



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL, OPB, MNRL-S, MNDCL-S, FFL

Introduction

The Applicants seek the following relief under the *Residential Tenancy Act* (the “Act”):

- an order of possession pursuant to s. 55 after serving a Two-Month Notice to End Tenancy;
- an order of possession pursuant to s. 55 pursuant to a fixed term tenancy;
- a monetary order pursuant to ss. 38 and 67 for unpaid rent by claiming against the security deposit;
- a monetary order pursuant to ss. 38 and 67 for loss or other money owed by claiming against the security deposit; and
- return of their filing fee pursuant to s. 72.

P.T. and S.D. appeared as the named Applicants. M.T. appeared as counsel for the Applicants. Y.L. appeared as the Tenant. H.L. appeared as agent for the Tenant and spoke on his behalf.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other’s application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other’s application materials.

Preliminary Issue – Applicants Claims

At the outset of the hearing, I was reminded by the applicants' counsel that this was not the first time the parties appeared before me. On August 9, 2022, I had dismissed a previous application filed by the Tenant in which he applied to cancel a Two-Month Notice on the basis that the Tenant moved out on July 31, 2022. At that time, Applicant's counsel sought to have this matter heard, which I did not permit as per my decision of August 9, 2022.

Given the tenant vacated the rental unit on July 31, 2022, the applicants claim for an order of possession is moot. Both claims for an order of possession pursuant to s. 55 are dismissed without leave to reapply.

I am further advised by counsel that the applicants would not be advancing their unpaid rent claim as July's rent, though unpaid, operated as the Tenant's compensation pursuant to s. 51(1) of the *Act*. Accordingly, the claim for unpaid rent is dismissed without leave to reapply.

Issues to be Decided

- 1) Are the Applicants entitled to monetary compensation?
- 2) Are the Applicants entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

By way of some context, I am advised that S.D. and A.D. sold the property to their named co-applicants, S.T. and G.G.. I am advised by counsel that S.T. and G.G. took ownership of the property on June 3, 2022. For ease of reference, I will refer to S.D. and A.D. as the Sellers and S.T. and G.G. as the Purchasers.

A copy of the tenancy agreement was provided to me by the Applicants and describes the following aspects of the tenancy:

- The tenancy began on October 4, 2021 and was a fixed term ending on May 1, 2022.

- Rent of \$3,200.00 was due on the first day of each month.
- The Tenant paid a security deposit of \$1,600.00.

The tenancy agreement provided was signed and dated by the Tenant and the Sellers on September 27, 2021.

Counsel argued that the Tenant overheld the rental unit such that he should be responsible for Purchasers mortgage costs, their rental insurance, and the cost of their rent for the alternate accommodations until the Tenant vacated on July 31, 2022. An additional claim is made with respect to metal distress. The monetary claims are summarized in the Applicants monetary order worksheet. As summarize by counsel, the primary issue is when the tenancy ended as this would determine if the Tenant was overholding and, if so, what damages may flow from this.

Counsel advised that the property in question was previously owned by the Tenant and that he sold it to S.D. and A.D., though I am uncertain when this took place. I am further advised by counsel that Sellers contemplated either demolishing the property or reselling it. The Sellers had discussed their intention with the Tenant and agreed that he could continue to occupy the property, though as a tenant rather than the owner. Counsel argued that the fixed term of the tenancy contemplated the intentions of the Sellers to sell or demolish the property. I am directed by counsel to clause 2 of the tenancy agreement, which I have reproduced below:

2. BEGINNING AND TERM OF THE AGREEMENT (please fill in the dates and times in the spaces provided)

This tenancy created by this agreement starts on:

4	OCTOBER	2021
day	month	year

Check ☐ A) and continues on a month-to-month basis until ended in accordance with the Act.

A, B or C ☐ B) and continues on another periodic basis, as specified below, until ended in accordance with the Act.

☐ weekly ☐ bi-weekly ☐ other:

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☒ C) and is for a fixed term ending on

1	MAY	2022
day	month	year

IF YOU CHOOSE C, CHECK AND COMPLETE D OR E

Check ☐ D) At the end of this time, the tenancy will continue on a month-to-month basis, or another fixed length of time, unless the tenant gives notice to end tenancy at least one clear month before the end of the term.

D or E ☒ E) At the end of this time, the tenancy is ended and the tenant must vacate the rental unit.

This requirement is only permitted in circumstances prescribed under section 13.1 of the Residential Tenancy Regulation, or if this is a sublease agreement as defined in the Act.

Reason tenant must vacate (required):

SELLING PROPERTY OR BUILDING NEW HOUSE ON IT
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Counsel advised that the property was listed for sale and that a contract was signed in January 2022. The Applicants' evidence includes a copy of the contract of purchase and sale dated January 18, 2022.

Counsel argued that the Tenant ought to have vacated the rental unit as per the fixed term on May 1, 2022 such that he overheld since that date. It was further argued that the purchaser applicants, would be occupying the residential property such that they should be able to benefit from the fixed term clause. The Tenant's agent argued that the fixed term portion of the tenancy agreement was improper and unenforceable.

Counsel directed me to a letter dated March 17, 2022 sent to the Tenant from the Sellers' lawyer in which the Tenant was "placed on notice that [he] must be out of the property by no later than May 1, 2022". The Sellers then issued the Two-Month Notice. I have been provided with a copy of the Two-Month Notice, which shows it was signed on March 26, 2022 and lists its effective date of June 1, 2022.

I am advised by counsel that the Two-Month Notice was posted to the Tenant's door on March 26, 2022. However, both counsel and the Tenant's agent advise the Tenant was overseas at that time. The Tenant, through his agent, confirmed the Two-Month Notice was received on April 5, 2022 via email. As mentioned above, I had heard the Tenant's previous application in which he disputed the Two-Month Notice. Review of the previous file shows that the Tenant had filed his application and paid the filing fee on April 9, 2022.

Counsel argued that the Tenant was placed on notice via the March 17, 2022 letter to vacate as per the fixed term and that this is the end date for the tenancy. As an alternative argument, counsel says I should look to the effective date of the Two-Month Notice, which is June 1, 2022.

The Tenant's agent argued that the Tenant did not overhold the rental unit. I was advised by the agent that the Tenant could not return to the property at the time as he was overseas. The agent further argued the proper process for ending a tenancy had to be followed such that the end date was when the Tenant vacated.

The agent directed me to the August 9, 2022 decision in which I made a finding that the tenancy ended on July 31, 2022. It was argued by the agent the matter had been decided and that this finding was consistent with Policy Guideline #3. Counsel argued the previous finding was in relation to when the Tenant moved out of the rental unit such that the matter had not previously been decided.

The Tenant's agent further directed me to an email dated May 16, 2022 from S.D. in which she offered that the tenancy end on July 31, 2022 provided rent was paid and a

mutual agreement to end tenancy was signed. The agent argued the Tenant acted on the offer by vacating on that date.

The parties confirmed the Tenant provided his forwarding address on August 4, 2022. I am advised by the Applicants' counsel that the parties have filed two other applications with respect to the security deposit and that those applications are set for hearing on May 23, 2023. Review of those files show that the Applicants' application is a replication of the present monetary claims and the Tenant's application is for the double return of the security deposit.

Analysis

The Applicants seek compensation against the security deposit alleging the Tenant overheld the rental unit. They claim against the security deposit.

Policy Guideline #17 states the following with respect to the retention or the return of the security deposit through dispute resolution:

1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the *Act*, on:
 - a landlord's application to retain all or part of the security deposit; or
 - a tenant's application for the return of the deposit.

Unless the tenant's right to the return of the deposit has been extinguished under the *Act*. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the Residential Tenancy Branch. A landlord may not claim against the security deposit if the application is made outside of the 15-day window established by s. 38. Under s. 38(6) of the *Act*, when a landlord fails to either repay or claim against the security deposit within the 15-day window, the landlord may not claim against the security deposit and must pay the tenant double their deposit.

I need not consider the question of extinguishment as the Applicants are not claiming for damages to the rental unit. Policy Guideline #17, which provides guidance with respect to security deposits and set offs, states the following on page 2:

9. A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
- to obtain the tenant's consent to deduct from the deposit any monies owing for other than damage to the rental unit;
 - to file a claim against the deposit for any monies owing for other than damage to the rental unit;
 - to deduct from the deposit an arbitrator's order outstanding at the end of the tenancy; and
 - to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.

This guidance is consistent with the language used in ss. 24(2) and 36(2) of the *Act* both of which make specific reference to a landlord's right to claim against the security deposit "for damage to residential property". As the Applicants are claiming against the security deposit for other compensation, not damage to the residential property, extinguishment is not relevant.

It is undisputed that the Tenant vacated the rental unit on July 31, 2022 and that he provided his forwarding address on August 4, 2022. Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that this application was filed by the Applicants on July 14, 2022. Accordingly, the Applicants filed against the security deposit prior to the 15-day window being triggered such that doubling provision of s. 38(6) does not apply.

Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.

4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

In this instance, the Applicants whole claim hinges on a determination that the Tenant overhired the rental unit. I am asked to look at the fixed term of the tenancy, a demand from March 17, 2022, and the effective date of the Two-Month Notice.

Looking first at whether the tenancy ended on the fixed term listed in the tenancy agreement, I note that s. 44(b) of the *Act* permits tenancies to end under pursuant to fixed term tenancy agreements provided the fixed terms comply with those circumstances proscribed in the regulations. In other words, fixed terms are only enforceable provided they comply with the circumstances set in the regulations.

Section 13.1 of the Regulations sets out the permitted circumstances for ending a tenancy through a fixed term. This section was amended in September 2022. The version in force prior to September 2022 states the following:

Fixed term tenancy — circumstances when tenant must vacate at end of term

13.1 (1) In this section, "**close family member**" has the same meaning as in section 49 (1) of the *Act*.

(2) For the purposes of section 97 (2) (a.1) of the *Act* [*prescribing circumstances when landlord may include term requiring tenant to vacate*], the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term are that

- (a) the landlord is an individual, and
- (b) that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.

When the tenancy agreement was signed, the Sellers were the landlords. The purpose stated for ending the tenancy was that the property would either be sold or a new house be built "on it". On its face, the fixed term portion of the tenancy agreement does not comply with s. 13.1 of the Regulations as occupation is required, not sale or demolition.

Counsel argued that the Purchasers intended to occupy the property and that, as owners, they became the landlords such that they should be able to make use of the fixed term portion of the tenancy agreement. Though creative, I find counsel's argument is a stretch of and, most importantly, runs contrary to the plain reading of s. 13.1 of the Regulations. The wording is clear, there must be evidence of good faith intention to occupy the rental unit "at the time of entering into the tenancy agreement". It is absurd to believe the Purchasers could in any way be found to demonstrate their good faith to occupy the rental unit when the tenancy agreement was formed. It is not clear that the Purchasers knew of the property or the Tenant's existence in September 2021. The Purchasers were complete strangers to the tenancy agreement when it was entered into by the Sellers and the Tenant.

I find that the fixed term portion of the tenancy agreement is unenforceable.

Counsel argued that a letter from the Sellers' lawyer dated March 17, 2022 letter is relevant. However, s. 52(e) of the *Act* requires notices to end tenancy, when issued by a landlord, to be in the proper form. The March 17, 2022 is not the proper form. In other words, it is not a proper notice for ending a tenancy under the *Act*, a point that is evidence by the Sellers issuing the Two-Month Notice shortly after the letter. The Tenant, quite rightly, was under no obligation to entertain the demand to vacate as set out in the March 17, 2022 letter.

Finally, I am asked to enforce the effective date of the Two-Month Notice and that the Tenant overheld the property since June 1, 2022. Pursuant to s. 49(8) of the *Act*, the Tenant was permitted to dispute the Two-Month Notice by filing an application with the Residential Tenancy Branch. He did so. As per s. 49(8)(a) of the *Act*, the Tenant had 15-days after receiving the Two-Month Notice to file that dispute. As per the information on the previous file and pursuant to Rule 2.6 of the Rules of Procedure, I find the Tenant filed his application on April 9, 2022. Despite some minor conflict on when the Tenant received the Two-Month Notice, the Tenant filed within the 15-day window. Even if I were to accept the earliest date possible of receipt of the Two-Month Notice, being March 26, 2022 when it was posted to the door, the Tenant filed within the time permitted to him under s. 49(8) of the *Act*.

The practical effect of disputing the Two-Month Notice and filing on time is that the tenancy did not end on the effective date in the notice. This is made clear by Policy Guideline #3 in its discussion on the application of s. 55(1.1) of the *Act*, which may be in relation to a different portion of the *Act* but provides guidance that is relevant here. The

effect of disputing the notice suspends the effective date until it is determined whether the notice is valid. If the notice is successfully disputed, it is of no force or effect. If the notice is upheld, the tenancy ends on the date that determination is made.

In this instance, the Tenant exercised his right to dispute the Two-Month Notice as per s. 49(8) of the *Act* and did so within the time permitted such that the conclusive presumption did not apply. His application disputing the notice was never heard as he vacated on July 31, 2022, which is the date I find the tenancy ended. I appreciate the delay may have proved burdensome to the Purchasers. However, the *Act* provides substantive and procedural rights to tenants that do not exist at common law. The Tenant's agent is quite right, the process for ending a tenancy must be followed.

I find that the Tenant did not breach the *Act* and did not overhold the rental unit as the tenancy ended on July 31, 2022. The claim for compensation is dismissed without leave to reapply.

With respect to the security deposit, I order it be returned to the Tenant in full. It was not clear to me based on the submissions of the parties whether the Sellers still hold the security deposit or whether the security deposit was accounted for in the sale of the property such that the Purchasers hold it. I leave that to the Applicants to sort out amongst themselves. All four are listed in the style of cause and I make the order pursuant to how they named themselves in their application.

Conclusion

The claim for monetary compensation under s. 67 of the *Act* is dismissed without leave to reapply.

The Applicants were unsuccessful such that I find they are not entitled to the return of their filing fee. Their claim under s. 72 of the *Act* is dismissed without leave to reapply.

Pursuant to ss. 38 and 67 of the *Act*, I order the Applicants return the security deposit of **\$1,600.00** to the Tenant.

It is the Tenant's obligation to serve the monetary order on the Applicants. If the Applicants do not comply with the monetary order, it may be filed by the Tenant with 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: December 14, 2022

Residential Tenancy Branch