# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MNDC FF

Introduction

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

- a monetary order for compensation for damage or loss 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 sworn testimony, to make submissions and to call witnesses. The landlord was assisted by counsel.

This hearing was reconvened from hearings held on June 15, 2020 and July 21, 2020 before another arbitrator. The matter was adjourned from the June 15, 2020 hearing due to the poor organization of documentary evidence contrary to the Rules of Procedure.

At the July 21, 2020 hearing the arbitrator notes that the parties organized evidence as required and "both acknowledged receipt of the respective evidence submissions". The matter was adjourned from the July 21, 2020 hearing by agreement between the parties.

Issue(s) to be Decided

Is the tenant entitled to a monetary award as claimed?
Is the tenant entitled to recover the filing fee from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. The rental unit is a suite in a detached home with two residential suites. The landlord resides in the other portion of the rental building. This tenancy originally began in June, 2013. The parties renewed the tenancy annually signing new fixed-term tenancy agreements. The most recent fixed-term tenancy agreement was signed September 2, 2019 and provides that monthly rent is $1,340.54 payable on the first of each month. The agreement provides that the tenancy ends October 31, 2019 at which time the tenant must vacate the rental unit as the landlord or a close family member intends in good faith to occupy the rental unit at the end of the term, pursuant to section 13.1 of the Residential Tenancy Regulations.

Prior to entering the fixed-term tenancy of September 2, 2019 the landlord issued a 2 Month Notice to End Tenancy for Landlord's Use dated August 26, 2019. The 2 Month Notice provides an effective date of October 31, 2019 and states that the reason for the tenancy to end is that the landlord or a close family member intends in good faith to occupy the rental unit.

The landlord explained that the 2 Month Notice was issued in error as the parties had agreed to end the tenancy on October 31, 2019. The landlord submits that the parties signed the fixed-term tenancy agreement of September 2, 2019 to confirm their agreement. The landlord said that while they have not issued any subsequent correspondence expressly cancelling or withdrawing the 2 Month Notice the parties understood that the tenancy would end by way of the fixed-term agreement. The landlord confirmed that the tenant was permitted to withhold the payment of the monthly rent for October, 2019 as they would be pursuant to section 51 of the *Act*. The landlord explained that this too was done in error as they believed that the tenant would be entitled to withhold the last month's rent even though there was no enforceable 2 Month Notice.

There was an earlier hearing on November 15, 2019 under the file number on the first page of this decision dealing with the tenant's application to dispute the 2 Month Notice. The tenant failed to attend that hearing and their application was dismissed. The tenant vacated the rental unit, ending the tenancy on or about October 31, 2019.

The landlord submits that the close family member referenced in the 2 Month Notice is their adult son. The landlord testified that their son has moved into the rental unit as of September 1, 2020 and now resides in the rental suite. The landlord said that their son also maintains an apartment in another municipality. The landlord explained that while their son occupies other living accommodations when out of town for work, the rental suite is their sole and primary residence.

The tenant submits that they do not believe that the rental unit has been occupied as at the date of the hearing. The tenant said that they have not personally witnessed the landlord's son vehicle on the rental property, have not seen the landlord's son coming and going from the rental unit and have been presented no evidence to support the landlord's testimony. The tenant further submits that they have many friends and contacts in the neighborhood and have not been informed by them that they have witnessed evidence of the landlord's son residing in the rental unit.

The tenant submits that if the rental unit has been occupied as of September 1, 2020, which they dispute, the 10-month period from the effective date of the notice is unreasonable. The tenant submits that the landlord performed major renovations and repairs to the rental unit despite issuing a 2 Month Notice stating the reason for the tenancy to end is occupation of the rental unit. The tenant testified that they have extensive experience and knowledge of the construction industry and believe that the amount of time taken by the landlord to perform work on the rental unit to be unreasonable.

The landlord testified that they initially undertook some cosmetic work to the rental unit to allow the landlord's son to comfortably reside. The landlord testified that some of the work included painting, refinishing floors, and repairs to some of the plumbing. The landlord retained a contractor to oversee the work, which commenced after the end of the tenancy and the earlier hearing. The landlord submitted into evidence a signed letter from the contractor detailing the scope of work they were commissioned to perform and the timeline of events that occurred thereafter.

The landlord testified that work on the rental unit was halted in January, 2020 when a municipal Stop-work Order was issued for the site. The landlord said their contractor dealt with the municipality in addressing their concerns and responding to requests for information until they were authorized to resume work on the rental suite sometime in March, 2020.

The landlord submits that the authorization to resume work coincided with the provincial declaration of a state of emergency due to the Covid-19 pandemic. The landlord testified that due to the restrictions on workplaces, gatherings and activities, work on the rental unit once again stopped. The landlord said that once restrictions were eased several weeks later, work resumed but under strict health guidelines including restrictions on the number of workers present. The landlord submits that work that is being performed under heavy regulations with less manpower takes longer than it otherwise would to complete. The landlord submits that the combination of the initial Stop-work Order, the ongoing global pandemic, and the prudence of the contractor in adhering to health guidelines has caused the minor work on the rental unit to take an inordinate amount of time to complete. The landlord characterizes these circumstances as extenuating circumstances as set out in Section 51(3) of the Act which prevented them from accomplishing the stated purpose for a period of 10 months.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Section 51(2) of the *Act* states if:

> (a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or
> (b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,
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> the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

The landlord issued a 2 Month Notice dated August 26, 2019. The landlord submits that the Notice was issued in error and that the tenancy ended in accordance with the fixed-

term tenancy agreement signed by the parties on September 2, 2020. I do not find the landlord's submission to be persuasive or consistent with the behaviour of the parties. The tenant's filing of an earlier application to dispute the 2 Month Notice on September 9, 2019 would not have been necessary if the parties had come to an agreement to end the tenancy in accordance with the fixed-term tenancy agreement. I find the filing of an application to dispute the Notice to be evidence that, despite having signed a subsequent fixed-term tenancy agreement, there was no agreement between the parties that the tenancy would end on October 31, 2019 as provided on both the Notice and the tenancy agreement.

If the tenancy was ending pursuant to the fixed-term agreement and the 2 Month Notice was withdrawn or cancelled there would have been no obligation for the landlord to provide the equivalent of one month's rent. The evidence of the parties is that the landlord permitted the tenant to withhold the last month's rent, consistent with section 51(1) of the *Act*. If the tenancy was simply ending in accordance with a fixed-term tenancy agreement the tenant would have had no right to withhold the rent payable.

I find that the conduct of the parties to be consistent with the issuance and continuing effectiveness of a 2 Month Notice to End Tenancy for Landlord's Use. While the parties may have signed a subsequent fixed-term tenancy agreement I find that the notice remained in full effect and was not withdrawn, cancelled or superseded by subsequent agreements between the parties.

In the 2 Month Notice the landlord indicated that the tenancy is ending as the landlord or a close family member will occupy the rental unit.

While the parties dispute whether the landlord's son has occupied the rental unit as of September 1, 2020, I find the landlord's testimony on this point to be sufficient to establish on a balance of probabilities that the rental unit is occupied by the landlord's close family member. The tenant's testimony consisted of denials and assertations without substantive details. I find the tenant's testimony that they have been informed by neighbors and community members of the occupancy of the rental unit as they are a fixture of the community to be hyperbolic and not have the air of reality. I accept the evidence of the landlord that as of September 1, 2020 the rental unit has been occupied by the landlord's adult son.

I accept the evidence of the landlord that while the landlord's son maintains a separate property in a different municipality which they use when working that they ordinarily reside in the rental unit. I find that the description provided by the landlord as to how

their son resides in the rental unit and will occupy another residence when performing seasonal work out of town to meet the normal definition of occupying a rental suite for residential purposes. While I accept that the landlord's son may travel for the purposes of work and maintains a separate residence for those instances, I find that does not preclude or contradict the submission that they occupy and primarily reside in the rental unit.

The tenant submits that while the 2 Month Notice was issued in accordance with section 49(3) of the Act providing that the rental unit would be occupied by the landlord's close family member, the landlord's actual intent was to perform renovations and repairs to the rental unit pursuant to section 49(6). The tenant points to the terminology used in the various permits, notices and stop work orders issued by government agencies as evidence of the major scope of work. The tenant also testified that they are in the construction industry and that the state of the rental unit at the end of the tenancy did not require major work to be performed.

I find that the nature of the work undertaken by the landlord to be more in the nature of cosmetic work to make the rental unit more accommodating. Section 49(3) of the Act does not preclude a landlord from performing <u>any</u> work. An ordinary reading of the relevant portions of the Act is that section 49(6) would be invoked in situations where the primary reason for the tenancy to end is that the landlord intends to perform renovations or repairs that require vacant possession.

I find the description of the work provided by the landlord in their testimony and the written statement from their contractor to be work that is incidental to the landlord's son taking possession of the rental unit to occupy. The work was intended to be some repairs and cleaning. The inexhaustive list of work intended includes "paint the suite, refinish the wood floors, replace the bathroom floor, and repair the kitchen sink". I find that the issues, as described, are reasonable precursors to the landlord's son occupying the rental suite. While the work may not be unnecessary to make the rental unit habitable, it is open for the landlord and their family member to make some alterations incidental to occupation.

I accept the evidence of the landlord that the process took far longer than they had expected or planned. The landlord says that the rental unit was first occupied by their son on September 1, 2020, 10 months after the effective date of the 2 Month Notice. The landlord submits that the delay was due to extenuating circumstances.

Section 51(3) provides that:

> 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
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> (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

Residential Tenancy Policy Guideline 50 provides some examples of extenuating circumstances including death and wildfires. The Guideline specifically cites changing one's mind or failing to adequately budget to be examples of circumstances that would likely not be considered extenuating.

I find that the sequence of events that occurred to be reasonably characterized as extenuating under the circumstances. The unforeseen presence of asbestos in the building, the stop work order issued by the municipality and the global pandemic and subsequent public health recommendations all contributed to the reasonable delay in the landlord accomplishing the stated purpose of the 2 Month Notice.

I find that the landlord at all times, acted in a prudent and reasonable manner in attempting to accomplish their stated purposes. I accept the landlord's evidence that they delayed in retaining a contractor until the earlier hearing was concluded and the landlord achieved vacant possession of the rental unit on November 15, 2019. I find that waiting for the results of litigation to be prudent and reasonable delay.

While the tenant submits that the contractor took an inordinate amount of time to complete the scheduled work, I find little evidence that the work was not done in a professional manner in accordance with industry standards. I accept the evidence of the landlord that work was conducted in a timely manner before being halted by a Stop-work Order from the municipality. I find little evidence supporting the landlord's suspicion that the Stop-work was arranged in a retaliatory manner by the tenant. I find

the supposition of the landlord to have little merit. I find that there was a valid order made by an authorized agency to halt the work on the rental unit.

I accept the evidence of the landlord that work commenced in a reasonable time frame after dealing with the requirements of the municipality. I accept the landlord's submission that the return to work coincided with the provincial declaration of a state of emergency and accompanying restrictions on business and activities. I accept the evidence that work on the rental unit was further delayed due to the provincial health restrictions and workplace adaptations required. I find it reasonable that restricting the number of workers and increasing health and safety measures would cause work to take longer than otherwise to complete. I find that these circumstances, taken both individually and cumulatively, would reasonably be characterized as extenuating.

Accordingly, I dismiss the tenant's application as I find that while the landlord was unable to accomplish their stated purpose for issuing the 2 Month Notice to End Tenancy within a reasonable period of time, there were extenuating circumstances that prevented the landlord.

Conclusion

The tenant's application is dismissed in its entirety 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: November 2, 2020

Residential Tenancy Branch