



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes FFT, MNDCT, MNSD (Tenant)
 FFL, MNDCL-S, MNRL-S (Landlord)

Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties.

The Landlord filed their application July 12, 2019 (the “Landlord’s Application”). The Landlord sought:

- Compensation for monetary loss or other money owed;
- To recover unpaid rent;
- To keep the security deposit; and
- Reimbursement for the filing fee.

The Tenants filed their application July 25, 2019 (the “Tenants’ Application”). The Tenants sought:

- Compensation for monetary loss or other money owed;
- Return of the security deposit; and
- Reimbursement for the filing fee.

The Agent appeared at the hearing for the Landlord. Tenant 1 and 2 (the “Tenants”) appeared at the hearing with the Witness. The Witness was outside of the room until required. Tenant 1 chose not to call the Witness during the hearing. Tenant 2 exited the conference call around 2:37 p.m.

Tenant C.F. was named on the Tenants’ Application but removed from the style of cause as this is a child. Tenant 2 provided the correct spelling of Tenant K.F.’s name which is reflected in the style of cause.

I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing packages and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered the documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Is the Landlord entitled to compensation for monetary loss or other money owed?
2. Is the Landlord entitled to recover unpaid rent?
3. Is the Landlord entitled to keep the security deposit?
4. Is the Landlord entitled to reimbursement for the filing fee?
5. Are the Tenants entitled to compensation for monetary loss or other money owed?
6. Are the Tenants entitled to return of the security deposit?
7. Are the Tenants entitled to reimbursement for the filing fee?

Background and Evidence

These claims arise out of a situation where the parties entered into a fixed term tenancy agreement and the Tenants ended the tenancy prior to the end of the fixed term. The Tenants never moved into the rental unit due to the unit not being painted.

The Landlord sought the following amounts:

- \$1,700.00 liquidated damages;
- \$50.00 for NSF and late fees;
- \$3,300.00 in unpaid rent for July; and
- \$100.00 for the filing fee

The Tenants sought the following amounts:

- \$1,212.28 for hotel and food from June 25-28, 2019;
- \$782.50 for hotel for June 29 and 30, 2019;
- \$1,294.00 for hotel and food for July 01-04, 2019;
- \$1,760.00 for June rent; and
- \$100.00 for the filing fee.

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. The tenancy was to start June 15, 2019 and was for a fixed term ending June 30, 2020. Rent was to be \$3,300.00 due by the first day of each month. The Tenants paid a \$1,650.00 security deposit. The agreement was signed by the Tenants June 09 and June 10, 2019. It was signed for the Landlord June 12, 2019.

The agreement includes a liquidated damages clause at term 3.1 which states that the Tenants will pay the Landlord \$1,650.00 if they end the fixed term tenancy early. It states that the amount is not a penalty but an agreed pre-estimate of the Landlord's administrative costs of advertising and re-renting the unit.

The agreement includes term 4.1 which sets out a \$25 NSF fee and \$25.00 fee for late payment of rent.

The parties agreed the Tenants never moved into the rental unit.

The parties agreed the Landlord received the Tenants' forwarding address in writing June 28, 2019.

The parties disagreed about what happened at the move-in inspection; however, both agreed this was not a situation where the Tenants were offered two opportunities to do the inspection but refused to participate.

Both parties agreed a move-out inspection was not done. The Agent did not know if the Tenants were offered two opportunities to do the inspection. The Tenants testified that they were not offered two opportunities to do the inspection.

The parties testified as follows in relation to the specific claims.

\$1,700.00 liquidated damages

The Agent testified as follows. The Tenants signed the tenancy agreement and acknowledged term 3.1. The Tenants chose not to move into the rental unit for cosmetic reasons. The Tenants provided notice ending the tenancy June 28, 2019. The Tenants did not provide 30 days notice. There was no reason for the Tenants not to move into the rental unit. It is possible the rental unit did not meet the Tenants' standards; however, the Landlord was allowed a reasonable amount of time to address the issues.

The Agent further testified as follows. The liquidated damages amount is a predetermined amount to compensate the owner. It is not a penalty per se. It is for advertising the unit.

The Landlord submitted work orders dated June 17, 2019 regarding cleaning the unit and June 19, 2019 regarding painting the unit.

Tenant 1 testified as follows. The Tenants rented the unit expecting to move in June 15, 2019. The Tenants had movers arranged. When he saw the condition of the unit, he could not move into it with his family as planned. The rental unit was not ready. The Tenants tried to work with the Landlord up until June 24, 2019 to have the unit painted. The Tenants did not believe the painting would be done. The Tenants' belongings were in storage and they had nowhere to stay. The Tenants had to stay in a hotel.

Tenant 1 testified that he did look at the rental unit June 06, 2019. He said an agent for the Landlord told him the painting would be done. Tenant 1 testified that the Landlord had from June 06, 2019 to June 15, 2019 to paint.

Tenant 1 acknowledged there is nothing in the tenancy agreement about the Landlord painting the rental unit prior to the Tenants taking possession.

Tenant 1 testified that he was horrified at the state of the rental unit and had never encountered a house in that condition. Tenant 1 submitted photos of the rental unit. He testified that these were taken June 19, 2019.

Tenant 1 testified as follows in relation to why the Tenants did not move into the rental unit. He is a clean person. The walls would have had to be sanded. Every room of the rental unit needed to be painted. The unit was supposed to be ready to move into June 15, 2019.

Tenant 1 submitted that the Landlord breached a material term of the tenancy agreement.

The Tenants submitted correspondence between them and the Landlord about painting the rental unit.

The Tenants submitted photos of the rental unit. These show holes in the walls of the rental unit that need to be filled as well as white patches that need to be painted. They also show a few areas that need cleaning. The photos only show holes and patches in two bedrooms. One of the photos is of the garage.

The Tenants submitted the letter sent ending the tenancy. It is dated June 28, 2019. It states as follows:

This is our written notice ending the tenancy because of a breach of a material term of the contract which was to have the house ready for move in June 15, 2019. We have no intention of continuing with the lease...

\$3,300.00 in unpaid rent for July

The Agent testified as follows. The Tenants were responsible to pay July rent pursuant to the tenancy agreement. The Tenants did not pay July rent. The unit was re-rented for August. The unit was posted for rent immediately after the Tenants gave notice ending the tenancy. She believes the unit was posted for the same rent amount. The unit was rented for the same rent amount.

Tenant 1 testified as follows. The Tenants are not responsible for July rent. The Tenants were “scammed” from the beginning. The Landlord breached a material term of the tenancy agreement in relation to the state of the rental unit.

\$50.00 for NSF and late fees

The Agent testified that the Landlord is seeking \$50.00 for the NSF fee and late fee for July rent which was never paid. The Agent relied on term 4.1 of the tenancy agreement in relation to this.

Hotel and food

Tenant 1 testified as follows. He sold the house he was living in and rented the rental unit. The Tenants were supposed to move in June 15, 2019 but could not given the state of the rental unit. He was able to stay at his old house until June 25, 2019. He then had to stay at a hotel because he had nowhere else to go. The movers could not move his belongings into his new place until July 05, 2019. He is seeking reimbursement for hotel and food costs for this period.

The Tenants submitted bills for the hotel costs.

The Agent took the position that the Landlord is not responsible for these costs.

June rent

The Tenants sought return of June rent that was paid to the Landlord given the unit was unlivable. Tenant 1 took the position that the Tenants should not have had to pay June rent.

The Agent submitted that the Tenants signed the fixed term lease and were required to pay June rent.

Analysis

Section 7 of the *Residential Tenancy Act* (the “Act”) states:

7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

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.

Security deposit

Under sections 24 and 36 of the *Act*, landlords and tenants can extinguish their rights in relation to a security deposit if they do not comply with the *Act*. Further, section 38 of the *Act* sets out specific requirements for dealing with a security deposit at the end of a tenancy.

Given the testimony of the parties, I do not find that this is a situation where the Tenants were offered two opportunities to do a move-in or move-out inspection but refused to participate. Therefore, the Tenants did not extinguish their rights in relation to the security deposit under sections 24 or 36 of the *Act*.

I do not find it necessary to determine whether the Landlord extinguished their rights in relation to the security deposit under sections 24 or 36 of the *Act* as extinguishment relates to claims for damage to the rental unit which is not the issue here.

Based on the testimony of the parties and the Tenants' notice ending the tenancy, I find the tenancy ended June 28, 2019 for the purposes of section 38(1) of the *Act*.

Based on the testimony of the parties, I find the Landlord received the Tenants' forwarding address in writing June 28, 2019.

Pursuant to section 38(1) of the *Act*, the Landlord had 15 days from June 28, 2019 to repay the security deposit or file a claim against it. The Landlord's Application was filed

July 12, 2019, within the 15-day time limit. The Landlord complied with section 38(1) of the *Act*.

\$1,700.00 liquidated damages

There is no issue that the parties entered into a written tenancy agreement in relation to the rental unit between June 09, 2019 and June 12, 2019. The rights and obligations of the parties under the written tenancy agreement started as of the date it was entered into as stated in section 16 of the *Act*. This is so despite the Tenants never having moved into the rental unit.

The parties signed the written tenancy agreement. The parties were bound by the terms of the written tenancy agreement. The tenancy agreement includes a liquidated damages clause, term 3.1, which states that the Tenants will have to pay the Landlord \$1,650.00 if they end the fixed term tenancy early.

The tenancy agreement was for a fixed term starting June 15, 2019 and ending June 30, 2020. There is no issue that the Tenants gave notice ending the tenancy June 28, 2019, prior to the end of the fixed term. Term 3.1 of the tenancy agreement applies.

Policy Guideline 04 deals with liquidated damages and states in part:

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach...

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when

they are oppressive to the party having to pay the stipulated sum. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

I have considered the amount sought for liquidated damages. Based on the written tenancy agreement and testimony of the Agent, I accept this is a pre-estimate of damages for ending the tenancy early and not a penalty. Based on the same evidence, I accept that the amount is meant to cover the costs of re-renting the unit. I do not find the amount extravagant considering what it is meant to cover. I also do not find it extravagant considering the rent amount. I find the amount is reasonable and not oppressive to the Tenants, again considering the rent amount.

The liquidated damages clause is enforceable. The Tenants are bound by it. The Tenants must pay the Landlord \$1,650.00 for liquidated damages.

\$3,300.00 in unpaid rent for July

There is no issue that the parties entered into a fixed term tenancy starting June 15, 2019 and ending June 30, 2020. Nor is there an issue that the Tenants gave notice ending the tenancy June 28, 2019, prior to the end of the fixed term.

Section 45 of the *Act* outlines when tenants can end a fixed term tenancy and states:

(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 [emphasis]

(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.

Pursuant to section 45(2) of the *Act*, the Tenants were not entitled to end the fixed term tenancy early.

I have considered whether section 45(3) of the *Act* applies. I do not find that it does. The issue raised by the Tenants is that the rental unit was not painted prior to them moving in. There may also have been an issue with cleanliness although the Tenants did not focus on this at the hearing.

Tenant 1 acknowledged there is nothing in the written tenancy agreement that states the Landlord will paint the rental unit prior to the Tenants moving into the rental unit.

The Tenants did not point to a term in the written tenancy agreement that the Landlord breached.

I note that the written tenancy agreement includes term 5.1 which states:

LANDLORD'S COVENANTS

...

5.1 To provide and maintain the Premises in such a state of decoration and repair as to comply with health and safety standards, including housing standards, as required by law, and having regard to the age, character and locality of the Premises. Without limiting the generality of the foregoing, the Landlord agrees to provide and maintain the Premises in good repair.

I have reviewed the photos submitted showing the state of the rental unit June 19, 2019. I agree that the rental unit needed to be painted. I agree that the rental unit could have been cleaner. I also agree that both of these things should have been addressed prior to the Tenants moving into the rental unit.

However, I do not accept that the Landlord breached a material term of the tenancy agreement by failing to paint the unit prior to the Tenants moving in or by providing a rental unit that needed a few areas cleaned. Based on the photos, I do not accept that these were serious or significant issues. Based on the photos, I find these were cosmetic issues. Based on the photos, I do not accept that these issues had any impact on the normal use of the rental unit.

Given the above, I do not accept that the Tenants could not have moved into the rental unit on June 15, 2019 as planned. Nor do I accept that the rental unit was unlivable. I find the Tenants could have moved into the rental unit as planned. I note that, if doing so resulted in inconvenience or other loss to the Tenants, the appropriate course of action would have been to seek compensation for any loss from the Landlord or through the RTB.

In the circumstances, I do not accept that the Tenants were entitled to end the fixed term tenancy early based on a breach of a material term of the tenancy agreement by the Landlord.

Further, even if the Landlord had breached a material term of the tenancy agreement, Policy Guideline 8 outlines the following required step:

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.

There is no evidence before me showing that the Tenants did this. In the June 28, 2019 notice, the Tenants stated that they had “no intention of continuing with the lease”. The letter does not refer to painting or cleanliness. It does not refer to a specific term in the written tenancy agreement that has been breached. It does not include a reasonable deadline for the Landlord to fix the problem.

In the circumstances, the Tenants were not entitled to end the fixed term tenancy pursuant to section 45(3) of the *Act*.

The Tenants breached both the written tenancy agreement and section 45 of the *Act* by ending the fixed term tenancy early without authority to do so.

I accept that the Landlord lost rent for July because of the Tenants’ breach. The Tenants gave notice ending the tenancy June 28, 2019. Given the late date, I accept

that the Landlord did not re-rent the unit until August. I find the Landlord lost July rent because the Tenants ended the fixed term tenancy early.

I do accept that the Landlord mitigated their loss in relation to July rent as I accept the testimony of the Agent that they posted the unit for rent immediately after the Tenants gave notice. However, I also would have found that the Landlord was entitled to July rent whether they mitigated their loss or not given the Tenants did not give notice until June 28, 2019. It would be unreasonable to expect the Landlord to re-rent the unit for July given the late date of the Tenants' notice.

The Landlord is entitled to \$3,300.00 in compensation for July rent.

\$50.00 for NSF and late fees

The written tenancy agreement allows for an NSF fee and late fee. These fees are permitted pursuant to section 7 of the *Residential Tenancy Regulation*.

However, the tenancy ended June 28, 2019 with the Tenants' notice. Although the Tenants are responsible for the Landlord's loss as a result of the breach of the fixed term tenancy, I do not accept that the Tenants are responsible for paying an NSF fee or late fee after the tenancy ended. Neither the NSF fee or late fee are losses that resulted from the Tenants' breach. I decline to award the Landlord compensation for the NSF fee and late fee in relation to July rent.

Hotel and food

The Tenants' claim for hotel and food costs is based on the Tenants' position that they could not move into the rental unit June 15, 2019. As stated above, I do not accept that the Tenants could not have moved into the rental unit June 15, 2019. I find the Tenants could have moved into the rental unit June 15, 2019 as planned. I find the Tenants chose not to move into the rental unit and chose to end the tenancy June 28, 2019. The Landlord is not responsible for the costs associated with this choice. The loss claimed did not arise from a breach by the Landlord. It arose from the Tenants' choice not to move into the rental unit and to end the tenancy.

June rent

I make the same comments as above. The Tenants' claim for June rent is based on the Tenants' position that the rental unit was unlivable. I do not accept that the rental unit

was unlivable. I find the Tenants could have moved into the rental unit June 15, 2019 as planned. I find the Tenants chose not to move into the rental unit and chose to end the tenancy June 28, 2019. The Tenants are not entitled to June rent back in the circumstances.

Given the Landlord was successful, I award the Landlord reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

Given the Tenants were not successful, I decline to award them reimbursement for the filing fee.

In total, the Tenants owe the Landlord \$5,050.00. The Landlord can keep the \$1,650.00 security deposit pursuant to section 72(2) of the *Act*. Pursuant to section 67 of the *Act*, the Landlord is issued a Monetary Order for the remaining \$3,400.00.

Conclusion

The Tenants' Application is dismissed without leave to re-apply.

The Landlord's Application is granted.

The Tenants owe the Landlord \$5,050.00. The Landlord can keep the \$1,650.00 security deposit. The Landlord is issued a Monetary Order for the remaining \$3,400.00. This Order must be served on the Tenants and, if the Tenants do not comply with the Order, it may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: November 06, 2019

Residential Tenancy Branch