Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes DRI, OLC, FFT, MNDCT

Introduction

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

- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43;
- an order that the landlord comply with the Act, regulation or tenancy agreement pursuant to section 62;
- a monetary order for $39,120 representing 12 times the amount of monthly rent, pursuant to sections 51(2) and 62 of the Act; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Tenant FC attended the hearing on behalf of all tenants. The landlord was represented at the hearing by an agent ("**RN**") and her assistant ("**HL**").

Preliminary Issue – Service of Documents

The tenants served the notice of dispute resolution form and support evidence package shortly after this application was filed. On June 29, 2021, the tenants amended this application to include the monetary claim for $39,120. They served the landlord with the amendment and support evidence package on July 5, 2021 via email.

The landlord served the tenants with their evidence package on July 12, 2021 via email.

Both parties acknowledged that email is not an accepted mode of service but consented to allow the other's documents referenced above into evidence on the condition that theirs were entered. As such, I deem the documents mentioned above to have been served in accordance with the Act for the purposes of the Rules of Procedure.
H
The evening before the hearing (July 18, 2021), the tenants emailed additional documents to the landlord which they intended to rely on at the hearing. RN stated that she had not received these documents. Rule of Procedure 3.14 requires that an applicant serve all documents it intends to rely on at the hearing no later than 14 days prior to the hearing. FC was unable to explain why the tenants could not have submitted and served these documents within the required time frame. Rather, he stated that they were provided as a rebuttal to the evidence tendered by the landlord. The Rules of Procedure do not allow

such rebuttal evidence. Accordingly, I exclude these documents from the evidentiary record.

Preliminary Issue – Tenants' Claim

At the outset of the hearing, FC advised me that the tenants vacated the rental unit in April 2021, and that the tenancy was over. As such, he stated, the tenants no longer required an order that the landlord comply with the Act. Additionally, he stated that the parties had resolved the issue of the rent increase, and that the tenants did not require any order to be made with relation to this portion of their claim.

Accordingly, I dismiss these portions of the tenants' application, without leave to reapply.

The questions left to be resolved are whether the tenants are entitled to a monetary order of $39,120 and if they are entitled to recover their filing fee.

Preliminary Issue – Final Decision

The hearing was scheduled for one hour, starting at 11:00 am. Despite the hearing continuing until 12:15 pm, the hearing was unable to be completed. The tenants concluded their submissions, but the landlord did not start theirs. At end of the hearing, I advised the parties that the hearing would be adjourned to a later date, and at that reconvened hearing, the entirety of the time would be given to the landlord to make their submissions. FC acknowledged this and confirmed he understood this.

However, upon further consideration, I do not find that the reconvening of this application is necessary for me to determine the outcome. Based on the evidence presented at the hearing on July 19, 2021, I am able to make a determination on this matter. I do not come to this conclusion lightly, as it is contrary to what I indicated to the parties would happen at the end of the July 19, 2021 hearing. I find that proceeding in this manner meets with the objectives of the RTB Rule of Procedures to resolve the dispute in a "fair, efficient, and consistent process".

The central reason for declining to reconvene this hearing is because (for reasons I will discuss below) upon having heard the full submissions of the tenants, I find that they have failed to displace their evidentiary burden to prove the facts underlying their claim. Rule 6.6 states:

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
>
> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

The tenant's claim is not a complex one. It involves the application of section 51(2) of the Act to determine if they are entitled to an amount equal to 12 times the monthly rent. In order for section 51(2) of the Act to be applied, the tenants must establish that certain conditions have been met, namely that a notice to end tenancy for landlord's use of the rental unit has been issued pursuant to section 49 of the Act (a "**Section 49 Notice**").

I note that, should the tenants prove this, the onus then switches to the landlord to prove they met certain conditions set out at sections 51(2)(a) and (b) of the Act. However, as the tenants have not discharged their onus, this switch does occur.

Based on the evidence submitted at the hearing, I find that the tenants have failed to establish that a Section 49 Notice was issued. Indeed, FC conceded the fact in his submissions. Instead, he argued that a letter from the landlord purporting to end the tenancy pursuant to the fixed-term tenancy agreement ought to stand in the place of a Section 49 Notice. For the reasons set out below, I find that this cannot be the case.

As I have found that the tenants have failed to meet their evidentiary burden, I find that it is not necessary to reconvene the hearing to hear submissions from the landlord. Such an exercise would not represent an efficient use of the parties' or the RTB's time and resources. I note that the landlord, in advance of the hearing, provided written submissions as part of his evidence package. During his submissions, FC responded to these submissions directly and at some length.

It is not fair to the landlord to needlessly require them to reiterate what is in their written submissions at a future hearing. Similarly, the tenants are not prejudiced by the landlord not making submissions, as they have already had the opportunity to provide their response to the landlord's written submissions.

I do not find that the landlord is deprived of any procedural fairness as a result of not reconvening the hearing, as he has already provided written submissions, and as the outcome of the hearing represents a finding in his favour on all issues.

As stated above, I acknowledge that this decision represents a departure from what I said would occur at the conclusion of the July 19, 20201 hearing. However, on balance, I find that neither party is prejudiced by my not reconvening the hearing (as the tenants have had an opportunity to be fully heard and to fully respond to the landlord's position and as the landlord will be successful in defending against the tenants' application) and neither party is deprived of the procedural fairness they are entitled to (as both have made submissions, albeit in writing for the landlord, and the tenant has had an opportunity to respond to the submissions).

I note that section 74(2) of the Act permits a hearing to be held, in person, in writing, by telephone, or by any combination of these methods. As such, I order that the hearing is to be adjudicated on the oral submissions of the tenant and the written submissions of the landlord. For the reasons which are set out below, I find that tenants have failed to discharge their evidentiary burden, and that their application is dismissed, in its entirety, without leave to reapply.

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a series of written, fixed term tenancy agreements. The first was entered into on October 1, 2018 and ended on September 30, 2019. Monthly rent was $3,100 (the "**First Agreement**"). The parties entered into a second fixed term tenancy starting October 1, 2019 and ending September 30, 2020. Monthly rent was $3,177 (the "**Second Agreement**"). This agreement was followed by a third written fixed-term agreement starting October 1, 2020 and ending March 31, 2021. Monthly rent was to start at $3,177 and be increased to $3,260 on December 1, 2020 (the "**Third Agreement**"). At the end of the tenancy, the parties retroactively cancelled this rent increase, keeping it at $3,177, and the tenants were reimbursed the difference.

On the Third Agreement, the landlord specified that the at the end of the fixed term, the tenancy would end, and the tenants must vacate the rental unit. The reason requiring the tenants to vacate was listed as "seller will move into the property". FC testified that he understood "the seller" to refer to the landlord.

The FC testified when he was negotiating the duration of the third tenancy, RN advised him (via a text message submitted into evidence) that the "landlord really wants to come back in March 2021". He testified that in March 2021, the landlord's niece and her husband attended the rental unit to meet with FC and discuss possible renovations that might be needed to bring it up to their tastes. At this point, FC understood that either the landlord or his niece would be moving into the rental unit.

FC testified that he spoke with the landlord at some point before March 2021 and obtained his verbal agreement to extend the duration of the tenancy by one month. However, he did not receive confirmation of this extension in writing. He testified that the landlord's niece attended the rental unit on March 30, 2021 and provided him with a letter which stated:

> With reference to our tenancy agreement on the [rental unit], a six month fixed term lease started from Oct 1, 2021 to Mar 31, 2021, which you must vacate on Mar 31, 2021 as the end of the lease, however due to your request to extend the fixed term lease to April 30, 2021 which you must vacate the rental unit on or

> before April 30, 2021. Please sign back this agreement on or before Mar 31, 2021 or the previous tenancy agreement will be in effect which means you must vacate on Mar 31, 2021.
>
> [as written]
> (the "**March 30th Letter**")

Attached to this letter was a completed copy of a mutual agreement to end tenancy (form #RTB-8) which required the tenants' signatures. This mutual agreement specified a move out date of May 1, 2021 at 2:00 pm.

FC testified that the tenants did not sign this agreement. He testified that he understood the service of this letter to represent a revocation of the prior oral agreement. Despite this, the tenants remained in the rental unit until April 28, 2021. He testified that, with the consent of the landlord, they stored some of their belongings in the garage until the first week of May 2021.

FC testified that he advised the landlord that the tenants were entitled to receive an amount equal to one month's rent because the tenancy was being ended so that the landlord could move in. The landlord returned the tenants' April 2021 rent cheque, and the tenants did not pay any rent for April 2021. The landlord, in its written submissions, characterized this as "a show of good faith" and did not concede they the Act required them to do this.

FC testified that, up until April 15, 2021, the tenants were under the impression that the landlord or his niece were going to move into the rental unit. However, after this date, the tenants learned the that landlord had listed the rental unit for sale. It sold shortly thereafter for $1,650,000.

The tenants seek a monetary order for $39,120, representing an amount equal to 12 months' rent, based on section 51(2) of the Act, which states:

> **Tenant's compensation: section 49 notice**
>
> (2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if the landlord or purchaser, as applicable, does not establish that
>
> (a) the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and
>
> (b) the rental unit, except in respect of the purpose specified in section 49(6)(a), has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

In his written submissions, the landlord argued that “the landlord has never issued the tenants a [Section 49 Notice]. The tenancy was never ended by the landlord under section 49 of the [Act]. As such, this claim should be dismissed.”

Analysis

I must first note that the only basis on which the tenants seek compensation is pursuant to section 51(2) of the Act. The do not seek damages caused by an alleged breach of the Act or the tenancy agreement. The only relief they seek is a statutorily based award. Accordingly, I do not need to consider whether the landlord breached the Act or whether the landlord acted in good faith when advising the tenants of his intention to move into the rental unit. I must only consider if the landlord has acted in such a way to fulfil the criteria set out at section 51(2) of the Act. As stated above, I find that the landlord has not.

Section 51(2) of the Act only entitles a tenant to an amount equal to 12 time the monthly rent in instances where a landlord has not taken steps within a reasonable after the effective date of the notice to accomplish the stated purpose for ending the tenancy or if the rental unit is not used for that stated purpose for at least six months. Crucially, this section refers to a “notice”. The title of this section is “Tenant's compensation: section 49 notice” and section 51(1) refers to “a notice to end a tenancy under section 49 *[landlord's use of property]*”. As such, I understand the notice referred to in section 51(2) to mean a notice issued pursuant to section 49 of the Act.

Similarly, I understand “the stated purpose for ending the tenancy” to be referring to the purpose for ending the tenancy listed on a Section 49 Notice.

Accordingly, in order for the tenants to be eligible to receive compensation under section 51, they must prove they have received a Section 49 Notice. FC admitted that the tenants did not receive such a notice. Rather, he argued that the March 30th Letter should be considered a substitute for such a notice.

Based on the contents of the March 30th Letter and on the Third Tenancy Agreement, I do not accept this argument.

The March 30th Letter does not purport to give the tenants two months’ notice of the end of the tenancy. Rather, it states that the tenants must vacate on March 31, 2021 which is the following day. Additionally, it offers to extend the tenancy by a single month, on the condition that the tenants sign a mutual agreement to end tenancy. Were the tenants to have signed such an agreement, the tenant would not have ended by operation of section 49 or of the tenancy agreement, but rather by operation of section 44(1)(c) of the Act which states a tenancy may end if “the landlord and tenant agree in writing to end the tenancy.”

Additionally, section 44(1)(b) of the Act states a tenancy ends if "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". The Third Tenancy Agreement specified that the tenancy would end at the end of the fixed term so that the "seller [could] move into the property". As the tenants understood "seller" to mean the landlord, this reason meets the statutory requirement of section 44(1)(b).

As such, I find that the March 30th Letter has not acted as a substitute for a Section 49 Notice. It does not purport to give the tenants two months' notice of the end of the tenancy. Rather, it advises the tenants that the tenancy is ending pursuant to the tenancy agreement and offers to extent the duration of the tenancy by one month, on the condition that the parties mutually agree to end the tenancy at the end of the that month. Both of these options contained in the March 30th Letter are valid ways to end a tenancy that are substantively different from ending the tenancy pursuant to section 49 of the Act.

I am not persuaded that the fact the landlord returned the tenants' April 2021 rent cheque causes the tenancy to have been ended pursuant to section 49 of the Act, notwithstanding that section 51 requires a landlord to provide tenants whose tenancy is ended pursuant to section 49 of the Act with an amount equal to one month's rent.

The requirement to provide one month's rent to the tenants is an obligation that following the issuing of a Section 49 Notice, and not vice versa. A landlord is entitled to provide one month's free rent to the tenants, at his discretion, for any reason. It is not uncommon for landlords, when ending a tenancy for legitimate reasons, to provide more that the statutorily mandated minimum to their tenants. I find that the landlord's decision to return the April rent cheque was not required by the Act, but instead was done gratuitously.

For the foregoing reasons, I find that the tenancy was not ended pursuant to a Section 49 Notice. As such, the relief set out at section 51(2) of the Act is not available to the tenants. I dismiss their claim for a monetary order equal to 12 months' rent without leave to reapply.

As the landlord has been successful in this application, I decline to order that he reimburse the tenants the filing fee.

Conclusion

I dismiss the tenants' application, 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: July 22, 2021

Residential Tenancy Branch