



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

On December 1, 2021, the Landlord made an Application for Dispute Resolution seeking a Monetary Order for compensation pursuant to Section 67 of the *Residential Tenancy Act* (the “Act”), seeking to apply the security deposit towards this debt pursuant to Section 67 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Landlord attended the hearing, and J.G. attended the hearing as a representative for the Tenant. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

The Landlord advised that the Tenant was served the Notice of Hearing and evidence package by registered mail on December 9, 2021, and J.G. confirmed that the Tenant received this package. Based on this undisputed testimony, I am satisfied that the Tenant has been duly served the Tenant’s Notice of Hearing and evidence package. As such, I have accepted all of the Landlord’s evidence and will consider it when rendering this Decision.

J.G. advised that the Tenant's evidence was mailed to the Landlord on December 28, 2021, and the Landlord confirmed that he received this. As such, I have accepted all of the Tenant's evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to a Monetary Order for compensation?
- Is the Landlord entitled to apply the security deposit towards this debt?
- Is the Landlord entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on July 1, 2020, and that the tenancy ended when the Tenant gave up vacant possession of the rental unit on November 30, 2021. Rent was established at \$1,500.00 per month and was due on the first day of each month. A security deposit of \$750.00 was also paid. A signed copy of the tenancy agreement was submitted as documentary evidence for consideration.

J.G. advised that the Tenant provided a forwarding address by email; however, he was not sure when this was done.

The Landlord advised that the Tenant provided her forwarding address in writing on November 30, 2021, and he subsequently made this Application using the address provided. J.G. confirmed that this was the correct address for the Tenant.

The Landlord advised that he is seeking compensation in the amount of **\$1,500.00** for December 2021 rent because the Tenant gave him notice by email on November 8, 2021, to inform him that she was moving out on November 30, 2021. As she did not provide any written notice, of one full month, to end her tenancy as required by the *Act*, the Landlord suffered a rental loss for December 2021. He referenced the Tenant's emails, submitted as documentary evidence, to support this position.

J.G. advised that the Tenant served her written notice to end her tenancy by placing it in the Landlord's mailbox on October 25, 2021. He referenced the letter submitted as documentary evidence to support this submission. However, there was no proof of service to corroborate this. He stated that the Tenant then emailed her notice to end tenancy on November 8, 2021 because there was no response from the Landlord regarding the October 25, 2021 notice to end tenancy.

He made submissions with respect to the Landlord controlling the heat, which left the Tenant in "freezing" conditions. He referenced a February 2021 letter about this being a breach of the tenancy, and he suggested that the tenancy ended due to this breach.

The Landlord denied ever receiving the October 25, 2021 notice from the Tenant. He stated that he has a Tupperware box in front of his property that acts as his mailbox, and that the only time he ever saw this note was when it was presented as documentary evidence by the Tenant.

Analysis

Upon consideration of the testimony before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 38(1) of the *Act* requires the Landlord, within 15 days of the end of the tenancy or the date on which the Landlord receives the Tenant's forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlord to retain the deposit. If the Landlord fails to comply with Section 38(1), then the Landlord may not make a claim against the deposit, and the Landlord must pay double the deposit to the Tenant, pursuant to Section 38(6) of the *Act*.

Based on the undisputed evidence before me, I am satisfied that the Tenant provided a forwarding address in writing to the Landlord on November 30, 2021, and that the Landlord made the Application to claim against the security deposit on December 1, 2021. As the Landlord made an Application to claim against the security deposit within 15 days of November 30, 2021, I am satisfied that the Landlord complied with the requirements of the *Act* with respect to the handling of the security deposit at the end of the tenancy. As such, the doubling provisions of this Section do not apply in this instance.

With respect to the Landlord's claims for damages, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

I also find it important to note that 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. Given the contradictory testimony and positions of the parties, I must first turn to a determination of credibility. I have considered the parties' testimonies, their content and demeanour, as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

When reviewing the totality of the evidence before me, there is no dispute that the tenancy reverted to a month-to-month tenancy after the fixed term ended on June 30, 2021. Furthermore, the tenancy effectively ended when the Tenant gave up vacant possession of the rental unit on November 30, 2021. Sections 44 and 45 of the *Act* set out how tenancies end and also specify that the Tenant must give written notice to end a tenancy. As well, this notice cannot be effective earlier than one month after the date the Landlord receives the notice, and 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. In essence, the Tenant must have given one, whole month's notice in writing to end the tenancy. So, if the Tenant wanted to end her tenancy on November 30, 2021, she would have been required to give her written notice so that it was deemed

received prior to November 1, 2021. Section 52 of the *Act* sets out the form and content of a notice to end a tenancy.

Regarding the Tenant's notice to end her tenancy, I have before me evidence from the Landlord of emails exchanged on November 8, 2021, which support his submission that this was the first time that he was informed by the Tenant that she would be ending her tenancy effective for November 30, 2021. On the contrary, I have J.G.'s testimony that the Tenant actually placed a notice to end her tenancy in the Landlord's mailbox on October 25, 2021. However, I find it important to note that the Tenant did not provide any proof of service of this having been done. While J.G. claimed that his wife witnessed this, but was unavailable to testify at the hearing, it would not have been difficult to provide a signed document from her confirming that she witnessed this service. Furthermore, there was also no other documentary evidence submitted to corroborate this service.

Moreover, I note that J.G. stated that the reason the Tenant emailed the Landlord on November 8, 2021, about ending her tenancy on November 30, 2021, was because the Landlord never responded to the alleged notice that was placed in his mailbox on October 25, 2021. It is not clear to me why the Tenant would feel the need to inform the Landlord again if she had already delivered a notice to end her tenancy, as purported. Furthermore, if the Tenant was truly concerned about this issue, it is not clear to me why she did not indicate in her November 8, 2021 email to end her tenancy that this was in relation to her October 25, 2021 notice that was already provided. I find that this is not consistent with common sense or ordinary human experience, and this causes me to doubt the reliability of J.G. testimony.

In addition, when reviewing the email thread on November 8, 2021, which was initiated by the Tenant stating only that, "I will be moving out at the end of the month.", the Landlord immediately replies and informs the Tenant that she must provide at least one, whole month's notice to end her tenancy and that based on this email, her tenancy would effectively then actually end at the end of December 2021. I find that this reply supports the Landlord's submission that this was the first time that he was aware that the Tenant wanted to end her tenancy.

In response to this email, the Tenant then replies, "Sorry, I'm moving at the end of the month." Given that she had been informed by the Landlord that her email constituted late notice to end her tenancy and that it was not sufficient pursuant to the *Act*, it is not clear to me why the Tenant would not have then referenced her October 25, 2021

written notice to end her tenancy, if she truly did deliver this to the Landlord. The Landlord then replies, "At the end of November is not a full month notice. Unless you mean the end of December?" to which the Tenant only responded, "End of November." Again, the Tenant had been informed of her requirements under the *Act* for the proper notice timeframe, and there has been no mention from her about the existence of any October 25, 2021 notice to end her tenancy. This causes me to further doubt the legitimacy and truthfulness of J.G.'s testimony or portrayal of events.

On November 8, 2021, at 5:14 PM, the Landlord then sends an email to the Tenant reiterating that this late notice would mean that December 2021 rent is still owed and that she would be entitled to stay until December 31, 2021. The Tenant then replied at 5:28 PM stating, "I'm leaving on November 30th before midnight. I'm not paying Dec 1st rent. You have my damage deposit for half months [sic] rent, which is not returned."

As noted above, it is more than apparent that the Landlord had informed the Tenant of the requirements of the *Act* to end her tenancy, and how she had failed to comply with those requirements. Yet, there is no evidence that the Tenant ever brought up the October 25, 2021 written notice that was allegedly served, as suggested by J.G. Had this truly happened, it does not make any logical sense why the Tenant would not have mentioned this in any of the multiple emails that were exchanged in regards to the matter of failing to provide the proper notice and consequently owing December 2021 rent.

When assessing the testimony of the parties and the totality of the documentary evidence submitted, on a balance of probabilities, I am doubtful of the veracity of J.G.'s testimony, and I question the credibility of his submissions on the whole. I find it more likely than not that this October 25, 2021 notice to end tenancy was fraudulently created after the fact in an attempt to portray an alternate version of events that did not exist. I note that during the hearing, J.G. provided dubious and inconsistent testimony, which had already caused me to doubt the truthfulness of the details of what he was testifying about. As a result of the doubts created by his questionable testimony, in conjunction with my findings above, I give no weight to the credibility or reliability of his testimony. Ultimately, I am satisfied that J.G. was being entirely untruthful and that the first time the Tenant informed the Landlord that she would be ending her tenancy was by email on November 8, 2021.

With respect to the matter of a breach of a material term, I find it important to note that Policy Guideline # 8 outlines what a material term of the tenancy is and how a tenancy

is permitted to end early if a material term was breached and not corrected within a reasonable period of time.

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.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

When reviewing the evidence before me, I accept that the Tenant served the Landlord with a letter on February 24, 2021 informing him that she believed a material term of the tenancy was breached and that this issue was happening as early as December 2020. However, I do not find that the Tenant has submitted sufficient, or compelling documentary evidence to support the position that there was indeed a breach of a material term.

Furthermore, if there was in fact this breach, and if it was so significant that it warranted requiring the Landlord to fix it or risk that the tenancy would end, it is not clear to me why the Tenant would continue to live there for another nine months before giving her notice to end her tenancy. This is not consistent with common sense or ordinary human experience, especially since there were many months in this time period which were likely cold, and heat would have been required. Consequently, I am doubtful that this tenancy was actually ended because of a material breach of the tenancy that was brought to the Landlord's attention in February 2021. As such, I do not find that the Tenant was permitted to end the tenancy any earlier than by providing the Landlord with one, whole month's written notice to end her tenancy.

Based on my assessment of the documentary evidence and testimony provided, I do not find that the Tenant ended the tenancy in accordance with the *Act*. Therefore, I find that the Tenant vacated the rental unit contrary to Sections 45 and 52 of the *Act*. Moreover, I find that the evidence indicates that as a result of the Tenant's actions, the

Landlord suffered a rental loss. Given that the Landlord had been provided with late notification that the Tenant would be giving up vacant possession of the rental unit, the Landlord was not even obligated to mitigate this loss as the effective date of the Tenant's late notice on November 8, 2021 would have automatically self corrected from November 30, 2021 to December 31, 2021 pursuant to Section 53 of the *Act*.

Ultimately, even if the Landlord attempted to mitigate this loss and rent for December 1, 2021, which would have been to the Tenant's benefit, I am satisfied that the Landlord was put in a position where it would have been near impossible to rent the unit for December 1, 2021, as the Tenant provided late notice to end her tenancy.

Consequently, I am satisfied that the Tenant is responsible for the rental loss that the Landlord is seeking compensation for. As such, I grant the Landlord a monetary award in the amount of **\$1,500.00**.

As the Landlord was successful in this Application, I find that the Landlord is entitled to recover the \$100.00 filing fee paid for this Application. Under the offsetting provisions of Section 72 of the *Act*, I allow the Landlord to retain the security deposit in partial satisfaction of these claims.

Pursuant to Sections 38, 67, and 72 of the *Act*, I grant the Landlord a Monetary Order as follows:

Calculation of Monetary Award Payable by the Tenant to the Landlord

Item	Amount
December 2021 rent	\$1,500.00
Filing fee	\$100.00
Security deposit	-\$750.00
Total Monetary Award	\$850.00

Conclusion

The Landlord is provided with a Monetary Order in the amount of **\$850.00** in the above terms, and the Tenant must be served with **this Order** as soon as possible. Should the

Tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and 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: July 1, 2022

Residential Tenancy Branch