



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: FFL MNDCL-S MNDL-S MNRL-S

Introduction

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

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

The tenant confirmed receipt of the landlord's application for dispute resolution hearing. In accordance with section 89 of the *Act*, I find that the tenant duly served with the landlord's application. All parties confirmed receipt of each other's evidentiary materials, and that they were ready to proceed.

At the outset of the hearing, the landlord withdrew his monetary claim in the amount of \$500.00 for unpaid utilities. Accordingly, this portion of the landlord's monetary claim is cancelled. Liberty to reapply is not an extension of any applicable limitation period.

Issue(s) to be Decided

Is the landlord entitled to monetary compensation for unpaid utilities and losses?

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

Background and Evidence

This fixed-term tenancy began on December 1, 2019, and was to end on May 30, 2020. The tenant submits that she moved in on November 8, 2019. The tenant gave notice on January 4, 2020 that she would be moving out, and moved out on January 14, 2020. Monthly rent was set at \$925.00, payable on the first of every month. The landlord collected a security deposit in the amount of \$462.50, which he still holds.

The landlord is seeking monetary compensation as follows:

Carpet Cleaning	50.00
Cleaning	100.00
Paint Door	100.00
Loss of Rent (Feb-May 2020)	3,700.00
Liquidated Damages	462.50
Unpaid Utilities/Gas Bill	81.91
Estimated Gas Bill for remaining 5 months (withdrawn in hearing)	500.00
Filing Fee	100.00
Total Monetary Award Requested	\$5,094.41

The landlord is seeking loss of rental income for the remainder of this fixed-term tenancy. The landlord testified that the tenant gave less than 30 days' notice before moving out, and despite the landlord's efforts to find a new and suitable tenant by posting advertisements online, the landlord was unable to fill the vacancy. The landlord testified that his efforts to mitigate his losses were impacted by the pandemic, and lack of suitable applicants during this time. The landlord is also seeking liquidated damages in the amount of \$462.50 as set out in the tenancy agreement. The tenancy agreement states the following:

"In the event of a breach of the term of the tenancy agreement the tenant will pay the landlord the sum of the damage deposit for costs including advertising, time spent screening applicants, time preparing and showing the suite, time and expenses checking references, time and expenses for administrative costs, and time for supervising move in."

The landlord is seeking a monetary order for the unpaid utilities in the amount of \$81.91 for this tenancy.

The landlord testified that the tenant failed to leave the home in reasonably clean and undamaged condition, and submitted photos as well as the move-in, and move-out inspection reports to support his claim. The landlord is seeking a monetary order in the amount of \$100.00 for cleaning and \$50.00 for carpet cleaning.

Lastly, the landlord is seeking a monetary order in the amount of \$100.00 for repainting of a door that was scratched and damaged by white marks.

The tenant is disputing the landlord's monetary claim for loss of rental income. The tenant does not dispute moving out before the end of the fixed term, but testified that she was unable to continue the tenancy because it was a frustrated tenancy. The tenant testified that she suffered an injury shortly after moving in that prevented her from being able to access the sleeping loft in the suite. The tenant submitted copies of the MRI report in her evidentiary materials. The tenant testified that the injury also affected her ability to pay the rent. The tenant also testified that she had items stolen from the landlord's property, which were essential to her ability to earn an income, and also affected her sense of personal safety.

The tenant testified that she was also extremely disturbed by the fact that she was unable to flush toilet paper down the toilet. The tenant submits that this was highly unusual and unhygienic, and despite the fact that it was in the tenancy agreement, she assumed that she would be able to flush toilet paper down the toilet. The tenant believes that this clause would impact the landlord's ability to re-rent the suite to other tenants.

The tenant disputes damaging the door, and failing to leave the home in reasonably clean condition. The tenant testified that the carpet was in the loft, and due to the location it was difficult to vacuum the carpet. The tenant admitted that some glitter may have been left behind, but testified that she had cleaned the suite before moving out.

Analysis

When making a claim for damages under a tenancy agreement or the *Act*, the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss

Section 44 of the *Residential Tenancy Act* reads in part as follows:

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:...
- (b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
- (c) the landlord and tenant agree in writing to end the tenancy;...

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

45 (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
- (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.

While the tenant did notify the landlord of the early termination of this tenancy, they did not end it in a manner that complies with the *Act*, as stated above. The landlord 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 fixed term tenancy. No applications for dispute resolution have been filed by the tenant in regards to this tenancy. The tenant moved out earlier than the date specified in the tenancy agreement, and the effective date was not the day before the day the rent is payable under the tenancy agreement.

The evidence is clear that the tenant did not comply with the *Act* in ending this fixed term tenancy, and I therefore, find that the tenant vacated the rental unit contrary to Sections 44 and 45 of the *Act*. I must now consider whether the landlord is entitled to the monetary losses associated with the early end of this fixed term 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.

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. Although the tenant experienced economic hardship and physical limitations due to her injury, I find that that the evidence presented by the tenant did not meet the test for a frustrated tenancy. Furthermore, I find that the tenancy agreement clearly stated how toilet paper could not be disposed of in the toilet. Despite the tenant's concerns about health and hygiene, I find that the tenant has not provided sufficient evidence to support the health or safety risks associated with this requirement. I also find that that the tenant was disclosed these terms and had agreed to them by signing the tenancy agreement. Despite the tenant's concerns about this condition, she ended the tenancy without giving proper notice, and failing to file any applications for dispute

resolution. Lastly, I find the tenant's submissions about the theft of her personal belongings do not support any breach by the landlord of the tenancy agreement or *Act*, nor does it support the tenant's arguments that the tenancy was frustrated.

While I accept the tenant's testimony that she faced unforeseen hardships during this tenancy, I find the tenant's explanations do not justify the tenant's decision to end the tenancy in a manner that contravenes the *Act* or tenancy agreement. The evidence is clear that the tenant did not comply with the *Act* in ending this fixed term tenancy.

I find further that the evidence shows that as a result of the tenant's actions, the landlord suffered a rental loss. The evidence of the landlord is that despite advertising the suite for rent on several online rental sites, the landlord was unable to re-rent the suite for the remainder of the term. The landlord cited difficulties due to the pandemic. The tenant testified that the landlord's restrictive conditions regarding the inability to flush paper down the toilet prevented him from finding a new tenant. Despite the tenant's theory and concerns, I do not find this to be based on fact. I am, however, satisfied that the landlord fulfilled his obligations by attempting to mitigate the tenant's exposure to the landlord's monetary loss of rent for the remainder of the term, as is required by section 7(2) of the *Act*. I find that the landlord provided a reasonable explanation for why he was unable to fill the vacancy despite his efforts. I therefore allow the landlord's claim for a monetary order for \$3,700.00 in lost rental income for the remainder of the fixed term.

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 landlord drafted the agreement calling for payment of \$462.50 as liquidated damages in the event that the tenant ended the tenancy before the end of the fixed term. Whether or not an amount specified in a contract should be construed as liquidated damages or as a penalty is a question of law to be decided upon on the basis of a consideration of the whole agreement. The amount claimed in an agreement as liquidated damages is intended to be an estimate of the loss that may be suffered by the landlord if the tenant breaches the agreement by ending the tenancy early. In this case, the landlord testified that the clause was to ensure the coverage of costs associated with the tenant's early termination of the rental unit such as advertising, and screening of prospective new tenants. I do not find the amount to be considered a penalty. For this reason, I allow the landlord's monetary claim in the amount of \$462.50 in satisfaction of the liquidated damages for this tenancy.

I am satisfied that the landlord is entitled to a monetary award of \$500.00. I do so as I accept the landlord's assertion that this is not a penalty but a legitimate pre-set charge for ending this fixed term tenancy early. I find this to be a reasonable estimate of the landlord's loss in the event of a breach to cover change over costs, such as advertising, interviewing, administration, re-renting of the rental unit due to the early termination of this tenancy.

I find that the tenant had failed to pay the outstanding utilities as required for this tenancy. Accordingly, I allow the landlord's monetary claim of \$81.91 for the outstanding utilities.

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 condition except for reasonable wear and tear. I have reviewed the landlord's monetary claim for damages, and have taken in consideration of the evidentiary materials submitted, as well as the sworn testimony of both parties.

The tenant disputes the damage to the door. Taking in consideration that the party claiming the loss bears the burden of proof, I find that the landlord has not provided sufficient evidence to support that the door was damaged by the tenant beyond reasonable wear and tear. Although the pictures submitted by the landlord do show white marks on the door, I find that the report only notes that the door was in “good” condition at the beginning of the tenancy. In the absence of photos at the beginning of the tenancy, I find that the photo and inspection reports do not sufficiently support that the tenant had damaged the door beyond reasonable wear and tear. Furthermore, the landlord did not testify to the age of the door and when the door was last re-painted. Without knowing the actual age of the door and when it was last re-painted, it is difficult to ascertain the years of useful life left for the painting of the door, which is normally assessed using Residential Policy Guideline #40. As per this policy, the useful life of interior paint is four years. The door was part of the bathroom, in what the tenant considered a small living area, which contributes to the wear and tear of the door. For this reason, I dismiss the landlord’s monetary claim for repainting the door without leave to reapply.

I find that the tenant admitted that she had failed to clean portions of the suite, including the carpet and glitter on the floors. Although the tenant testified that she was unable to vacuum the loft sleeping area herself, she did not provide an explanation for why she was unable to obtain assistance to do so. I find that that the landlord’s photos support the landlord’s claim that the tenant failed to properly clean the home and carpet at the end of the tenancy. For this reason, I allow the landlord’s monetary claims for cleaning and carpet cleaning.

I allow the landlord to recover the filing fee for this application.

The landlord continues to hold the tenant’s security deposit of \$462.50. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlord to retain the tenant’s security deposit in satisfaction of the monetary claim.

Conclusion

The landlord withdrew his monetary claim in the amount of \$500.00 for unpaid utilities. Accordingly, this portion of the landlord’s monetary claim is cancelled. Liberty to reapply is not an extension of any applicable limitation period.

I issue a Monetary Order in the amount of \$4,031.91 in the landlord’s favour as set out in the table below. I allow the landlord to retain the tenant’s security deposit in satisfaction of their monetary claim. The landlord’s monetary claim for painting the door is dismissed

without leave to reapply.

Carpet Cleaning	50.00
Cleaning	100.00
Loss of Rent (Feb-May 2020)	3,700.00
Liquidated Damages	462.50
Unpaid Utilities/Gas Bill	81.91
Filing Fee	100.00
Less Security Deposit Held by Landlord	-462.50
Total Monetary Award	\$4,031.91

The landlord is provided with this Order in the above terms and the tenant(s) must be served with a copy of this Order as soon as possible. Should the tenant(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: June 8, 2020

Residential Tenancy Branch