



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDL, MNDCL, FFL

Introduction

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss, for a monetary Order for damage to the rental unit, and to recover the fee for filing this Application for Dispute Resolution.

The Agent for the Landlord stated that on April 07, 2021 the Dispute Resolution Package and evidence the Landlord submitted to the Residential Tenancy Branch on March 31, 2021 were sent to each Tenant, via registered mail, at the service address noted on the Application. The Landlord submitted Canada Post documentation that indicates registered mail was sent to the Tenants on April 01, 2021.

On April 20, 2021 the Landlord submitted additional evidence to the Residential Tenancy Branch. The Agent for the Landlord stated that this evidence was served to the Tenants, via registered mail, on April 07, 2021. The Tenant stated that this evidence package was not received. As the Landlord submitted no evidence to corroborate the testimony that registered mail was sent to the Tenants on April 07, 2021 and the Tenant denies receiving this evidence package, I find that the Landlord has failed to meet the burden of proving service of the second evidence package. As such, the second evidence package is not accepted as evidence for these proceedings.

The male Tenant, hereinafter referred to as the Tenant, stated that each Tenant received a copy of the aforementioned documents in packages that are date stamped April 01, 2021 by Canada Post. The Tenant stated that he is representing the female Tenant at these proceedings. As the Tenant acknowledged that each Tenant received the aforementioned documents, the hearing proceeded in the absence of the female Tenant and the aforementioned evidence was accepted as evidence for these proceedings.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each participant affirmed that they would speak the truth, the whole truth, and nothing but the truth during these proceedings.

The participants were advised that the Residential Tenancy Branch Rules of Procedure prohibit private recording of these proceedings. Each participant affirmed they would not record any portion of these proceedings.

Issue(s) to be Decided

Is the Landlord entitled to compensation for damage to the rental unit and to liquidated damages?

Background and Evidence

The Agent for the Landlord and the Tenant agree that:

- the tenancy began on July 01, 2020;
- the parties had a fixed term tenancy agreement, the fixed term of which ended on the tenancy ended on June 30, 2021;
- rent of \$1,870.00 was due by the first day of each month;
- there is a term in the written tenancy agreement that requires the Tenants to pay liquidated damages of \$912.50 if the Tenants ended the tenancy prior to June 30, 2021;
- on December 29, 2020 the Tenants requested permission to sublet the rental unit, which was denied;
- the Tenants were requesting permission to sublet the unit on February 01, 2021;
- on December 31, 2020 the Tenants sent the Landlord a letter in which the Tenants declared that the Landlord has breached a material term of the tenancy agreement by refusing to consider the request to sublet;
- in the letter of December 31, 2020, the Tenants declare that they will vacate the unit by February 01, 2021, if the Landlord does not, by January 07, 2021, “properly consider” the request to sublet and if the Landlord arbitrarily refuses the request;
- the Landlord never provided the Tenants with a reason for denying the request to sublet;
- on December 31, 2020 the Tenants also provided the Landlord with written notice of their intent to vacate the rental unit on January 31, 2021; and
- the rental unit was vacated on January 31, 2021.

The Landlord is seeking liquidated damages of \$912.50, pursuant to term 4 of the written tenancy agreement.

At the hearing the Agent for the Landlord stated that the request to sublet was denied, in part, because sometimes tenants rent to people who are not good tenants. The Agent for the Landlord further stated that the request to sublet was denied, in part, because some tenants might use the unit as an "Airbnb" if they were permitted to sublet.

When she was asked if she considered the ability to sublet to be a material term of the tenancy, the Agent for the Landlord stated that subletting was not permitted.

When he was asked if he considered the ability to sublet to be a material term of the tenancy, the Tenant stated that:

- the right to sublet is granted under the *Residential Tenancy Act (Act)*;
- Landlord's cannot "contract out of the *Act*"; and
- it is an important right because it allows a tenant to move after signing a fixed term tenancy, if there are unforeseen circumstances, while still ensuring rent is paid to the Landlord.

The Landlord is seeking compensation, in the amount of \$96.00, for cleaning the rental unit.

The Agent for the Landlord stated that rental unit required additional cleaning at the end of the tenancy.

The Tenant stated that the rental unit did not require additional cleaning at the end of the tenancy. The Tenant stated that there were some items left on the balcony at the end of the tenancy, however those items were on the balcony at the start of the tenancy.

The Landlord is seeking compensation, in the amount of \$138.25, for painting. The Agent for the Landlord stated that rental unit required painting at the end of the tenancy as the walls were greasy and the walls were damaged.

The Tenant stated that the rental unit did not require painting at the end of the tenancy.

The Landlord submitted a condition inspection report that was completed at the end of the tenancy, which declares that painting and cleaning is required. The parties agree

that the Tenants did not agree with the content of the report and, as such, did not sign the report.

Analysis

Section 45(3) of the *Residential Tenancy Act (Act)* stipulates that 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.

Residential Tenancy Branch Policy Guideline #8, with which I concur, reads, in part:

A material term of a tenancy 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 during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – 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.*

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

Section 34(2) of the *Act* stipulates that if a fixed term tenancy has 6 months or more remaining in the term, a landlord must not unreasonably withhold consent to assign or sublet a rental unit. Given that the right to sublet, in reasonable circumstances, is granted by the *Act*, I find it reasonable to conclude that the right to sublet is a material term of any fixed term tenancy that has more than 6 months remaining in the term.

I note that when the Tenants requested permission to sublet the unit there was more than six months remaining in the tenancy, although the Tenants were only requesting permission to sublet the unit for five months. Had the Landlord responded to the initial request in a timely manner and declined the request to sublet on the basis of the five month issue, it is entirely possible the Tenants would have sublet the unit for the sixth month as well.

Clause 13 of Schedule A of the tenancy agreement declares that the Landlord will not arbitrarily or unreasonably withhold consent to assign or sublet if the tenancy agreement is “for six months or more”. This is a right that is greater than the right to sublet granted under the *Act*. Given the binding nature of a fixed term tenancy I find that this term of Schedule A is highly important and should, therefore, be considered a material term of the tenancy.

I find the reasons for withholding consent which were provided by the Agent for the Landlord at the hearing were unreasonable. A Landlord cannot arbitrarily determine that all sub-tenants will not be suitable or that all sub-landlords will rent a unit for short term vacancies. Rather, a Landlord must work with the Tenant in an attempt to find a sub-tenant that meets the approval of both parties.

I therefore find that the Landlord breached a material term of the tenancy agreement when the Landlord unreasonably withheld consent to sublet the unit.

On the basis of the undisputed evidence, I find that on December 31, 2020 the Tenants gave the Landlord written notice of the aforementioned breach of the tenancy agreement, in which they declared the Landlord had until January 07, 2021 to correct the breach. I find this a reasonable amount of time, given that the breach was easily remedied and the Tenants needed time to find a person to sublet the unit.

As the Landlord did not correct the breach within a reasonable amount of time, I find the Tenants had the right to end this tenancy, pursuant to section 45(3) of the *Act*.

Section 6(3)(b) of the *Act* stipulates that a term of a tenancy agreement is not enforceable if the term is unconscionable. A term is considered unconscionable if the term is oppressive or grossly unfair to one party, Residential Tenancy Branch Policy Guideline #8 suggests that a term may be unconscionable if it is “so one-sided as to oppress” the other party or if it grants a “procedural advantage”.

Term 4 of the tenancy agreement requires the Tenants to pay liquidated damages of \$912.50 if “the Tenant terminates the tenancy” prior to the end of the original fixed term of the tenancy. I find that this term is unconscionable, as it requires the Tenant to pay liquidated damages even if the Tenant has the legal right to end the tenancy prior to the end of the fixed term of the tenancy.

In these particular circumstances, the Tenants have established that they had a legal right to end the tenancy prior to the end of the fixed term of the tenancy. I therefore find that the term requiring them to pay liquidated damages is not enforceable and I dismiss the claim for liquidated damages.

When making a claim for damages under a tenancy agreement or the *Act*, the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

Section 37(2) of the *Act* requires tenants to leave a rental unit reasonably clean at the end of a tenancy. I find that the Landlord submitted insufficient evidence to establish that the unit was not left in reasonably clean condition at the end of the tenancy. In reaching this conclusion I was heavily influenced by the absence of evidence, such as photographs, to corroborate the Landlord’s submission that it needed cleaning or to refute the Tenant’s submission that it did not require cleaning.

In considering the claim for cleaning I have placed no weight on the undisputed evidence that items were left on the balcony at the end of the tenancy, as there is no evidence to refute the Tenant’s testimony that those items were on the balcony at the start of the tenancy.

As the Landlord failed to meet the burden of proving the unit required cleaning, the claim for cleaning is dismissed.

Section 37(2) of the Act requires tenants to leave a rental unit undamaged, except for reasonable wear and tear, clean at the end of a tenancy. I find that the Landlord submitted insufficient evidence to establish that the unit needed painting at the end of the tenancy. In reaching this conclusion I was heavily influenced by the absence of evidence, such as photographs, to corroborate the Landlord's submission that it required painting or to refute the Tenant's submission that it did not require painting.

As the Landlord failed to meet the burden of proving the unit required painting, the claim for painting is dismissed.

In considering the claim for cleaning and painting I have placed no weight on the final condition inspection report that was submitted in evidence, as it is clear the Tenants did not agree with the content of the report.

I find that the Landlord has failed to establish the merit of the Application for Dispute Resolution and I dismiss the application to recover the fee for filing this Application.

Conclusion

The Application for Dispute Resolution 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 Act.

Dated: July 26, 2021

Residential Tenancy Branch