



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ROYAL LEPAGE WOLSTENCROFT REALTY
and [tenant name suppressed to protect privacy]

DECISION

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

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlords requested:

- a monetary order for money owed or compensation for damage or loss pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant requested:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

KK, agent for the landlords, testified on behalf of the landlords in this hearing. 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.

Both parties confirmed receipt of each other’s applications for dispute resolution hearing package (“Applications”) and evidence. In accordance with sections 88 and 89 of the Act, I find that both the landlords and tenant were duly served with the Applications and evidentiary materials.

Issue(s) to be Decided

Are the parties entitled to the monetary orders applied for?

Is the tenant entitled to the return of their security deposit?

Are either of the parties entitled to recover the costs of their filing fees for their applications?

Background and Evidence

This tenancy originally began as a fixed-term tenancy on July 1, 2018. The tenancy continued after June 30, 2019 on a month-to-month basis with monthly rent set at \$1,400.00, payable on the first of every month. The tenant paid a security deposit in the amount of \$700.00, which the landlords still hold.

The tenant testified that she had moved out on August 29, 2019, while the landlords testified that this tenancy ended on September 1, 2019.

The tenant is seeking a monetary order in the amount of \$15,900.00 as set out in the table below:

| Item | Amount |
|---------------------------------------|--------------------|
| Rent Reduction | \$14,000.00 |
| Moving Costs | 1,100.00 |
| Return of Security Deposit | 700.00 |
| Filing Fee | 100.00 |
| Registered Mail Costs | 47.25 |
| Registered Mail Costs | 34.20 |
| Total Monetary Order Requested | \$15,981.45 |

The landlords submitted a monetary claim in order to recover their losses associated with the tenancy as listed below:

| Item | Amount |
|--|---------------|
| Liquidated Damages as set out in the Tenancy Agreement | \$700.00 |
| Loss of September 2019 Rent | 1,400.00 |
| Unpaid Utilities | 27.75 |
| Cleaning Costs | 126.00 |
| Filing Fee | 100.00 |
| Security Deposit | -700.00 |

| | |
|---------------------------------------|-------------------|
| Total Monetary Order Requested | \$1,653.75 |
|---------------------------------------|-------------------|

The landlords' agent testified that the tenant gave notice on August 18, 2019 that she would be moving out on September 15, 2019. The landlords included an email from the tenant dated August 18, 2019 which read:

"Please find attached notice that I will be moving out..."

I had texted both C and S a few days ago to give them a heads up and had estimated September 15th. It does look, though, like I can move out September 1st. Please let me know if the 1st is possible, otherwise I will give notice for the 15th".

The landlords' agent included her response to the tenant that the tenant must give at least 30 days notice in writing with the tenancy ending on the last day of the month, and that the tenant's notice "will end your tenancy on September 30th at 1pm". The landlords are seeking the liquidated damages in the amount of \$700.00 as set out in the tenancy agreement to cover the costs of re-renting the suite, as well as the unpaid utilities, cleaning costs, and lost of rental income for September 2019. The landlords' agent testified that the unit was advertised immediately upon being given written notice by the tenant, and was able to re-rent the rental unit as of October 15, 2019 for \$1,200.00 per month. The landlords' agent testified that the home was listed for sale on September 26, 2019, and had reduced the rent accordingly.

The landlords' agent testified that the tenant failed to remove all her personal belongings from the property by August 31, 2019. The landlords provided photos, the move-in and move-out inspection reports, utility statements, and invoices in support of their claim. It was undisputed by both parties that the tenant did not provide a forwarding address to the landlords.

The tenant does not dispute that she had moved out with less than the required notice for the following reasons. The tenant testified that the rental unit was uninhabitable due to an ant infestation. The tenant states that her unit was infested with ants for her entire tenancy. The tenant also states that plants were growing through the foundation and her wall, into her bedroom. The tenant submitted photos and videos to support her claim. The tenant testified that she was subject to constant harassment from the landlords, and found it too difficult to address issues with the landlords and their property manager.

The tenant testified that the landlords had informed her that they were selling the home, and she was concerned about finding housing, and receiving a positive reference. The tenant testified that the landlords had installed an unknown device in her rental unit without her knowledge, and she was worried that the device was used to monitor her. The tenant testified that she felt so harassed that she did not feel comfortable providing the landlords with her forwarding address.

The tenant testified that despite the fact that she had paid her utility bill on time, she still received emails from the landlords. The tenant testified that the landlords had failed to provide her with the utility bills, and she was unaware of what she had owed. The tenant testified that with all the issues, she no longer felt comfortable living there.

The landlords' agent responded that the tenant received auto reminders for utility payments, but the landlord had responded by shutting off the reminders once notified of the issue. The landlords admit that the utility bills were overlooked, and testified that the tenant was given a reduction. The landlord responded that they have always fulfilled their obligations to maintain the property, but the property is on agricultural land reserve, which must be taken into consideration. The landlords also provided an explanation for the device in the tenant's unit. The landlords testified that the device was installed when the contractor had attended for maintenance and repairs. The landlords testified that the device was a thermostat. The landlords admit that they had not informed the tenant, but the tenant had never asked about the device.

Analysis

Section 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement." The tenant applied for a rent reduction of \$14,000.00 in rent for this tenancy.

Residential Tenancy Policy Guideline 34 states the following about a Frustrated Tenancy:

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. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

The Frustrated Contract Act deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

Despite the tenant's testimony that the home was uninhabitable, in consideration of the evidence and testimony before me, I am not satisfied that this tenancy meets the definition of a Frustrated Tenancy as clarified by RTB Policy Guideline 34. Despite the tenant's testimony that the ant infestation was present since the beginning of the tenancy, the tenant continued to reside there for over a year despite the infestation. The fixed-term tenancy ended on June 30, 2019, and despite all the issues the tenant brought up in this application, the tenant did not give her notice until August of 2019, nor had the tenant filed any applications for dispute resolution. While I accept the tenant's testimony that she was fearful of a retaliatory negative reference from the landlords, I find this explanation does not justify the tenant's decision to give less than 30 days' notice as required by the *Act*.

Section 44 of the *Residential Tenancy Act* states the following:

- 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*];
 - (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];
 - (ii) section 46 [*landlord's notice: non-payment of rent*];

- (iii) section 47 [*landlord's notice: cause*];
- (iv) section 48 [*landlord's notice: end of employment*];
- (v) section 49 [*landlord's notice: landlord's use of property*];
- (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];
- (vii) section 50 [*tenant may end tenancy early*];

- (b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
- (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;
- (f) the director orders that the tenancy is ended;
- (g) the tenancy agreement is a sublease agreement.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Section 45(1) deals with a Tenant's notice in the case of a periodic tenancy:

- 45** (1) A tenant may end a periodic 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, and

(b) 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.

While the tenant notified the landlords that she was ending the tenancy, she did not end it in a manner that complies with the *Act*, as stated above. The tenant did not give the landlord at least one month's notice. The landlords did not mutually agree to end this tenancy in writing, nor did the tenant obtain an order from the Residential Tenancy Branch for an early termination of this tenancy. No previous applications for dispute resolution have been filed by the tenant in regards to this tenancy, nor do I find this tenancy frustrated.

The evidence is clear that the tenant did not comply with the *Act* in ending this, and I therefore, find that the tenant vacated the rental unit contrary to Sections 45 of the *Act*.

I find further that the evidence shows that as a result of the tenant's actions, the landlords suffered a rental loss. The evidence of the landlord is that they were able to re-rent the suite for October 15, 2019, and are seeking loss of rental income for September 2019. I am satisfied that the landlords had sufficiently mitigated their losses, I therefore allow the landlords' claim for a monetary order for loss of rental income for September 2019 in the amount of \$1,400.00 due to the tenant's failure to comply with section 45 of the *Act*.

Residential Tenancy Branch Policy Guideline #4 with respect to Liquidated Damages includes the following guidance with respect to the interpretation of such clauses:

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 an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- *If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

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...

The landlords had drafted the agreement calling for payment of \$700.00 in liquidated damages if the tenant “ends the fixed term tenancy before the end of the original term.” I find that although the tenant did not end the tenancy in a manner that complies with section 45 of the Act, the tenant did not end the tenancy before the end of the original term, June 30, 2019. Accordingly, I dismiss the landlord’s application for liquidated damages without leave to reapply.

The landlords also applied for a monetary claim for unpaid utilities. In consideration of the evidence before me, I find that the tenant is responsible for twenty five percent of the utilities. I find that the tenant owes the landlords utilities in the amount claimed. Accordingly, I allow the landlords a monetary order for \$27.75.

Section 37(2)(a) of the *Act* stipulates that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. I find that the landlords provided sufficient evidence to show that the tenant did not take reasonable care and attention when vacating the suite. I find that the landlords complied with sections 23 and 35 of the *Act* by performing condition inspection reports for both the move-in and move-out. I also find that the landlords supported their claims with invoices, as well as photos. Accordingly, I find the landlords are entitled to compensation for cleaning. I issue a monetary award of \$126.00 to the landlords for the losses associated with the tenant’s failure to leave the rental unit in reasonably clean condition.

The tenant’s application for rent reduction was made in accordance with the following provisions of section 65 of the *Act* which allows me to make an order regarding past and future rent:

65 (1) *Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if the director finds*

that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:...

(f) that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement;...

The landlords' obligations to maintain and repair facilities in a rental property are set out in section 32(1) of the *Act* which reads as follows:

Landlord and tenant obligations to repair and maintain

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.

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(4) A tenant is not required to make repairs for reasonable wear and tear.

Although the tenant provided evidence to support that there were problems with ants and plants in the rental unit, I am not satisfied that the landlords had contravened either section 32(1) of the *Act*. As stated in the hearing, the home is located on agricultural land reserve, which may be a factor in the ongoing ant problem. The tenant testified that she was harassed by the landlords, and believes that the landlords have installed monitoring devices inside her rental unit without her knowledge or permission.

Section 67 of the *Act* establishes that an Arbitrator may determine and issue an order for damages and loss arising from a party breaching the *Act*, regulations or tenancy agreement. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. A claimant also has the duty to act reasonably to mitigate their losses.

I find that the tenant has not met the evidentiary burden on a balance of probabilities. I find that tenant's evidence does not sufficiently support that the losses claimed are a result of the landlords' failure to comply with the tenancy agreement and *Act*. I find that the tenant made the decision to move out, in a manner that does not comply with the *Act*. I am not satisfied that the tenant had suffered the losses in the amounts claimed, and that these losses are attributed to the landlords' contravention of the *Act*. I accept the landlords' explanation that the unknown device installed by the landlords was thermostat, and was not a device installed for the purposes of harassing or monitoring the tenant. Accordingly, the tenants' application for a rent reduction, for the recovery of moving costs, the filing fee, and registered mailing costs are all dismissed without leave to reapply.

The landlords continue to hold the tenant's security deposit of \$700.00. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlords to retain the tenant's security deposit of \$700.00 in partial satisfaction of the monetary claim.

I find that the landlords' application has merit and that the landlords are entitled to recover the fee for filing this Application.

Conclusion

I issue a Monetary Order in the amount of \$953.75 in the landlords' favour under the following terms which allows the landlords to retain the security deposit in satisfaction of the monetary claim for losses, plus recover the \$100.00 filing fee for this application.

| Item | Amount |
|-----------------------------|-----------------|
| Loss of September 2019 Rent | 1,400.00 |
| Unpaid Utilities | 27.75 |
| Cleaning Costs | 126.00 |
| Filing Fee | 100.00 |
| Security Deposit | -700.00 |
| Total Monetary Order | \$953.75 |

Should the tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The landlord's application for liquidated damages is dismissed without leave to reapply.

The tenant's entire application is dismissed 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: January 28, 2020

Residential Tenancy Branch