Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL, FFL, MNDL, MNDCL / MNDCT, FFT

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlord's application for:

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $19,703.96 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And the tenants' application for:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $3,501.39 pursuant to section 67;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

This matter was reconvened from a prior hearing on August 13, 2021. I issued an interim decision setting out the reasons for the adjournment on that same date (the "**Interim Decision**"). This decision should be read in conjunction with Interim Decision.

All parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The tenants were assisted by counsel ("**EW**").

All parties confirmed that they had received the other's application materials and raised no issues with regards to service.

Issues to be Decided

Is the landlord entitled to:

1) a monetary order for $19,703.96;
2) recover the filing fee?

Are the tenants entitled to:

1) a monetary order of $3,501.39;
2) recover the filing fee?

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 written, fixed term tenancy agreement starting September 1, 2020 and ending August 31, 2021. Monthly rent was $2,475 (excluding utilities) and was payable on the first of each month. The tenants paid the landlord a security deposit of $1,237.50, which the landlord holds in trust for the tenants.

Prior to this tenancy agreement being signed, the tenants rented the rental unit from the landlord pursuant to a prior tenancy agreement, from September 1, 2019 to August 31, 2020.

The rental unit is the basement suite of a single-detached house. The upper unit is rented by other tenants.

At the start of the tenancy, the parties conducted a move-in condition inspection report.

The tenants vacated the rental unit on February 28, 2021 and conduced a move-out condition inspection that same day and the landlord completed a report (the "**move-out report**"). The tenants provided their forwarding address to the landlord on that same day.

The move-out report recorded significant damage to the rental unit at the end of the tenancy. At the hearing, the tenants acknowledged that the rental unit's condition was as described on the move-out report. Additionally, the move-out report indicated that the landlord may make deductions from the deposit for:

- carpet shampooing for three bedrooms
- past-due utilities
- deadbolt replacement
- disposal of dining table and chairs
- paint, labour and supplies
- replacement cost of lightbulbs
- two window screens

The tenants testified that the rental unit flooded multiple times when they lived there: January 31, 2020, December 21, 2020, January 2, 2021, and January 13, 2021.

The parties agree that the floods were likely the result of problems with the underground drainage cause water to penetrate the building's foundation and seep into the floor of the rental unit's living room. The tenants testified that after the January 2020 flood, the landlord dried the living room out and then re-installed the same carpet that had been water-soaked.

The tenants testified that they did not want to sign a new lease once their first lease expired without being sure that the issues causing water to enter the rental unit had been dealt with. They testified that the landlord assured them that they would be. As such they entered into the second tenancy agreement in September 2020.

They testified that contrary to their understanding, the problem with the underground drainage had not been remediated and three separate floods occurred quick succession. After the second flood, on January 8, 2021, tenant CS emailed the landlord stating:

> I am emailing you in regards to the meeting or email we were supposed to have today about our compensation slash ending or tenancy due to the fact that there have been two floods in our house in the past month, we are living with the concrete floor and there is no solution insight for the drainage issue that led to the flood. Not to mention the extreme likelihood that there will be a huge mold problem due to all the moisture that has seeped into the hardwood floor from the foundation. You had all week to discuss the options with your husband and his brother. If you truly had an answer for us, like you were supposed to, you could have just emailed us. I have called, and texted you multiple times today, and have not received an answer. This leads me to believe that you have not actually taken the time to discuss this problem with your husband, or you are trying to avoid this problem altogether. If this is true, you are being incredibly disrespectful and downright irresponsible. You are holding part of our livelihood in your hands, and I cannot believe you are being so cavalier regarding your legal obligations as a landlord, and your moral obligations as a human being.

The landlord responded the next day by email:

> On January 4th, 2021, we all had a meeting to discuss the options, and then I discussed both options with both partners. They took into consideration that out of the total 1400 square foot suite, only 200 square feet (carpeted portion of the living room) was impacted. They are willing to reduce the monthly rent by $300, due to lack of carpet in part of the living room, because of the rainwater soaking the carpet.
>
> The current rent will be $2,175 plus utilities affective on February 1st, 2021. As soon as the carpet is installed in the living area your monthly rent will go back to the original amount of $2,475 per month plus utilities as per our original fixed term lease agreement.

On January 31, 2021 tenant CS emailed the landlord and stated:

> […] we are informing you that we are declaring this is a frustrated tendency due to the event of multiple floods, and vacating the property by or on March 1st. I

> have cancelled all of the postdated checks in your possession so do not try to cash them.
>
> As you are aware the suite has flooded a total of four times within the last year and a half.[…] Following the first flood on January 31, 2020 it was discovered that the reason for the flood was an issue with the underground drainage system outside and around the house. You informed us that you would be having the issue fixed during the summer/fall of 2020, but the repairs never took place.
>
> […]
>
> As a result of the neglected outer drainage system the suite has since flooded three more times in the span of about a month. Our living area has been without carpet since December 21st, 2020 leaving the floor as bare concrete, and there is the potential for the suite to flood every time it rains. When the suite is flooded the groundwater has seeped up through the hardwood floor in the kitchen and hallway which will almost definitely result in the growth of mold.
>
> The outside drainage issue, the reason for the floods, cannot be fixed in a reasonable amount of time due to the rainy season […]. It declared this a frustrated tenancy as we cannot live in a suite has broken the original terms of our lease (see clause 10-a of our lease). The suite is no longer in a reasonable state of good repair and is thus not fit for tenants.
>
> Once again we would like to make it clear that the main and most important issue is the improper drainage system that has led to the floods, not the lack of carpet in the living room as you have previously tried to imply (although the bare concrete floor is still unacceptable).

The landlord did not accept the tenants' declaration that the tendency was frustrated and demanded payment of rent on February 1, 2021. The tenants refused to pay, and the landlord issued a 10-day notice for non payment of rent.

The landlord testified that it made repairs to the drainage system in June 2020, it admitted that that was not sufficient to fix the problem. She testified that the whole drainage system was replaced in August 2021.

The tenant submitted photographs of the damage caused by the flood which include waterlogged carpets, pools of water on unfinished floors, and water on the cement floor of a closet which abuts onto a laminate hardwood floor.

The landlord does not dispute that the floods occurred, or that it caused damage to the rental unit as alleged by the tenants. Rather, she argued that it was only a small portion of the rental unit that was affected by the floods, and that this did not cause the rental unit to become unlivable, as the tenants had full use of their bedrooms, bathrooms and

kitchen, and as once the water was dried from the living room, they had use of the living room (albeit without carpet).

The landlord argued that the tenants were not entitled to break their fixed term lease, and by moving out prior to the end of the fixed term, she lost the ability to earn income that she otherwise would have generated pursuant to the tenancy agreement (rent for March to August 2021) in the amount of $14,850.

The landlord testified that she was not able to re rent the rental unit until after the end of the fixed term period in support of this she submitted a screenshot of a Craigslist posting and a corresponding email showing that she posted the unit for rent in February 2021. She did not provide any documentary evidence as to what efforts she made to re-rent the unit after February, or what the reasons were for being unable to re-rent the unit. She testified she re-rented the rental unit starting September 1, 2021.

The landlord also seeks to recover February 2021 rent, which remains unpaid. Additionally, she testified, and the tenants admitted, that the tenants had failed to pay utilities bills for the period of time ending February 10, 2021 in the amounts of $195.60 (electricity) and $164.30 (water).

The landlord also seeks a monetary order for the cost of repairing the damage set out on the move-out report as follows:

Description	Amount
Carpet cleaning	$315.00
Paint, primer and supplies	$136.87
Pot light and bulb replacement	$35.66
Cleaning	$160.00
Painting bedroom walls (labour)	$100.00
Drywall repair and kitchen cabinet repair	$62.50
Replacement window screens	$199.50
Total	**$1,009.53**

In summary, the landlord seeks a monetary order of $18,694.43, calculated as follows:

Description	Amount
Repairs to rental unit	$1,009.53
February rent	$2,475.00
Unpaid utilities	$359.90
Loss of rent (6 months)	$14,850.00
Total	**$18,694.43**

As stated above, the tenants did not deny they caused damage to the rental unit as set out on the move-out report and did not dispute these amounts. They applied for the return of the balance of the security deposit ($227.97).

The tenants disputed that they should be required to pay February's rent or be responsible for reimbursing the landlord any amount for loss of rent for March to August 2021. They argued that the tenancy was frustrated as of December 21, 2021, when the rental unit flooded the first time after the second tenancy started (and after they understood the issue causing the flooding had been fixed).

Further to this point, they argued that they were entitled to the return of the $798.39 of December 2020's rent (representing a prorated amount from December 21 to 31, 2021) as well as all of January 2021's rent ($2,475).

In summary, the tenants seek a monetary order of $3,501.39, calculated as follows:

Description	Amount
Return of security deposit	$1,237.50
Credit for deductions by consent	-$1,009.53
Return of pro rated December 2020 rent	$798.39
Return of January rent	$2,475.00
Total	**$3,501.36**

In the alternative, the tenants argued that they were entitled to end the tenancy agreement ended the tenancy due to the landlord breaching a material term of the tenancy agreement (clause 10(1)(a), requiring the landlord to provide and maintain the residential property in a reasonable state of repair suitable for occupation) and failing to make the necessary repairs within a reasonable amount of time.

Analysis

The tenants do not dispute that the landlord is entitled to $1,009.53 due to damage caused to the rental unit during the tenancy. As such I order the tenants to pay the landlord this amount. Additionally, the tenants conceded that they owed $359.90 in unpaid utilities. As such, I ordered the tenants to pay the landlord this amount.

The remaining portions of the two applications relates to the question of whether the tenants were permitted to vacate the rental unit when they did or whether they must compensate the landlord for unpaid rent and loss of income. I will address the tenant's arguments of frustration and material breach in turn.

RTB Policy Guideline 34 addresses the doctrine of frustration. It states:

> 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.
>
> [emphasis added]

In the present case, I do not find that the repeated flooding of the rental unit caused the tenancy to become frustrated for three reasons.

First, the evidence shows that the possibility of the rental unit flooding was within the contemplation of the tenants at the time the second tenancy agreement was entered into. Indeed, the tenants' evidence was that they were worried about the possibility the rental unit would become flooded (as it had at the start of the first tenancy agreement) when they entered into the second tenancy agreement, and only agreed to do so once they received assurances that the landlord had taken steps to prevent this from happening again. This also indicates that any of the floods of the rental unit were entirely foreseeable by the parties.

Second, if I accept the tenants' evidence that the landlord failed to take adequate steps to repair the underground drainage system after the January 2020 flood, it follows that the floods in late 2020 and early 2021 were the result of the negligence of the landlord in failing to make proper repairs. If this were the case, then it could not be said that the flooding occurred without the fault of either party. It would seem that the landlord's failure to repair a known issue contributed to the flood occurring.

And third, in light of the fact that the tenants continued to reside in the rental unit for over two months after the December 21, 2020 flood, I cannot find that the circumstances of the tenancy had been so radically changed that the fulfillment of the contract was impossible. The rental unit could still be used as living accommodation, albeit be it in a reduced and less functional fashion.

For these reasons I do not find that the tenancy was frustrated.

Section 45(3) of the Act allows a tenant to end a tenancy in the event the landlord breached a material term of the tenancy agreement. It states:

> **Tenant's notice**
> 45(3) If 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.

RTB Policy Guideline 8 sets out the steps a tenant must follow in order to comply with the requirements of this section. It states:

> 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;
> • that they believe the problem is a breach of a material term of the tenancy agreement;
> • that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
> • that if the problem is not fixed by the deadline, the party will end the tenancy.

The tenants did not follow these steps. In CS's January 8, 2021 email, she alleged that the landlord had no intention to repair the drainage system, but did not set out a deadline by which the landlord must repair it or else the tenants would end tenancy. In the next email CS sent (on January 31, 2021), the tenants unilaterally declared that the tenancy was frustrated, advised the landlord that they would be moving out by March 1, 2021, and advised them that they had cancelled their pre-paid rent cheques.

As such, I cannot find that the tenant's have satisfied the requirements of section 45(3) of the Act which would allow them to have ended the fixed term tenancy.

However, this does not mean that the landlord is entitled to recover the amount she has claimed.

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

The fourth step is of particular relevance in this case.

The landlord did not provide any evidence as to the efforts she made after the tenants vacated the rental unit to secure new tenants beyond a single craigslist post. There is no evidence that she advertised the unit for re-rent after February 2021 or whether she showed it for rent to any other tenant. The landlord is required to take reasonable steps (such as relist the rental unit, adjust the price to attract new applicants, for example) to mitigate her loss as the result of the tenants' breach of the tenancy agreement. She did not prove that she did this. Additionally, given that the repairs to the underground drainage system were not completed until August 2021, I am not satisfied that the rental unit was suitable for rent until that date, which may have contributed to the inability for the landlord to rent it until September 2021. For this reason, I find that the landlord failed to satisfy the fourth step set out above.

Additionally, in the event that this is not sufficient to establish the tenant failed to minimize her loss, I find that by not adequately repairing the underground drainage system after learning it was defective in January 2020, the landlord failed to mitigate the loss caused by the tenants' breach. Had the landlord made the required repairs when the need for them was discovered, the tenants would not most likely not have vacated the rental unit when they did.

As such, I decline to award the landlord any amount for loss of rent for March to August 2021.

Section 26 of the Act states:

> **Rules about payment and non-payment of rent**
> 26(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

As such, given that the tenants occupied the rental unit for all of February 2021, and that rent was due on the first of the month, I find that the tenants breached this section of the Act. I order the tenants to pay the landlord $2,475, representing payment of rent for February 2021. The fact that the landlord may have breached the Act or the tenancy agreement does not permit the tenants to withhold rent when it is due.

As the tenants were unsuccessful in their application, I decline to order that they may recover the filing fee from the landlord. As the tenants were partially successful in defending against the landlord's application, I decline to order that the landlord may recover the filing fee from the tenants.

Pursuant to section 72(2) of the Act, the landlord may retain the security deposit in partial satisfaction of the monetary orders made above.

Conclusion

Pursuant to sections 67 and 72 of the Act, I order that the tenants pay the landlord $2,609.93, representing the following:

Description	Amount
Repairs to rental unit	$1,009.53
February rent	$2,475.00
Unpaid utilities	$359.90
Security deposit credit	-$1,237.50
Total	**$2,606.93**

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 13, 2022

Residential Tenancy Branch