



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNSD, MNETC**

Introduction

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

- A return of the security deposit pursuant to section 38; and
- A monetary award for damages and loss pursuant to section 67.

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 confirmed receipt of the tenant's application and evidence. Based on the evidence I find the landlord duly served in accordance with sections 88 and 89 of the *Act*.

The tenant disputed that they were served with the landlord's evidence saying that they did not sign for receipt of any materials. The landlord provided a valid Canada Post tracking number showing their package being sent on February 1, 2021. Based on the evidence, I find that the tenant is deemed served with the landlord's evidence on February 6, 2021, five days after mailing in accordance with sections 88, 89 and 90 of the *Act*. I do not find the tenant's testimony that they were not served to be particularly credible or supported in the materials. It appears that the tenant believes that they were not served as they did not provide a signature confirming receipt. I note that pursuant to Residential Tenancy Policy Guideline 12 the refusal of a party to accept or pick up registered mail does not override the deeming provisions.

Issue(s) to be Decided

Is the tenant entitled to a monetary award as sought?

Is the tenant entitled to recover the security deposit for this tenancy?

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.

There was a previous hearing under the file number on the first page of this decision on September 11, 2020 wherein the landlord was granted a monetary award for overholding rent for the period of March through July, 2020 and was authorized to withhold the security deposit in partial satisfaction of their monetary award.

The monthly rent for this tenancy was \$1,050.00 payable on the first of each month. The landlord purchased and took possession of the rental unit on December 4, 2019 and issued a 2 Month Notice to End Tenancy for Landlord's Use dated December 18, 2019 with an end of tenancy date of February 29, 2020.

The tenant failed to move out of the rental unit on the effective date of the 2 Month Notice and the landlord was required to file an application for dispute resolution for an Order of Possession of the rental unit on the basis of the Notice. The landlord was granted an Order of Possession in a decision dated May 11, 2020. The parties agree that the tenant still did not vacate the rental unit until July 2020 when the landlord obtained a writ of possession. The tenant paid no amount for the period of March to July 2020 while they occupied the rental unit.

The 2 Month Notice provided the reason for the tenancy to end as the landlord or a close family member intends to occupy the rental unit. The parties agree that as at the date of the hearing, February 22, 2021 the landlord has not occupied the rental unit.

The landlord submits that they have been unable to occupy the rental unit due to extenuating circumstances including the condition of the rental property after the tenant vacated, unexpected expenses to obtain possession from the tenant and the unpaid overholding rent. The landlord says that the tenant left the rental unit in a state of complete disarray with garbage and items strewn about and significant damage to the fixtures, walls and floors of the rental unit. The landlord submitted some photographs of the state of the rental unit into evidence.

The landlord submits that the rental unit was uninhabitable due to the condition left by the tenant. The landlord says that they incurred significant costs for retaining contractors who were unable to commence work on the unit on the effective date of the 2 Month Notice. The landlord says that during the period when the tenant overhauled the rental unit they refused reasonable access to perform maintenance, failed to report issues and contributed to the deterioration of the property. The landlord submits that while some work to the rental unit has been completed, they have been unable to complete all necessary repairs and work to make the rental unit inhabitable.

Analysis

The principle of *res judicata* prevents an applicant from pursuing a claim that has already been conclusively decided. The security deposit for this tenancy was the subject of a previous hearing and a final decision was issued by the previous arbitrator as recorded in the decision dated September 11, 2020. I find that I have no jurisdiction to consider a matter that has already been the subject of a final and binding decision by another arbitrator appointed under the *Act*. Accordingly, I dismiss this portion of the tenant's claim seeking a return of the security deposit.

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,

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.

In the 2 Month Notice the landlord indicated that the tenancy is ending as the landlord will occupy the rental unit. The parties agree that the landlord has not occupied the rental unit as at the date of the hearing.

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

- (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 may not be extenuating.

I find the evidence of the circumstances in this instance to be reasonably characterized as extenuating. I find that this is not a case where the landlord failed to adequately budget for necessary renovations but a reasonable and inevitable result of numerous breaches on the part of the tenant. I find that the landlord incurred unforeseeable costs for taking possession of the rental unit from the tenant, additional repairs, maintenance and cleaning that became required due to the state of the rental unit caused by the tenant, and costs of having contractors retained during a period in which work could not commence. In addition, the landlord incurred loss of rental income due to the tenant overholding the rental unit and had to pay their own costs of housing as well as the mortgage for the rental unit.

I find the landlord's lack of funds to perform the necessary work is not an instance of failing to reasonably predict the scope and cost of work but a result of the tenant's actions draining the landlord of available funds, increasing the amount of work required, and causing other expenditures to simply gain possession of the rental property. It is unreasonable to expect or require a landlord to include in their budget sufficient funds to cover a tenant overholding for close to 6 months. I find that it would be unjust to allow a tenant to create circumstances which prevent a landlord from accomplishing the purpose stated on the 2 Month Notice and simultaneously seek a monetary award on the basis of the landlord failing to accomplish the purposes.

Based on the evidence I find that the reasons for the landlord being unable to accomplish their stated purpose for ending the tenancy are a result of the tenant's actions and breaches of the *Act*, regulations and tenancy agreement. I find the series of events to be properly characterized as extenuating and sufficient reason for the landlord to not accomplish the purpose of their 2 Month Notice. I find that the circumstances in the matter at hand makes it unreasonable and unjust to order a monetary award as against the landlord and are properly characterized as extenuating.

Accordingly, I dismiss the tenant's application as I find that while the landlord did not accomplish their stated purpose for issuing the 2 Month Notice to End Tenancy, there are, in my view, 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: February 22, 2021

Residential Tenancy Branch