

The landlord's lawyer argued the Craigslist ad is not actually relevant to the determining of this case. Rather, he argues, that I must consider section 51(2) and (3) of the Act, which state:

Tenant's compensation: section 49 notice

51(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if

(a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or

(b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

(3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from

(a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or

(b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

He argues that the factors to consider are:

- 1) what the effective date of the Notice is;
- 2) if the landlord took steps within a reasonable period after the effective date of the Notice to move into the rental unit;
- 3) if the landlord delayed beyond a reasonable period to take steps to move into the rental unit; and
- 4) if there was such a delay, that there exist extenuating circumstances.

The landlord's counsel submits that, as it is not mentioned in section 51, "good faith" is not a factor to be considered when determining to make an order section 51(2) of the Act.

The landlord's counsel argued that the effective date of the Notice was December 31, 2019. He argued that the fact the tenants moved out prior to the effective date should not change the time from which the window for the landlord to take steps to move into the rental unit should start.

Landlord's counsel argues that a reasonable period of time for the landlord to take steps to move into the rental unit is one month. He argues that, if the landlord failed to take steps within the window, that extenuating circumstances (detection of asbestos in the rental property) prevented her from moving in within this window, and that the landlord moved into the rental unit as soon as was reasonable, in the circumstances.

The tenants argue that because the landlord failed to act in good faith, as is evidenced by her posting the Craigslist ad, they are entitled to relief under section 51(2).

Analysis

The tenants sought a monetary award of \$18,600.00 representing 12 times their monthly rent as a result of the landlord's failure to use the rental unit for the reasons listed on the 2 Month Notice to End Tenancy.

The sections of the Act relevant to this hearing are sections 49 and 51. The tenants rely on section 49 for their position that good faith must be demonstrated by the landlord. Section 49(5) states:

Landlord's notice: landlord's use of property

- 49(5) A landlord may end a tenancy in respect of a rental unit if
- (a) the landlord enters into an agreement in good faith to sell the rental unit,
 - (b) all the conditions on which the sale depends have been satisfied, and
 - (c) the purchaser asks the landlord, in writing, to give notice to end the tenancy on one of the following grounds:
 - (i) the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit;
 - (ii) the purchaser is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

[...]

- (8) A tenant may dispute
- (a) a notice given under subsection (3), (4) or (5) by making an application for dispute resolution within 15 days after the date the tenant receives the notice, or
 - (b) a notice given under subsection (6) by making an application for dispute resolution within 30 days after the date the tenant receives the notice.

The landlord relies on section 51 for her position that good faith is not a factor to be considered when assessing whether a monetary order ought to be made pursuant to section 51. Section 51 is reproduced above.

Factual Determinations

The keys facts of this case are not in dispute by the parties. Rather, it is the intention of the landlord at the time the Notice was issued that is in dispute (and indeed, the landlord's counsel argues that the intention is not relevant in determining whether or not to grant the relief sought).

I find that the Notice was issued on October 26, 2018, and had an effective date of December 31, 2018. I find that the tenants moved out of the rental unit on November 31, 2018. I find that the landlord moved into the rental unit on February 2 or 3, 2019.

I find that the plaster of the walls of the rental property contains asbestos. I find that, as of January 4, 2019, the tenant was aware of this. I find that remediation of the asbestos started on February 4, 2019.

I find that, in early January, 2019, the landlord posted an advertisement on Craigslist offering the rental unit for rent.

For the purposes of this application it is not necessary for me to determine if there was an odour in the rental property which prevented the landlord from moving into the rental unit for a period of time.

Good Faith Requirement

The tenants are correct in arguing that, when issuing a Notice and when ending the tenancy, the landlord must act in good faith. If good faith is not present when the tenancy is to end, the Notice may be vacated by an arbitrator. Section 49 stands for this principal. However, the tenants are not arguing that the Notice ought to be set aside. Indeed, they have already moved out of the rental unit. They have accepted that the tenancy has ended. Instead, they seek to import the good faith requirement of section 49 into the analysis to be conducted under section 51, to be a factor relevant when considering to make an award for damages under section 51(2).

I agree with counsel for the landlord's submissions that section 51 makes no reference to good faith. The plain language of section 51(2) sets out the criteria to be considered when making a determination to award a tenant the equivalent of 12 month's rent. These criteria do not include the considerations of the landlord's intention, or whether a landlord acted in good faith when issuing the Notice. Section 51(2), as written, requires a determination of whether that landlord ultimately complied with the bases for ending the tenancy as set out on the Notice. Section 51(2) does not provide a mechanism to punish the landlord for detours made along the way.

As such, it is not necessary for me to determine whether or not the landlord acted in good faith when ending the tenancy. It is not an element of the section 51 analysis.

Did the Landlord Comply with Section 51?

I find that, in this case, in order for an award of 12 times the monthly rent to be made, the following must be demonstrated:

- 1) the landlord must have asked the Prior Owner to issue a notice under section 49;
and
- 2) the landlord has not taken any steps within a reasonable period of time to move into the rental unit.

I find that the landlord asked the Prior Owner to issue the Notice, as is evidenced by the existence of the Notice.

Policy Guideline 50 discusses what a reasonable period of time is:

Reasonable Period

A reasonable period is an amount of time that is fairly required for the landlord to start doing what they planned. Generally, this means taking steps to accomplish the purpose for ending the tenancy or using it for that purpose as soon as possible, or as soon as the circumstances permit.

It will usually be a short amount of time. For example, if a landlord ends a tenancy on the 31st of the month because the landlord's close family member intends to move in on the 15th of the next month, then a reasonable period to start using the rental unit would be about 15 days.

In this case, I see no reason to deviate from the Policy Guideline's definition of a reasonable period of time for a landlord to move into the rental unit. As such, I find that, barring extenuating circumstances as defined in section 51(3), the landlord must take steps to move into the rental unit within 15 days of the effective date listed on the Notice.

I find that this 15 day window for the landlord to take steps to move into the rental unit starts on the effective date of the Notice (in this case, December 31, 2018), and not on the date the tenants moved out of the rental unit. The Act does not provide any basis for the latter.

As the landlord did not take steps to move in by January 15, 2019, I must determine if extenuating circumstances existed so as to excuse the landlord from so doing.

Policy Guideline 50 considers what circumstances would be considered extenuating:

Extenuating Circumstances

An arbitrator may excuse a landlord from paying compensation if there were extenuating circumstances that stopped the landlord from accomplishing the purpose or using the rental unit. These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation. Some examples are:

- A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies before moving in.
- A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
- A tenant exercised their right of first refusal, but didn't notify the landlord of any further change of address or contact information after they moved out.

The following are probably not extenuating circumstances:

- A landlord ends a tenancy to occupy a rental unit and they change their mind.
- A landlord ends a tenancy to renovate the rental unit but did not adequately budget for renovations

I find that it would be unreasonable to expect the landlord to move into a house she knows to contain asbestos, which she has been advised may be very dangerous to her health. It is unreasonable for the landlord to have been presented with the choice to either:

- 1) move into a house which contains a known carcinogen which is dangerous to her health; or
- 2) pay the tenants \$18,600.00.

It is not only unreasonable for these to be the only options for the landlord, it would also be unjust. It is unlikely that drafters of the Act intended to create a requirement where a landlord would have to choose between their health and paying a hefty fine. I find that it would be unjust to punish someone for refusing to expose themselves to a dangerous substance.

As such, I find that extenuating circumstances exist which entitle the landlord to be excused from moving into the rental unit within a reasonable time.

For this reason and because the landlord moved into the rental unit promptly upon learning it was safe for her to do, I do not find it appropriate to order the landlord to pay the tenants a monetary award.

As the tenants have not been successful in their application they must bear the cost of their own filing fee.

Conclusion

I dismiss the tenants' application, without leave to reapply.

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: April 4, 2019

Residential Tenancy Branch