Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNDCT FFT

Introduction

Both parties attended the hearing and gave sworn testimony. The tenant provided evidence that he had served the landlord with the Application for Dispute Resolution by registered mail. The landlord agreed he had received it as stated. I find the documents were served pursuant to sections 88 and 89 of the Act for the purposes of this hearing. This hearing dealt with an application by the tenant pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

a) An Order to compensate the tenant with 12 months rent pursuant to sections 49 and 51 as the landlord did not use the unit according to his stated purpose.

Issue(s) to be Decided:

Has the tenant proved on the balance of probabilities that the landlord did not use the unit for the stated purpose in the section 49 Notice and he is entitled to 12 months rent refund or, in the alternative, double the monthly rent pursuant to sections 49 and 51 of the Act?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to present evidence and make submissions. It is undisputed that the landlord served a Notice to End Tenancy on May 8, 2018 to be effective July 31, 2018 for his own use of the property. In a hearing in July 2018, the parties reached a settlement agreement that the landlord would extend the date for the Order of Possession to October 31, 2018 and the tenant vacated on that date and received a free month's rent for October pursuant to section 51 of the Act.

It is undisputed that the tenancy commenced April 17, 2017 on a fixed term lease to April 15, 2018 (as corrected pursuant to section 53 of the Act) and continued on a month to month lease thereafter. Rent was $700 a month and the tenant paid a security deposit of $750 which has not been refunded. He stated he had not provided his

forwarding address to the landlord yet. He confirmed he had received one free month's rent for October 2018 as required by the Act.

The tenant now applies for a refund of rent pursuant to section 51 as the landlord did not move into the property and use it for his own accommodation for at least six months after the tenant vacated. The landlord said he fully intended to move into the property and use the extra bedrooms when his relatives (who live at a distance) came to assist him. He had the hydro switched into his name at the end of October 2018. He had a repair person there in November and he wrote a letter saying the landlord moved some belongings into the unit. Another person wrote a letter stating he helped with the move. However, the landlord said that after he moved, he realized it was beyond his ability now to use the stairs 5 or 6 times a day. He began getting heart pains so he decided to move back into his original unit. He rented the suite to a third party in December 2018. His doctor wrote a letter dated April 29, 2019 stating he was treating the landlord for heart disease and he had heart valve surgery last year. He notes the landlord gets shortness of breath with exertion and for this reason, he avoids climbing stairs.

The tenant's advocate questioned the landlord. Apparently his office is close to the landlord's current residence. The landlord agreed he owns a moving company but states that others do the moving and he does office work. He said he is 79 years old and had not realized how many of his abilities had deteriorated. His friend walks his dog as he cannot manage the hill near his residence. He agreed there were 2 sets of stairs in the tenant's unit, one of 3 and the other of 41/2 but said he cannot manage doing them 5 or 6 times a day; his heart and C.O.P.D. would not allow this. It is not the stairs that are the problem but his health that won't allow him to do them several times a day. He agreed he drives a cube van around town and uses the bars to haul himself up the high step and can do it if not required to do it many times a day. The advocate noted that the landlord's present suite has a step up to the porch and a steep hill at the back where the landlord often parks his van. He asked him how he could manage that hill. The tenant said he never does enter his home from the area where the van is parked at the back; the back parking is used when he is visiting his neighbour who takes his dog for a walk. He never walks to his front entrance from there.

In response to the advocate's questions, the tenant said he moved in April 2017 and this landlord purchased the place in November 2018 and used the stairs when collecting the rent. The landlord said he only collected rent personally once and then used an agent to collect it. He reiterated that doing the stairs once was not the problem; it was doing them repeatedly as required when living there. He did not realize these limits until he moved in.

The advocate made submissions as to why the amended Residential Tenancy Act which provides for up to 12 months refund of rent if the landlord does not use the unit as stated should be applied to this situation and provided some case law.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

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Analysis:

The *Residential Tenancy Act* provided until May 16, 2018:

Tenant's compensation: section 49 notice

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 before 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.

I find the Act was amended on May 17, 2018 and now reads as follows:

Tenant's compensation: section 49 notice

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 before 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) 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.

I find the Notice to End Tenancy was served on May 8, 2018 and thus fell under the provisions of the older version of the Act. Although the tenant's advocate contended that the "right to claim compensation" did not accrue until the landlord rented the unit to someone else before 6 months had elapsed, I find the Notice was served under the former Act and the consequences for the landlord violating that section of the Act should in fairness, fall under the legislation that was in force when he took the action to end the tenancy. I have no discretion under the former Act to adjust the compensation for violation; therefore, although the landlord had extenuating circumstances, I find he did not use the rental unit for the stated purpose for at least 6 months duration after the effective date of the Notice. Therefore, I find he is responsible to pay to the tenant an amount equivalent to two months rent.

In the alternative, if I had found the amended Act was applicable and considered the extenuating circumstances of the landlord, I would have considered the weight of the evidence is that his physical limitations precluded him from living in the unit. I find he did move in but found increasing heart pain in dealing with frequent use of stairs so had to move back to his own unit which is less challenging. In light of these extenuating

circumstances, I would have reduced the award in my discretion to a maximum payment of the equivalent of two months rent which the former Act awarded regardless of circumstances.

I cautioned the parties to read section 38 of the Act and to deal with the security deposit accordingly. The landlord expressed willingness to deal with the security deposit upon receipt of the tenant's forwarding address in writing.

Conclusion:

I find the tenant entitled to a monetary order as calculated below and to recover the filing fee for this application.

Two months rent (2x700)	1400.00
Filing fee	100.00
Total Monetary Order to Tenant	**1500.00**

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: May 16, 2019

Residential Tenancy Branch