Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ASSOCIATED PROPERTY MANAGEMENT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL, MNDCL-S, MNRL-S

Introduction

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

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $16,950.00 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant 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 two agents (herein after referred to as the "landlord's agent" and the "landlord's second agent"), and the tenants appeared each on their own behalf.

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

Preliminary Issue – Amendment of Claim

At the outset of the hearing, the landlord's agent advised that the portion of its claim relating to loss of rental income is reduced from $15,050.00 to $8,600.00. The basis for this reduction is that the landlord sold the rental property subsequent to the filing of the application for dispute resolution. The date of possession, according to the landlord's

agent, was the end of April, 2019. Previously the landlord claimed for loss of rental income for January 1, 2019 to July 31, 2019. They now claim a loss of income from January 1, 2019 to April 31, 2019 (for a total of $8,600.00)

As this amendment is not prejudicial to the tenants, pursuant to section 64(c) of the Act, I order that the landlord's claim for compensation relating to loss of rental income is reduced from $15,050.00 to $8,600.00.

Preliminary Issue – Admissibility of Recordings

The tenants submitted a number of audio recordings into evidence of conversations tenant AD had on the phone with the landlord's agent (the "**Recordings**"). She testified that her phone automatically records all phone calls.

The landlord's agent sought to have the Recordings excluded from evidence on the basis that they were obtained illegally. He testified that he was advised of this by the RCMP. He did not refer to any provision of the *Criminal Code* in support of this assertion. In support of his position, he argued that this illegality was the reason why hearings before the Residential Tenancy Branch (the "**RTB**") could not be recorded.

Tenant AD argued that it was not illegal for her to record her phone calls. She stated that an information officer of the RTB advised her to upload the Recordings as part of her evidence in this hearing.

As the landlord has not provided any statutory authority to support its assertion that the Recordings are illegal, it is difficult for me to assess the validity of its argument. RTB Rule of Procedure 6.6 states, in part:

> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

In this instance, the landlord is, in effect, making an in-hearing application to exclude the Recordings from evidence. It therefore has the burden to prove that the Recordings are inadmissible. I find that the landlord has failed to discharge this burden. As such, I find that the Recordings are admissible as evidence in this proceeding.

I must also note that the basis for the prohibition of the recording of RTB hearings is not the illegality of recordings, but rather on Rule 6.11, which states:

6.11 Recording prohibited Persons are prohibited from recording dispute resolution hearings, except as allowed by Rule 6.12. Prohibited recording includes any audio, photographic, video or digital recording.

Preliminary Issue – Potential Recording of Hearing

Tenant AD testified that her telephone automatically records all calls made on it. I am not certain if tenant AD was using her telephone to call into this hearing. If she was, I am not certain that the recording feature was active during this hearing. If it was, however, such a recording would be a violation of Rule 6.11 (see above).

As such, in the event such a recording was made by one or either of the tenants, I order that the tenants:

1) immediately delete all copies of such recordings in their possession, power, or control;
2) refrain from duplicating, uploading, disseminating, sharing, or otherwise distributing copies of such recordings; and
3) if copies of such recordings have already been distributed to third parties, or are otherwise outside of the tenants' possession, power, or control, to notify the RTB within two days of receipt of this decision.

Issue(s) to be Decided

Is the landlord entitled to a monetary order?
Is the landlord entitled to recover its filing fee?

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 parties entered into a written, fixed term tenancy agreement starting August 1, 2018. Monthly rent was $2,150.00 and was payable on the first of each month. The tenants paid the landlord a security deposit of $1,075.00. The landlord still retains this deposit.

The tenancy agreement contained the following, hand-written clause at section 48 initialed by the landlord and tenants:

> Should tenants want to end their lease at the end of this term, during this term or anytime after, they must provide a written 1 month notice with signature.

The landlord's agent testified that the landlord inserts such a clause in all their agreements, in order to remind tenants of their obligation under the Act, to avoid situations where a tenant may attempt to end a tenancy without giving any notice.

The rental property where the rental unit is located is "nine or ten" years old, according to the landlord's agent.

End of Tenancy

The tenants moved into the rental unit on August 1, 2018. Tenant AD testified that soon thereafter her son developed hives. In her written statement which she submitted into evidence, tenant AD wrote that at first the tenants thought the hives were the result of a change in climate (the tenants and their family had recently moved to Canada). However, they discovered that the hives only appeared when their son was in the rental unit. The hives were severe, and caused their son to scratch himself until he bled. The tenants understood this to mean that he had an allergic reaction to something in the rental unit.

Tenant AD testified that she took her son to the doctor, and the doctor confirmed that the cause of the hives could be something in the rental unit. The tenants produced their son's medical records. These records confirm that the son had hives and eczema, but are silent as to the cause of the condition.

At the hearing, the landlord's agent suggested that the son's *eczema* is caused by the climate in the city and not as a result of something in the rental unit. He offered no suggestion as to the cause of the tenants' son's *hives*.

On October 31, 2018, the tenants provided the landlord with a hand-written 30 day notice to end tenancy (the "**Notice**"), seeking to end the tenancy on December 1, 2018. The tenants also paid the landlord liquidated damages in the amount of $625.00, as set out in section 6 of the tenancy agreement.

Tenant AD testified that, at the time of delivering the letter, she advised the landlord's agent that the reason for giving the Notice was due to the effect that the rental unit was having on her son. The landlord's agent denies this. He testified that tenant AD told her

that the reason the tenants wanted to move was so that they could be closer to her husband's place of work. The landlord's second agent gave testimony which corroborated the landlord's agent's testimony. Tenant AD denied that the landlord's second agent was present when she gave the Notice to the landlord's agent.

The Notice itself does not state a reason for ending the tenancy.

The landlord's agent testified that at some point in November (he was unsure of the date) he was advised by the tenants that the reason for ending the tenancy was because of their son's hives and their belief that the hives were caused by mold in the rental unit.

Tenant AD disputed this. She testified that she never said that it was specifically mold that caused her son's hives; only that it was something in the rental unit that caused them.

The landlord's agent testified that the tenant did tell him it was a mold issue, and pointed to an email from an air testing company which referenced mold in the rental unit.

The landlord's agent attended the rental unit with a moisture detector on November 30, 2018. He testified that he did not find any abnormal moisture readings. He testified that he could not smell any mold when he attended the rental unit. He also testified that he spoke with the building manager, who advised him that they had no complaints from prior occupants on the rental unit about mold.

Tenants AD testified that she wanted air testing done, but that the landlord's agent refused to pay for it. The landlord's agent did not dispute this.

The tenants commissioned their own air testing report, and, on December 10, 2018, were provided with the results. The report contained the following information:

	Outside			Inside		
	Raw Ct	%	Spore/Cubic Metre	Raw Ct	%	Spore/Cubic Metre
Penicillium/Aspergillus	16	25%	212.8	*35	65%	465.5

*Pen/Asp spores were observed in small clumps (3-6 spores).

The report was accompanied by an email from the air testing company which stated:

> There is a slight Pen/Asp issue on the inside sample in as much as it is higher than the outside sample. There are no types of mold inside that don't exist outside and all other species present inside are lower than the corresponding species on the outside sample.
>
> Penicillium/Aspergillus: Visually like each other, the two are counted as a group. Commonly found indoors on dust, cellulose materials, and some food stuff. Elevated levels can be associated with water damage. It can produce mycotoxins and causes Type I allergies, such as hay fever and asthma, and type II hypersensitivity pneumonitis causing various respiratory conditions. It mostly affects those with pre-existing health conditions.

Neither the email nor the report state that the symptoms the tenant's son exhibited could be caused by the Penicillium/Aspergillus found inside the rental unit. The tenants produced no other evidence as to whether the symptoms suffered by their son could be caused by Penicillium/Aspergillus.

Efforts to Re-rent

The landlord's agent testified that, once the tenants provide the landlord with the Notice, the landlord advertised the rental unit "all over the internet". The landlord did not submit any documentary evidence of this. The tenant uploaded a single advertisement from the website castanet.net. The landlord's agent stated that he hoped this advertisement would be sufficient proof to demonstrate the efforts he took to re-rent the property.

Tenant AD testified that she posted a link to the advertisement on her Facebook page, but took it down after a discussion with the landlord's agent (I am uncertain for how many days it was posted before being taken down). I should note that, in an email exchange submitted into evidence by the tenants, the landlord does not directly ask that Facebook advertisement be taken down. However, he does write that:

> We acknowledge that you are trying to help however as mentioned, it is causing confusion with what people have been told, and neither one of your letters [containing contact information for perspective renters] has led to a showing or any kind of interest.

The parties gave testimony at length about the “confusion” referred to by the landlord’s agent. In brief, the tenant’s Facebook post generated two leads. The first contacted tenant AD, who then put her in touch with the landlord’s agent. He told the first prospective renter the price of the rental unit was $2,150.00 *plus* utilities. This caused her to lose interest, as the advertisement entered into evidence stated, confusingly, that “unit includes…all utilities” and “utilities not included”. The landlord’s agent testified that tenant AD misquoted the price of rental unit to the first prospective renter. However, in one of the Recordings, the landlord’s agent states that the discrepancy regarding utilities in the advertisement was “definitely a mistake”.

The second prospective tenant contacted tenant AD to ask if the price was negotiable. Tenant AD told her that she would have to discuss that with the landlord’s agent. The landlord’s agent testified that the second prospective tenant wanted to pay an unreasonably low amount of monthly rent, to which he could not agree.

As December 1, 2018 approached, a new renter had not been located. The tenants remained in the rental unit for an additional month. They vacated the rental property on December 31, 2018. At the time they vacated, no re-renter had been located.

At some point prior to this hearing, the tenants provided the landlord with their forwarding address in a letter addressed to the landlord’s agent. This letter is undated, and was entered into evidence by the tenants.

Tenant AD testified that in the time between her delivering the Notice and the date the tenants vacated the rental unit that the landlord did not bring any no prospective renters to the rental unit for a viewing.

The landlord’s agent testified that the rental market was slow in the city between November and February, and that there were one or two showings of the rental unit in mid-December, but could not recall when these occurred. Tenant AD testified that these showings were for the prospective renters that her Facebook post had generated. The landlord’s agent did not disagree.

The landlord’s agent testified that there were no showings of the rental unit in January 2019.

The owner of the rental unit sold the rental unit on March 12, 2019. The landlord’s agent testified that the new buyers took possession of the rental unit at the end of April. He

testified that the reason for the sale was that the owner was losing money as the result of not being able to rent the rental unit out, and had to take a $20,000.00 loss on the sale of the rental unit. He did not provide any documentary evidence to support this assertion.

The landlord's agent argues that the tenants ought to be bound by the terms of the tenancy agreement, which obligates them to remain in the rental unit for a term of one year. He argues that, as the tenants failed to do this, they breached the tenancy agreement, and the landlord is entitled to compensation for lost rental income that resulted for the tenants' breach.

The tenants argued that they thought they could end the lease on giving one month's notice, and, in any event, the conditions in the rental unit which caused their son's hives and eczema are an appropriate basis upon which they can validly end the tenancy.

Other Damages

The landlord also claims damages in the amount of $1,900.00 stemming from cleaning costs it incurred once the tenants vacated the rental unit, and for "7 months of utilities". The landlord made no mention of a claim for recovering utilities costs on its monetary order worksheet, or in its agent's oral testimony. The monetary order worksheet listed the amount claimed for cleaning costs as $160.00, for which the landlord provided an invoice.

The landlord entered a number of photos into evidence which, the landlord's agent testified, showed the condition of the rental unit after the tenants vacated it. These photos depict, among other things:

1) dirty cabinet doors;
2) dirty cupboards;
3) dirty blender;
4) unclean glass coffee table;
5) drawer containing a loose Q-Tip;
6) dirty oven;
7) scorched glass stovetop;
8) a blue substance on a wall;
9) dusty vent;
10) drawer containing what appears to be chewed gum;
11) white spots of uncertain origin on various surfaces; and
12) scratched baseboards.

The tenants did not deny that these pictures accurately depicted the state of the rental unit. Rather, tenants AD testified that they had hired cleaners to clean the rental unit prior to their move-out. They submitted two invoices from cleaners. The landlord alleged that these invoices were fraudulent, but did not provide any basis for this accusation, other than his assertion that the rental unit was not adequately cleaned.

The tenants also entered into evidence a video recording walkthrough of the rental unit on the day they moved out. In the video, the rental unit appears to be reasonably clean. However, the video does not provide close ups of the areas shown in the landlord's photographs.

Analysis

Cleaning Costs

Section 37(2) of the Act states:

> **Leaving the rental unit at the end of a tenancy**
>
> 37(2) When a tenant vacates a rental unit, the tenant must
>
> (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear;

The standard of cleanliness is not that of perfection, but rather that of reasonableness.

Likewise, the rental unit need not be in pristine condition, rather, reasonable wear and tear is permitted. Residential Tenancy Policy Guideline 1 states:

> Reasonable wear and tear refers to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion. An arbitrator may determine whether or not repairs or maintenance are required due to reasonable wear and tear or due to deliberate damage or neglect by the tenant. An arbitrator may also determine whether or not the condition of premises meets reasonable health, cleanliness and sanitary standards, which are not necessarily the standards of the arbitrator, the landlord or the tenant. [emphasis added]

I have reviewed the photographs and video recording submitted into evidence by the parties, and find that the condition the rental unit was left in upon the tenants moving out

was not reasonably clean. It does appear that some cleaning had taken place, and I have no reasons to doubt (the landlord's unsupported claim of fraud notwithstanding) that the tenants hired cleaners in advance of their departure. However, just because the tenants hired cleaners does not mean that the rental unit was reasonably clean. The photographs provided by the landlord clearly show that additional cleaning was required.

I find that $160.00 is a reasonable amount for the landlord to have paid to have the rental unit cleaned to a standard of reasonable cleanliness. Accordingly, pursuant to section 67 of the Act, I order that the tenants pay the landlord $160.00.

As no documentary evidence was submitted or oral testimony was made regarding the loss caused by non-payment of utilities, I find that the landlord did not suffer any loss associated with this. I dismiss this portion of the landlord's claim, without leave to reapply.

Loss of Rental Income

The basis for the landlord's claim for loss of income is that, by signing the tenancy agreement, the tenants committed to staying in the rental unit for one year, and are not permitted to end the lease early.

However, clause 48 of the tenancy agreement, as written, provides the tenant with a method of ending the tenancy agreement before the end of the one year term. Clause 48, in full, states:

> Should tenants want to end their lease at the end of this term, during this term or anytime after, they must provide a written 1 month notice with signature.

On a plain reading of this section, it appears that a tenant may end the lease during the term of the lease, by providing one month's notice to the landlord.

The landlord's agent argued that this meaning is not the intended meaning of the section. Rather, as stated above, he testified the clause is meant to remind tenants of their obligation under the Act, to avoid situations where a tenant may attempt to end a tenancy without giving any notice.

Upon my reading of this clause, I do not understand it to mean what the landlord's agent argued it means. I note that there is no requirement under the Act for a tenant to give one month's notice to end a fixed term tenancy during that term. The Act simply does not allow for such a termination to occur, absent the breach of a material term by the landlord, as contemplated in section 45(3) of the Act.

Where two or more competing interpretations of clause in a contract are valid, and the language of the clause cannot be reconciled with another part of the agreement (as in this case), the common law principal of *contra proferentem* should be applied.

In The Law of Contract In Canada (6th Edition), G.H.L. Fridman writes at pages 455 to 456:

> In cases of doubt, as a last resort, language should always be construed against the grantor or promisor under the contract; *verba forties accipiuntur contra proferentem*.
>
> In the words of Sir Montague Smith in *McConnel v Murphy*:
>
> > where a stipulation is capable of two meetings equally consistent with the language employed, that shall be taken which is most against the stipulator and in favor of the other party.
>
> Or, as Abella J.A. said, dissenting, in *Arthur Andersen Inc. v Toronto Dominion Bank*, where the majority of the Ontario Court of Appeal, reversing the trial judge, held that an agreement between a group of companies and the bank, whereby the parties undertook to use a "mirroring system of accounting", was not ambiguous,
>
> > It is a rule meant to relieve the non-authorial party to a contract from an interpretation that party could not clearly discern from a plain reading of the document. This prevents the party who did draft and understand the contract for springing in contractual burden on an unsuspecting signatory.
>
> The maxim only applies where the other party has no meaningful opportunity to participate in negotiation of the contract, where, in effect, there is inequality of bargaining power.

I find that clause 48 of the tenancy agreement was drafted by the landlord. I find that, in the present case, there was an inequality in bargaining power between the landlord and the tenants, and that the tenants had no meaningful opportunity to participate in the

negotiation of the contract. As such, it is appropriate to apply the doctrine of *contra proferentem.*

As such, I find that it is appropriate to interpret clause 48 of the tenancy agreement in such a way that is “most against” the landlord and “in favour” of the tenants. I find that clause 48 permits the tenants to end the tenancy, during the stated term of the tenancy, by providing one month’s signed, written notice to the landlord.

Such an interpretation may not be what the landlord intended when it drafted clause 48, but the interpretation above is what a plain reading of clause 48 supports. As the language used in clause 48 was wholly within the landlord’s power, it is the landlord’s responsibility to ensure that the language of its tenancy agreements accords with its intentions.

I acknowledge that an ability to end a fixed term tenancy during the term of the tenancy is not in keeping with the Act’s criteria on how a tenant may end such a tenancy. However, I find that the inclusion of such a term causes the tenancy agreement to no longer be a fixed term tenancy, but rather a periodic tenancy with a guarantee from the landlord that the term of the tenancy shall not be less than one year (that is, the landlord cannot end the tenancy before this one year term has passed, barring a breach of the Act or agreement by the tenants).

Such an interpretation is in keeping with the conduct of the tenants. They believed they could validly end the tenancy agreement by providing one month’s notice to the landlord, as suggested by clause 48.

I therefore find that the tenants validly ended the tenancy agreement by serving the landlord with the Notice. As such, the landlord is not entitled to recover any amount for loss of rental income, and I dismiss, without leave to reapply, this portion of its application.

<u>In the event the Arbitrator is incorrect in the interpretation of clause 48</u>

In the event that I am incorrect in my interpretation of clause 48, and the tenants are not entitled to terminate the tenancy during the term by providing one month’s notice, I will consider whether the landlord is entitled to the relief it seeks.

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Based on the evidence and testimony of the parties, I find that, in the event the tenants were not permitted to end the tenancy pursuant to clause 48 of the Act, that the tenants breached the Act and the tenancy agreement by vacating the rental unit prior to the end of the term of the tenancy.

I should note that, it is not necessary for me to determine whether the tenants ended the tenancy so they could move closer to tenant ID's work, or due to the health concerns for their son. Under either scenario, I find that the tenants breached the tenancy agreement. For the purposes of this analysis, I will consider the tenants' reason for ending the tenancy, that the rental unit was not habitable due to the health problems it caused their son.

Section 45 sets out how a tenancy may end a fixed term tenancy:

Tenant's notice

45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a)is not earlier than one month after the date the landlord receives the notice,

(b)is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c)is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(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.

The tenants did not provide notice in accordance with 45(2). Additionally, the tenants did not notify the landlord of a failure of it to comply with a material term of the tenancy agreement in advance of giving notice to end the tenancy, as required by 45(3).

The landlord was not provided with an opportunity to correct the failure (in this case, a possible failure to comply with section 32 of the tenancy agreement by not providing and maintaining the rental unit in “a reasonable state of decoration and repair suitable for occupation by the tenant”).

In any event, based on the tenants’ evidence, I am not persuaded, on a balance of probabilities that the presence of the Penicillium/Aspergillus in the rental unit caused the symptoms suffered by their son. There is no evidence before me as whether Penicillium/Aspergillus can cause the skin conditions suffered. Rather, the evidence before me suggests that Penicillium/Aspergillus can cause fever, asthma, and respiratory conditions, none of which the tenants’ son suffered from.

As such, I must consider the remaining steps set out in Policy Guideline 16. I find that as a result of the tenants’ breach, the landlord suffered a loss of rental income in the amount of $8,600.00, representing lost rent from January 1, 2019 to April 31, 2019, that the tenants would have been obligated to pay but for their breach of the tenancy agreement.

However, there is insufficient evidence before me to find that the landlord reasonably minimized its damages. While the landlord’s agent testified he advertised the rental property “all over the internet” he submitted no evidence of such actions (for example, screen shots of the advertisements, invoices for the advertisement, or correspondence with the publishers regarding the advertisements). I find the single advertisement entered into evidence by the tenant to be insufficient to demonstrate the landlord’s efforts to re-rent the rental property. This single advertisement does not assist me in determining how many advertisements were posted, or for how long the rental unit was advertised.

Additionally, I am troubled by the lack of prospective renters the landlord’s advertising efforts generated. The tenants, using only a Facebook post that was up for a short time, generated two leads. There is no evidence before me that the landlord generated a single lead from all of its advertising efforts. I am not persuaded that the reason for this lack of interest, as argued by the landlord’s agent, is that November to February is a

slow time to rent, given the moderate success the tenants had at attracting interested renters. I would have reasonably expected the landlord's efforts to attract, at minimum, a similar number of interested parties.

To be clear, it is not the lack of success at re-renting the rental property which causes me to find that the landlord failed to reasonably minimize its loss. Rather, it is the lack of evidence of its efforts to re-rent the rental unit that causes me to make such a determination. As discussed above, the party making the claim has the burden of evidence to prove such a claim. In this case, I find that the landlord has failed to discharge its burden.

As such, in the event I was mistaken in my interpretation of clause 48, I dismiss the landlord's application for damages stemming from the tenants early termination of the tenancy agreement for the reasons above.

Conclusion

As the tenants have largely been successful in this application, I decline to order that they pay the landlord's filing fee.

Pursuant to section 67, I order that the tenants pay the landlord $160.00.

Pursuant to section 72(2), I order that the landlord may deduct this amount from the security deposit it currently holds in trust for the tenants.

I order that the landlord return the balance of the security deposit ($915.00) to the tenants in accordance with the Act.

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 2, 2019

Residential Tenancy Branch