Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNECT, FFT

Introduction

This hearing dealt with the tenants' application pursuant to section 67 of the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for monetary loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- a monetary order for compensation from the landlords related to a Notice to End Tenancy for Landlord's Use of Property pursuant to section 51; and
- authorization to recover the filing fee for this application from the landlords, pursuant to section 72.

While the tenant MS attended the hearing by way of conference call, the landlords did not. I waited until 2:13 p.m. to enable the landlords to participate in this scheduled hearing for 1:30 p.m. The tenant was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. During the hearing, I also confirmed from the online teleconference system that the tenant and I were the only one who had called into this teleconference.

The tenant provided sworn, undisputed testimony that she had served the landlords with this application for dispute resolution hearing package ("Application") and evidence by way of Registered Mail on February 27, 2021 to the landlords' address as provided to the tenants on the 1 Month Notice which was served to the tenants on December 29, 2020. The tenant testified that as an abundance of caution she had also served the landlords by sending a copy by registered mail to the rental address, as well as by email to the landlords. The tenant provided the tracking numbers for the packages in the hearing. As the address used for service was provided by the landlords in writing to the tenants, I find the address used to be a valid mailing address where the landlords may be served. In accordance with sections 88, 89, and 90 of the Act, I find that the landlords deemed served with the tenants' application and evidence on March 4, 2021,

five days after mailing. The landlords did not submit any written evidence for this hearing.

Issues(s) to be Decided

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

Are the tenants entitled to recover the filing fee for this application from the landlords?

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 fixed-term tenancy began on October 1, 2019, and ended on January 31, 2021. Monthly rent was set at $1,900.00, payable on the first of the month. The landlords collected a security deposit in the amount of $950.00, which was returned at the end of the tenancy.

The tenants filed this application requesting the following compensation

Item	**Amount**
Compensation for loss of use of elevator	$1,000.00
Compensation from the landlords related to a Notice to End Tenancy for Landlord's Use	3,500.00
Total Monetary Order Requested	**$4,500.00**

The tenant testified in the hearing that several disputes took place during the tenancy between the two parties. The tenant testified that the landlords were upset about the tenants' new dog, and the fact that the tenants failed to provide a pet damage deposit. The tenant testified that the landlords were also upset about the tenants' request for a rent reduction related to the elevator issue.

The tenant testified that the landlords served them with a 1 Month Notice to End Tenancy for Cause. A copy of the Notice was submitted in evidence dated December 29, 2020, for an effective date of January 30, 2021. The tenants found a new place to move to, and when they had informed the landlords, the landlords responded "haha, I never submitted it". The tenants then signed a Mutual Agreement to End Tenancy as

they had already paid a deposit for the new place. The tenants feel that they were bullied by the landlords, and had made plans to move unnecessarily. The tenants are seeking compensation in the amount of $3,500.00.

The tenants are also seeking a monetary order in the amount of $1,000.00 for loss of use of an elevator in their building. The tenants testified that they lived on the top floor, and that they did not have use of the elevator for two months. The tenants testified that they had difficulty bringing up groceries to the fourth floor, and had to either use the stairs or use the elevator located in an adjoined building. The tenant testified that due to social distancing restrictions, the tenants had to wait in line. The tenants testified that this extremely inconvenient, and that they would not have rented the fourth floor unit if they knew of this issue.

Analysis

As indicated in the tenants' application, the tenants applied for compensation pursuant to section 51 of the *Act*, which requires that a notice be given under section 49 of the *Act*.

Tenant's compensation: section 49 notice

> **51** (1) A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement…

I find that the tenants moved out after being served with a 1 Month Notice to End Tenancy pursuant to section 47 of the *Act*, and not as a result of receiving a 2 Month Notice pursuant to Section 49. I find that the tenants moved out without applying to dispute this notice, and instead signed a Mutual Agreement to End Tenancy. As section 51 of the *Act o*nly allows for compensation when a tenant is served with a 2 Month Notice, I am not allowing the tenants' application for monetary compensation pursuant to section 51 of the *Act*. This portion of the tenants' application is dismissed without leave to reapply.

The tenants also filed an application for the loss of use of an elevator. 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 or 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. In this case, the onus is on the tenants to prove, on a balance of probabilities, that they are entitled to compensation for the loses associated with elevator. In this case, the tenants applied for a monetary order in the amount of $1,000.00.

Section 27 of the *Act* establishes the basis for a landlord to terminate or restrict services or facilities with respect to a tenancy:

> ***27*** *(1) A landlord must not terminate or restrict a service or facility if*
>
> *(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or*
>
> *(b) providing the service or facility is a material term of the tenancy agreement.*
>
> *(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord*
>
> *(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and*
>
> *(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.*

RTB Policy Guideline #22 provides further clarification of what constitutes an essential facility or facility:

B. ESSENTIAL OR PROVIDED AS A MATERIAL TERM

An "essential" service or facility *is one which is necessary, indispensable, or fundamental. In considering whether a service or facility is essential to the tenant's use of the rental unit as living accommodation or use of the manufactured home site as a site for a manufactured home, the arbitrator will hear evidence as to the importance of the service or facility and will determine whether a reasonable person in similar circumstances would find that the loss of the service or facility has made it impossible or impractical for the tenant to use the rental unit as living accommodation. For example, an elevator in a multi-storey apartment building would be considered an essential service.*

I find the use of an elevator an essential service as the tenants resided in a multi-storey building. As confirmed in the hearing, the tenants still had use of the stairwell, or an alternate elevator further away. I must now determine whether the tenants are entitled to any financial compensation in the amount of the rent reduction applied for.

In assessing this claim, I first note that the party applying for dispute resolution bears the responsibility of demonstrating entitlement to a monetary award. Based on the evidence before me, I accept that the landlord had temporarily withdrawn a facility or service that was part of the included services and facilities that the landlords committed to provide to the tenants as part of the tenancy. I accept the testimony of the tenants that they resided on the fourth floor, and due to health concerns, relied on the use of the closest elevator.

Based on the tenants' testimony, I find that the tenants did suffer the loss of one of the elevators in his building, and as a result had to make accommodations that affected their daily life. Although I acknowledge that the tenants were impacted by the loss of use of one of the elevators for a duration of not less than two months, I must still consider whether they are entitled to the actual loss claimed.

The tenants submitted a copy of their new tenancy agreement, and stated that they are now spending $250.00 more per month now. The tenants state that if the landlords had lowered the rent instead, they would not have moved. The tenants are now seeking $1,000.00.

Residential Tenancy Policy Guideline #5 addresses the duty of the claimant to mitigate loss:

"Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss[1]. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord

does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation[2]. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."

The duty to mitigate losses is only one of the criteria that needs to be met when making a claim. As stated earlier in this decision, the claimants must not only prove the value of the loss, the claimants must also prove that the losses were solely due to the other party's contravention of the *Act* or tenancy agreement. Only after these requirements are met, can the applicant be successful in their claim. In consideration of the tenants' claim that they are now paying substantially more rent, and the tenants' duty to mitigate their losses, the tenants did not file an application for dispute resolution or for a rent reduction prior to moving out. Furthermore, the tenants were still provided with the alternative of another elevator, although the elevator was further away. I also find that the some of the inconvenience was due to circumstances beyond the landlord's control, rather than a contravention of the *Act*, such as the social distancing requirements.

Although I am satisfied that the tenants' expectations were not met during this tenancy, I am not satisfied that the tenants had supported the value of the loss as claimed in their application, nor did they fulfill their requirements to mitigate the losses claimed. Accordingly, I dismiss this claim without leave to reapply.

As the filing fee is normally rewarded to the successful party after a hearing, the tenants' application to recover the filing fee is dismissed without leave to reapply.

Conclusion

The tenants' entire application 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 *Residential Tenancy Act*.

Dated: July 2, 2021