



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding TFM CONTRACTING LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S FFL

Introduction

This hearing was convened as a result of the landlord's Application for Dispute Resolution (application) seeking remedy under the *Residential Tenancy Act* (Act). The landlord applied for a monetary order in the amount of \$2,650.00 for compensation for damage or loss under the Act, regulation or tenancy agreement, to offset any amount owing with the tenant's security deposit and recover the cost of the filing fee.

Attending the teleconference hearing were an agent for the landlord, MR (agent) and the tenant. All parties were affirmed and given a chance to provide testimony and present evidence. A summary of the testimony and evidence is provided below and includes only that which is relevant to the hearing. Words utilizing the singular shall also include the plural and vice versa where the context requires.

The tenant stated that they were served with the landlord's documentary evidence the morning of the hearing. Much of the landlord's documentary evidence including the Monetary Order Worksheet was uploaded to the Dispute Management System (DMS) with the Residential Tenancy Branch (RTB) the day before the hearing. In accordance with the RTB Rules of Procedure (Rules), the landlord's documentary evidence was excluded in full as it was not served at least 14 days on the respondent and the RTB prior to the hearing pursuant to RTB Rule 3.14. Given the above, the agent was advised that I could still consider their affirmed testimony.

Regarding the tenant's digital video evidence, the agent stated that they were unable to open the videos and the tenant confirmed they did not ask the landlord prior to the hearing if the landlord was able to open the video evidence as is required by RTB Rule 3.10.5. Therefore, I have excluded all of the tenant's digital video evidence as the tenant did not comply with RTB Rule 3.10.5.

Preliminary and Procedural Matters

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the RTB Rule 6.11. The parties were also informed that if any recording devices were being used, they were directed to immediately cease the recording of the hearing. In addition, the parties were informed that if any recording was surreptitiously made and used for any purpose, they will be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation under the Act. Neither party had any questions about my direction pursuant to RTB Rule 6.11.

In addition, the parties confirmed their respective email addresses and were advised that the decision would be emailed to both parties.

Issues to be Decided

- Is the landlord entitled to a monetary order under the Act, and if so, in what amount?
- What should happen to the tenant's security deposit under the Act?
- Is the landlord entitled to the recovery of the cost of the filing fee under the Act?

Background and Evidence

A copy of a tenancy agreement was submitted in evidence. The tenancy began on June January 15, 2021 and was for a fixed-term reverting to a month-to-month tenancy after January 31, 2022. Monthly rent was \$1,700.00 per month and was due on the first day of each month. The tenant paid a security deposit of \$850.00, which the landlord continues to hold.

The tenant vacated the rental unit on March 29, 2021. The landlord's monetary claim of \$2,650.00 is comprised as follows:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. April loss of rent	\$1,700.00
2. Liquidated damages	\$850.00
3. Filing fee	\$100.00
TOTAL	\$2,650.00

Regarding item 1, the agent stated that the tenant moved into the rental unit on January 16, 2021 and on February 22, 2021, emailed the landlord about carpet moths (moths).

The landlord responded the next day, February 23, 2021 about the moths and the pest control company was arranged to attend the rental unit on March 3, 2021.

The tenant claims that on March 1, 2021 they sent an email stating that they were vacating the rental unit; however, the email does not state the tenant plans to vacate the rental unit and states in part, "I would like to request that we get a wooden floor for the room. It seems like the best solution." The tenant stated that on March 3, 2021, they let the pest control person into the rental unit to spray the unit and after returning 7 or 8 hours later, the tenant stated they still saw some moths.

On March 5, 2021, the tenant wrote a letter to the landlord which states in part that they were ending their tenancy based on a claim of a frustrated tenancy. The tenant includes the following reasons in support of their decision to vacate the rental unit:

- The apartments toilet was not running well (took over a month to get it fixed, leaving me to have to turn off the water every night in order to be able to sleep)
- The apartment was handed over in very dirty conditions in which I was forced to do deep cleaning of someone else's mess during the COVID pandemic
- Various things were not in the best condition, such areas are the kitchen and the bathroom
- The bathroom had several issues and still has issues
- The washroom bathtub is unhygienic, I have not showered there once – after speaking to the plumber he explained to me that the inside of the bathtub drain also had issues including too much grout all over the inside of it and the bad condition could cause a leakage in the building
- The handyman took the bathtub shower rail on January 27, stating he would come back in a couple of days and I have not heard from him since
- The handyman has also not fixed everything, and I have given up on asking for things after realizing that he would get frustrated with almost each task and that it wasn't the best job in the end
- The apartment had a clothes moth infestation at the time I was handed the keys (I have a photo of one not knowing what it was on my first night – January 16), which has led to an increased infestation and a very stressful time for me.
- I have seen and killed more clothes moths after the fumigation that was done while being there for a few minutes, showing me that these things are harder to handle than thought.

[Reproduced as written]

In the same letter, the tenant writes:

I am aiming to vacate the apartment on the 15th of March, or on March 30 at the latest. If I am successful in leaving on the 15, I would like to request both my security deposit and the month's rent, because I have not been leaving [sic] there even though I have been paying my rent on time.

[Reproduced as written]

The agent stated that the landlord responded on March 8, 2021 stating that if the tenant plans on breaking their lease that the tenant would be responsible for rent until a new tenant is arranged. The agent also stated that the rental unit was hardly uninhabitable as claimed by the tenant. The agent stated that the landlord responded quickly to the concerns of the tenants by arranging a plumbing company and exterminator to attend the rental unit. The agent stated that the tenant vacated the rental unit on March 29, 2021 and had no prior notice of a specific date as the March 5, 2021 letter from the tenant was vague in terms of a specific date they were vacating. The agent testified that the landlord was able to secure a new tenant effective May 1, 2021 and as a result are only seeking loss of April 2021 rent of \$1,700.00 and liquidated damages. The agent stated that the tenant did not respond to their March 8, 2021 reply to the tenant until March 17, 2021 after the landlord emailed the tenant again on March 16, 2021.

The tenant writes in their March 17, 2021 email to the landlord that they consider the tenancy to be frustrated and as a result they do not need to provide notice of ending tenancy. The email does not include a date that the tenant was vacating, and instead states, "I will provide the keys as soon as possible."

Regarding item 2, the landlord has claimed \$850.00 for liquidated damages. The parties confirmed that they had the tenancy agreement and addendum, and the tenant signed the addendum section "2e" which states in part:

e. Liquidated Damages: If the tenant terminates this agreement during the fixed term, the tenant will reimburse the owner for all costs associated with re-renting the suite including but not limited to, advertising, tenant credit checks (\$20.00 each), and re-leasing fees (including associated administrative fees) the owner must pay to [Name of management company] to re-let the property (half of 1 month's rent) payable immediately to commence remarketing the suite for re-leasing.

[Reproduced as written]

The agent stated that the landlord is unable to re-rent the rental unit until official notice is given by a tenant with a specific date they are vacating and that it was not until March 29, 2021 when the tenant returned the keys, that the landlord knew which date they were vacating.

The agent stated that they posted their ads on Craigslist, and several other websites and stated that the landlord minimized their loss by finding a new tenant for May 1, 2021.

The tenant claims the carpets were not cleaned at the start of the tenancy, to which the agent disagreed and affirmed that the carpets had been cleaned twice prior to the tenant moving in. The agent stated that there were no moths in the rental unit prior to the tenant moving in and that the tenant is just as likely to have brought in the moths themselves.

Regarding the filing fee, I will address the filing fee later in this decision.

Analysis

Based on the documentary evidence presented, the testimony of the parties and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

In the matter before me, the landlord bears the burden of proof to prove all four parts of the above-noted test for damages or loss.

Item 1 – I will first address the tenant's claim that the tenancy was frustrated. RTB Policy Guideline 34 – Frustration states the following:

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.

[Emphasis added]

Given the above, I would consider a flood or a fire to be reasonable examples of when a contract is frustrated. I do not accept any of the tenant's assertions that the tenancy before me was frustrated by moths or other regular repairs to the rental unit. The Act already addresses both regular repairs and emergency repairs and I find the landlord acted in a reasonable and timely manner to the tenant's complaints based on the evidence before me. While the tenant may have been "frustrated" during the tenancy, I disagree that the tenancy before me meets the high test for a frustrated contract. Therefore, I find the tenant breached the fixed-term tenancy as follows:

Tenant's notice

45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) **is not earlier than the date specified in the tenancy agreement as the end of the tenancy**, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

[Emphasis added]

Based on the above, I find the tenant was not entitled to end the fixed-term before January 31, 2022 and as a result, is liable for the loss of rent of \$1,700.00 for April 2021 as claimed. I find the tenant breached section 45(2) of the Act and owes the landlord **\$1,700.00** for loss of April 2021 rent accordingly. I find the landlord has met the burden of proof.

Item 2 - The landlord has claimed \$850.00 for liquidated damages pursuant to section 2e of the tenancy agreement Addendum. RTB Policy Guideline 4 – Liquidated Damages states in part:

...A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. **The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into**, otherwise the clause may be held to constitute a penalty as a result and will be unenforceable...

[Emphasis added]

Based on the above, I find the half of one month's rent (\$850.00) to be reasonable and to be a genuine amount. Therefore, as I find the tenant breached the fixed-term tenancy by vacating early and without the contract being frustrated, I grant the landlord **\$850.00** as claimed for this item as liquidated damages. I find the landlord has met the burden of proof.

Item 3 – As the landlord's claim was successful, I grant the landlord the filing fee of **\$100.00** pursuant to section 72 of the Act.

Based on the above, I find the landlord has established a total monetary claim of **\$2,650.00** comprised of \$1,700.00 for item 1, \$850.00 for item 2 and \$100.00 for item 3. Pursuant to sections 38 and 67 of the Act, I grant the landlord authorization to retain the tenant's security deposit of \$850.00, which has accrued \$0.00 in interest in partial satisfaction of the landlord's monetary claim. Pursuant to section 67 of the Act, I grant the landlord a monetary order for the pursuant to section 67 of the Act, for the balance owing by the tenant to the landlord in the amount of **\$1,800.00**.

Conclusion

The landlord's claim is fully successful.

The landlord has established a total monetary claim of \$2,650.00 which has been offset with the tenant's security deposit of \$850.00, which has accrued \$0.00 in interest, in partial satisfaction of the landlord's monetary claim pursuant to sections 38 and 67 of the Act.

The landlord has been granted a monetary order pursuant to section 67 of the Act, for the balance owing by the tenant to the landlord in the amount of \$1,800.00. This order must be served on the tenant and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

The tenant is reminded that they may be held liable for enforcement costs related to the monetary order.

This decision will be emailed to both parties.

The monetary order will be emailed to the landlord only for service on the tenant.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: September 14, 2021

Residential Tenancy Branch