



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC, FFT

Introduction

This hearing originally convened on April 11, 2023 and was adjourned to April 25, 2023. This decision should be read in conjunction with the April 11, 2023 Interim Decision. The hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the Act) for:

- a Monetary Order for compensation from the landlord related to a Notice to End Tenancy for Landlord's Use of Property, pursuant to section 51; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Counsel for the landlord, the landlord, the landlords interpreter and the tenants attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

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

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue- Service of Tenants' Evidence

Both parties agreed that the landlord was served with the tenants' evidence via registered mail and that this evidence was received by the landlord on September 29, 2022. I find that the tenants' evidence was served in accordance with section 88 of the act and is accepted for consideration.

Issues

1. Are the tenants entitled to a Monetary Order for compensation from the landlord related to a Notice to End Tenancy for Landlord's Use of Property, pursuant to section 51 of the *Act*?
2. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Background / Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenants' and landlord's claims and my findings are set out below.

Both parties agreed to the following facts:

- this tenancy began on February 15, 2021 and ended on March 13, 2022 pursuant to a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice"),
- monthly rent in the amount of \$2,800.00 was payable on the first day of each month,
- a security deposit of \$1,400.00 was paid by the tenants to the landlord.

A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that the landlord's agent (the "agent") served the tenants with the Notice in person on February 7, 2022. Tenant TKW testified that the agent only served them with page one of the notice and did not serve them with pages 2-4. The landlord

testified that she does not know what pages the agent served the tenants. The tenants entered into evidence page 1 of the Notice.

Page 1 of the Notice is signed by the landlord, is dated February 7, 2022, gives the address of the rental unit, states that the effect date of the notice is April 16, 2022, and is in the approved form, #RTB-32.

The tenants testified that they gave the agent a verbal notice to end the tenancy before the effective date of the notice. The landlord testified that she was notified of the tenants' early move out by the agent.

Tenant TKW testified that the tenants filed this application for dispute resolution because the landlord listed the property for sale 18 days after they moved out and advertised the subject rental property for rent available July 1st 2022. The tenants entered into evidence the above-described property listing and rental advertisement. The rental advertisement states that the subject rental property is available for rent July 1, 2022 at a rental rate of \$3,700 per month.

Tenant TKW testified that the property listing and rental advertisement show that the landlord did not intend on moving into the subject rental property.

Council for the landlord submitted that the landlord moved into the subject rental property on March 14, 2022 and resided in the subject rental property as her principle residence until September 14, 2022, a total of six months. The landlord entered into evidence a sworn affidavit from herself which states that she used the property as her primary residence for the period of March 13, 2022 to Sept 13, 2022.

The only exhibit attached to the landlord's affidavit is a residential tenancy agreement pertaining to the subject rental property between the landlord and a new tenant (the "new agreement"). The new agreement states that the tenancy started on September 15, 2022 and is for a fixed term ending on September 14, 2023.

No documentary evidence to support the alleged date of the landlords alleged move into the subject rental property were entered into evidence. The affidavit did not attach relevant exhibits such as moving records or evidence of residence in the subject rental property such as photographs of same, or utilities in the landlord's name at the subject rental address.

The landlord testified that the subject rental property was listed for sale for promotional purposes as a favor to a friend. The landlord testified that the listing served as advertisement for her friend but that at no time did she intend on selling the subject rental property. The landlord testified that the advertisement for rent with an availability of July 1st, 2022 must have been a mistake as she did not intend on moving out until mid-September 2022.

The landlord entered into two evidence an affidavit from the listing realtor which states that the subject rental property was listed for sale for promotional purposes only and not for the purpose of sale.

The tenants testified that for the duration of the tenancy they were led to believe that the landlord's agent was the landlord and not an agent. The tenants testified that when the agent served them with the Notice the agent informed them that she (the agent) was moving into the subject rental property because her daughter was being bullied and the agent needed to move to a new school catchment area.

The landlord testified that she would have remained in the subject rental property beyond September of 2022 if her daughter had been accepted in the local school's catchment area. The landlord testified that the catchment school was not able to offer her daughter a space and so they moved to a different catchment area that had space and she rented the subject rental property after residing in it for six months. The Realtors affidavit did not contain any exhibits. The landlord did not provide any documentary evidence to establish her daughter's enrollment in any school or catchment area.

Counsel submitted that it is the landlord's position that since the landlord moved into the subject rental property and resided in it for six months the landlord did not breach the relevant sections of the act and so the tenants are not entitled to compensation. Counsel submitted that the new agreement shows that the subject rental property was not rented until September 15, 2022, which timeline does not violate the six month requirement of the legislation.

Tenant TKW testified that while he does not have proof that the landlord did not move into the subject rental property he is not required to prove same. Tenant TKW testified that the landlord has not proved that she moved into the subject rental property and that the affidavit alone without additional supportive documentary evidence does not prove that she moved into the subject rental property after the tenants moved out.

Counsel submitted that the tenants failed to prove, on a balance of probabilities, that the landlord did not reside in the subject rental property for six months following the end of the tenancy. Council submitted that because the tenants failed to prove same, the tenants are not entitled to receive 12 months compensation.

Tenant TKW testified that the landlord did not provide the tenants with one month free rent in accordance with the *Act*. Tenant TKW testified that the tenants are seeking to recover one month's rent from the landlord.

Counsel for the landlord submitted that the tenants did not seek one-month free rent in this application for dispute resolution and because this claim was not pled it should not be heard in this dispute resolution hearing.

Analysis

Based on the testimony of both parties I find that the tenants were served with the Notice on February 7, 2022 in accordance with section 88 of the *Act*. I find that whether the first page or all four pages of the Notice were served, for the purposes of section 51 of the *Act* the tenants were served with a section 49 Two Month Notice To End Tenancy For Landlords Use Of Property and moved out of the subject rental property because the Notice was served.

Section 51(2) of the *Act* states that subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if

- (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
- (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Residential Tenancy Policy Guideline 50 (PG 50) states:

The onus is on the landlord to prove that they accomplished the purpose for ending the tenancy under sections 49 or 49.2 of the RTA or that they used the rental unit for its stated purpose under sections 49(6)(c) to (f) for at least six

months. If this is not established, the amount of compensation is 12 times the monthly rent that the tenant was required to pay before the tenancy ended.

Counsel for the landlord submitted that the tenants' claim should be dismissed because the tenants did not prove that the landlord did not move in. I find, pursuant to PG 50, the landlord and not the tenant, bears the onus in a section 51 application for dispute resolution.

I find that the landlord has not proved, on a balance of probabilities, that she moved into the subject rental property on either March 13, 2022 or March 14, 2022 or that she resided in the subject rental property from either of those dates until September of 2022. In making this finding I take into account the lack of documentary evidence provided by the landlord. The landlord's documentary evidence consisted of two affidavits with only one exhibit, the new agreement, which shows that the subject rental property was rented to another tenant on September 14, 2022 for a tenancy starting September 15, 2022.

I find that while the new agreement indicates that a tenant moved in on September 15, 2022 it does not prove on a balance of probabilities that the landlord resided in the subject rental property between March and September of 2022. The affidavit from the realtor does not speak to the landlord moving into the subject rental property whatsoever. I have considered the landlord's affidavit and testimony; however, without supporting documentary evidence, I find that these are insufficient to meet the burden of proof to prove that the landlord moved into the subject rental property. As the landlord has failed to meet the burden of proof, and pursuant to section 51(2) of the *Act*, I award the tenants 12 months rent in the amount of \$33,600.00.

Counsel submitted that the tenants' claim for one month's rent should not be heard because it was not pled in the tenants' application for dispute resolution. I agree with counsel on this point as the landlord had a right to know and understand the claims made against her in this application for dispute resolution. I find that it would be procedurally unfair to amend the tenants' application to hear their section 51(1) claim and so I decline to amend their application in this hearing. I note that the tenants are not restricted from making such an application in the future.

As the tenants were successful in their application for dispute resolution, I find that they are entitled to recover the \$100.00 filing fee from the landlord, pursuant to section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the tenants in the amount of \$33,700.

The tenants are provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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: April 25, 2023

Residential Tenancy Branch