Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNDCT, FFT

Introduction

In this dispute, the tenant's personal representative (hereafter the "representative") sought compensation under section 51 of *Residential Tenancy Act* (the "Act"), compensation under section 67 of the Act for two matters, and, recovery of the filing fee under section 72 of the Act.

The representative applied for dispute resolution on October 29, 2019 and a dispute resolution hearing was held on March 10, 2020. The representative, the landlord, and a witness for the landlord, attended the hearing and were given a full opportunity to be heard, to present testimony, and to make submissions. The witness did not testify.

I have reviewed evidence submitted that met the *Rules of Procedure,* under the Act, and to which I was referred, but have only considered evidence relevant to the preliminary issues and the issues of this application.

Preliminary Issue 1: Legal Standing of Deceased Tenant's Personal Representative

I note at the outset that the applicant in this dispute named himself as a tenant and brought suit against the landlord. However, upon reviewing the documentary evidence that was submitted and considering the testimony of the parties, it is clear that, and I must conclude, that the applicant was at all times during the tenancy an occupant, and not a tenant, as is defined by the Act and by common law.

The tenancy began on September 1, 2017, and it was a fixed-term tenancy ending on August 31, 2019. The only tenant named on the written tenancy agreement (a copy of which was submitted into evidence) was that of the applicant's now-deceased mother.

The tenant resided in the rental unit until her death in August 2018. The applicant, the tenant's son, also resided in the rental unit throughout the tenancy and until August 31, 2019.

Nowhere in the tenancy agreement is there a reference to the applicant being a tenant. Nor, based on the conduct and communication of the parties, was the applicant ever intended to be a tenant. For example, emails between the landlord and the applicant indicate quite evidently that the landlord considered him to be a guest, with no legal rights under the tenancy agreement. Also, the representative testified that his mother expressly wanted him not to be on the tenancy agreement.

Certainly, all parties recognized that the son played an important role in his mother's life, especially given that his mother was suffering from a life-threatening illness that ultimately resulted in her death. He looked after her in the rental unit, and, by all accounts was a forceful, yet loving, advocate for her rights as a tenant. Much interaction between the son and the landlord occurred throughout the tenancy. But, none of the forgoing leads me to find that he was a tenant.

A "tenant" is defined in section 1 of the Act to include "the estate of a deceased tenant." In this dispute, the estate of the deceased tenant was the tenant from the time of the tenant's death until August 31, 2019.

Any individual who resides with a tenant, but who is not a named party in a tenancy agreement, is considered an "occupant." Occupants do not have any legal rights or obligations under the Act or a tenancy agreement. This is clarified in *Residential Tenancy Policy Guideline 13 ("Rights and Responsibilities of Co-tenants"),* which states:

> Where a tenant allows a person who is not a tenant to move into the premises and share the rent, the new occupant has no rights or obligations under the tenancy agreement, unless all parties agree to enter into a tenancy agreement to include the new occupant as a tenant.

Moreover, it should be noted that section 6(1) of the Act states that the "rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant under a tenancy agreement." Thus, the only legal rights and obligations that are enforceable under the Act are those that existed between the landlord and the tenant, including the tenant's estate. It follows, then, that the deceased tenant's son, specifically as an occupant, has no legal standing to claim for damages against the landlord under the Act.

As such, I dismiss the son's claims for compensation related to harassment and storage costs, as the issues giving rise to those claims relate to the relationship between the landlord and the son, as occupant.

That said, the tenant's son is, by all accounts, the personal representative and executor of his mother's estate and thus may act on behalf of the estate regard the claim for compensation under section 51 of the Act. That aspect of the application is considered.

In making this finding, the tenant's son's name is hereby removed from the style of cause of this dispute, and instead added to the tenant's estate's name, in his capacity as personal representative.

Preliminary Issue 2: Landlord's Failure to Serve Documents

The landlord testified that she received the Notice of Dispute Resolution Proceeding package in late October or early November 2019. She was fully aware of this hearing for more than four months but chose to submit the entirety of her evidence anywhere between five days and one day before the hearing.

Rule 3.15 of the *Rules of Procedure* clearly states that "the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing." The landlord did neither.

When asked why she submitted everything at the last minute, and in contravention of the *Rules,* the landlord simply said that she "has been very busy" and that she is a "working mother" who travels. It also, she explained, "took me a long time" to gather her evidence and submit it when she did. She further testified that the representative has all of the evidence in any event, and thus she did not serve him with any of her evidence. Some of this evidence included bank statements, which she remarked she had no intention of providing copies of to the representative.

I find the landlord's explanation for her delay in submitting evidence to be both absurd and unconvincing. Her explanation is entirely unreasonable and, compounded with her deliberate failure to serve copies of her evidence on the representative as is required by the *Rules of Procedure,* leads me to exclude the entirety of any documentary evidence submitted.

Therefore, none of the landlord's documentary evidence submitted, except for a copy of the tenancy agreement, is accepted or considered in this decision.

Issues

1. Is the tenant entitled to compensation pursuant to section 51 of the Act?

2. Is the tenant entitled to recovery of the filing fee pursuant to section 72 of the Act?

Background and Evidence

The tenancy agreement, entered into between the tenant and the landlord, indicated that it was a fixed term tenancy ending on August 31, 2019. The tenant passed away in August 2018, but the landlord did not find out about the tenant's death until January 2019. However, the landlord permitted the tenant's son (the representative) to remain in the rental unit (or, at least, to keep paying the rent) after she found out about the death. He told her that he was acting as executor and was handling the affairs of his mother. The landlord asked him for documentary proof of this, but the son refused to provide any. He was aware that the tenancy would end on August 31, 2019. The landlord apparently contacted the son repeatedly about what he was doing and when he would be moving out.

On or about April 15, 2019, the landlord issued a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice"). The Notice, a copy of which was submitted by the representative, was served on the estate of the tenant and on the representative. The Notice indicated that the tenancy would end on August 31, 2019 (as the tenancy agreement also indicated). Further, the Notice indicated on page 2 that the reason for the tenancy ending was that the "rental unit will be occupied by the landlord or the landlord's close family member." The representative did not dispute the Notice. And, on August 31, 2019, the representative vacated the rental unit.

The representative testified that for "the first two months after [he moved out], nobody moved into [the rental unit]." He explained that he "spoke to a few people" over the course of moving out and filing his application in late October 2019, and on "several occasions, every week" and right up until last week. He spoke with the tenants in two other rental units in the building who seemed to believe that nobody lived in the rental unit. As a result of those conversations, he came to the conclusion that there was no one living in the rental unit. He also testified that "nobody's ever been in their parking stall," which supports his position that the landlord did not move into the rental unit. In his closing submissions, the representative argued that "there is no proof of the landlord moving in."

The landlord testified that she and her family reside in the rental unit. She found it concerning that the representative went to the building on so many occasions and spoke to so many people. However, she remarked that those people would not necessarily know if she lived in the rental unit, because she “never spoke with anyone in that building.”

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Here, the onus is on the representative to prove that the landlord breached section 51(2) of the Act, thus entitling the tenant’s estate to an amount equivalent to twelve times the monthly rent, which is $11,700.00.

Section 51(2) of the Act states:

> (2) Subject to subsection (3), the landlord [. . .] must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if
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> (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
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> (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Section 51(3) of the Act permits extenuating circumstances to excuse a landlord from having to pay an amount under section 51(2).

The “stated purpose” referred to in section 51(2) of the Act means the stated purpose for ending a tenancy under section 49 of the Act. Section 49(3) of the Act permits a landlord to end a tenancy, by giving proper notice, when the “the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.” This was the stated reason provided to the representative in the Notice of April 15, 2019.

In this dispute, the representative testified that he spoke with several people in and around the building in which the rental unit is located and observed an empty parking stall. As a result of those conversations and observations he concluded that the landlord had not moved into, and was not residing in, the rental unit. Thus, he argues, the landlord did not use the rental unit for the purpose stated in the Notice. The landlord disputed this and testified that she resides in the rental unit with her family.

When two parties to a dispute provide equally reasonable accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

This cannot be overstressed: the onus is on the representative, not the landlord, to prove a breach of section 51(2) of the Act. The representative twice submitted that there "is no proof of the landlord moving in." But that is missing the point: the landlord does not carry the burden to prove that she is occupying the rental unit, rather, it is the representative who must prove his case.

I place little weight on the hearsay conversations that the representative may have had with others in the building, and I lend no weight to his observations of an empty parking stall. Indeed, the outcome might have been different had I heard from witnesses who actually reside in the building. But there were no such witnesses. There is, quite simply, no proof beyond the representative's speculation that the landlord is not occupying the rental unit. An empty parking stall can mean any number of things, of which not living in a rental unit is but one explanation. Likewise, that other residents in the building may or may not have seen the landlord in the building is not proof of non-residency.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the representative has not met the onus of proving the tenant's claim that the landlord breached section 51 of the Act. Accordingly, I dismiss this aspect of the application without leave to reapply.

Finally, section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee. As the representative was unsuccessful, I dismiss the claim for recovery of the filing fee.

Conclusion

I dismiss the tenant's application without leave to reapply.

This decision, which is final and binding except where permitted by law, is made on authority delegated to me under section 9.1(1) of the Act.

Dated: March 11, 2020

Residential Tenancy Branch