



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

<u>Dispute Codes</u>	Tenants:	CNR, FFT CNC, MNDCT, OLC, FFT
	Landlord:	OPR, MNRL-S, FFL

Introduction

This hearing dealt with the Tenants' repeat applications pursuant to the *Residential Tenancy Act* (the "Act") for:

1. Cancellation of the Landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") pursuant to Sections 46(1) and 62 of the Act;
2. Cancellation of the Landlord's One Month Notice to End Tenancy for Cause (the "One Month Notice") pursuant to Section 47 of the Act;
3. An Order for compensation for a monetary loss or other money owed pursuant to Section 67 of the Act;
4. An Order for the Landlord to comply with the Act, regulations, and tenancy agreement pursuant to Section 62(3) of the Act; and,
5. Recovery of the application filing fee pursuant to Section 72 of the Act.

This hearing also dealt with the Landlord's cross application pursuant to the Act for:

1. An Order of Possession for a 10 Day Notice to End Tenancy For Unpaid Rent or Utilities (the "10 Day Notice") pursuant to Sections 46, 55 and 62 of the Act;
2. A Monetary Order to recover money for unpaid rent – holding the security deposit pursuant to Sections 26, 38, 46 and 67 of the Act; and,
3. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlord and his Legal Counsel, and the Tenant and his Assistant attended the hearing at the appointed date and time.

Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the “RTB”) Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

Both parties acknowledged receipt of:

- the Landlord’s 10 Day Notice served by registered mail (Tracking Number on cover sheet) on May 9, 2022, the Tenants confirmed receipt, deemed served on May 14, 2022;
- the Tenants’ Notice of Dispute Resolution Proceeding package and evidence for the 10 Day Notice served by registered mail (Tracking Number on cover sheet) on May 26, 2022, the Landlord confirmed receipt on May 28, 2022;
- the Landlord’s One Month Notice served by registered mail (Tracking Number on cover sheet) on June 11, 2022, the Tenants confirmed receipt on June 16, 2022 in their Notice of Dispute Resolution;
- the Tenants’ Notice of Dispute Resolution Proceeding package and evidence for the One Month Notice served by registered mail (Tracking Number on cover sheet) on July 6, 2022, the Landlord confirmed receipt, deemed served on July 11, 2022;
- the Landlord’s evidence served by registered mail (Tracking Number on cover sheet) on July 29, 2022, the Tenants confirmed receipt, deemed served on August 3, 2022;
- the Landlord’s Notice of Dispute Resolution Proceeding package-OP/MN for the 10 Day Notice served by registered mail in the same package as the evidence noted above on July 29, 2022, the Tenants confirmed receipt, deemed served on August 3, 2022; and,
- the Tenants’ 2nd evidence served by registered mail (Tracking Number on cover sheet) on August 7, 2022, the Landlord confirmed receipt, deemed served on August 12, 2022.

Pursuant to Sections 88, 89 and 90 of the Act, I find that both parties were duly served with all the documents related to the hearing in accordance with the Act.

Preliminary Matters

Naming parties

RTB Rules of Procedure 4.2 allows for amendments to be made in circumstances where the amendment can reasonably be anticipated. In the Tenants' application, the Tenants named their minor child as a Tenant in the matter. I asked the Tenants if I could remove their minor child they named in their application, and they agreed. The correct Tenants' name is noted in the style of cause of this decision.

If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served. On this basis, I have amended the Tenants' party name which reflects the two names in the tenancy agreement for this matter.

Unrelated claims

Legal Counsel stated that the Landlord has withdrawn the One Month Notice served on June 11, 2022. The Tenants did not want to withdraw their application disputing that notice as their application also included claims for compensation. Rule 2.3 of the RTB Rules of Procedure provides that claims made in an application must be related to each other and unrelated claims may be dismissed with or without leave to re-apply. As the Tenants' monetary claim is not related to the matter of whether the tenancy will end, I dismiss the claim with leave to re-apply.

Issues to be Decided

Tenants:

1. Are the Tenants entitled to cancellation of the Landlord's 10 Day Notice?
2. Are the Tenants entitled to recovery of the application filing fee?

Landlord:

1. Is the Landlord entitled to an Order of Possession for the 10 Day Notice?
2. Is the Landlord entitled to a Monetary Order to recover money for unpaid rent – holding the security deposit?
3. Is the Landlord entitled to recovery of the application filing fee?

Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this tenancy began as a fixed term tenancy on September 1, 2020. The fixed term ended on August 31, 2021, then the tenancy continued on a month-to-month basis. Monthly rent is \$2,000.00 payable on the first day of each month. A security deposit of \$1,000.00 was collected at the start of the tenancy and is still held by the Landlord.

The reason in the 10 Day Notice why the Landlord was ending the tenancy was because the Tenants owed \$2,650.00 in outstanding rent on May 1, 2022. The effective date of the 10 Day Notice was May 25, 2022.

On March 9, 2021, the Tenants text messaged the Landlord that construction had begun in and around the Tenants' balcony. The message was cut off; however, the Landlord's response was to offer a \$200.00 rent decrease starting in April 2021 to October 2021. On October 15, 2021, the Landlord sent an email to the Tenants with the attached 'Construction Schedule Notice Revised' from the strata council for the Tenants' building stating:

[Restoration company] is continuing to work on balcony and roof deck repairs. There has been extensive framing damage at the roof decks and bay roofs. Due to the framing repairs required, the project is now expected to be complete mid December 2021.

The scaffolding may be removed from buildings at different times.

We appreciate your understanding and cooperation. If you have any questions, please contact your property manager.

The Landlord, on October 15, 2021, offered rent reductions for November 2021 for \$1,800.00, and December 2021 for \$1,900.00. The Tenants paid \$1,800.00 for December's rent, which the Landlord followed up with an email on December 1, 2021 @ 8:36 PM stating that the outstanding balance owing for December's rent was \$100.00.

On December 8, 2021 @ 1:34 PM, the Landlord offered rent to be \$1,900.00 per month from January 2022 to June 2022 due to the financial crisis the Tenants were experiencing. On January 28, 2022 @ 3:20 PM, the Landlord informed the Tenants that he decided to put the rental unit up for sale, and he offered a one time \$300.00 off the rent plus the previous arrangement of \$100.00 off rent in March. March's rent was \$1,600.00.

At the end of March, the Landlord emailed the Tenants with an updated viewing schedule, including every Saturday between 3 PM and 5 PM. The Landlord also asked for a viewing time on the first Sunday. The Tenants wrote back on April 1, 2022 @ 8:04 PM that the schedule was daunting, but that they would have the suite ready for viewing on Sunday. The Tenants asked, *"But are we of the understanding that we having a similar arrangement in regards to this months rent."* The Landlord replied that the \$300.00 off in March was a one-time discount.

The Landlord later wrote the Tenants that they could deduct an extra \$100.00 from the April rent. April's rent was set at \$1,800.00. Fourteen minutes later, the Landlord wrote that the *"\$100.00 extra deduction valid only if rent paid today April 2nd by noon."* In a May 5, 2022 email from the Tenants, they write, *"As was verbally agreed upon by both parties, the rent for April was \$1,750.00 which we sent. We have no issue with the rent going back to \$2,000.00 per month as of May 1st which we duly did."* The Landlord testified that he did not agree that April's rent would be \$1,750.00.

On April 26, 2022, the Landlord wrote the Tenants stating, *"1) The rent goes back to \$2000 per month as of April 1st, 2022, as specified in the lease. Discounted rates are not available any longer. You've been working full time per April 1st email. Deductions from rent are not permissible unless in writing."*

Rent continued to be \$2,000.00 per month starting May 1, 2022. The rent payment history submitted by the Landlord's Legal Counsel was as follows:

Rental Month	Agreed Rent Amount	Rent Paid	Rent O/S
October 2021	\$1,800.00	\$1,800.00	\$0.00
November 2021	\$1,800.00	\$1,800.00	\$0.00
December 2021	\$1,900.00	\$1,800.00	\$100.00
January 2022	\$1,900.00	\$1,900.00	\$0.00

Rental Month	Agreed Rent Amount	Rent Paid	Rent O/S
February 2022	\$1,900.00	\$1,900.00	\$0.00
March 2022	\$1,600.00	\$1,600.00	\$0.00
April 2022	\$1,800.00	\$1,750.00	\$50.00
May 2022**	\$2,000.00	\$2,000.00	\$0.00
June 2022	\$2,000.00	\$2,000.00	\$0.00
July 2022	\$2,000.00	\$2,000.00	\$0.00
August 2022	\$2,000.00	\$2,000.00	\$0.00

**10 Day Notice served on May 9, 2022.

When the May 9, 2022 10 Day Notice was served, the Landlord took the position that all missed payments are now overdue. Legal Counsel submitted that the March 9, 2021 agreement is void due to fraudulent misrepresentation or common mistake; and the October 15, 2021 agreement is void due to common mistake.

The Tenants' Assistant submitted that the Tenants are confused about the amount of rent due and owing. The Tenants believed that they paid the correct amount of rent each month. The Tenants uploaded a February 19, 2021 Construction Notice which specifies that balcony repair work would start on February 24, 2021. The notice specifies their building number, and their unit number. They were required to remove all their personal belongings from balconies before March 1, 2021. The Construction Notice also states, "*Residents are **not** permitted to access balconies or patios being worked on. Residents are **not** permitted in construction areas, including all scaffolding or elevated platforms.*"

The Tenants feel continuous harassment from the Landlord as he has served the Tenants with the 10 Day Notice, a One Month Notice, and stated he threatens them with eviction.

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. Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

Section 26(1) of the Act specifies the rules about payment of rent. It states, 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.

Section 46 of the Act outlines how a tenancy can end for unpaid rent:

Landlord's notice: non-payment of rent

46 (1) *A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.*

(2) *A notice under this section must comply with section 52 [form and content of notice to end tenancy].*

...

(4) *Within 5 days after receiving a notice under this section, the tenant may*

(a) *pay the overdue rent, in which case the notice has no effect,*
or

(b) *dispute the notice by making an application for dispute resolution.*

...

The Tenants conveyed the information about the start of construction to the Landlord in a text message on March 9, 2021. The Landlord replied to the Tenants with an agreement that they could reduce their rent amount by \$200.00 per month from April 2021 to October 2021 because of the construction work that was beginning on the residential properties' balconies. I do not find that the Tenants conveyed this information under a false pretense. The Tenants' property number and unit number were listed on the construction notice, and subsequently, their balcony as well as other balconies around the building were surrounded by scaffolding because of the upcoming construction work on the roof and the balconies. I find the Tenants did not fraudulently misrepresent the construction situation on the residential property to the Landlord.

On October 15, 2021, due to continued work on balconies and roof decks, the Landlord again offered a rent reduction of \$1,800.00 for November 2021, and \$1,900.00 for December 2021. The Landlord's Legal Counsel submitted that the common law doctrine of common mistake renders the Landlord's agreement void on the basis that it was entered into by the parties because of a common and mistaken assumption concerning a material fact, construction was to take place. Although the Tenants' balcony was surrounded by scaffolding, and the Tenants were instructed to clear their personal items off the balcony and not use the balcony, no balcony work commenced on their balcony. Construction work was done on the roof, and construction workers accessed the Tenants' balcony from time to time. I find that construction work was carried out on the roof and balconies of the residential property, albeit not on the Tenants' balcony. The Tenants were impacted by the construction work.

I find that the common law doctrine of common mistake does not apply in this matter. Construction work commenced on the residential property, and the Landlord made offers of rent reduction via text message and email to alleviate the inconvenience to the Tenants. The Tenants accepted the offers of rent reduction.

The Landlord continued \$100.00 per month reduced rent amounts into 2022. In March 2022, the Landlord reduced the rent one time by \$300.00. In April 2022, the Landlord reduced the rent to \$1,800.00 of the which the Tenants only paid \$1,750.00. The Tenants believed that after an oral conversation with the Landlord, that he was agreeable to April's rent being \$1,750.00. The Landlord was not agreeable. On May 9, 2022, the Landlord issued the 10 Day Notice.

The Tenants were deemed served with the Landlord's 10 Day Notice on May 14, 2022. The grounds for ending the tenancy noted on the 10 Day Notice say that the Tenants owed \$2,650.00 in outstanding rent on May 1, 2022. The Landlord agreed to rent reductions during the construction events at the residential property, but the agreed amounts do not result in the Tenants owing \$2,650.00 in unpaid rent on May 1, 2022. The Landlord cannot renege on his past agreements and now unilaterally amend the rent amount owing. The parties had agreements. I find the 10 Day Notice reason is not valid because the Tenants did not owe \$2,650.00 in outstanding rent on May 1, 2022. I cancel the Landlord's 10 Day Notice and the tenancy will continue until ended in accordance with the Act.

As the Tenants are successful in their claim, they are entitled to recovery of one application filing fee. The Tenant may, pursuant to Section 72(2)(a) of the Act, withhold \$100.00 from next month's rent due to the Landlord.

Conclusion

The Tenants' application to cancel the Landlord's 10 Day Notice is granted.

The Tenants may withhold \$100.00 from one month's rent to recover one application filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: September 07, 2022

Residential Tenancy Branch