



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDCL, MNETC, FFT, FFL

Introduction

This hearing was convened in response to cross applications.

The Landlord filed an Application for Dispute Resolution in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss and to recover the fee for filing this Application for Dispute Resolution.

The Tenant filed an Application for Dispute Resolution in which the Tenant applied for compensation related to being served with a Two Month Notice to End Tenancy for Landlord's Use and to recover the fee for filing this Application for Dispute Resolution.

The Tenant stated that on May 19, 2022 the Tenant's Dispute Resolution Package and evidence submitted by the Tenant to the Residential Tenancy Branch on May 09, 2022 was sent to the Landlord, via registered mail. The Landlord acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

The Landlord stated that on October 12, 2022 the Landlord's Dispute Resolution Package and evidence submitted by the Landlord to the Residential Tenancy Branch on September 28, 2022 was sent to the Tenant, via registered mail. The Tenant acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

In January of 2023 the Tenant submitted additional evidence to the Residential Tenancy Branch. The Tenant stated that this evidence was served to Legal Counsel for the

Landlord, via fax, on January 05, 2023. Legal Counsel for the Landlord acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On January 05, 2023 the Landlord submitted additional evidence to the Residential Tenancy Branch. Legal Counsel for the Landlord stated that this evidence was served to the Tenant by express post and email on January 03, 2023. The Tenant acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On January 11, 2023 the Landlord submitted additional evidence to the Residential Tenancy Branch. Legal Counsel for the Landlord stated that this evidence was served to the Tenant by express post and email on January 12, 2023. The Tenant acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each participant, with the exception of legal counsel, affirmed that they would speak the truth, the whole truth, and nothing but the truth during these proceedings.

The participants were advised that the Residential Tenancy Branch Rules of Procedure prohibit private recording of these proceedings. Each participant, with the exception of legal counsel, affirmed they would not record any portion of these proceedings. Legal Counsel for the Landlord stated that she understood private recordings were not permitted.

Preliminary Matter

The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of *Residential Tenancy Act (Act)*. With the exception of compensation for filing the Application for Dispute Resolution, the *Act* does not allow an Applicant to claim compensation for costs associated with participating in the dispute resolution process, including legal fees.

I therefore decline to consider the Landlord's application for legal fees she incurred in regard to these proceedings or the tenancy.

Issue(s) to be Decided

Is the Landlord entitled to compensation for lost revenue?

Is the Tenant entitled to compensation because the Landlord did not comply with the reasons cited for ending the tenancy on the Two Month Notice to End Tenancy for Landlord's Use?

Background and Evidence

The Landlord stated that this tenancy began on September 19, 2019 and the Tenant stated that it began on October 01, 2020. The tenancy agreement submitted in evidence by both parties declares the tenancy began on September 19, 2019. The Landlord and the Tenant agree that rent, at the end of the tenancy, was \$1,270.00.

The Landlord and the Tenant agree that neither party served the other party with notice to end tenancy on a form generated by the Residential Tenancy Branch.

The Landlord and the Tenant agree that on September 23, 2021 the Landlord sent the Tenant an email in which she informed him that he must move out of the unit by December 01, 2021. At the hearing both the Landlord and the Tenant acknowledged that they were in receipt of this email.

The Tenant stated that the Landlord submitted the September 23rd email to the Residential Tenancy Branch labelled "Evidence C_2_month_notice_end_tenancy_310-820". The parties were advised that the document uploaded under that label is a copy of the tenancy agreement and that I could not locate the email in the evidence submitted.

The Tenant read the aforementioned email aloud. The Landlord agrees that the Tenant has correctly represented the content of the email. In this email the Landlord informs the Tenant, in part, that she is ending the tenancy because she will be occupying the rental unit; that she must give the Tenant two months notice of her intent to end the tenancy; that he is entitled to one month's compensation; that he will not be required to pay rent for November in compensation for the one month's rent he is entitled to receive; and that she will be moving into the unit on December 01, 2021.

The Landlord and the Tenant agree that the tenancy ended December 01, 2021 on the basis of the email sent on September 23, 2021.

The Landlord stated that she moved into the rental unit on December 2021, that she moved out of it approximately 5 or 6 weeks later, and that she rented it to a third party on January 15, 2022. She stated that she moved back in with her mother because she could not afford to live in the rental unit.

The Tenant stated that she owns a gym in the community which was shut down in December of 2021 due to COVID. She stated that this was the only time her business was shut down as a result of the pandemic when she did not receive government funding to assist her during the shut down. The Landlord submitted a document from the Provincial Government which indicates gyms are being closed due to COVID-19 between December 22, 2021 and January 18, 2022.

The Landlord stated that in preparation for moving into the rental unit she purchased furniture, which exacerbated the impact the closure of her business had on her finances. The Landlord submitted a receipt to show that she paid \$15,737.39 for furniture on November 13, 2021.

The Tenant does not dispute that the Landlord owned a gym which was closed due to COVID, but he submits that she also sells nutritional supplements. He submits that on social media the Landlord declared that this source of income helped her purchase real estate. The Landlord agrees that she sells nutritional supplements and that this income helped her pay a down payment on one of the properties she owns, but she says that this is not a consistent and significant source of income.

The Tenant submits that the evidence submitted by the Landlord shows that she and her fiancé are clearly intending to build a life together. He submits that the fiancé is a doctor with significant income and that their financial situation should be considered jointly when determining if the Landlord's financial situation should be considered extenuating circumstances for the purposes of section 51 of the *Act*.

The Tenant stated that her fiancé planned to move to the community to cohabitate and they planned to live in the rental unit together. She stated that the fiancé decided not to permanently move to the community, for reasons that are not particularly relevant to this decision. The Landlord submitted a letter from her fiancé which corroborates this testimony.

The Landlord stated that her current plan is to emigrate to the United States to live with her fiancé. She stated that she has applied to emigrate and she received advise from a lawyer that she must be prepared to “leave quickly” if her application is approved. She stated that she concluded that it would be easier to “leave quickly” if the rental unit was already rented to a third party.

The Tenant submitted a copy of a Two Month Notice to End Tenancy for Landlord's Use, dated September 26, 2020, which the parties agree was served in regard to a different rental unit after the Landlord purchased that unit.

The Tenant submits that service of this Two Month Notice to End Tenancy for Landlord's Use suggests that the Landlord was acting in bad faith when she ended this other tenancy pursuant to section 49 of the *Act*.

The Landlord stated that shortly after the Two Month Notice to End Tenancy for Landlord's Use dated September 26, 2020 was served, she contacted the occupant of that rental unit; she told the occupant that she no longer planned to move into the rental unit; she told the occupant they could continue to live in the rental unit; and that the occupant told her that alternate accommodations had already been found.

The Tenant submitted a Form K which shows that on November 09, 2021 a new tenant moved into another rental unit owned by the Landlord. The Tenant submits that this suggests the Landlord ended his tenancy in bad faith because the Landlord could have moved into the other vacant rental unit she owned, rather than ending his tenancy.

The Landlord is seeking compensation for lost revenue. In support of this claim the Landlord submits that:

- The Tenant stopped living in the rental unit in July of 2021;
- The Tenant re-rented the unit to a third party for higher rent;
- The Tenant did not live in the rental unit with the third party;
- She would have been able to rent the unit to a third party for higher rent if the Tenant had not re-rented the unit to a third party in July of 2021;
- The Tenant asked for permission to have a roommate;
- The Tenant did not ask for permission to sublet the unit; and
- She did not initially realize the Tenant was not sharing the unit with the third party.

The Tenant stated that:

- He did not live in the rental unit after July 29, 2021;
- He re-rented the unit to a third party, on the basis of a verbal agreement;
- The third party paid him \$1,700.00 in monthly rent;
- He continued to pay monthly rent to the Landlord, in the amount of \$1,270.00;
- He did not live in the rental unit with the third party;
- The third party vacated the rental unit on November 30, 2021 at the Tenant's request;
- He rented the unit to the third party, rather than ending his tenancy, because he moved from the community and he thought he might move back;
- His current home is a 15 hour drive from this community (approximately);
- He owns another apartment in the community;
- The apartment he owns is rented to a different person;
- He could not occupy the apartment he owns without displacing his tenant;
- He had permission from the Landlord to have a roommate; and
- He did not have permission from the Landlord to sublet the unit.

Analysis

On the basis of the testimony of the Tenant and the tenancy agreement, which was submitted in evidence by both parties, I find that this tenancy began on September 19, 2019.

On basis of the undisputed evidence, I find that this tenancy ended on the basis of the email that the Landlord sent to the Tenant on September 23, 2021, in which the Landlord declared, in part, that she is ending the tenancy because she will be occupying the rental unit; that the *Residential Tenancy Act* requires her to give the Tenant two months notice of her intent to end the tenancy; that the Tenant is entitled to one month's compensation; that he will not be required to pay rent for November in compensation for the one month's rent he is entitled to receive; and that she will be moving into the unit on December 01, 2021.

Section 49(3) of the *Act* allows a landlord who is an individual to end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit. As there is no dispute that the Landlord owns this rental unit, I find that she has the right to end the tenancy pursuant to section 49(3) of the *Act* if she intends to move into the rental unit.

As the email sent on September 23, 2022 declared that the Landlord was moving into the unit, I find that she understood she was ending the tenancy pursuant to section 49(3) of the *Act*.

Section 49(2)(a) of the *Act* stipulates that a landlord may end a tenancy for a purpose referred to in subsection (3), (4) or (5) by giving notice to end the tenancy effective on a date that must be not earlier than 2 months after the date the tenant receives the notice; 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, and if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy.

Sections 49(3), 49(4), and 49(5) of the *Act* are the only sections that require a landlord to give two months notice to end a tenancy. I therefore find that the Landlord understood that she was ending the tenancy pursuant to section 49(3), 49(4), or 49(5) of the *Act* when she declared, in her email of September 23, 2021, that she was required to give two months notice to end the tenancy. As the email sent on September 23, 2021 declared that the Landlord was moving into the unit on December 01, 2021, I find that the Landlord provided the Tenant with the requisite 2 month's notice.

Section 51(1) of the *Act* stipulates that a tenant who receives a notice to end a tenancy under section 49 of the *Act* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement. A tenant is not entitled to compensation in the equivalent of one month's rent if they are served notice to end a tenancy pursuant to any other section of the *Act*.

As the email sent on September 23, 2021 declared that the Tenant was entitled to receive compensation of one month's rent, I find that the Landlord understood she was ending the tenancy pursuant to section 49 of the *Act*.

Section 49(7) of the *Act* stipulates that a notice served under section 49 of the *Act* must comply with section 52 of the *Act*. Clearly the email of September 23, 2021 does not comply with section 52 of the *Act*, as it is not served on the proper form, which is a Two Month Notice to End Tenancy for Landlord's Use, and it is not signed by the Landlord.

Although the Landlord did not comply with the *Act* when she did not serve the Tenant with proper notice to end the tenancy pursuant to section 49 of the *Act*, I find that the

Landlord's actions effectively ended this tenancy pursuant to section 49 of the *Act*. As the Landlord benefited from the provisions of section 49 of the *Act*, I find that the Landlord was obligated to comply with the obligations imposed on a landlord when notice to end tenancy is served pursuant to section 49 of the *Act*.

Section 51(2) of the *Act* stipulates that, subject to section 51(3) of the *Act*, a landlord who ends the tenancy pursuant to section 49(3) of the *Act* must pay a tenant an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if the landlord does not establish that the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice and the rental unit has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

On the basis of the undisputed evidence, I find that the Landlord only occupied the rental unit for a period of approximately 6 weeks after the tenancy ended and, as such, is subject to the penalty imposed by section 51(2) of the *Act*, unless section 51(3) of the *Act* applies.

Section 51(3)(b) of the *Act* stipulates permits me to excuse a landlord from paying the tenant the amount required under subsection (2) if, in my opinion, extenuating circumstances prevented the landlord from occupying the rental unit for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Residential Tenancy Branch Guideline #50 addresses the issue of extenuating circumstances and reads, in part:

These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation, typically because of matters that could not be anticipated or were outside a reasonable owner's control.

Some examples are:

- *A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies one month after moving in.*
- *A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.*
- *A tenant exercised their right of first refusal, but did not notify the landlord of a further change of address after they moved out so they did not receive the notice and new tenancy agreement.*
- *A landlord entered into a fixed term tenancy agreement before section 51.1 and amendments*

to the Residential Tenancy Regulation came into force and, at the time they entered into the fixed term tenancy agreement, they had only intended to occupy the rental unit for 3 months and they do occupy it for this period of time.

The following are probably not extenuating circumstances:

- A landlord ends a tenancy to occupy the rental unit and then changes their mind.*
- A landlord ends a tenancy to renovate the rental unit but did not adequately budget for the renovations and cannot complete them because they run out of funds.*
- A landlord entered into a fixed term tenancy agreement before section 51.1 came into force and they never intended, in good faith, to occupy the rental unit because they did not believe there would be financial consequences for doing so.*

In these unique circumstances, I find that the Landlord should be excused from paying the penalty imposed by section 51(3)(b) of the *Act* as there were extenuating circumstances that prevented her from living in the rental unit for 6 months. I therefore find that the Landlord is not obligated to pay the penalty imposed by section 51(2) of the *Act*.

In concluding that there were extenuating circumstances that prevented the Landlord from living in the rental unit for at least 6 months, I was heavily influenced by the undisputed evidence that her business was closed during COVID in December of 2021 and that she did not receive support from the government as a result of that mandatory closure. It is common knowledge that many small businesses suffered significantly as a result of pandemic restrictions and I find that leeway should be granted to the Landlord in this regard. I find that the Landlord, like many Canadians, could not have predicted the impact the pandemic would have on small businesses.

In concluding that there were extenuating circumstances that prevented the Landlord from living in the rental unit for at least 6 months, I was further influenced by evidence that the Landlord purchased furniture, at a cost of \$15,737.39, for furniture on November 13, 2021. I find that this would have had a negative impact the closure of her business had on her finances.

In determining this matter, I have placed little weight on the undisputed evidence that the Landlord also sells nutritional supplements. In the absence of evidence that refutes the Landlord's submission that these sales do not provide a consistent and significant source of income, I must conclude that her finances suffered as a result of the closure of her gym. Prior to the closure of her gym, she received income from both sources so

it stands to reason that she experienced a significant reduction in income, even if she was still receiving some income from selling supplements.

In determining this matter, I have placed little weight on the Tenant's submission that the Landlord and her fiancé are intending to build a life together and that her fiancé's income should be considered. As there is no evidence to show that the Landlord and her fiancé are married or are cohabitating, I cannot conclude that the fiancé has any legal obligation to share his finances with the Landlord.

In determining this matter, I have placed limited weight on the Landlord's submission that her fiancé planned to move to the community and to live in the rental unit with her, other than to acknowledge that sharing accommodations with a second person typically reduces living costs.

In determining this matter, I have placed little weight on the submission that the Landlord has applied to emigrate to the United States and she has been advised that she must be prepared to "leave quickly" if her application is approved. I find that the decision to rent the rental unit to a third party to facilitate her move to the United States once her application to emigrate is approved is a matter of convenience and should not be considered extenuating circumstances for the purposes of section 51 of the *Act*.

In considering this matter I have not considered the Tenant's submission that the Landlord ended this tenancy in bad faith.

The "good faith" argument arises when a tenant applies to cancel a Two Month Notice to End Tenancy for Landlord's Use. When a landlord serves notice to end a tenancy pursuant to section 49 of the *Act*, the landlord has the burden of proving the notice was served in good faith. If the landlord is unable to establish that the notice was served in good faith, the Two Month Notice to End Tenancy for Landlord's Use is likely to be set aside.

In these circumstances, the Tenant has not applied to cancel the notice to end the tenancy that was served pursuant to section 49 of the *Act* and, as such, I do not need to determine whether the notice to end tenancy was served in good faith.

Regardless of whether the notice to end the tenancy was served in good faith, the Landlord was obligated to occupy the rental unit for at least six months after December 01, 2022 and is subject to the penalty imposed by section 51(2) of the *Act*, unless I find

there are extenuating circumstances that prevented her from doing so. I am satisfied that the temporary closure of the Landlord's business are extenuating circumstances regardless of whether the Landlord ended this tenancy, initially, in bad faith.

On the basis of the undisputed evidence, I find that the Tenant rented the unit to a third part, on the basis of an oral tenancy agreement, and that the tenancy between the Tenant and the third party ended on November 30, 2021.

Regardless of whether the Tenant sublet the rental unit to the third party or the Tenant assigned his tenancy agreement to the third party, I find that the Tenant breached section 34(1) of the *Act* when he did so without the written consent of the Landlord.

When making a claim for damages under a tenancy agreement or the *Act*, the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

Given that the Tenant was able to re-rent the unit to a third party for \$1,700.00 and the Tenant was paying rent of \$1,270.00, I find it reasonable to conclude that the Landlord could have generated greater income if the Tenant had ended the tenancy in July of 2021, rather than subletting the unit or assigning his tenancy.

Section 67 of the *Act* permits me to order a tenant to pay a landlord compensation for loss that results from a tenant not complying with the legislation or the tenancy agreement.

Residential Tenancy Branch Policy Guideline 16 specifies that damage or loss is not limited to physical property and that it includes less tangible impacts, including "loss of rental income that was to be received under a tenancy agreement and costs associated". I am not convinced that it can include compensation for loss of revenue a landlord could have generated if the tenancy ended.

In these circumstances, the Landlord continued to receive the agreed upon rent that she could have reasonably expected to receive if the tenancy continued until it was ended in accordance with the *Act*. I find that she suffered no real loss and that she is not entitled

to compensation for potential income she could have generated. I therefore dismiss the Landlord's claim for compensation arising from the Tenant subletting the unit.

I note that section 47(i) of the *Act* permits a landlord to end a tenancy if a tenant purports to assign the tenancy agreement or sublet the rental unit with the written consent of the Landlord. This is the remedy available to a landlord if a tenancy breaches section 34(1) of the *Act* and I find that the Landlord could have attempted to end this tenancy pursuant to section 47(i) of the *Act* as soon as she became aware of the assignment/sublet.

I find that the Landlord has failed to establish the merit of the Landlord's Application for Dispute Resolution and I dismiss the application to recover the fee for an Application for Dispute Resolution.

I find that the Tenant has failed to establish the merit of the Tenant's Application for Dispute Resolution and I dismiss the application to recover the fee for an Application for Dispute Resolution.

Conclusion

The Tenant's Application for Dispute Resolution is dismissed, without leave to reapply.

The Landlord's Application for Dispute Resolution is dismissed, 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 *Act*.

Dated: January 20, 2023

Residential Tenancy Branch