



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT MNDCT

Introduction

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

- a monetary order for compensation for 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 from the landlord, pursuant to section 72 of the *Act*.

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.

As the parties were in attendance I confirmed that there were no issues with service of the tenants' application for dispute resolution ('application'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenants' application. As both parties confirmed receipt of each other's evidentiary materials, I find that these were duly served in accordance with section 88 of the *Act*.

Preliminary Issue: Do I Have Jurisdiction to Decide This Matter?

Both parties agreed that the tenants had entered into a tenancy agreement to rent the suite beginning on September 28, 2020 for monthly rent of \$2,375.00. The landlord had collected a security deposit in the amount of \$1,150.00 for this tenancy, which was dropped off by the mother of one of the tenants as the tenants were moving from another province. Both parties confirmed that no written tenancy agreement was signed by both parties.

The tenants submitted a copy of a land title search that shows that the registered owner of the property as the administrator of the estate of the former owner, NAS, who is now deceased. The tenants also submitted a copy of an email from a licensed insolvency

trustee which states “further to your discussion with JE, please address your correspondence directly to RS as we did not authorize this”.

RS testified that he is one of the children of the deceased, and the rental property is one of nine homes currently in the probate process. RS testified that the responsibility of caretaking the homes is split amongst all the children, and this rental property was his responsibility. RS testified that he had possession of the rental home as well as authority to rent out the property. RS testified that he had renovated the home prior to this tenancy, and after the tenants had moved out, he had successfully re-rented out the property to a new tenant. RS submitted a copy of the tenancy agreement for this new tenancy.

Analysis - Do I Have Jurisdiction to Decide This Matter?

The definitions of a “tenancy” and a “tenancy agreement” are outlined in the following terms in section 1 of the *Act*:

“tenancy” means a tenant’s right to possession of a rental unit under a tenancy agreement;

“tenancy agreement” means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a license to occupy a rental unit.

"landlord", in relation to a rental unit, includes any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
 - (i) permits occupation of the rental unit under a tenancy agreement, or
 - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
- (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
- (c) a person, other than a tenant occupying the rental unit, who
 - (i) is entitled to possession of the rental unit, and

(ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;

(d) a former landlord, when the context requires this;

Although RS is not the registered owner of the property, in consideration of the evidence before me, I find that RS had, and still has possession of the rental unit. I find that he has demonstrated that he had acted in a capacity of landlord by renting the home to the tenant applicants, as well as to the new tenant who rented the property shortly thereafter on November 1, 2020 as supported by the written tenancy agreement signed on October 2, 2020. Accordingly, I find that RS meets the definition of “landlord” as defined by section 1(c) of the *Act*.

Although no written tenancy agreement was signed between the parties, both parties provided undisputed testimony in this hearing that there was an agreement for the tenant applicants to occupy the premises in exchange for monthly rent. Both parties discussed, and agreed to monthly rent of \$2,375.00 per month.

A consideration of value has been provided for this occupancy, and an oral agreement was made regarding the terms of this tenancy. Section 16 of the *Act* states that “the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit”. Based on the evidence before me, I find that the relationship between both parties is a tenancy, and this dispute falls within the jurisdiction of the *Residential Tenancy Act*.

Issues

Are the tenants entitled to a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement?

Are the tenants entitled to recover the cost of the filing fee from the landlord for this application?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This month-to-month tenancy began on September 28, 2020, with monthly rent set at \$2,375.00. The landlord collected a security deposit in the amount of \$1,150.00, which was received from the mother of one of the tenants on September 6, 2020. Both parties confirmed that the tenancy ended on September 29, 2020.

The tenants are seeking the following monetary orders as listed in their monetary order worksheet:

Item	Amount
Long Haul Move	\$2,989.35
Moving Truck for Moving to Storage	69.37
Storage Fees	184.35
Accommodation	500.00
Filing Fee	100.00
Total Monetary Order Requested	\$3,843.07

The tenants testified that they decided to rent the home and move from another province after doing a virtual walk through of the home. The tenants testified that the landlord had assured them that the home would be clean and renovated when they arrive, but upon move-in the tenants discovered that the home was not in the condition that the landlord had promised them. The tenants testified that there was mold in the suite, which was concerning as they had a 2 month old child. The tenants also submitted photos of various damage as well as insect bites from the one night they had spent in the home. The tenants submitted several photos in their evidence package, as well as receipts for the above expenses. The tenants moved out as they felt that it would not be possible to continue the tenancy. The tenants confirmed in the hearing that they had found a new place to rent as of October 15, 2020, but had to pay \$500.00 for accommodation until the new rental was ready.

The landlord disputes that he had mislead the tenants. The landlord testified that he had renovated the home before the tenancy had began, and that the 60 year old home was in the condition that he had promised. The landlord submitted photos of the home, as well as a rental agreement for the current tenancy. The landlord testified that he was able to re-rent the home, and that the current tenant continues to reside there with no issues. The landlord testified that the tenants had decided to move out and end the tenancy without proper notice or an order allowing them to do so.

Analysis

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter " tenant must satisfy each component of the following test for loss established by **Section 7** of the *Act*, which states;

Liability for not complying with this Act or a tenancy agreement

7 (1) *If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

(2) *A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the landlord)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (tenant) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Therefore, in this matter, the tenants bear the burden of establishing their claim on the balance of probabilities. The tenants must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party. Once established, the tenants must then provide evidence that can verify the actual monetary amount of the loss. Finally, the tenants must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

Section 44 of the *Act* states how a tenancy may be ended:

How a tenancy ends

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:

- (i) section 45 [*tenant's notice*];
- (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];
- (ii) section 46 [*landlord's notice: non-payment of rent*];
- (iii) section 47 [*landlord's notice: cause*];
- (iv) section 48 [*landlord's notice: end of employment*];
- (v) section 49 [*landlord's notice: landlord's use of property*];
- (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];
- (vii) section 50 [*tenant may end tenancy early*];

(b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;

- (c) the landlord and tenant agree in writing to end the tenancy;
- (d) the tenant vacates or abandons the rental unit;
- (e) the tenancy agreement is frustrated;
- (f) the director orders that the tenancy is ended;
- (g) the tenancy agreement is a sublease agreement.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

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.

Despite the tenants' testimony that the home was uninhabitable, 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. Despite the tenants' testimony of the presence of mold, and insect bites, I am not satisfied that the tenants had provided sufficient evidence to support that the home was unfit or unsafe for occupation. I find the landlord's evidence and testimony supports that he was able to re-rent the home and enter into a new tenancy agreement a few days later on October 2, 2020, for similar monthly rent. The landlord testified that the tenant continues to reside there. I find the tenants' belief that the home was "unlivable" to be inconsistent with the fact that the home was re-rented and now occupied by a new tenant for similar monthly rent.

I have also considered the tenants' testimony that despite a virtual showing, the rental unit was not in the satisfactory condition. While I accept the tenants' testimony that the home may not have been in the condition that they expected the home to be in, I find this explanation does not justify the tenants' decision to end the tenancy in a manner that contravenes the *Act*. The tenants did not give the landlord at least one month's notice, nor did the landlord mutually agree to end this tenancy in writing. Despite the issues raised by the tenants of the condition of the home, the tenants did not obtain an order from the Residential Tenancy Branch for an early termination of the tenancy or for the landlord to comply with the *Act* and tenancy agreement. No previous applications for dispute resolution have been filed by the tenants in regard to this tenancy, nor do I find the contract frustrated.

As stated above, section 7(2) of the *Act* requires the party to take steps to mitigate or minimize loss. Although I sympathize with the tenants, I find that they had moved out instead of disputing the matter, giving the landlord the opportunity to address any outstanding issues, or giving proper notice under section 44 the *Act*. Although the tenants' expectations for this tenancy were not met, I am not satisfied that the tenants had provided sufficient evidence to support that the monetary losses claimed in this application are due to the landlord's contravention of the *Act* and tenancy agreement. I therefore dismiss the tenants' monetary claim for losses without leave to reapply.

As the filing fee is normally awarded to the successful party after a hearing, I dismiss the tenants' application for recovery of the filing fee without leave to reapply.

Conclusion

I dismiss the tenants' entire application 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: January 26, 2021

Residential Tenancy Branch