



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT FFT

Introduction

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

- a monetary order for compensation for money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord confirmed receipt of the tenant's application for dispute resolution ('application'). In accordance with section 89 of the *Act*, I find that the landlord duly served with the tenant's application. As both parties confirmed receipt of each other's evidentiary materials, I find that these documents were duly served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Is the tenant entitled to a monetary order for compensation for money owed under the *Act*, regulation, or tenancy agreement?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This month-to-month tenancy began on October 1, 2011. The tenant originally moved into the 2 bedroom rental unit on the lower floor, paying \$675.00 in monthly rent. On August 1, 2013 the tenant moved to the 3 bedroom rental unit upstairs, with monthly rent set at \$800.00.

On December 27, 2018 the landlord served the tenant with a 2 Month Notice for Landlord's Use, for an effective date of February 28, 2019 in order to move into the 3 bedroom suite on March 1, 2019. The effective date of the 2 Month Notice was February 28, 2019.

The tenant requested to move into the 2 bedroom suite, which was vacated by the landlord's daughter in October of 2018. The landlord agreed to rent out the 2 bedroom suite beginning February 1, 2019 for \$650.00 per month. The 2 bedroom unit was being used as storage by the landlord, and the landlord was undergoing repairs to the bathroom in that suite. The landlord had agreed to allow the tenant to start moving some of his belongings on January 16, 2019 for storage purposes. The landlord submits that on January 20, 2019 they discovered that the tenant had stored potted marijuana plants in one of the bedrooms. After confronting the tenant, the tenant removed the plants and moved out of the home on January 31, 2019. The landlord testified that \$800.00 was returned to the tenant, which was the security deposit, with the agreement that no further money would be owed by the landlord to the tenant.

The landlord testified that they did not end up moving into the 3 bedroom suite, and sold the home instead. The landlord testified that this decision was made after consulting with a tax accountant, JM, on January 31, 2019. The landlord called JM as a witness in the hearing to confirm that that the consultation took place, and that this is when the landlord had discovered the consequences of moving into the 3 bedroom suite. The landlord testified that despite their intentions to move into the home, they discovered that this would result in tax consequences they could not afford.

The landlord confirmed in the hearing that the home was listed in December 2019, and was sold on January 3, 2020.

The tenant is seeking compensation under section 51(2) of the Act for the landlord's failure to use the home for the intended purpose as stated on the 2 Month Notice. The landlord is disputing the claim as they feel they issued the 2 Month Notice in good faith, and they believe the 2 Month Notice was no longer in effect at the time the tenant moved out.

Analysis

Residential Tenancy Policy Guideline #11 states the following about withdrawal of notices.

C. WITHDRAWAL OF NOTICE TO END TENANCY

A landlord or tenant cannot unilaterally withdraw a notice to end tenancy.

A notice to end tenancy may be withdrawn prior to its effective date only with the consent of the landlord or tenant to whom it is given.

A notice to end tenancy can be waived only with the express or implied consent of the landlord or tenant (see section D below).

It is recommended that withdrawal of a notice to end tenancy be documented in writing and signed by both the landlord and the tenant.

D. WAIVER OF NOTICE AND NEW OR CONTINUED TENANCY

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for "use and occupancy only," it could be implied that the landlord and tenant intend for the tenancy to continue.

Intent may also be established by evidence as to:

- *whether the landlord specifically informed the tenant that the money would be for use and occupancy only;*
- *whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and*
- *the conduct of the parties.*

Withdrawal of notice to end tenancy for landlord's use

If a landlord and tenant agree to withdraw a notice to end tenancy for landlord use under section 49, the tenant is not entitled to compensation for the notice. The tenant must repay any compensation that was paid as a result of the notice.

I find that no written acknowledgement exists confirming that the 2 Month Notice was withdrawn by the landlord. I find that the landlord ended the tenancy for the 3 bedroom

suite pursuant to the 2 Month Notice, and the landlord and tenant entered into a new tenancy agreement for a different 2 bedroom suite.

Although the tenant moved out on January 31, 2019, before the effective date of the 2 Month Notice, the tenant's election to end tenancy earlier than the effective date on the 2 Month Notice or enter into a new tenancy with the landlord for a different rental unit, does not cancel the 2 Month Notice.

Furthermore, both parties confirmed that the tenant was given \$800.00 at the end of the tenancy, which the landlord testified was the return of the tenant's deposits. I find that that the written tenancy agreement submitted by the landlord reflects a security deposit and pet damage deposit in the amounts of \$337.50 each. The tenant submits that the \$800.00 reflects the 1 month rent compensation for the 2 Month Notice. I find that the evidence submitted for this hearing supports the tenant's testimony that they were compensated the equivalent of 1 Month's Rent rather provided the return of the security and pet damage deposits. For all the reason above, I find that the 2 Month Notice was valid and still in effect.

Section 51(2) of the Act reads in part as follows:

51(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice 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

(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

(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.

(3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from

- (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or*
- (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.*

Policy Guideline #50 states the following about “Extenuating Circumstances” in the context of compensation for ending a tenancy under section 49 of the *Act*.

An arbitrator may excuse a landlord from paying compensation if there were extenuating circumstances that stopped the landlord from accomplishing the purpose or using the rental unit. These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation. Some examples are:

- A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies before moving in.*
- A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.*
- A tenant exercised their right of first refusal, but didn't notify the landlord of any further change of address or contact information after they moved out.*

The following are probably not extenuating circumstances:

- A landlord ends a tenancy to occupy a rental unit and they change their mind.*
- A landlord ends a tenancy to renovate the rental unit but did not adequately budget for renovations*

I have considered the testimony and evidence of both parties, and I find that it was undisputed that the landlord failed to use the rental unit for the stated purpose on the 2 Month Notice. In consideration of Policy Guideline #50 and the definition of “extenuating circumstances”, I have considered the explanation provided by the landlord. I find that the landlord did not consult with the tax accountant until January 31, 2019, after the tenant was already served with the 2 Month Notice, and after the tenant had already made plans to move out of the 3 bedroom suite. I find that the landlord's failure to obtain this information prior to the service of the 2 Month Notice does not meet the definition of extenuating circumstances under the *Act*.

Although I accept the testimony of the landlord that the landlord had issued the 2 Month Notice in good faith, the landlord failed to fulfill their obligations are required by section

49(3) of the *Act*. Accordingly, I find that the tenant is entitled to compensation equivalent to 12 times the monthly rent as required by section 51(2) of the *Act* for the landlord's noncompliance. I issue a monetary award to the tenant in the amount of \$9,600.00.

As the tenant was successful in his claim, I find that he is also entitled to recover the filing fee for this application.

Conclusion

I issue a \$9,700.00 Monetary Order in favour of the tenant in compensation for the landlord's failure to comply with section 49(3) of the *Act*, and for recovery of the filing fee for this application.

The landlord(s) must be served with this Order as soon as possible. Should the landlord(s) 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.

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 28, 2020

Residential Tenancy Branch