Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCT, FFT**

Introduction

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

- a monetary order for $19,300 representing 12 times the amount of monthly rent, pursuant to sections 51 and 62 of the Act;
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

This hearing was reconvened from a previous hearing on May 11, 2020. Following that hearing I issued an interim decision setting out the reasons for its adjournment. I will not repeat those reasons here.

Both tenants attended this hearing. They were assisted by an advocate ("**MT**") and a mental support worker ("**LN**"). The landlord was represented by its two owners ("**LM**" and "**JM**") and its property manager ("**KM**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Neither party raised any issue with service. I find that the parties are deemed to have been served with all required documents in accordance with the Act.

Issues to be Decided

Are the tenants entitled to:

1) a monetary order of $19,300 representing 12 times the amount of monthly rent; and
2) recover their filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The tenants and the prior owners of the residential property (the "**Building**") entered into a tenancy agreement in 1999. The rental unit is a two-bedroom apartment. By

2019, the monthly rent was $917. The tenants paid the then-owner a security deposit of $480, which the landlord has returned to the tenants.

On February 22, 2019, the tenants were served with Four Month Notice to End Tenancy for the Landlord's Use of Property (the "**Notice**") with an effective date of June 30, 2019. It specified that vacant possession was required to perform renovations to the Building including:

1) asbestos abatement;
2) demolition of walls;
3) removal of floor finishing;
4) installation of:
    a. in suite laundry;
    b. new floors, countertops and appliances
5) interior and exterior painting; and
6) common area finishing.

The landlord served all occupants of the Building with similar notices to end tenancy (the "**Notices**").

The landlord offered compensation above what is required by the Act to occupants of the Building's occupants if they agreed to end their respective tenancies by way of a mutual agreement to end tenancy, rather than by operation of the Notice. Some of the occupants entered into settlement agreements whereby they agreed to end their tenancies for additional compensation, others did not.

On March 4, 2019 the parties to this hearing entered into a written settlement agreement wherein they agreed to vacate the rental unit (the "**Agreement**"). Pursuant to the Agreement:

1) the tenancy would end on April 3, 2019;
2) the landlord would pay the tenants $2,647, representing the following:
    a. $917, representing one month's free rent;
    b. $480, representing the return of the tenants' security deposit;
    c. $500 for moving costs;
    d. $250 for a utility deposit at the tenants' new rental unit; and
    e. $500 towards the tenants' security deposit at their new rental unit.
3) The tenants "requested the first right of refusal".

On March 4, 2019, the tenants served the landlord with Form #RTB – 28 (Tenant Notice: Exercising Right of First Refusal) and with Form #RTB – 8 (Mutual Agreement to End Tenancy) which was signed by the tenants and a representative of the landlord.

On April 3, 2019, the tenants vacated the rental unit and moved into a rental unit with a monthly rent of $1,600.

On April 3, 2019, the landlord paid the tenants $2,647, by way of three cheques.

The tenants testified that the landlord did not provide them with an opportunity to exercise their right of first refusal to re-rent the rental unit once the renovations were completed.

The landlord's representatives testified that they were unaware if the tenants were notified to be given an opportunity to exercise their right of first refusal. They testified that the prior property manager who would have be responsible for doing this is no longer employed by the company. At the hearing, JM offered to allow the tenants could return to a two-bedroom unit in the Building at market rate ($1,900). He stated that, if the tenants had not previously been given an opportunity to exercise their right of first refusal, they now have been.

The tenants testified that other tenants negotiated mutual agreements to end their tenancies for as much as $20,000. They offered no documentary evidence to support this. The landlords testified that any settlement agreements to mutually end the tenancies of other occupants are subject to non-disclosure agreements, and they are not certain how the tenants arrived at their understanding that other occupants settled for this amount.

The tenants testified that they felt bullied into accepting the Agreement. They testified that they did not understand their rights as a tenant and thought that they would be required to move. However, LN testified that when the Notices were served on the occupants, it "was chaos" for all the occupants. She testified that she spoke with tenants shortly after they were served with the Notice and they discussed the fact that rental units in the same area might become scarce as a result of 65 people (the number of occupants of the Building) looking for a new place to live.

The tenants testified that not all occupants entered into settlement agreements to mutual end their tenancies. Some of them refused and applied to the Residential Tenancy Branch (the "**RTB**") to dispute the Notices. The tenants were not among these applicants. The tenants entered a copy of a decision of the RTB dated May 24, 2019 (the "**May Decision**") following a hearing on May 14, 2019.

The May Decision listed the tenants' rental unit as one of the rental units the dispute concerned. The tenants, however, testified that they were not parties to this dispute, nor did they file an application to dispute the Notice. As such, I understand the reference to the tenants' unit in the May Decision to be a typographical error.

In the May Decision, the presiding arbitrator cancelled the Notices of those occupants who applied for dispute resolution. He found that the landlord had failed to prove that the renovations required vacant possession of the rental units and that the landlord failed to establish that it did not have another purpose or ulterior motive for ending the tenancies.

By the time the May Decision was rendered, the tenants had vacated the rental unit, and moved into a new unit. They testified that they pay $1,600 in monthly rent in this new unit.

The tenants' argument for compensation is threefold. They argued that they were bullied into entering the Agreement and that they did not know their rights as tenants. They testified that this should cause the Agreement to be nullified.

The tenants argued that the Notice was not issued in good faith (as determined in the May Decision) and as such is invalid. They argue that, as a result, the tenancy was improperly ended and that they are entitled to compensation as a result.

Furthermore, the tenants argued that the landlord breached the Agreement by failing to provide them with an opportunity to exercise their right of first refusal, and that, as a result they are entitled to compensation.

Under all of these arguments, the tenants claim compensation in the amount of $19,200, which represents twelve times their *current* monthly rent ($1,600 x 12).

The tenants also testified that they are on a limited budget and are unable to afford the monthly rent of their new rental unit ($1,600). They testified that they had mental health issues which amplified the impact of their being displaced from their home of 20 years.

The landlord argued that the tenancy was not ended pursuant to the Notice, but by the Agreement. The landlord denied that the tenants were bullied or forced into entering into the Agreement, and noted that based on the testimony of LN, it appears that the tenants were able to discuss their options with medical professional as to their best option to proceed.

The landlord argued that there is no basis to cause the Agreement to be nullified by the May Decision.

The landlord took the position that, by offering the tenants the opportunity to return to the Building at the hearing, they have satisfied their obligation to grant the tenants their right of first refusal.

Analysis

1. Relevant sections of the Act

The tenants claim compensation pursuant to sections 51, 51.2, and 51.3 of the Act, which state:

> **Tenant's compensation: section 49 notice**

51(1) A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(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.

Right of first refusal

51.2(1) In respect of a rental unit in a residential property containing 5 or more rental units, a tenant who receives a notice under section 49 (6) (b) is entitled to enter into a new tenancy agreement respecting the rental unit upon completion of the renovations or repairs for which the notice was issued if, before the tenant vacates the rental unit, the tenant gives the landlord a notice that the tenant intends to do so.

(2) If a tenant has given a notice under subsection (1), the landlord, at least 45 days before the completion of the renovations or repairs, must give the tenant

(a) a notice of the availability date of the rental unit, and

(b) a tenancy agreement to commence effective on that availability date.

Tenant's compensation: no right of first refusal

51.3(1) Subject to subsection (2) of this section, if a tenant has given a notice under subsection (1) of section 51.2, the landlord must pay the tenant an amount that is the equivalent of 12 times the monthly rent payable under the previous tenancy agreement if the landlord does not comply with section 51.2 (2).

(2) The director may excuse the landlord from paying the tenant the amount required under subsection (1) if, in the director's opinion, extenuating circumstances prevented the landlord from complying with section 51.2 (2).

I note that, in the event the tenants are successful, these section permits me to award an amount equal to 12 times the monthly rent payable under the previous tenancy agreement (that is, the agreement between the landlord and the tenants), and not, as the tenants claim in this application, payable under the tenants' current tenancy agreement (that is, for the rental unit they now live in).

1. Is the Agreement void?

    a. Were the tenants pressured into entering the Agreement?

The tenants testified that they felt bullied into accepting the Agreement. They testified that they felt they had no choice but to move after receiving the Notice. The tenants did not provide any evidence as to what specific actions the landlord's agents took that caused them to feel bullied. Rather, it seems as though it was the circumstance itself – being served with an eviction notice – that caused the tenants to feel pressured into the Agreement. This is understandable. Most tenants would feel stress and anxiety when faced with a looming eviction. This is not enough to cause any subsequent settlement agreement to be entered into to be void. If this were the case, the majority of settlement agreements would be invalid.

The tenants had time to consider their best course of action after they received the Notice. They consulted with the mental support worker LN. The considered the possibility that they may be unable to find new accommodation if they waited too long to move, as all the Building's residents received Notices, and would (presumably) be looking for new accommodation as well.

I have no evidence before me to suggest that landlord or its agents did anything to deprive the tenants of their ability to consider their position regarding the Notice, obtain any information they wanted to regarding their rights, make any offer on any terms wanted to, or unduly pressure them into entering into the Agreement.

I accept that there was an imbalance in power between the landlord and the tenants (as is often the case in such situations). However, I see no basis on which to find that the landlord exercised their power in an unfair or improper manner. As such, I do not find that the Agreement should be set aside on the basis that the tenants were pressured into entering it by the landlord.

    b. Does the May Decision cause the Agreement to be nullified?

The tenants did not cite any authority for the proposition that a settlement agreement can be nullified based on the outcome of a subsequent dispute of the RTB (or any other decision-making body) between different parties.

Indeed, if this were the case, there would be little incentive for parties ever to enter into settlement agreements, as neither could be sure that, even if all the terms were faithfully executed, that an agreement would not be set aside.

In these circumstances, both parties knew, or reasonably ought to have known, that the validity of a Notice was not a certainty (the Notice itself provides information as to how the tenants might dispute the it). This is why a landlord is willing to pay a tenant more than the tenant is entitled to under the Act to end the tenancy: with such an agreement comes the certainty for a landlord that a tenant will vacate the rental unit.

Similarly, this lack of certainty as to the validity of a Notice is why a tenant might agree to vacate the rental for additional monetary compensation: if a Notice is found to be valid, a tenant is only entitled to compensation set out under the Act (one month's free rent and the right of first refusal) and must vacate the rental unit, but if a tenant agrees to vacate a rental unit of their own accord, they can gain additional consideration (as is the case here).

Deciding to enter into a settlement agreement is a calculated risk for all parties involved. Each gives up more than they otherwise might obtain were the matter adjudicated. In exchange for giving up their best-case scenario (an unconditional victory at an adjudicative hearing), they receive more than their worst-case scenario (an unconditional failure at an adjudicative hearing). The mid-point that the parties arrive at in a settlement agreement is a comprise on the part of both sides involved, and represents a party conceding more to the other party than they might obtain if they successful at adjudication, in exchange for a guarantee that they will receive *something* in excess to what they would receive if they were unsuccessful at adjudication.

In the present case, the Act provides tenants who receive a Notice under section 49 is entitled to "an amount that is the equivalent of one month's rent" (section 51(1)) and the right of first refusal, if the tenants provide the landlord notice of their intention to exercise this right (section 51.2(1)). A tenant is not entitled to any more than this.

In the Agreement, the tenants receive an amount equal to one month's rent, the right of first refusal, as well as the unconditional return of their security deposit (which the Act does not guarantee) and an additional $1,250. The tenants obtained these additional benefits in exchange for providing the landlord the certainty that they would vacate the rental unit. Both sides obtained more that than they would be entitled to were they unsuccessful at an application to dispute the Notice.

As such, in the absence of any authority to the contrary, I see no reason to set aside the Agreement on the basis that, in the May Decision, other Notices similar to the Notice received by the tenants were set aside. Such an outcome was a possibility, but not a certainty, at the time the Agreement was made. I find that both the landlord and the tenants leveraged this uncertainty to obtain more that they might other obtain were they unsuccessful at adjudication. I find that the Agreement remains valid, as to set it aside

would undermine the entire purpose of allowing parties into enter into settlement agreements.

2. Notwithstanding the Agreement being valid, are the tenants entitled to compensation under the Act?

    a. Section 51 of the Act

I note that section 51(1) states that a tenant who *receives* a notice to end tenancy under section 49 is entitled to one month's free rent. Section 51(1) does not require that the tenancy actually end pursuant to that notice.

However, RTB Policy Guideline 50 considers this section 51, and states:

> Section 49 of the *Residential Tenancy Act* (RTA) […] allows a landlord to end a tenancy for "landlord's use." Section 51 of the RTA […] sets out compensation requirements for landlords who end a tenancy for landlord's use.
>
> […]
>
> Section 51(2) of the RTA is clear that a landlord must pay compensation to a tenant (except in extenuating circumstances) if they end a tenancy under section 49 and do not take steps to accomplish that stated purpose or use the rental unit for that purpose for at least 6 months.
>
> [emphasis added]

As such, I understand that section 51 to only apply to tenancies that were ended by a notice to end tenancy issued pursuant to section 49 of the Act. In this case, the tenancy was not ended pursuant to the Notice. Rather it was ended by the Agreement. As such, compensation under section 51(2) is not available to the tenants.

This accords with the principle set out above that settlement agreements represent a compromise between the parties to ensure that neither party is exposed to the risk of their worst-case scenarios at an adjudicative hearing. It would make little sense for a landlord to provide a tenant compensation over and above what the tenant is entitled to under the Act, if, despite the tenant accepting the offer, a landlord would still face the risk of having to pay the tenant an amount equal to twelve times the amount of monthly rent.

Section 5 of the Act states:

> **This Act cannot be avoided**
>
> **5**(1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

> (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

However, I do not understand this section to require that the twelve-month penalty set out in section 51(2) remains in force when a settlement agreement is reached. Relief under 51(2) is only available for tenancies that are ended pursuant to a section 49 notice, and to ones ended by a mutual agreement (as stated above).

Rather, I understand section 5 to require that any settlement agreement entered into by parties, the negotiation of which was precipitated by a section 49 notice to end tenancy, must ensure that a tenant receive, at a minimum, that which the Act guarantees: an amount equal to one month's rent and the right of first refusal. To provide the tenant with less than these amounts would be to contract out of the Act.

In the present case, the Agreement provides the tenants with both the right of first refusal and an amount equal to one months' rent. As it meets the minimum requirements of the Act, I find that the Agreement is not an attempt to contract out of the Act. It is therefore valid.

As the Agreement is valid, I find that the tenancy was ended pursuant to it, and not pursuant to the Notice. Accordingly, the relief set out in section 51(2) of the Act is not available to the tenants.

b. Sections 51.2 of the Act

As stated above, a tenant, at a minimum, are guaranteed the right of first refusal. However, this does not mean that section 51.2 necessarily applies to the current situation. Rather it sets a minimum level of compensation to a tenant that any settlement agreement must contain.

The Agreement states: "the tenant has requested the First Right of Refusal". It does not define what "first right of refusal" means. It does not set out any mechanism as to how this right is to be exercised. It does provide for any consequences if the landlord prevents the tenant from exercising this right.

I cannot resolve these questions by looking at the Agreement alone. However, based on the surrounding circumstances at the time the Agreement was made, I find that the parties understood the tenants' request for "first right of refusal" to mean that the tenants indicated they wanted to exercise their option to enter into a new tenancy agreement respecting the rental unit upon completion of the renovations or repairs indicated on the Notice."

I make this finding as the Notice itself alerts the tenants to this right, and as, on the same day the parties signed the Agreement, the tenants served the landlord with a copy of Form #RTB-27.

Similarly, I understand the Agreement to require that the landlord follow the steps set out in section 51.2(2) of the Act to ensure that the tenants have the opportunity to exercise this right. I find that the landlord was obligated to notify the tenants at least 45 days before the completion of the renovation the date the rental unit is available and provide the tenants with a tenancy agreement for that unit starting on that date.

I find that the parties intended the clause in the Agreement which states "the tenant has requested the First Right of Refusal" to mean that parties intended to incorporated the mechanism of section 51.2 into the Agreement, and agreed to follow the steps set out therein to give the tenants an opportunity to exercise a right of first refusal.

Based on the undisputed testimony of the tenants, I find that the landlord failed to notify the tenants of the date the rental unit would become available to re-rent within 45 days of the repairs being completed. I acknowledge that, at the hearing, JM offer to rent a two-bedroom rental unit to the tenants at market rates. However, such an offer is insufficient to satisfy the landlord's obligations as:

1) it was not an offer to allow the tenants to return to the rental unit, but rather a generic two-bedroom unit;
2) it was not made in the approved form (per section 51.2(4)), or indeed in written at all;
3) it did not indicate the date the unit would be available for (per section 51.2(2)(a)); and
4) it was not accompanied by a tenancy agreement (per section 51.2(2)(b)).

As such, the landlord breached the Agreement. As the Agreement is silent as to the consequences of such a breach, I must determine whether the relief set out in section for 51.3 of the Act is applicable.

c. Section 51 3 of the Act

Section 51.3 states "if a tenant has given a notice under subsection (1) of section 51.2, the landlord must pay the tenant an amount that is the equivalent of 12 times the monthly rent payable under the previous tenancy agreement if the landlord does not comply with section 51.2 (2)"

The terms in section 51.3 could apply to the present situation in two ways:

1) The Act applies to this portion of the Agreement; or
2) The terms set out in section 51.3 of the Act were incorporated into the Agreement as an implied term.

i. Application of the Act

For similar reasons to those set out above, I find that section 51.3 of the Act does not apply to the Agreement. The tenancy was not ended pursuant to the Notice, but rather

pursuant to the Agreement. Accordingly, the tenants exercised their right of first refusal not by the operation of the Act, but rather by operation of the Agreement: the tenants never gave “notice under subsection (1) of section 51.2”, rather they did so pursuant to a clause in the Agreement.

As such, section 51.3 does not apply, as it states that it applies when a tenant gives notice of their intention to exercise their right of first refusal pursuant to section 51.2. It does not apply when such notice is given pursuant to a settlement agreement.

ii. Implied Term

Terms can be implied into a contract when the term would be so obvious that it goes without saying (sometimes referred to as the “officious bystander” test) or when the term is necessary to make the contract function as intended (sometimes referred to as the “business efficacy” test).

In the present circumstances, I do not find that either of these conditions are met.

I do not find that a term obligating the landlord to pay the tenants an amount equal to twelve times their monthly rent in the event the landlord failed to give the tenants an opportunity exercise their right of first refusal is a term that is so obvious it goes without saying. Rather, I find that reasonable bystander would not find the disproportionality of the amount of the penalty to the breach to be obvious at all.

Additionally, the penalty at section 51.3(1) is not necessary to make the Agreement function. A penalty clause is not required in order for the parties to be compete the Agreement. The tenants can be compensated for the landlord’s breach in other ways.

d. Consequence of breaching the Agreement

When a party breaches an agreement, the aggrieved party must prove that they suffered damage or loss as a consequence of the breach. In this case, the tenants must show that they suffered an actual loss as the result of the landlord failing to provide them with an opportunity to exercise their right of first refusal.

The tenants have not provided any evidence of actual damage or loss suffered as a result of the breach. The tenants are currently paying monthly rent of $1,600. The landlord’s undisputed evidence is that the market rate for a two-bedroom unit in the Building is $1,900. Accordingly, the tenants did not suffer a loss by having to remain in their current unit. There are no other facts before me which are suggestive of loss as a result of the landlord’s breach. Accordingly, the tenants have failed to prove they suffered any actual loss or damage as a result of the landlord’s breach.

In the circumstances, as the tenants have proven that the landlord did breach the Agreement, I find that the tenants are entitled to nominal damages, as defined by Policy Guideline 16:

> "Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

I order that the landlord pay the tenants $400, representing an award of nominal damages.

Pursuant to section 72(1) of the Act, as the tenants has been partially successful in the application, they may recover their filing fee from the landlord.

I decline to make any further monetary award in favour of the tenants.

Conclusion

Pursuant to sections 67 and 72 of the Act, I order that the landlord pay the tenants $500, representing payment of nominal damages and reimbursement of their filing fee.

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 19, 2020

Residential Tenancy Branch