



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCL-S, MNRL-S, FFL**

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;
- Authorization to recover the filing fee for this application pursuant to section 72.

SB attended for the landlords ("the landlord"). The tenants attended. The parties were given a full opportunity to be heard, to present affirmed testimony, make submissions, and call witnesses. I explained the hearing process and provided the parties with an opportunity to ask questions. I find the landlord served the tenant with the Notice of Hearing and Application for Dispute Resolution as required by the *Act*.

I have only considered and referenced in the Decision relevant evidence submitted in compliance with the Rules of Procedure to which I was referred.

Issue(s) to be Decided

Is the landlord entitled to:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;
- Authorization to recover the filing fee for this application pursuant to section 72.

Background and Evidence

This is an application by the landlord filed March 17, 2020 for a monetary award for damages and compensation arising from the termination by the tenants of a fixed term tenancy agreement before the end date. These damages included loss of rent, expenses in finding a replacement occupant, lawyer's fees, and gardening expenses which the landlord claimed in the aggregate amount of \$35,000.00.

The tenants claimed that the landlord breached their right to quiet enjoyment resulting in a breach of a material term of the tenancy. They denied that the landlord is entitled to a monetary award.

The hearing lasted 110 minutes and included considerable testimony with divergent perspectives.

The parties agreed they entered a fixed term tenancy which began on May 1, 2017 with an end date of April 30, 2022. The rental unit was a 5-bedroom house in a semi-rural area. The tenants vacated on September 30, 2019, 17 months after the beginning.

The parties agreed a condition of the tenancy was that the tenants look after certain limited gardening upkeep and the landlord had landscaping obligations. A copy of the tenancy agreement was provided as evidence for this hearing.

At the beginning of the tenancy, the tenants provided a security deposit in the amount of \$2,347.50 and a pet deposit in the amount of \$2,347.50 for a total of \$4,695.00 ("the security deposit") which is held by the landlord without the consent of the tenants. The

parties agreed the tenants provided their forwarding address before they vacated the unit. The landlord declined in writing to attend a condition inspection requested by the tenants, a copy of the correspondence being admitted as evidence. The tenants have brought an application for the return of double the security deposit which is scheduled to be heard a future date; reference to the RTB file number appears on the first page.

Rent in the amount of \$4,695.00 per month was originally payable under the tenancy agreement and increased to \$4,795.00 per month; there are no rental arrears.

This is the second arbitration between the parties the reference number to which appears on the first page.

The tenants provided testimony about the background of the tenancy along with documentary evidence including a timeline detailing all communication between the parties. Their version of key events is summarized as follows:

1. They had a good relationship with the landlord's local property manager; the landlord lived in another country;
2. The initial good relationship is reflected in the landlord's letter to the tenants of March 26, 2018 in which the landlord stated the allowable annual rent increase was \$187.80; the letter continued as follows (in part, emphasis added):

"however we feel you are excellent tenants and therefore propose a rental increase of \$100.00 per month [...]"

As [the property manager] related to you, we will be commencing spring clean up and, as agreed, we expect that you will maintain the landscaping and lawn over the next season. We also plan to have the house and back deck painted this spring and will do our best not to have this inconvenience you in any way."

3. The property manager repeated this assessment of the tenants and stated in an email to the tenants dated March 28, 2018 (in part, emphasis added):

"I've attached an email noting a small increase [of rent] of \$100.00. I know [landlords] very much appreciate the extra you do to keep the place".

4. However, the relationship between the parties changed in June 2018 when the

landlord became directly involved in issues that arose with respect to the unit replacing the property manager as the conduit for communications;

5. The key areas of mounting problems were:
 - a. The landlord promised to carry out certain repairs and clearing on the property and failed to do so in a timely and undistruptive manner;
 - b. The landlord sent workmen to the unit who showed up without notice once or twice a month disturbing the tenants;
 - c. The landlord wrote the tenants so often about the gardening with an “increasing level of aggression”, that the tenants were upset and felt “tortured” by the landlord;
 - d. The tenants, believing their right to quiet enjoyment was ruined and realizing they wanted to vacate because they could not tolerate these conditions any more, were unreasonably refused the option to vacate on two months notice or assign/sublet the unit, compelling them to obtain an order from the RTB;
6. The tenants felt personally attacked by the landlord, particularly over her repeated disapproval of their gardening, and notified the local property manager and the landlord about their concerns in June of 2018;
7. The tenants claimed that all these issues, taken together, amounted to a complete loss of their right to quiet enjoyment which made it impossible for them to continue to live there;
8. In letter sent at the end of June 2018, the tenants gave two months’ notice to terminate the tenancy and described their reasons for wanting to move out;
9. The landlord replied, declining their notice; she stated she was a “proactive landlord” looking after normal maintenance issues;
10. The landlord acknowledged “extensive dialogue” regarding the gardening; however, she characterised it as mere “miscommunication” which had been resolved;
11. The landlord claimed that the tenants were not disturbed as claimed, and suggested the following assessment:

I feel that these issues are just smoke and mirrors in your desire to end the contract, I may be wrong and if so I apologize, however we have not really been able to discover exactly why you wish to vacate the property.

12. The tenants then requested that they be permitted to assign/sublet in order to move out;
13. The landlord unlawfully refused;
14. The tenants sought and obtained an RTB Order allowing them to assign or sublet the unit;
15. By the time the Order from the RTB was obtained (September 17, 2018), the tenants did not make any efforts to assign/sublet as they believed it was futile; the school year had started and they believed it was unlikely that anyone would be interested in moving into the unit at that time of the year;
16. The tenants gave notice on September 23, 2018 they were vacating the unit on September 30, 2018; they cited breach of a material term based on failure to clear the grounds required under the agreement, disturbing the tenants' right to quiet enjoyment under section 28, and unreasonably withholding consent to assign the tenancy;
17. The landlord replied to the notice, declining to acknowledge the right to move out, and saying she was "weary of this continuing attempt to end [the tenancy]"; she refused to conduct a condition inspection at the time suggested by the tenants;
18. After the tenants vacated, the landlord failed to mitigate by not advertising the unit at an economic rent as the rental market had declined; the landlord failed to allow pets or restricted the pet policy, thereby changing the terms of the tenancy and limiting the pool of possible occupants;
19. The loss of rent for ten months until a new tenant moved in at reduced rent of \$3,700.00 was due to the landlord's failure to mitigate.

In reply, the landlord testified at length, including a legal opinion. A summary of the landlord's key submissions follows:

1. The landlord lived outside the country and was an exemplary landlord;

2. The landlord carried out all her obligations under the tenancy in as timely a manner as possible;
3. The landlord had confidence in the local property manager but learned that the tenants were upset with gardening issues that were raised by him; to remedy the situation and achieve compliance from the tenants, she became actively involved in trying to get the tenants to live up to their obligations or to hire out the work;
4. She made all reasonable efforts to have the workmen/contractors provide notice to the tenants and, while notice may not have been provided, she failed to see that they had any justified complaints;
5. The landlord was attempting to obtain quotes for future work on the house; while there may have been lack of required notice, it should not have disturbed the tenants as all or most visits took place during the day;
6. In all correspondence, she was civil and courteous; the landlord said she was puzzled over why the tenants vacated and did not understand "why they were upset";
7. The landlord acknowledged the exchange of letters in June 2018 in which the tenants set out their reasons to vacate in reply to which the landlord refused to recognize the validity of any of their complaints;
8. The landlord acknowledged unlawfully refusing permission to the tenants to assign/sublet;
9. The landlord offered to work with the tenants when the RTB ordered that they could assign or sublet;
10. The landlord retained the services of a company to find a suitable replacement tenant after the tenants vacated; the agent acted promptly and in accordance with good business practices to advertise the property, reduce the rent by increments over the 10-month vacancy period, and establish a reasonable pet policy;
11. After ten months, the property was rented to the current occupants at monthly rent of \$3,700.00 and a small pet was permitted.

The landlord claimed that as a result of the tenants' moving out before the end of the fixed term, she incurred expenses set out below. She requested compensation as follows to be capped at \$35,000.00.

ITEM	AMOUNT
Re-rental fee	\$1,942.50
Gardening services	\$429.76
Gardening services	\$380.13
Gardening services	\$760.00
Legal services	\$896.00
Rental loss \$4,795.00 x 10	\$47,950.00
Loss of rental to end of fixed term (reduced)	\$13,140.00
Total Claim (not to exceed \$35,000.00)	\$65,498.39

The tenants claim the landlord is not entitled to any compensation as the landlord caused serious loss of quiet enjoyment thereby breaching material terms of the contract justifying their leaving the unit before the end of the fixed term.

Analysis

While I have turned my mind to the documentary evidence and the testimony introduced in the 110-minute hearing, not all details of the submissions and arguments are reproduced here. The relevant, admissible and important aspects of the claims and my findings are set out below.

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.

Credibility and Weight of Testimony/Evidence

In assessing the weight of the testimony and evidence, I found the tenants credible, well-prepared and sincere. They were persuasive, calm and forthright.

In assessing the weight of the landlord's testimony and evidence, I observed that she appeared indifferent about the effect of her actions regarding the issues raised by the tenants. She dismissed their claims of loss of quiet enjoyment as unreasonable and persevered with her plans and objectives. I found the landlord throughout was primarily

concerned about her own agenda while lacking any comprehension of the effect on the tenants' loss of quiet enjoyment.

As a result of my assessment of the credibility of the parties, I gave greater weight to the tenants' account; where the evidence of the parties' conflicts, I prefer the tenants' version of events. I do not give significant weight to the landlord's testimony.

Fixed-Term Tenancy

Section 44(1) of the Act lists fourteen categories under which a tenancy may be ended, and references section 45 of the Act. Section 45 of the Act deals with a tenant's notice to end a tenancy, and reads, in its entirety, as follows:

(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.

*(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.

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].

Breach of a material term

Guidance to the interpretation of section 44(3) (above) is found in *RTB Policy Guideline #8* which reads in part as follows:

To end a tenancy agreement for breach of a material term the party alleging a breach...must inform the other party in writing:

- *that there is a problem;*
- *that they believe the problem is a breach of a material term of the tenancy agreement;*
- *that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and*
- *that if the problem is not fixed by the deadline, the party will end the tenancy...*

Loss of Quiet Enjoyment

Section 22 of the Act deals with the tenant's right to quiet enjoyment. The section states as follows:

22. A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;*
- (b) **freedom from unreasonable disturbance;***
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.*

[emphasis added]

I have considered *The Residential Tenancy Policy Guideline # 6 - Entitlement to Quiet Enjoyment* which states as follows:

A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. *A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and*

situations in which the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

...

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16). In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

In reviewing the testimony and evidence, I find the tenants have met the burden of proof on a balance of probabilities that they suffered a loss of quiet enjoyment of the premises. I have balanced the tenants' right to quiet enjoyment with the landlord's right and responsibility to maintain the premises. I find the landlord has failed in the landlord's obligation to ensure that the tenants' entitlement to quiet enjoyment was protected. The landlord/property manager were aware of the issues described above, were informed of the problems in writing, and failed adequately address the problems within a reasonable time. I find that the landlord failed to take reasonable steps for correction.

Loss of Quiet Enjoyment as a Breach of a Material Term

The tenants claimed that the landlord denied them of their right to quiet enjoyment to such an extent that they could not live in the unit. As I found above, when notified of their loss of quiet enjoyment, the landlord failed to take steps to correct the issues and then refused the tenants' request to vacate early; she then unlawfully refused permission to assign/sublet.

As noted in *RTB Policy Guideline #8 – Unconscionable and Material Terms*, a *material term* is a term that the parties both agree is so important that the most trivial breach of

that term gives the other party the right to end the Agreement.

To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement. It falls to the person relying on the term, in this case the tenants, to present evidence and argument supporting the proposition that the term was a material term.

The question of whether a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. The same term may be material in one agreement and not material in another. Applications are decided on a case-by-case basis. Simply because the parties have stated in the agreement that one or more terms are material, is not decisive. The Arbitrator will look at the true intention of the parties in determining whether the clause is material.

In considering the facts of this case, the testimony and the evidence, I find the tenants have met the burden of proof under section 44(3). I find that there was a material breach of the requirement that the landlord provide quiet enjoyment to the tenant. I find that there were multiple problems as credibly articulated by the tenants and referenced above. I find that the tenants requested the landlord in writing to remedy the various situations, that the tenants stated their intention to leave through the provision of a notice and the request to assign/sublet, and that the landlord failed to address the problems, even failing to acknowledge problems existed. I find the loss of quiet enjoyment was a breach of a material term which made it impossible for the tenancy to continue.

I find the tenants acted reasonably at all times; they notified the landlord of the issues amounting to loss of quiet enjoyment; they attempted unsuccessfully to vacate in a timely manner providing notice or by subletting. When all efforts to reach a solution with the landlord failed, they vacated the unit.

In summary, I find the loss of quiet enjoyment to the extent described by the tenants and supported by the documentary evidence to amount to breach of a material term.

As a result of this finding, I find the landlord has no claim for damages or compensation from the early ending of the fixed term agreement. I dismiss the landlord's application in all respects without leave to reapply.

Conclusion

The landlord's 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: July 27, 2020

Residential Tenancy Branch