Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: MNRL-S, MNDL-S, FFL
Tenants: MNDCT, OLC, FFT

Introduction

This hearing dealt with cross Applications for Dispute Resolution with both parties seeking monetary orders. In addition, the tenants sought an order to have the landlord comply with the *Residential Tenancy Act (Act)*, regulation and/or tenancy agreement.

The hearing was originally convened on March 7, 2022 and conducted via teleconference. Due to insufficient time, I adjourned the hearing, and it was reconvened on April 11, 2022. The landlord, their agent and legal counsel as well as both tenants and their legal counsel attend the hearing.

At the outset of the first hearing, I noted that legal counsel for the landlord had submitted their submissions 3 days prior, contrary to the requirements set forth in the Residential Tenancy Branch Rules of Procedure. I also note that the landlord's Application for Dispute Resolution was filed after the tenants' Application and, for the purposes of serving their evidence must comply with Rule of Procedure 3.3.

Rule of Procedure 3.3 requires that all evidence supporting their cross application must be received by the other party not less than 14 days prior to the hearing. However, legal counsel for the tenants acknowledged receipt of the late submission and was prepared to proceed.

In addition, and in the interests of providing a fair opportunity for both parties, I also allowed the tenants' legal counsel to provide a copy of their written submissions during the adjournment. Legal counsel for the landlord did not object.

As a result, I have considered the submissions made by legal counsel for both parties. Neither party raised any other significant issues with the service of the Applications for Dispute Resolution; notices of hearing; or evidence. The landlord confirmed receipt of

the tenants' hearing documents on December 13, 2021 and the tenants confirmed receipt of the landlord's hearing documents on February 3, 2022.

I also note that the tenants submitted their Application for Dispute Resolution on November 29, 2021, the same date that they completed their move out condition inspection with the landlord's agent. On their Application, they indicated that the tenancy was a "current tenancy" and sought, as noted above, an order to have the landlord comply with the *Act*, regulation or tenancy agreement.

Specifically, they wrote:

> "The landlord or his agent have breached the *Act* at various times, including accessing the apartment without prior notice or consent, using the tenants' designated parking spaces without prior notice or consent, and failing to provide rental receipts. The landlord has also failed to repair the above noted deficiencies in the property, preventing the tenants from quiet use and enjoyment of the property. These breaches prevented the tenants from using the property at all during the tenancy."

As all of the identified issues in their request for the order to have the landlord comply with *Act*, regulation, or tenancy agreement would be issues of concern if the tenancy were to continue and have no impact after a tenancy ends, I have amended the tenants' Application to exclude the matter of an order for the landlord to comply.

I also note that on the description of their monetary claim the tenants wrote:

> "The property has been uninhabitable for the duration of the lease. In particular, a foul odour has been constantly present in each of the property's three bathrooms since the tenants took possession of the property. The landlord was aware of this odour prior to the tenants taking possession. The tenants have not had quiet enjoyment of the property at any time during the tenancy. Other issues have included wastewater in the sink and dishwasher, a broken bathroom fan, and other deficiencies."

As such, I have considered evidence and submissions as they relate to the general issues of the odours; wastewater in the sink and dishwasher; a broken fan, and other deficiencies.

The landlord's counsel written submission raised concern that the phrase "other deficiencies" identified above is contrary the principles of procedural fairness and natural justice allowing the landlord to know the complaint against him. Counsel submitted that I should not consider this generalized claim, as it prevents the landlord "from providing a wholesome response to this aspect of their claim."

I also note that after identifying this concern counsel then provided written submissions and documentary evidence to address all of the "other deficiencies". As such, I find there has been no prejudice to the landlord on this point and I have considered this aspect of the tenants' claim.

In regard to the quantum claimed by the tenants on their Application, I note that their monetary claim is identified as $35,000.00, which is the statutory limit for claims for compensation for losses and damages under the *Act*. I also note that the description for this claim, as noted above, is solely for compensation and does not identify that the tenants are seeking return of the security and pet damage deposits.

However, in the Monetary Order Worksheet (MOW) submitted by the tenants they indicate the total of their claim is $39,614.00 and includes "return of rent and deposit". While the tenants did not provide a breakdown of the amounts, I determined that the deposits currently held by the landlord total $3,300.00.

As the tenants did not identify on their Application that they were seeking return of the security and pet damage deposit, I note that they cannot amend their Application but noting it on the MOW, I cannot consider their request for return of these deposits as part of their Application.

If I deduct the amount of deposits from the tenants' claim I note this reduces their claim to $36,314.00. However, this is still above the statutory limitation I can consider. As such, I have considered their claim of up to $35,000.00 only and note that the tenants are barred from seeking any further compensation on these matters above that amount.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent; for compensation for repairs required at the end of the tenancy; for all or part of the security deposit and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 26, 37,38, 44, 45, 67, and 72 of the *Act.*

The issues to be decided are whether the tenants are entitled to a monetary order for compensation for loss of quiet enjoyment and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 28, 67, and 72 of the *Act.*

Background and Evidence

The tenant submitted a copy of a tenancy agreement signed by the parties on May 5, 2021 for a one year and one day fixed term tenancy beginning on June 1, 2021 for a monthly rent of $6,200.00 due on the 1st of each month with a security deposit of $3,100.00 and a pet damage deposit of $200.00 paid.

There is no dispute between the parties that due to some repairs being required at the start of the tenancy, the tenants did not take possession of the unit until June 7, 2021. As result, the parties also agree that the landlord agreed to refund a per diem amount of rent and the tenants therefore paid only $5,314.00 rent for the month of July, 2021 to accommodate the refund.

I also note that the tenants have provided in their written sworn statements that they did not spend one night in the rental unit for the duration of the tenancy. The female tenant acknowledged in her statement that she maintained another rental property in the area with an intention to completely move into the rental unit and then give up her other rental property that was on a month-to-month basis.

The landlord acknowledges that prior to the tenants moving to the rental unit, they had lived in the rental unit and that there had been a “slight” odour issue that emanated from the hallway bathroom when he did not use it but that when he used it on a more regular basis the odour would dissipate.

Prior to the start of the tenancy, the landlord contacted the strata to investigate the issue when the building also having issues with back-ups in the sewer stack. Repairs had been made to another unit on the property that was hoped would result in a fix for the back-up issues.

Prior to the start of the tenancy, the landlord had technicians replace the toilet’s wax seal; treat the toilet, vanity and shower drains treated with industrial cleaner. The technicians also recommended opening up the ceiling to inspect for cracked pipes.

When the technicians returned, they found the odour had dissipated but they still proceeded with checking the pipes and found no leaks.

The landlord also noted that it was during this work that the technicians discovered a separate issue that required replacement of flooring, which is the work that was completed and delay the tenants from taking possession of the unit.

The parties agree, as noted in the move-in Condition Inspection Report (CIR), that there was the “smell of standing water” in one of the bathrooms in the unit. The parties describe this as the hallway bathroom, which is one of three bathrooms in the unit.

The tenants submit that the odour started out mild but over several weeks it increased significantly and that by mid August 2021 it had move into the master bedroom bathroom as well. The tenants sent an email to the landlord on August 19, 2021 updating them about the smell getting worse.

The tenants acknowledge the landlord responded the same day and said he would take it up with the strata as it had been an ongoing issue. The tenants also acknowledge the landlord responded on August 23, 2021 stating that he had arranged for the strata to look into the issue but that the tenants responded back to the landlord to hold off, as they thought they may have determined the problem.

On August 30, 2021, the tenants wrote to the landlord with an update and elaborated that they will “try to see what else I can do if it’s just the toilet causing the odor” and that they will get back to the landlord with any updates.

The landlord provided that in early September they and their agent attended the property with the female tenant. While the landlord and their agent could not smell anything they report that the female tenant indicated the odour was “burning her nose”.

The female submitted that she has significant allergies which bother her respiratory system. Despite not spending a single night in the unit the female tenant submitted that she had spent time in it preparing for move in. She provided that she had showered and napped in the unit a number of times and whenever she spent time there, she was overwhelmed by the odour and would get headaches and nausea.

The parties agree also that in early September 2021 the landlord offered to accept a mutual agreement to end the tenancy to which the tenants countered that they would consider doing so if the landlord considered some compensation. The request for

compensation ranged from one's month rent to $20,000.00 for costs anticipated by the tenants for things like storage of some of their belongings.

By mid to late September 2021 the landlord and tenant continued to discuss possible approaches. On September 29, 2021 the tenants' suggested that if the landlord was correct in that the issue may correct itself with regular use of the rental unit it should resolve itself by December and that if it wasn't then they would agree to mutually agree to end the tenancy. It was in this correspondence the tenants suggested ending the tenancy and asked for one month's rent.

On October 4, 2021, the tenants reported that there was sewage in the dishwasher. On the same date the landlord arranged for someone to come and investigate it.

On October 8, 2021 the tenants wrote the landlord advising that the repair to the dishwasher was made but that the odour case by that was still bothersome and identified a number of newly discovered deficiencies, some of which resulted from the work the done when repairing the dishwasher.

Later the same day the landlord wrote back to the tenants that he had arranged from someone to come and look at the other issues identified and suggested doing a test to see where the originally complained about odour was originating from. He suggested wrapping the toilet in saran wrap and seeing if the odour was still present. As the landlord was out of town, he copied the strata manager on the emails, asking for the manager and the tenants to coordinate an appropriate date.

The parties agreed to this approach. On October 31, 2021 the landlord wrote to the tenants stating he was anxious to hear the results but the tenants responded, on November 2, 2021, that they never heard from the strata property manager to make arrangements for the saran wrap test and they would like to agree to the landlord's offer for a mutual agreement to end the tenancy.

In support of the landlord's position the landlord has submitted the following documents into evidence:

- Copies of correspondence between themselves and the strata;
- Copies of reports from their plumbing provider;
- An unsigned statement attributed to the landlord's "handyperson" attesting to their experience in relation to the odour issue;

- An unsigned statement attributed to the occupant in the unit next to the rental unit attesting to their experience in relation to the odour issue;
- An unsigned statement attributed to the current occupants in rental unit indicating they have not notice any odour.

The landlord submitted that on November 5, 2021 he received an email from the tenants saying that they were agreeable to December 31, 2021 but that they might vacate earlier. On November 23, the tenant wrote an email to the landlord confirming they would be out of the unit before the end of November.

The tenants vacated the rental unit prior to November 29, 2021, and a move out condition inspection was completed. A CIR was completed to record the moveout condition of the rental unit with the tenant's providing their forwarding address on the document.

The tenants submit the landlord is barred from claiming the tenancy ended later than November 29, 2021 because that date is listed on the CIR as the move-out date. In the alternative, the tenants submit that they rely on equity because despite their attempts to seek assistance from the landlord the tenants determined that the landlord was not interested or able to resolve the issue and was not interested in making the rental unit habitable.

The tenants also argue that the landlord materially breached the tenancy agreement by failing to ensure quiet enjoyment of the rental unit and the claimants cannot be expected to pay rent for a property that they do not have access to or is uninhabitable due to the odour.

The landlord seeks rent for the month of December 2021 as the tenants moved out of the unit prior to the mutually agreed upon date of December 31, 2021. The landlord submitted that the tenants refused to pay rent for December citing incomplete repairs to the rental unit.

The tenants seek compensation in the form of the return of rent for the period beginning in June 2021 to November 2021, in the total amount of $36,314.00 to a maximum of $35,000.00 noted above.

The landlord also seeks compensation for repairs required to a closet in the master bedroom because the tenants had removed the existing shelving with the intention of replacing it with something they wished, which was never completed prior to the end of

the tenancy. The landlord seeks $500.00 for this work and has provided a copy of a quote in support of the claim.

The tenants submit the landlord is barred from claiming these repairs because the CIR does not list this issue as damage for which the tenant is responsible.

In the alternative the tenants submit that the landlord is also barred from claiming this damage because they filed their claim outside of the 15 days required to submit a claim to retain the security deposit. I note the tenants counsel reference Section 28(1)(d), however, the correct reference, I am assuming, they wished to make was to Section 38(1)(d).

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

To be clear, in this decision, the burden rests with the landlord to provide sufficient evidence to establish that rent is owed and that the tenants owe for the repairs to the closet and the burden for the tenants' claim for compensation for loss of quiet enjoyment rests with the tenants.

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

Section 28 of the *Act* stipulates that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(a) reasonable privacy;
(b) freedom from unreasonable disturbance;

> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted]; and
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline 6 states:

> "A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of an entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.
>
> Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.
>
> In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises."

While both tenants assert that the rental unit had a constant odour that was so horrendous that it prevented them from using the rental unit at all during the length of their tenancy, I note that they have provided no evidence to corroborate this claim other than their own testimony.

I also note that both the landlord and his agent acknowledge that there was an odour prior to the tenancy and a faint odour during the move in inspection and when they attended the property in September, there is no such acknowledgement on the move out condition inspection.

Furthermore, documentation submitted from the landlord suggests that there may, from time to time, be plumbing odours in residential properties, including in a letter from the landlord's plumber dated February 22, 2022 where they state:

> "[Plumber] felt there would be a low probability of finding leaks in the pressurized system behind the walls or possible flooring as there was no evidence of current/previous leaks.
>
> [Plumber] described to the owner, the plumbing, venting and mechanical in an older building can exhibit temporary various anomalies given the complexity and interconnectedness of the units and stacks within the building. Depending on the mechanical, HVAC, plumbing scope of work within the building going on at various times, it is possible and unavoidable to prevent odours travelling throughout the system and entering into various units as units are not airtight."

Section 32(1) of the *Act* states a landlord must provide and maintain residential property in a state of decoration and repair that

> (a)complies with the health, safety and housing standards required by law, and
> (b)having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

I also recognize it is the landlord's responsibility to maintain a rental unit in state of repair that make it suitable for occupation and as such when a report is made by a tenant that a problem exists that the landlord must, at least, investigate and make any appropriate repairs, if necessary, within a reasonable time.

Despite the recording that there was a "smell of standing water" on the move in CIR; there is no notation that the tenant requested any correction to the situation or that the smell prevented the tenants from taking possession.

Furthermore, despite several emails between the parties over the months of June and July, there is no mention, from the tenants, of the odour becoming more of a problem until August 19, 2021. As such, in the absence of any report that there was a problem that needed to be dealt with, I find it is reasonable that the landlord did not take any action during this period.

Even once the tenants did report the issue and, despite the landlord's immediate response, it was the tenants who suggested that the landlord wait to implement his suggested course of action – which had been to bring a professional in to investigate.

In addition, while there was clearly a misunderstanding on the part of the strata property manager's part to contact the tenants to set up the "saran wrap" test, it was the landlord who reached out to the tenants to see what the results were and he did so three weeks after he had asked for it to be set up. The tenants provided no explanation as to why they did not report back to the landlord in a timely manner that they had not heard from the strata property manager.

I also note that when the landlord and their agent attended the property in September, after the tenants submitted their complaint and asked the landlord to hold off on bringing anyone in to investigate, the landlord and their agent barely smelled anything and yet the female tenant indicated that her nose was burning.

As such, in relation to the odour issue, I find that there is more evidence than not that while there may have been some odour it was not as significant as the tenants assert.

I do accept from the submissions of both parties that there was, at least, at times odours in the rental unit but I find the tenants have failed to establish that it rendered the rental unit uninhabitable at any point during the tenancy.

In relation to the tenants' assertion that the landlord failed to respond to and make other repairs, I find the evidence submitted by both parties actually shows the opposite to be true. Whenever the tenants reported an issue to the landlord, it appears, that they responded either immediately or within a day or two of the original report.

I also note that it was the landlord that had the odour issue investigated prior to the start of the tenancy and that the landlord agreed to delay the possession date and reduce the tenants' first month rent in order that they could make repairs to the property. In addition, the landlord arranged for other repairs to be completed, after the tenants took possession but before they planned to move into the rental unit.

As a result, I find the tenants have failed to establish that the landlord breach either the tenants' right to quiet enjoyment pursuant to Section 28 of the *Act* or the landlord's obligations under Section 32 to maintain and repair the rental unit.

As such, I dismiss the tenants' Application for Dispute Resolution in its entirety, without leave to reapply.

Section 44 of the *Act* allows for a tenancy to end, among other reasons, by mutual agreement or pursuant to a notice provided under Section 45 from the tenant.

Section 45(2) also allows a tenant to 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.

Section 45(3) allows that ff 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 Policy Guideline 8 states that 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;
- they believe the problem is a breach of a material term of the tenancy agreement;
- the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- if the problem is not fixed by the deadline, the party will end the tenancy.

As I have determined that the landlord did not breach their obligation to the tenants for quiet enjoyment or failure to complete repairs and the tenants have not identified any other breaches of material terms of the tenancy, I find the tenants cannot end the tenancy for breach of a material term.

Even if I was satisfied that the tenants had a right to end the tenancy based on a breach of a material term, I find the tenants did not provide the notice required outlined in Policy Guideline 8 where they must identify the problem; specifically state it is a breach of a material term; and then give a deadline for correction. While they may have provided a date for the landlord to make repairs, they still did not identify that they intended to end the tenancy because they felt it was a breach of a material term.

I also note that Section 44 states that a tenancy ends when a tenant vacates the rental unit. While the tenants vacated prior to the November 29, 2021, effectively the tenancy ended on the day the returned keys to the landlord, which was November 29, 2021.

However, in contrast to the tenants' position that the landlord is therefore barred from seeking rent for December 2021, I find that just because the tenancy itself has ended when the tenant vacated the rental unit it does not absolve the tenant from their obligations under the *Act*, regulation or tenancy agreement. In particular, this means, in the case of a fixed term tenancy, the tenant's obligation to pay rent endures until the end of the fixed term, subject to the landlord's obligation to mitigate their losses.

As such, if a landlord is not able to re-rent a rental unit until the end of the fixed term despite actively seeking a new tenant, the tenant may be held responsible for the full payment of rent until the end of the fixed term. In the alternative, if the landlord rents the rental unit to a new tenant within a short period of time but did so by reducing the amount of rent, the tenant may still be considered responsible to make up the difference rent that the landlord has had to loss.

In the case before me, however, I accept the parties, mutually agreed to end the tenancy, including the obligations for the tenant to pay rent to end of the fixed term.

However, in regard to a specific date that the parties mutually agreed upon, I note in the tenants' email dated November 5, 2021, they accepted that they were "alright with the December 31 date to terminate the lease. We might be able to vacate earlier, but we're still trying to work all of that out."

As such, and in the absence of anything other documentary evidence I find the parties agreed the tenancy would end on December 31, 2021 and the tenants are responsible for the payment of rent until the end of that date.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

Section 60(1) allows that if the Act does not state a time by which an application for dispute resolution must be made, it must be made within 2 years of the date that the tenancy to which the matter relates ends or is assigned.

Section 37 of the *Act* stipulates that when a tenant vacates a rental unit, the tenant must:

a) Leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and
b) Give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

In relation to the tenant's claim that the landlord is barred from making a claim for damage to the rental unit because the landlord did not apply within 15 days, I note that the deadline of 15 days only applies to the landlord's requirement to submit a claim against the deposits not for any damage or other losses suffered as a result of the tenancy.

I also note that Section 38 does not bar the landlord from claiming against the deposit, rather if the application is not submitted within 15 days the landlord is obligated to return double the amount of the deposits, but there is no bar to a claim for damage.

Likewise, the failure to document something in the CIR does not bar the landlord from making a claim for damage to the rental unit, it simply means that the landlord cannot, necessarily, rely solely on the CIR as their support for their position. A tenant may still be held responsible for the cost to repair damages if there is a preponderance of evidence that supports the damage occurred as a result of the tenancy.

In the case before, I am satisfied that the tenants intended to change out the shelving in the closet and that they started that work but failed to restore the closet either to the original condition or to similar fashion. I am satisfied of this based on the acknowledgement of both parties that this was indeed what occurred.

Therefore, I am satisfied that the tenants breached their obligations under Section 37. I am also satisfied the landlord suffered a loss as a result and they have established the value of that loss in the amount of $500.00. I find, in the circumstances, the landlord is not obligated to mitigate these damages, as the landlord had no choice but to reinstall the shelving.

As to the security and pet damage deposits themselves, I find that the tenants surrendered possession of the rental unit and the landlord received the tenants'

forwarding address on November 29, 2021. As such, I find the landlord had until December 15, 2021 to submit their Application claiming against the security and pet damage deposits.

As the landlord submitted their Application for Dispute Resolution on January 18, 2022, I find the landlord failed to comply with the requirements set forth in Section 38(1) and as a result, I find the tenants are entitled to double the amount of both deposits in the amount of $6,600.00, pursuant to Section 38(6).

Conclusion

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **$6,800.00** comprised of $6,200.00 rent owed; $500.00 repairs and the $100.00 fee paid by the landlord for this application.

I order the landlord may deduct the security deposit and pet damage deposit held in the amount of $6,600.00 in partial satisfaction of this claim. I grant a monetary order in the amount of **$200.00**. This order must be served on the tenants. If the tenants fail to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

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: April 18, 2022

Residential Tenancy Branch