Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT, MNDCL-S, MNRL-S, FFL

Introduction

This hearing dealt with applications from both the landlords and the tenants under the *Residential Tenancy Act* (the *Act*). The landlords identified Tenant GD (the tenant) as the sole Respondent in their application for:

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's pet damage and security deposits (the deposits) in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for their application from the tenant pursuant to section 72.

The tenants applied for:

- a monetary order for compensation for losses or other money owed under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of their deposits pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. As both parties confirmed receipt of one another's dispute resolution hearing packages, I find that the parties were duly served with these packages in accordance with section 89 of the *Act.* Since the tenants confirmed that they had received copies of the landlord's written evidence, I find that the landlords'

written evidence was served in accordance with section 88 of the *Act*. Landlord NP (the landlord) testified that they had not received the tenants' written and photographic evidence, which the tenant said they served by placing this material in the landlord's mail slot. As I accept the tenant's claim that this material was included with the hearing package, which the landlords said they had received, I find that this information was served in accordance with section 88 of the *Act*. I have considered this information in reaching my decision.

At the commencement of the hearing, the landlord reduced the amount of their requested monetary award to $1,500.00, to reflect their recovery of their loss of rent that they maintained was owing for November 2018, plus the recovery of their $100.00 filing fee. The amount of the landlord's requested monetary award is hereby reduced from a total of $2,100.00 to $1,600.00.

Issues(s) to be Decided

Are the landlords entitled to a monetary award for unpaid rent? Are the tenants entitled to a monetary award for losses or damages arising out of this tenancy? Which of the parties are entitled to the deposits? Are either of the parties entitled to recover the filing fees for their applications from the other party?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, miscellaneous receipts, letters and e-mails, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of these claims and my findings around each are set out below.

On March 31, 2018, the landlords and Tenant GD signed a Residential Tenancy Agreement (the Agreement) for a month-to-month tenancy that began on April 1, 2018. According to the terms of the Agreement, monthly rent was set at $1,500.00, payable in advance on the first of each month. The landlords continue to hold the tenant's $750.00 security deposit and $750.00 pet damage deposit, both paid on April 1, 2018.

The parties agreed that the other tenant, Tenant JV, moved into the rental unit with the tenant shortly after this tenancy began, and remained there until some point in October 2018.

The tenants' March 29, 2019 application for a monetary award of $2,854.59 included the following items listed on their application for dispute resolution, but without any Monetary Order Worksheet attached to their application. At the hearing, the tenant provided the following clarification of the items claimed in their application:

Item	**Amount**
Recovery of Rent Paid by Tenant(s) from October 24, 2018 until October 31, 2018	$483.87
Replacement of Mattress	531.99
Reimbursement for Hotel Bills October 23-31, 2018	388.73
Return of Deposits	1,500.00
Total of Above Items	**$2,904.59**

The tenants also applied for the recovery of their $100.00 filing fee.

During the latter stages of this tenancy, the tenant was working out of town; Tenant JV remained in the rental unit looking after the tenant's dog. The tenant gave sworn testimony that they first discussed a mice infestation with the landlord in September 2018. The tenant testified that they sent the landlord a text message on October 1, 2018, advising that the mice infestation was causing problems for the tenants and requesting the landlords' assistance in resolving this situation. The tenant provided sworn testimony and written evidence that by the time they returned to the rental on October 21, 2018, the infestation had become very serious. The tenants were trapping mice within the rental unit on an ongoing basis. Since the landlords were not action which the tenants considered adequate to address this infestation within the house itself and not just in the garage, the tenant sent the landlord an email on October 23, 2018, advising the landlords that they considered the tenancy frustrated and were ending their tenancy the following day, on October 24, 2018. The tenant maintained that the landlord had offered to put rat poison in the house, which would cause problems for the tenant's dog and the tenants' health. The tenant asserted that the landlord offered to pay for the tenant's relocation to a hotel while the landlord addressed the mouse infestation. The tenant requested the replacement of their new $531.99 mattress, which the tenant said had been damaged by the mice infestation. The tenant's written evidence also referenced damage to the tenant's couch, which had been purchased second hand for a cost of $50.00. The tenant also sought the recovery of a pro-rated amount of their October 2018 rent, as they considered the tenancy frustrated as a result of the landlords' failure to address the rodent infestation reported to the landlords. The

tenant confirmed that they had not provided any copies of hotel bills they incurred from October 23 to October 31, 2018. Tenant JV confirmed that they vacated the rental unit on October 24, 2018.

The landlord testified that the first they heard of the serious mice infestation was when the tenant returned from working in another community on October 21, 2018. By that time, the landlord said that they were already receiving calls to act as a reference for other rental accommodations sought by the tenant(s). The landlord denied having received text messages from the tenant about this matter on October 1, 2018. The landlord said that the garage is sometimes visited by mice, as this is a rural area and it is difficult to keep mice out of outdoor locations. The landlord said that they reminded the tenants on a number of occasions that they needed to keep the doors of the rental unit closed at all times to prevent the entry of rodents into the house. The landlord said that when the tenant raised the issue of the mice infestation with them on October 21, 2018, that the landlord offered to hire an exterminator to inspect the premises. Before the landlords could make arrangements to have a pest control specialist attend the premises and take action that would not affect the tenant's dog, the tenant sent the landlord an email on October 23, 2018, stating that they were leaving the rental unit the following day on October 24, 2018.

The landlord gave undisputed sworn testimony that as soon as the tenants vacated the rental unit, they placed an advertisement on a popular rental website seeking a new tenant to take possession of the rental unit for November 2018. Despite listing the rental unit for reduced monthly rent of $1,350.00, they did not receive any offers from prospective tenants. The landlord said that they kept the website ad in place until mid-December 2018. At that time, they decided to renovate the premises so that they could seek the same monthly rent as the tenant was paying, $1,500.00. The landlord said that they have still not rented the premises to new tenants.

The parties agreed that the first forwarding address in writing given to the landlords by the tenant for the return of the security deposit occurred when the tenants provided their application for dispute resolution to the landlords. The tenant confirmed that they had been living in hotels out of the province for a number of months and only selected an address for the return of the security deposit shortly before they completed their application for dispute resolution on March 29, 2019.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. The onus rests with the parties making the claim to prove on the balance of probabilities that the other party contravened the *Act* and that they are entitled to monetary compensation for these contraventions.

Analysis -Tenants' Application

There is undisputed evidence from both parties that the tenant did not provide their notice to end this tenancy until October 23, 2018, and ended the tenancy the following day. During the hearing, the tenant made little mention of their claim that the tenancy had become frustrated by the landlords' failure to address concerns about the mice infestation. However, in their written evidence, much of their claim for compensation rests on their assertion that they were justified in ending this tenancy with one day's notice because the tenancy had become frustrated.

Section 44(1) of the *Act* outlines the ways that a tenancy may be ended. These ways include the following of relevance to the current application:

How a tenancy ends

> ***44*** *(1) A tenancy ends only if one or more of the following applies:*
>
> *(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:*
>
> (i) section 45 *[tenant's notice]*;
>
> *(c) the landlord and tenant agree in writing to end the tenancy;*
>
> *(d) the tenant vacates or abandons the rental unit;*
>
> *(e) the tenancy agreement is frustrated;...*

Section 45(1) of the *Act* requires a tenant to end a month-to-month (periodic) tenancy by giving the landlord notice to end the tenancy the day before the day in the month

when rent is due. In this case, in order to avoid any responsibility for rent for November 2018, the tenant would have needed to provide the notice to end this tenancy in writing before October 1, 2018. Section 52 of the *Act* requires that a tenant provide this notice in writing; emails are not considered written notice to end a tenancy.

The test to meet in ending a tenancy as a result of the tenancy agreement being frustrated is very high. I reproduce the relevant portion of Residential Tenancy Branch Policy Guideline 34 as follows:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into...

Since the test for determining that a contract has been frustrated is high, the party declaring that the contract has been frustrated bears the burden of proving that this high test has been met. In this case, the tenant bears the burden of proving on a balance of probabilities that the tenancy agreement has been frustrated.

In this case, there is disputed testimony as to the timing of the tenant's notification to the landlord that there was a serious infestation of mice within the rental home. The tenant claimed that this first happened on October 1; the landlord said that this did not happen until October 21, two days before the tenant gave their notice to end this tenancy. The landlord also gave sworn testimony that they let the tenant know that they were willing to engage the services of a pest control specialist, but that the tenant took action themselves to end this tenancy before that could happen.

As noted below, section 32(1) of the *Act* establishes a landlord's responsibilities to maintain residential property they are renting in a state of repair to their tenants.

32 *(1) A landlord must provide and maintain residential property in a state of decoration and repair that*

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

There is little doubt that the parties did not envision a serious infestation of mice within the rental home when this tenancy began. However, merely proving that mice were accessing this rental home in a rural area does not on its own mean that the tenancy has been frustrated. Time must be given to a landlord to take action to address such a problem. Even after enlisting the services of a pest control specialist, it may take considerable time to take effective action to address such a problem.

Under these circumstances, I find that the tenants have provided insufficient evidence that would demonstrate that they gave the landlords enough time to take action to address the mice infestation they raised with the landlords. Given that the tenants provided nothing in writing to show that they raised this problem with the landlords before October 21, 2018, I find on a balance of probabilities it more likely than not that the tenants only notified the landlords of the severity of this problem a few days before the tenant issued the emailed notice to end their tenancy on October 23, 2018, vacating the rental unit the following day.

As outlined above in RTB Policy Guideline 34, the standard for establishing that a tenancy agreement has been frustrated is necessarily very high, as it can lead to the ending of a tenancy without adhering to the standard time frames for providing notice to end a tenancy. I do not accept that the landlords were negligent in taking action regarding the mice infestation. I also do not accept that the change in circumstances totally affected the nature, meaning, purpose, effect and consequences of the contract as far as the parties were concerned. The landlord continued to provide accommodation for the tenant and the landlord was given very little time to address the problem before the tenant issued their notice to end this tenancy.

In conclusion, I find that the tenants have fallen far short of providing sufficient evidence that would demonstrate that the circumstances as they existed on October 23, 2018 were of such magnitude that could lead to their ending this tenancy because the tenancy agreement had been frustrated.

In coming to this determination, I also note that the tenants failed to provide any hotel bills to substantiate that portion of their monetary claim.

The tenants left a mattress and couch in the rental unit after they vacated the rental unit, the removal of which was initially included in the landlords' application for a monetary award. The tenants' application has not included sufficient evidence that these abandoned items continued to have value. Similarly, the tenants have not demonstrated that the landlords were in any way responsible for their loss in value, given the tenant's failure to adequately address the landlord's assertion that the landlord only had two days notice of the severity of this problem before the tenants vacated the premises.

I find no justification for allowing any of the tenants' application for a monetary award from the landlords. I dismiss the tenants' application for a monetary award for losses arising out of this tenancy in its entirety without leave to reapply.

There is undisputed evidence from both parties that the first time the tenant provided their forwarding address in writing to the landlords was in the tenants' application for a monetary award, which included the request for the return of the deposits. The landlords are still under no legal obligation to return the tenant's deposits, having yet to receive a formal request to return their deposits to an address provided by the tenant. I will address the return of the deposits below in the context of the landlords' application to retain those deposits.

Analysis -Landlords' Application for Loss of Rent/Rent Owing for November 2018

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. Section 26(1) of the *Act* establishes that "a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent."

There is undisputed evidence from both parties that the tenant did not provide their notice to end this tenancy until October 23, 2018. They ended the tenancy the following day. I find that the tenant did not comply with the provisions of section 45(1) of the *Act*. The tenants also failed to abide by the requirement under section 52 of the *Act* that their notice to end tenancy must be in writing.

There is undisputed evidence that the tenants did not pay any rent for November 2018. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Based on the landlord's undisputed sworn testimony presented, I accept that the landlord did attempt to the extent that was reasonable to re-rent the premises for November 2018. The landlord reduced the monthly asking rent from the $1,500.00, the tenants were paying, to $1,350.00. Even at this reduced monthly rent, the landlord was unable to rent the premises to another tenant at that time of year, and eventually commenced repairs and renovations in an attempt to obtain new tenants. As of the date of this hearing, the landlords' have still been unable to rent these premises to anyone else. As such, I am satisfied that the landlords have discharged their duty under section 7(2) of the *Act* to minimize the tenant's loss. For these reasons, I allow the landlords' application to obtain a monetary award of $1,500.00, the amount of rental loss the landlords have sustained for November 2018. This resulted from the tenant's premature and unauthorized ending of their tenancy prior to November 30, 2018, the date when they could legally have ended this tenancy on the basis of a valid notice to end tenancy that could have been provided to the landlords on October 23, 2018.

Since the landlords have been successful in their application, I also allow them a monetary award of $100.00 to recover their filing fee from the tenant.

In accordance with sections 38 and 72 of the *Act*, I allow the landlords to retain the tenant's deposits in partial satisfaction of the monetary award issued in the landlords' favour. There is no allowance for interest over the period when the landlords held the deposits for this tenancy.

Conclusion

I issue a monetary award in the landlords' favour under the following terms, which allows the landlords to recover unpaid rent owing for November 2018, and the landlords' filing fee from their legal tenant, Tenant GD, less the retained value of the deposits paid for this tenancy:

Item	**Amount**
Unpaid Rent Owing for November 2018	$1,500.00
Less Deposits ($750.00 + $750.00 = $1,500.00)	-1,500.00

Recovery of Filing Fee for Landlords' Application	100.00
Total Monetary Order	**$100.00**

The landlords are provided with these Orders in the above terms and Tenant GD must be served with this Order as soon as possible. Should Tenant GD fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

Save for the allowance to return the tenants' deposits noted above, 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: June 11, 2019

Residential Tenancy Branch