Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Hollyburn Properties Limited
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

For the landlord: MNRL-S, FFL
For the tenants: MNDCT, FFT

Introduction

The landlord filed an Application for Dispute Resolution (the "landlord's Application") on February 21, 2020 seeking an order to recover money for unpaid rent and utilities, and the application filing fee. The tenants confirmed receipt of the hearing information and evidence provided by the landlord.

The tenants filed an Application for Dispute Resolution (the "tenants' Application") on April 18, 2020. They seek a monetary order for damage or compensation under the *Residential Tenancy Act* (the "*Act*"). Additionally, they seek reimbursement of the application filing fee. In the hearing, the landlord confirmed receipt of the information and evidence prepared by the tenants for this hearing.

The matter proceeded to a hearing pursuant to section 74(2) of the *Act* on June 19, 2020. Both parties attended the conference call hearing. I explained the process and offered both parties the opportunity to ask questions. Both parties presented oral testimony and evidence during the hearing.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for recovery of rent/utilities pursuant to section 67 of the *Act*?

Is the landlord entitled to retain the security deposit held, pursuant to section 38 of the *Act*?

Is the landlord entitled to recover the filing fee for their application pursuant to section 72 of the *Act*?

Are the tenants entitled to an order for loss or compensation pursuant to section 67 of the *Act*?

Are the tenants entitled to recover the filing fee for their application pursuant to section 72 of the *Act*?

Background and Evidence

I have reviewed all written submissions and evidence before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this section.

The landlord presented a copy of the tenancy agreement, the tenants agreed the terms were accurate. When both parties signed the agreement on September 3, 2018, the rent amount was $1,760.00 per month payable on the first of each month. The tenants paid a security deposit of $880.00 on the date of signing. The landlord submitted a copy of a 'Notice of Rent Increase' dated June 12, 2019 showing a rent increase to $1,804.00 per month starting October 1, 2019.

The tenants provided a notice to end tenancy on February 4, 2020 for the move-out date of February 15, 2020. On the landlord's Application, they state the "Tenant put a stop payment on February rent cheque." They are seeking a monetary order for February rent in the amount of $1,804.00, and additionally the March rent amount for $1,804.00. The February rent amount also added a $25.00 "NSF" fee. This total amount is $3,633.00. At the time of the landlord preparing their hearing evidence on February 24, 2020, the unit did not have tenants for the month of March.

The landlord seeks an order applying the security deposit to the monetary claim.

When the tenants gave notice to the landlord of their ending the tenancy on February 4, they gave the ending date of February 15, 2020. This is "due to the unresolved well-documented noise issue . . ." They presented that the landlord's failure to repair the plumbing and hearing which caused the noise constitutes a failure to comply with a material term of the tenancy agreement. They stated: "Since our right to quiet enjoyment . . . has been breached and is still unresolved, this as [*sic*] a valid cause to end our tenancy early . . ."

The tenants provided sound files that are recordings of the noise emanating from a certain space within the unit. A witness appeared in the hearing for the tenants and they stated it was a "very annoying noise" being a 'humming noise out of the wall" and present during the day

The tenants apply for a monetary order for $6,637.00. This is for an issue of noise in the unit that "caused a reduction in liveable space during the last 4.5 months." The money they seek is for the return of 70% of the full amount of rent they paid during this time due to "loss of use." The timeframe which the tenants provided is October 2019 to February 2020.

In the hearing they stated that a comparable standard they were aware of was a loss of elevator use which typically gives 50% of rent back to the tenants who were so inconvenienced.

Additionally, they seek a return of the security deposit. They submit this should be doubled because the landlord did not refund the deposit and did not file a dispute to claim against it "within two weeks of the end of the tenancy." They also seek a return of a $75.00 garage door fob deposit.

On February 18, after they moved out, they posed key questions to a representative of the Residential Tenancy Branch by email. They asked what their rights were with respect to ending the tenancy early. An Information Officer from the branch gave information to the tenants about a breach of a material term. The officer stated: "Material terms are considered so important that even the smallest breach gives you the right to end the tenancy." A breach would give the tenants "the opportunity to end the tenancy early."

On February 19, 2020 after they moved out, they requested the landlord use the security deposit $880.00 to pay the one-half month rent for February 2020. A copy of that message to the landlord is in the evidence.

The tenants' claim is for the following:

• 70% of 4.5 months of full rent $8,118.00	$5,682.60
• double the $880.00 security deposit	$1,760.00
• ½ February rent (landlord can retain the security deposit)	- $880.00
• parking lot fob deposit	$75.00
TOTAL	**$6,637.60**

Analysis

Under section 7 of the *Act*, a landlord or tenant who does not comply with the legislation or their tenancy agreement must compensate the other for damage or loss. Additionally, the party who claims compensation must do whatever is reasonable to minimize the damage or

loss. Pursuant to section 67 of the *Act*, I shall determine the amount of compensation that is due – if any – and order that the responsible party pay compensation to the other party.

The landlord and tenants have each made a claim for compensation for damage or loss. To be successful an applicant has the burden to provide sufficient evidence to establish all of the following four points.

1. that a damage or loss exists;
2. that the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. the value of the damage or loss; and
4. steps taken, if any to mitigate the damage or loss.

For the landlord's claim for compensation of unpaid rent, the *Act* section 26 outlines a tenant's duty to pay rent:

> (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent.

The tenants withheld the amount of rent – by cancelling the cheque -- for February 2020 because they believed they should not be paying for the full month when their move-out date was February 15. They disclosed this fact in their communication to the Residential Tenancy Branch on February 18. After their move out, on February 19 they wrote to the landlord to authorize the use of the security deposit "to pay for the half month rent".

On their application on April 18, 2020 the tenants made a claim for double the security deposit amount. This because the landlord did not make their application "within two weeks of the end of the tenancy." I find this is incorrect.

The relevant portion of the Act regarding the landlord's right to hold the security deposit is section 38. Section 38(4) sets out that the landlord may retain an amount from the security deposit with either the tenant's written agreement, or by a monetary order of this office. I find the tenants granted their consent for the landlord to retain the security deposit by way of their letter dated February 19, 2020.

I find the tenants' written consent is not voided by their subsequent application for double the amount of the security deposit. In response to this, I find the landlord did apply within the legislated timeframe after the end of tenancy, on February 21, 2020. This is in line with the 15

days' timeframe set in section 38(1). Therefore, I reduce the total amount of the tenants' monetary claim ($6,637.60) by the amount of $1,760.00 which represents the portion of their claim that is double the paid security deposit. They are not entitled to recover this amount, with no breach by the landlord on this finer point concerning the disposition of the security deposit.

The question I shall resolve now is whether the tenants are liable for rent owing. This is a question of the proper notice to end tenancy because of what they stated was a breach of a material term.

The Residential Tenancy Policy Guideline 8 is in place to provide a statement of the policy intent of the *Act* and regulations, in line with principles of administrative fairness. It addresses material terms, and the steps a party must take to end a tenancy for breach of a material term. As a precursor to giving notice ending the tenancy, a landlord or tenant must inform the other, 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.

The tenants submitted a copy of their communication to the Residential Tenancy Branch dated February 18, 2020, with the branch response of February 24, 2020. The Information Officer identified the points outlined above – this includes the detail about the need for providing a deadline to the landlord in an initial letter. The Information Officer referred to this as the "responsibilities as a tenant."

In their message to the branch, the tenants state they "contacted the property manager directly via a letter delivered to the . . . head office . . . advising that this issue needed to be resolved due to the material term of tenancy "quiet enjoyment" being broken, and that the building manager was refusing to do anything." They also stated: "I also cancelled the cheque for February rent as I did not believe I should be paying a full month's rent when I was only there for half a month."

For this hearing, the tenants submitted copies of their communications to the landlord about the ongoing problem of noise. The document the tenants refer to is that entitled "Resident Concern Form", sent by the tenants to the landlord on October 8, 2019. On my review of this document, the tenants did not identify the issue as one violating a material term of "quiet

enjoyment" being breached. ~~The above letter to the landlord head office was not provided as evidence.~~ Therefore, I am not satisfied the tenants clearly identified the issue as being a breach of a material term to the landlord in line with the steps outlined above. Additionally, the communication with the Residential Tenancy Branch occurred after the tenants ended the tenancy. They did identify the issue as a material term breach in their notice advising the landlord of the end of tenancy; however, I find it more likely than not their February 4 end-of-tenancy letter was the first instance of the tenants framing the issue to the landlord in these terms. There is no record of the tenants earlier informing the landlord that they believe this is a material term breach, setting a reasonable deadline, and advising of an end of the tenancy if not fixed by the deadline.

I find the tenants did not end the tenancy in line with section 45 of the *Act*. The tenants did not identify the issue as the landlord's failure to comply with a material term as specified in section 45(3) and did not give a timeline as specified by the policy guideline. Ending the tenancy in a time period earlier than one month after the date the landlord received their notice to end constitutes a breach of the *Act*. In sum, it was not established that the tenants notified the landlord of a breach of a material term; therefore, ending their tenancy abruptly runs counter to section 45(1). The tenants therefore are liable for an amount of rent owing to the landlord; by section 26 they do not have the right to deduct all or a portion of February's rent.

By February 19, the tenants advised via letter that the landlord may use the security deposit of $880.00 "to pay for the half month rent. . .due to us moving out February 15th, 2020." This leaves the balance of the rent for February 2020 owing to the landlord. The landlord has properly made a claim against the security deposit and has the right to do so. With the landlord holding this amount of $880.00, I order this amount deducted from the recovery of the rental amount of $1,804.00. This is pursuant to section 72(2)(b) of the *Act*. Reducing the security deposit amount leaves a balance owing to the landlord of $924.00.

The "NSF" fee claimed by the landlord is provided for in the tenancy agreement at clause 11. The landlord is entitled to this $25.00 fee.

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The landlord also claimed the amount of rent for the month of March 2020. The tenants did not provide their end of tenancy notice in line with section 45(1) of the *Act*, and above I find they are not allowed an early end the tenancy based on a breach of a material term. The tenants must end the tenancy on a date "that is not earlier than one month after the date the landlord receives the notice". The notice given in February does not end the tenancy until the end of the subsequent month.

The tenants are liable to compensate the landlord for loss of March rent for $1,804.00. This puts the landlord in the same position as if the tenants had not breached the agreement, up to the earliest time that the tenants could legally have ended the tenancy.

The tenants claim reimbursement of 70% of the rent paid for October through to the end of the tenancy. I exclude the portion of time after the tenants advised the landlord of the end of tenancy on February 4. In effect there was no rent paid, and thus nothing for the tenants to subsequently recover. This adjusts their claim to the four months October to January.

To establish a claim for compensation, the onus here is on the tenants to prove all the numbered four points listed above. I have determined that the tenants did not end the tenancy in line with the *Act*. Fundamentally, the landlord did not breach the *Act* or agreement in a way that warranted the tenants' abrupt end to the tenancy.

My finding on that issue carries over to the tenants' claim for compensation: the landlord did not breach the *Act* or tenancy agreement. On this more basic level, the tenants have not met the burden to establish there is an amount owing for damage or loss.

The *Act* section 32 provides that a landlord is responsible for ensuring that a unit meets "health, safety and housing standards" established by law, and is reasonably suitable for occupation given the nature and location of the property. I find the tenants do not establish on a balance of probabilities that the landlord violated these standards.

I find the evidence shows the landlord fulfilled their duties under the agreement in answering to the tenants claim within reasonable amounts of time and acquiring extra resources in order to examine the problem. This is in line with the best interests of the tenants. An ongoing noise issue – which received full attention from the landlord in response to the tenants' claims – does not constitute a violation of the *Act* or tenancy agreement.

To attempt to assess the value of damage or loss, I shall examine the level of the impact of noise to the tenants, which is an abstract exercise. The sound recordings provided by the tenants have no comparative element to them and are made in isolation. There is no baseline ambient sound to establish that the sounds emanating from the closet area and living room interrupt or impair normal speech communication in the unit. They do not provide a preponderance of evidence that the sound was disruptive. The tenants did not establish that it presents a significant sleep disturbance, and there appear to be no ill critical health effects.

To further establish a value for damage or loss, I am not satisfied the tenants' day-to-day living was interrupted to a degree equal to 70% of paid rent recovery. In their description the

annoyance effectively reduced the size of the unit to a studio; however, there is no complete evidence to establish this. The tenants' submitted that a comparable estimated loss is that of 50% which typically results from elevator breakdown or stoppage. This standard is not established in the evidence. For comparison, I find the lack of elevator can significantly impact mobility and accessibility issues, more likely equating to tangible damage and loss. I cannot establish the same as such – even to a greater percentage of recovery – from the evidence the tenants present here.

Additionally, the landlord presented evidence of their efforts to provide another unit to the tenants. I find this is a further measure of the landlord attending to the repair request of the tenants, even further establishing a method of lessening its impact to the tenants. I find the tenants did not present ample evidence to address why the provision of an alternate unit did not receive their consideration. The written evidence of a property manager establishes further it was dissatisfaction of an exaggerated nature. I must consider also the age and nature of the building which the landlord spoke to in the hearing. I therefore find there is no evidence the tenants took steps to mitigate the issue.

In the hearing the landlord stated they were "comfortable in saying" that a $150.00 reduction in monthly rent was suitable for repayment. I find $100.00 more appropriate in this scenario where the tenants did not prove their damage or loss yet conveyed some evidence of their frustration at communicating with the landlord on the issue. This amount represents a marginal interruption to quiet enjoyment within the unit over a four-and-one-half-month period. I find this is a reasonable offer on the part of the landlord and so award the amount of $450.00 to the tenants as a nominal damage amount.

The tenants claimed $75.00 for the "garage door fob deposit which was not returned." I find this is the "remote deposit" in the tenancy agreement for the same amount. I account for reimbursement of this amount to the tenants as per the tenancy agreement.

As the landlord is successful in their application, I find that the landlord is entitled to recover the $100.00 filing fee paid for this application. I find the tenants are not entitled to recover their filing fee.

Conclusion

Pursuant to sections 67 and 72 of the *Act*, **I grant the landlord a Monetary Order in the amount of $2,328.00 as outlined above**. The landlord is provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the

tenants 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: July 6, 2020

Residential Tenancy Branch

CORRECTED DATE: August 12, 2020