



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC FFT

Introduction

The tenants applied for compensation pursuant to section 51(2) of the *Residential Tenancy Act* (“Act”). In addition, they applied to recover the cost of the filing fee, pursuant to section 72 of the Act.

Both parties, along with a witness for each party, attended the arbitration hearing on November 5, 2021. No service issues were raised, the parties and witnesses were affirmed, and Rule 6.11 of the *Rules of Procedure* was explained.

Issues

1. Are the tenants entitled to compensation?
2. Are the tenants entitled to recover the cost of the application filing fee?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure*, was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the specific issues of this dispute, and to explain the decision, is reproduced below.

The tenancy in this dispute began on July 1, 2017 and ended on November 30, 2020. Monthly rent, at the time the tenancy ended, was \$1,400.00. A copy of the original tenancy agreement was submitted into evidence. The rental unit itself was a two-bedroom basement suite in a residential property; the landlords live in the upper level.

On September 30, 2020, the landlords served a Two Month Notice to End Tenancy for Landlord’s Use of Property (the “Notice”) on the tenants, in person. A copy of the Notice is in evidence. The reason the Notice was issued was that the rental unit “will be occupied by the landlord or the landlord’s close family member” and that in this case it was to be the “father or mother of the landlord or landlord’s spouse.”

This was the reason as stated in the Notice and as understood by the tenants as to why the tenancy was ending.

The tenants had a particularly difficult and stressful time finding a new place to live, made worse by the limited supply and the pandemic. "It was completely just an awful experience [. . .] and the pandemic made everything worse," one of the tenants observed. They finally found a place (albeit for \$200.00 more in rent) in the middle of November, and they moved out on November 30, 2020.

Fast forward two months. One of the tenants happened to be perusing Craigslist ads when they came across a posting for the rental unit being available to rent. This ad was spotted on February 1 or 2, 2021, and a copy of the ad was in evidence. The tenants noted, too, that the rent was listed for \$1,550, which was \$150 higher than what they had been paying. When they stumbled across this ad the tenants "felt cheated," and that they were "asked to leave because [the landlords] wanted higher rent." The tenants remarked that they "hoped everyone is an honest person" and that when they were issued the Notice, they "believed it was for family use."

The tenants also testified that, in retrospect, a red flag for them was that the Notice was issued a mere two weeks after the provincial ban on evictions was lifted. Moreover, they argued, the landlords had an ongoing issue with the tenants' cats. The tenants had two cats over a period of three-and-a-half years and the landlords were not particularly happy with the smell from the cats. (Urine, primarily, it appears.) And there were allegations of the tenants not being clean.

In respect of this application, the tenants seek compensation equivalent to twelve months under section 51(2) of the Act in the amount of \$16,800.00. In addition, they seek \$2,400.00 in compensation representing 12 months multiplied by \$200.00, which was the additional rent the tenants were paying in their new accommodations after having vacated the rental unit. It should be noted that the additional \$2,400.00 was included in the tenants' claim under section 51 of the Act. Last, the tenants seek \$100.00 to cover the cost of the application filing fee.

The landlords testified that they issued the Notice in good faith: they had every intention of having their mother move into and occupy the rental unit. However, as the male landlord explained, "we were unable to use the rental unit because of extenuating circumstances." He continued, noting that these circumstances were "directly caused by the tenants and their unwillingness to maintain sanitary conditions."

As for the landlords' relationship with the tenants, they were otherwise friendly, quiet tenants, and they always paid their rent on time. That said, the landlords had ongoing concerns with the cleanliness of the rental unit. The landlords visually witnessed and smelled foul smells associated with the tenants' cats. Despite these issues, however, the landlords never intended to end the tenancy for any reason related to the cats or the cleanliness.

What precipitated the landlords' movement toward ending the tenancy, however, was that their mother "started asking to move closer" to her family and grandchildren. It was in the summer of 2020 that the landlord (A.H.) "started chatting with my mom" and the decision was finally made to end the tenancy so that the mother could move in. "We didn't come to the decision lightly," the landlord added.

After issuing the Notice, it was the landlords' and mother's plan to start moving into the rental unit around mid-December. However, this plan was derailed after, upon inspecting the rental unit on December 1, it was discovered that there was lots of grime, various damage throughout the rental unit, smudges and dents and so forth, dead insects, lots of cat hair and litter, and, it would appear, even maggots. But the main concern was that there was a "very unpleasant smell" in the rental unit." Now, the landlords had previously been aware of the smell, and had notified or warned the tenants in the past about dealing with the smells. The smell permeated the entire rental unit and there was some sort of sticky grease on the floors.

From December 2 onward the landlords made general repairs to the rental unit and mopped the floors several times, and, they patched the walls. Yet, there was a very strong odor, even after the repairs and mopping and cleaning was done. The landlords began to concern themselves with the possibility that the smell was permanent.

On December 3 the landlord engaged some professional cleaners. This did not solve the problem. A couple of days later, on December 5, the mother viewed the rental unit and expressed concerns about the smell. She described the smell as "nauseating."

From December 7 through the 23rd, further sanding and painting was undertaken, the rental unit was repainted, and the smell started to diminish. However, on December 25, the landlord's mother again viewed the rental unit and noted that the smell was still quite strong. It was the landlords' thoughts that perhaps cat urine had likely permanently saturated the floor.

A contractor was brought in, and other than a full floor replacement (which the landlords were not in a financial position to do), the floors were treated with chemicals. Indeed, the landlords went so far as to try using tea tree and other essential oils, but to no avail.

On January 16, 2021, the mother again viewed the rental unit. Given that it was winter, the windows were closed, and the heat turned on. The smell returned. It was at that point that the mother made the final decision not to move in. It was, testified the landlords, a very upsetting and difficult decision. After many months of hoping to have the mother move in, and after many months of trying to rid the rental unit of the smell, the landlords' plans of moving the mother in would not go through.

After this decision by the mother not to move in, the landlords were "forced to find someone" to rent the rental unit. They posted Craigslist ads in February 2021 and showed it to several people. Some prospective renters noted the smell, while others did not mention anything. (This could have been, noted the landlord, because everyone was wearing a mask and the showings of the rental unit were rather brief.) The landlords were unable to find a new tenant until May 2021.

The landlords' mother testified that she had hoped to occupy the rental unit in December 2020. She first viewed the rental unit on December 5 and testified that "the smell was just terrible [. . .] nauseating [. . .] and really, really strong." The mother also noted some sticky stuff on the floor. A few weeks later, around Christmas, the mother returned to and viewed the rental unit again and noted that the "smell was not clearing up." Ultimately, she testified, she decided not to move into the rental unit. "It's very sad, this whole thing," the mother added.

In rebuttal, the tenants' witness testified that in the many times (more than a hundred visits) she visited the tenants in their rental unit she never noticed any smells or cleanliness issues. The witness in fact did a showing of the rental unit with the landlords (after the Craigslist ad was active) and during the fifteen-minute walkthrough the witness did not notice any smell. The witness never saw any neglect to the property.

In closing statements, the tenants reiterated that "we're not dirty, messy people," and that "we made our best efforts to take care of the cats." In respect of the contractor brought in to assess the floors, the tenants questioned the reliability of this particular evidence, as they could find not information verifying the contractor.

In their closing statements, the landlords argued that “cleanliness is subjective.” That the tenants’ witness was wearing a mask, the windows were likely open, and a candle burning. The landlords noted that the smell was still there in February 2021.

Last, while the landlords witnessed “the slow degradation of their home” (referring to the ongoing cat issues), this degradation was not the motivation or intent behind issuing the Notice. Rather, it was to “get my mother in there.”

Analysis

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.

Claim for Compensation (Twelve Months’ Compensation)

The tenants seek compensation under section 51(2) of the Act. It is noted that this section was amended on July 1, 2021. However, it is the Act as it was on the date that the Notice was issued – that is, September 30, 2020 – that must be applied.

Sections 51(2) and 51(3) of the Act, on September 30, 2020, read as follows:

- (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
 - (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
 - (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.
- (3) 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

In this dispute, the stated purpose for ending the tenancy was because a close family member of the landlord (that is, the mother) intended, in good faith, to occupy the rental unit. While the tenants noted some red flags concerning the timing of the Notice, the previous issues with the cats, and the Craigslist ad listing the rental unit's rent at a higher rate of \$150, there was little by way of argument made that the landlords did not issue the Notice in good faith. Moreover, I found the mother's testimony to be credible, and consistent with that of the landlords' testimony and submissions: that it was the landlords' intention to have their mother move closer to the family.

What is not in dispute is the fact that the rental unit was not used for a period of at least six months, beginning within a reasonable period after the effective date of the Notice. While neither party made any argument nor provided any submissions as to what might constitute a reasonable period, it is my finding that a reasonable period is the period in which work was undertaken to remove the nauseating smells. By mid-January 2021, those smells were still present. By mid-February, perhaps not so much. And it must be inferred that the smell was at some sort of tolerable level by the time the landlords' new tenant took occupancy of the rental unit in May 2021. It is worth noting that a full five months had passed since the tenants vacated the rental unit to when the new tenants moved in.

Given the above, it is my finding that the landlords breached section 51(2)(b) of the Act because the rental unit was not used for the stated purpose for at least 6 months' duration beginning within a reasonable period after the effective date of the notice.

We must turn now to whether there were extenuating circumstances that prevented the landlords from using the rental unit for that stated purpose for at least six months duration, beginning within a reasonable period after the effective date of the notice.

The term "extenuating circumstances" is not defined in the Act but is explained to some degree in [Residential Tenancy Policy Guideline 50. Compensation for Ending a Tenancy](#), (version dated July 2021), on page 4:

These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation, typically because of matters that could not be anticipated or were outside a reasonable owner's control. Some examples are:

- A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies one month after moving in.
- A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
- A tenant exercised their right of first refusal, but did not notify the landlord of a further change of address after they moved out so they did not receive the notice and new tenancy agreement.

The following are probably not extenuating circumstances:

- A landlord ends a tenancy to occupy the rental unit and then changes their mind.
- A landlord ends a tenancy to renovate the rental unit but did not adequately budget for the renovations and cannot complete them because they run out of funds.

The common theme, or underlying characteristic of the first set of examples is a lack of landlord control. The characteristic of the second set of examples is landlord control. In the application before me, I find that it was the mother – and not the landlords – who ultimately made the decision not to occupy the rental unit. While the landlords apparently did everything within their control and financial means to rid the rental unit of the smell (they knew the smell was bad before issuing the Notice, but not as bad as it was until they started spending time in the rental unit after the tenants left), the individual who made the final decision to not occupy the rental unit was the mother. The mother presented as intelligent and in full control of her own decision-making. Thus, I am persuaded on the facts and evidence before me that the mother's decision to ultimately decide not to occupy the rental unit is an event that could not have been anticipated by the landlords and which was outside the landlords' control.

For this reason, it is my finding that there was an extenuating circumstance that prevented the landlords from using the rental unit for the stated purpose.

Taking into careful consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the tenants have, for the reasons given above, not met the onus of proving their claim for compensation under section 51(2) of the Act.

Claim for Compensation (Additional \$2,400)

The tenants seek an additional \$2,400 for the difference between what they were paying in rent to what they paid in rent at a new rental unit after the tenancy ended. Their application includes this additional compensation under section 51 of the Act.

However, section 51 of the Act provides for only two compensatory forms of relief: (1) sections 51(1) to 51(1.2) of the Act provide compensation equivalent to one month's rent when a tenant is issued a Two Month Notice to End Tenancy for Landlord's Use of Property; and (2) section 51(2) of the Act provides compensation equivalent to twelve months' compensation when a landlord does not use the rental unit as stated in the notice to end tenancy. There is, therefore, no additional compensation that may be sought under this section of the Act.

Claim for Application Filing Fee

Section 72 of the Act permits me to order compensation for the cost of the filing fee to a successful applicant. As the tenants did not succeed in this application their claim for the filing fee is dismissed.

Conclusion

The application is dismissed, without leave to reapply.

This decision is made on delegated authority under section 9.1(1) of the Act.

Dated: November 8, 2021

Residential Tenancy Branch