Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNRL-S, MNDCL-S, FFL**

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;

- Authorization to recover the filing fee for this application pursuant to section 72.

Both parties had opportunity to provide affirmed testimony, present evidence and make submissions. The hearing process was explained.

No issues were raised regarding service. I find each party served the other in compliance with the Act.

Both parties confirmed they were not recording the hearing.

Both parties provided their email addresses to which the Decision will be sent.

Issue(s) to be Decided

Is the landlord entitled to the relief requested?

Background and Evidence

The landlord brought an application for the return of a prorated portion of an agent's fees related to renting the unit and a prorated portion of one week's free rent provided to the tenant. The landlord claimed entitlement to these fees because the tenant vacated a fixed term rental agreement early. The landlord sought authorization to apply the security deposit to the award. The tenant denied the landlord is entitled to any award.

Tenancy Background

A copy of the tenancy agreement was submitted. The parties agreed they entered into a 1-year fixed term tenancy beginning January 15, 2022, which ended on February 15, 2022. The tenant ended the agreement early testifying the reason was an unreliable and poorly functioning elevator.

Monthly rent $4,000.00 and was payable on the 15th of the month. At the beginning of the tenancy, the tenant provided a security deposit in the amount of $2,000.00. The landlord retained the deposit without the authorization of the tenant.

Landlord's claim

The landlord claimed reimbursement for part of the $2,000.00 fee she paid to an agent to find suitable tenants for the unit. As the tenant vacated one month into a

12-month term, the landlord sound reimbursement of 11/12 of the fee, being $1,833.33.

The landlord also claimed reimbursement of 11/12ths of a rent-free period of one week prior to the beginning of the tenancy of a value of $1,000.00, the prorated amount being $855.56.

The landlord claimed reimbursement of a utility bill in the amount of $19.60 which the tenant agreed to pay.

The landlord also requested reimbursement of the filing fee of $100.00.

The landlord's claim is summarized as follows:

ITEM	AMOUNT
Agent's fee prorated	$1,833.33
Rent free week prorated	$855.56
Utility invoice	$19.60
Filing fee	$100.00
TOTAL	**$2,808.49**

Condition Inspection Report

The parties agreed a condition inspection took place as the beginning of the tenancy although no such report was submitted.

The parties agreed the agent was present when the tenant moved out. However, no report was completed or submitted in evidence. The tenant provided their forwarding address to the landlord at this time which was witnessed by MO in the submitted statement quoted below. The landlord acknowledged receipt of the forwarding address.

Tenant's Response

The tenant testified as follows. The elevators in the building were not reliable and frequently stopped. As the unit was on the 42nd floor, the tenants said they took the elevators several times a day. The female tenant experienced a panic attack, anxiety and physical illness from being in the elevator when it stalled on January 27, 2022. The tenant activated the emergency system while experiencing a ""full on panic attack". The tenant claimed the unreliability of the elevators was well known to the building's concierge and occupants.

A chain of many emails between the parties was submitted following this incident, not all of which are referenced.

The tenant testified she could not "take the stress" of living on the 42nd floor with an elevator that may stop at any time. She stated she sought medical help after the incident and moved out soon thereafter to live with her mother. She notified the landlord of the issue with the non-functioning elevator by email of January 27, 2022, a copy of which was submitted:

> [We, the tenants] really love this apartment and were super happy and exited to live here for a while, as it has magnificent view and you have been super nice to us all along.
>
> how ever we have noticed that the elevators in the building seem to have frequent problems , I got stuck today in the elevator and buzzed my self out on the 27 floor, then I could not go down since the bottom was not working - had to come back to 42 and go back down. this is very stressful.
>
> I had gone to the concierge and spoke to the lady and she mentioned well these elevators seem to work funky.
>
> I do have anxiety attacks problems and get panic attacks; being in a situation like this is not recommended for my health; as I have to use the elevators daily. as you know Taking the stairs isn't really an option.

> I understand for many this may not impactful for myself this is not something I am willing to deal with for another 12 months.
>
> Sadly for reasons of safety, I want to break the lease, and move out from the apartment.
>
> Again we love this place but this is a major issue and I simply do not feel comfortable nor happy being in a situation when I am anxious couple times a day.
>
> You know this issue will be costly as we have paid move in fees and moved already so not very favorable at all how ever please understand that its not working out and I am willing to relocate for the reasons mentioned.
>
> I would like to move out as soon as possible and may go to my moms until we move out- I am sorry for the inconvenience this may cause you but I really can not take this stress.
>
> Please kindly let me know how you would like to proceed and if you'd be willing to accept this termination for Feb 15 or sooner.

The tenant submitted a signed statement from a neighbour MO stating he saw the tenant was “visibly shaken” on January 27, 2022 after being stuck in the elevator. The statement reads:

> On January 27th around noon I was leaving my unit for a walk and I met [female tenant] whom was visibly shaken she told me she was stuck in the elevator and asked me if they function properly or if I had experienced any difficulties with the elevators, I have advised her not to take the middle elevator as that's the one that breaks down often and.had caused problems for the residents of the building, I myself have had problems and do not take the elevator located in the middle, I also have brought up to her

> attention the note that was on the exit door on the 42 floor and mentioned some neighbors prefer to take the stairs up due to this problem.

The landlord accepted the termination date proposed by the tenant and immediately hired the original agent to find new tenants. In her email of January 29, 2022, she wrote:

> I am more worried about any potential cost incurred to you. [The agent] has re-listed the apartment immediately and we are actively seeking future tenant to minimize any loss. He is working hard to help out (some commission and re-rent expense will be paid to him).
>
> We can work together to find a solution.

The landlord later suggested an “early termination fee” to reflect the cost to find a replacement tenant.

The tenant never agreed to pay the landlord compensation and did not authorize the landlord to retain the security deposit.

The tenant replied to the landlord that enquiries showed that the elevators had a previous history of not working and they would never have rented the unit if they had known, explaining, “I do have panic problems”.

The tenant testified to her belief based on enquiries that the problems with the elevator were well known to the concierge and other occupants of the building. The tenant submitted two statements from occupants. The concierge informed the tenant the elevators, although fixed, were not “working the greatest”. The tenant also submitted a letter from their movers stating the concierge told them what to do if the elevator stalled when they were moving the tenant in (as written).:

> The concierge staff on board had a conversation with us regarding the elevator sometimes getting stuck and gave us instruction on how to release the doors if it happened.
>
> -the elevator which was booked for the move had stopped couple of times, so we had to stop on the different floors due to its malfunctioning I assume hence we had to go back to the lobby and press the right floor again to be able to carry out the move.
>
> VVhen asked by the customer we have provided this information about why this move had taken longer than promised which was due to the elevator malfunctioning.

The tenant submitted a photograph of a notice later found on an exit door:

> Please do not remove. I walk up 42 stories to get home.

In a subsequent email, the landlord stated, “Security deposit will not be deducted due to early termination.”. She also wrote there would be a prorated agent fee and loss rent figure for the tenant to consider.

On February 4, 2022, the landlord wrote the tenant:

> We have agreed in writing about the Feb 15th move-out date.

The landlord became acrimonious with the tenant. The following day, February 5, 2022, the landlord wrote the tenant stating she required a public hearing, claiming “multiple honesty breaches and requesting a medical letter about the female tenant’s medical condition”, stating (as written):

> Please note to your medical provider that the disability verification will be used as court evidence. I doubt that medical provider can override or practice tenancy law. I will report to the Ministry of Health immediately o confirm if it is a mal-practice.

> Moreover, our move-out inspection will be fully video recorded. I will bring a ladder to check from floor to ceiling and potentially bring witness or inspector.
>
> Breach of honesty should be on record. I am willing to pay for it.

The parties signed a Mutual Agreement to End Tenancy effective February 15, 2022. A copy, in the standard RTB form, was submitted.

The landlord testified the unit was rented for $4,200.00 monthly following the end of the tenancy. The landlord incurred no loss of rent.

The landlord did not acknowledge prior knowledge of the problems with the elevator. The tenant was not informed prior to renting the unit that there was any problems with the elevator.

Analysis

I have considered all the submissions and evidence presented to me, including those provided in writing and orally. I will only refer to certain aspects of the submissions and evidence in my findings.

Standard of Proof

Rule 6.6 of the Residential Tenancy Branch Rules of Procedures state that 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.

It is up to the party to establish their claims on a balance of probabilities, that is, that the claims are more likely than not to be true.

In this case, it is up to the landlord to prove their claims.

When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

Credibility

The tenant claimed the problems with the elevator are akin to a fundamental breach of the tenancy. The landlord claimed the tenant ended a fixed term tenancy early and is responsible for her losses. Much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny (1952), 2 D.L.R. 354 (B.C.C.A.),* which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth.
>
> The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.
>
> In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

In this case, the female tenant testified she was unable to continue living in the unit because the elevator was unreliable and frequently stalled. The female tenant's testimony about having a "full on panic attack" as the result of being stuck in the elevator on January 27, 2022 was supported by the statement of the neighbour, the witness MO, who saw she was "visibly shaken" afterwards.

Considering all the evidence, I find the tenant's version of the events is "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances", as stated in the *Chorny* case. I find the tenant's testimony credible, forthright and candid.

I find the landlord's minimization or denial of the problem to lack a ring of truth. I find it likely the landlord knew about the problems with the elevator but omitted telling the tenant before the agreement was signed as it would be a deterrent to renting the unit.

For these reasons, I prefer the tenant's version of events in all aspects. Where the parties' evidence differs, I give greater weight to the tenant's evidence.

Four-Part Test

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria before compensation may be awarded:

1. Has the other party failed to comply with the Act, regulations, or the tenancy agreement?
2. If yes, did the loss or damage result from the non-compliance?
3. Has the claiming party proven the amount or value of their damage or loss?
4. Has the claiming party done whatever is reasonable to minimize the damage or loss?

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

In this case, the onus is on the landlord to prove the landlord is entitled a claim for a monetary award.

The above-noted criteria are based on sections 7 and 67 of the Act. Section 7(1) of the Act provided that if a landlord or tenant does not comply with the Act, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the Act, regulations or a tenancy agreement.

These sections state as following:

> 7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
>
> (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.
> . . .
>
> 67. Without limiting the general authority in section 62 (3) [. . .] if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Each part of the test is considered.

1. *Did respondent fail to comply with Act, regulations, or tenancy agreement?*

In this dispute, the tenancy was a fixed term tenancy. The tenant ended the tenancy on a date that was earlier than the date specified in the tenancy agreement.

As the landlord entered into a new tenancy right away, the landlord does not claim for loss of rent.

The tenant's claim is akin to breach of a material term. That is, the tenant claimed it was impossible to continue living on the 42nd floor of a building which did not have a reliable elevator. Accordingly, the tenant claimed they are not responsible for any of the landlord's losses.

Section 44(1) of the Act lists fourteen categories under which a tenancy may be ended, and references section 45 of the Act. Section 45 of the Act deals with a tenant's notice to end a tenancy, and reads, in its entirety, as follows:

> *(1) A tenant may end a periodic 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, and*
>
> *(b) 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.*
>
> *(2) A tenant may 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.*
>
> ***(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.***

> *(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].*

As noted in *RTB Policy Guideline* #8 – *Unconscionable and Material Terms,* a *material term* is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the Agreement.

> To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement. It falls to the person relying on the term, in this case the tenant, to present evidence and argument supporting the proposition that the term was a material term.
>
> The question of whether a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. The same term may be material in one agreement and not material in another. Applications are decided on a case-by-case basis. Simply because the parties have stated in the agreement that one or more terms are material, is not decisive. The Arbitrator will look at the true intention of the parties in determining whether the clause is material.

RTB Policy Guideline #8 reads in part as follows:

> *To end a tenancy agreement for breach of a material term the party alleging a breach…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…*

I find it was well known among other occupants of the building and the concierge that the elevator was not working properly. I accept the tenant's testimony she was stuck in the elevator on January 27, 2022, and experienced anxiety/panic symptoms as a result. I find the tenant concluded they could not continue to continue to live in the unit. I find this conclusion reasonable. As a matter of common sense, I believe most people in a similar building would insist on a reliable, properly functioning elevator.

In considering the facts of this case, the testimony and the evidence, I find the tenant has met the burden of proof there was a material breach of the implied requirement that the landlord provide a proper functioning elevator in a 42-storey building. I find the tenant notified the landlord of the problem on January 27, 2022 and said they wanted to move out. I find the tenant acted reasonably throughout. I find the landlord accepted the termination, made no suggestion they could correct the problem, and began searching for a new tenant quickly. In the circumstances, I find there was no need for the tenant to give a notice setting a date by which the elevator must be fixed to exercise their right to end the tenancy. I find the unreliable elevator to constitute a breach of a material term which made it impossible for the tenancy to continue.

/as the landlord has failed to meet the burden of proof with respect to the first of the four-part test, I will not consider the remaining three parts.

In summary, I find the unreliable elevator as described the tenant and supported by the documentary evidence to amount to breach of a materials term.

As a result of my finding, I find the landlord has no claim for damages or compensation from the early ending of tenancy. I dismiss the landlord's application in in this regard in its entirety without leave to reapply.

The tenant has agreed to compensate the landlord $16.90 for the utility bill. I direct the landlord may deduct this amount from the security deposit on a one-time basis.

Conclusion

I dismiss the landlord's application in in this regard in its entirety without leave to reapply.

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: October 05, 2022

Residential Tenancy Branch