Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding JUST VIRANI CONSULTING INC and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL, MNDL-S, FFL

Introduction

This Application for Dispute Resolution was filed by the Landlord under the *Residential Tenancy Act*, (the "*Act*"), for a monetary order for unpaid rent or utilities, for a monetary order for damages, permission to retain the security deposit and an order to recover the cost of filing the application. The matter was set for a conference call.

This matter initially proceeded by way of a hearing on February 6, 2023, an Interim Decision for that hearing was issued on February 14, 2023, adjourning the proceedings to a written submission proceeding, in lieu of further oral testimony, scheduled for April 3, 2023.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this decision.

This Written Submission Hearing decision should be read in conjunction with the Substituted Service decision and Order dated June 7, 2022, the Interim decision dated February 14, 2023, and the Interim decision corrected on May 2, 2023.

Issues to be Decided

- Is the Landlord entitled to monetary order for unpaid rent and utilities?
- Is the Landlord entitled to monetary order for damage?
- Is the Landlord entitled to retain the security deposit for this tenancy?
- Is the Landlord entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to all of the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here.

The parties agreed that the tenancy began on February 15, 2022, as a one-year fixed term tenancy, with a vacate cause. That rent in the amount of $3,20.00 had been due and payable by the 15th day of each month and the Landlord collected a $1,600.00 security deposit. The Parties agreed that this rental property consists of two units, with the Tenants residing in the upper unit and the Landlord residing in the lower unit. A copy of the tenancy agreement was submitted into documentary evidence by the Landlord.

The Landlord has submitted that the Tenants abandoned their tenancy when they realized in mid-august 2022, that the Tenants had vacated the rental unit without notice. The Landlord is claiming for $7,800.72 for damages and losses due to the Tenants' breach of the tenancy agreement. The Landlord submitted a six-page written statement into documentary evidence.

The Tenants submitted that they provided several written notices to the Landlord to end their tenancy early, due to disputes they were having with the Landlord. The Tenants submitted that they knew this was a breach of the tenancy agreement but that they were just unable to live there any longer. The Tenants submitted two copies of the emailed notice, dated May 14, 2022, and June 13, 2022, to end tenancy into documentary evidence.

The Landlord agreed that they received the emails from the Tenants that stated the Tenants would be ending the tenancy early but that they had responded to those emails advising the Tenants they could not leave, and that they had to stay until the term of their tenancy ended. The Landlord submitted 24 pages of email correspondence between them and the Tenants into documentary evidence.

The Tenants testified that they moved out of the rental unit in accordance with their written Notice on June 15, 2022.

The Parties agreed that no move-out inspection had been completed for this tenancy. The Landlord submitted a copy of the move-in inspection into documentary evidence.

The Landlord is claiming for unpaid rent in the amount of $6,400.00, for the June 15 and July 15, 2022, rental periods, and for $190.00 in the recovery of two $45.00 return cheques fees, and two $50.00 admin fees for this same rental period. The Landlord submitted that they had posted dated rent cheques for this tenancy and that the June 15 and July 15 rent cheques were returned insufficient funds. The Landlord submitted copies of the returned cheques into documentary evidence.

The Tenant submitted that in their June 13, 2022, email to the Landlord they requested the return of their post-dated cheques for this tenancy, as they were ending the tenancy, but the Landlord had refused to return their postdated cheques as requested.

The Landlord was asked what attempts they made to secure a new renter for the rental unit, the Landlord submitted that they did not know until mid-August that the Tenants had left, so they could not look for a new renter for the claimed period.

The Landlord has submitted that there are two unpaid municipal utility bills for this tenancy, in the amounts of $409.31 and $165.58. The Landlord submitted that the Tenants are required, under the tenancy agreement, to pay 100% of the utilities for the rental property. The Landlord submitted that at the end of this tenancy, these two bills remained unpaid. The Landlord submitted copies of the utility bills into documentary evidence.

The Tenants submitted that they are not responsible to pay these bills and that it is unfair of the Landlord to require the Tenants to pay 100% of the utilities for the full rental property, which includes the Landlord's use of the utilities. The Tenants submitted that as the Landlord also resides on the rental property in the lower unit, the costs for the utility bills should be shared between the Landlord and the Tenants.

The Landlord submitted that the Tenants agreed in the tenancy agreement to pay all the utilities for the shared house, but that when the Tenants pushed back on having to pay all of the bills, they agreed to cover 5%. The Landlord referenced section five of the tenancy agreement, already in evidence, for this point of their claim.

The Landlord has also submitted that they are seeking to recover $285.00 in the recovery of their costs to have the yard work completed, $55.99 for a new doorbell, and $294.84 for carpet cleaning at the end of the tenancy. The Landlord submitted three bills, and four pictures into documentary evidence. The Landlord also referenced section nine of the tenancy agreement.

The Tenant submitted that they returned the rental unit to the Landlord clean and undamaged at the end of the tenancy and that they do not owe the Landlord any money. The Tenants submitted fourteen pictures into documentary evidence.

Analysis

Based on the testimony and the documentary evidence before me, and on a balance of probabilities, I find as follows:

In this case, the Landlord is claiming for compensation totalling $7,800.72 for damages and losses due to this tenancy. Awards for compensation due to damage are provided for under sections 7 and 67 of the *Act.* A party that makes an application for monetary compensation against another party has the burden to prove their claim. The Residential Tenancy Policy Guideline #16 Compensation for Damage or Loss provides guidance on how an applicant must prove their claim. The policy guide states the following:

> "The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To determine whether compensation is due, the arbitrator may determine whether:
>
> - A party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - Loss or damage has resulted from this non-compliance;
> - The party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - The party who suffered the damage or loss has acted reasonably to minimize that damage or loss."

First, the Landlord has claimed to recover lost rental income in the amount of $6,400.00, consisting of $3,200.00 due June 15, 2022, and $3,200.00 due July 15, 2022. I accept the testimony of the Tenants, supported by both the Landlord and the Tenant's documentary evidence, and I find that the Tenants served the Landlord with written notice, by email sent on May 14, 2022, to end their tenancy early on June 15, 2022. I find that the Tenants' notice was deemed to have been received by the Landlord on May 17, 2022, three days after the email was sent, pursuant to section 43 of the *Residential Tenancy Regulations*.

Section 45(2)(b) of the *Act* states that a tenant cannot end a tenancy agreement earlier than the date specified in the tenancy agreement.

> ***Tenant's notice***
>
> ***45****(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.*

Based on the tenancy agreement signed between these parties, this tenancy could not have ended in accordance with the *Act* until February 14, 2023. Therefore, I find that the Tenants failed to comply with the *Act* when they ended their tenancy early, on June 15, 2022.

In this case, the Landlord has claimed for the lost rental income between June 15 to August 14, 2022; however, the Landlord has submitted that they made no attempt to secure a new renter for the rental unit after receiving the Tenants' notice to end their tenancy. I find that the Landlord did not act reasonably to minimize their damages or losses due to the Tenants' breach when they make no attempt to try and re-rent the rental unit until August 2022, two months after the Tenants had moved out.

Section 7(2) of the Act states the following regarding the requirement to mitigate a loss:

> ***Liability for not complying with this Act or a tenancy agreement***
>
> *7 (2) 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.*

Consequently, I find that the Landlord was in breach of section 7(2) of the *Act* when they did not take steps to attempt to rent the rental unit after being notified that the Tenants' decision to end the tenancy early. Therefore, I dismiss the Landlord's claim for the recovery of the loss of rental income between June 15 to August 14, 2022, in its entirety.

I acknowledge the Landlord's submission that the Tenants issued their notice to end their tenancy to the Landlord by email and that there was no agreement between the Landlord and the Tenants for email service. However, as stated in the Interim decision, dated February 14, 2023, these parties regularly communicated by email, with both parties relying on email to serve each other documents. Therefore, as both the Landlord and the Tenant had a history of serving each other by email, and responding to that email service, I find that these parties had created an agreement for email service through their own actions.

The Landlord has also claimed for $190.00 in fees, associated with returned rent cheques, admin fees associated with the two postdated rent cheques they cashed, dated June 15, 2022, and July 15, 2022. In the email dated May 14, 2022, the Tenants requested the return of their postdated cheques for this tenancy, I find that the Landlord had a legal obligation to return the Tenants' postdated cheques to them immediately after receiving their request. However, in this case, the Landlord chose to ignore the Tenants' request and instead attempt the cash the postdated cheques after there requested return. I find that the Landlord was in breach of the *Act* when they refused to return the Tenants' postdated cheques after they received a written request for their return. Therefore, I dismiss the Landlord's claim for the recovery of $190.00 in fees associated with cashing these two postdated rent cheques for this tenancy.

The Landlord has also claimed for the recovery of two unpaid municipal utility bills for this tenancy, in the amounts of $409.31 and $165.58. The Landlord has submitted that the tenancy agreement they wrote for this tenancy required the Tenants to pay 100% of the utilities for this two-unit rental property, in which the Landlord themselves lives in the other unit. The Landlord also submitted that they had agreed to pay 5% of the utilities themselves in a verbal agreement they had with the Tenants. The Tenants have submitted that it is unfair to hold the Tenants responsible for the utilities that the Landlord is consuming. Section 6(3) of the *Act* states the following regarding terms of tenancy:

> ***Enforcing rights and obligations of landlords and tenants***
>
> *6 (3) A term of a tenancy agreement is not enforceable if*
>
> *(a) the term is inconsistent with this Act or the regulations,*
>
> *(b) the term is unconscionable, or*
>
> *(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.*

The Residential Tenancy Branches Policy Guide #8 Unconscionable and Material Terms provides further guidance on terms of a tenancy agreement, stating the following:

Unconscionable Terms

> "Under the Residential Tenancy Act and the Manufactured Home Park Tenancy Act, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.
>
> ….
>
> A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party."

The tenancy agreement for this tenancy is titled a "house sharing agreement", and I accept the agreed-upon submissions of both the Landlord and the Tenant that the Landlord lived downstairs, and the Tenants lived upstairs during this tenancy and the utility accounts for this tenancy included usage for both the upper and lower units.

The Residential Tenancy Branches Policy Guide #1 Landlord & Tenant – Responsibility for Residential Premises provides additional guidance on "Shared Utility Service", stating the following:

Shared Utility Service

> 1. A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable as defined in the Regulations.
> 2. If the tenancy agreement requires one of the tenants to have utilities (such as electricity, gas, water etc.) in his or her name, and if the other tenants under a different tenancy agreement do not pay their share, the tenant whose name is on the bill, or his or her agent, may claim against the landlord for the other tenants' share of the unpaid utility bills.

I acknowledge that this "shared utility service" above describes circumstances where a tenant is required to put the utilities in their name, I interpret this section to also apply where a tenant is required to pay all of the bills, even if the bills are in the landlord's name. I have also reviewed section five of the tenancy agreement signed between these parties, which I have reproduced below:

5. In consideration of the above terms, we shall pay the utilities including gas, electricity, telephone, water, sewer, garbage removal, cable, internet and improvements, for the term of this agreement. The said services are not included in the Amount.

After reviewing section five of the Tenancy agreement and the relevant sections of the Act and the Residential Tenancy Branches Policy Guides noted above, and I find that where section five of this tenancy agreement does indicate that the Tenants are responsible for 100% of the utility payments for their rental unit, it does not clearly

indicate that the Tenants are responsible for paying 100% or even 95% of the utilities for the shared property. To provide further clarity on this point, as with rent payments for multiple-unit rental properties, a tenant in one unit would not be assumed to be responsible to pay the rent for the occupants in other units on that same property, and I find the same applies to utility payments, tenants in one unit cannot be assumed to be responsible to pay for the utility usage of an occupant in another unit.

Therefore, I find it to be a reasonable interpretation of section five of this tenancy agreement that these Tenants are required to pay all utilities for the rental unit they are renting. As such, I find section five of this tenancy agreement does not sufficiently set out these Tenants' liability to pay for all or even 95% of utilities for the entire property as claimed by the Landlord. Therefore, I find that section five of this Tenancy agreement does not meet the requirement of section 6(3)(c) of the *Act*.

As section 5 of this tenancy agreement does not clearly communicate the rights and obligations of these Tenants, I must apply the principle of contra proferentem, which is a legal principle or rule used in the legal system when interpreting contracts, which basically means that any ambiguous clause contained in a contract will be interpreted against the party responsible for drafting the clause. Therefore, as it was the Landlord who drafted this tenancy agreement, I find that I must settle the ambiguous nature of section five of this tenancy agreement against the Landlord.

Additionally, even if section five had been sufficiently and clearly set out that these Tenant's were liable to pay 100% or 95% of the utilities for the entire property, I find that this clause of this tenancy agreement would still be unenforceable due to its unconscionability, pursuant to section 6(3)(b) of the *Act*, as I find it unconscionable to require a tenant to pay for even a portion of a landlord's personal utility consumption.

For the reasons provided above, I dismiss the Landlord's request to recover the unpaid municipal utility bills for this tenancy, in the amounts of $409.31 and $165.58, in their entirety.

The Landlord has also claimed for $285.00 in the recovery of their costs to have the yard work completed, $55.99 for a new doorbell, and $294.84 for carpet cleaning at the end of this tenancy. An Arbitrator would normally look to the move-in/move-out inspection report (the "inspection report") as the official document that represents the condition of the rental unit at the beginning and the end of a tenancy; as it is required that this document is completed in the presence of both parties and is seen as a reliable account of the condition of the rental unit.

However, I find that I am unable to reference this document in my decision as the inspection report the Landlord submitted into documentary evidence is incomplete, with nothing filled out in the move-out section of this document.

Section 35 of the *Act* places the responsibility on the Landlord to ensure that the move-out inspection is scheduled and conducted in accordance with the *Act*, stating the following:

> ***Condition inspection: end of tenancy***
>
> ***35*** *(1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit*
>
> *(a) on or after the day the tenant ceases to occupy the rental unit, or*
>
> *(b) on another mutually agreed day.*
>
> *(2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.*
>
> *(3) The landlord must complete a condition inspection report in accordance with the regulations.*
>
> *(4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.*
>
> *(5) The landlord may make the inspection and complete and sign the report without the tenant if*
>
> *(a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or*
>
> *(b) the tenant has abandoned the rental unit.*

Pursuant to section 35(2), a landlord is required to offer at least two opportunities to a tenant to schedule the inspection; section 17 of the *Residential Tenancy Regulations* (the "*Regulations*") provides further clarity on the requirement of these two opportunities, stating the following:

> ***Two opportunities for inspection***
>
> ***17*** *(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.*
>
> *(2) If the tenant is not available at a time offered under subsection (1),*
>
> *(a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and*

(b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

(3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

I have reviewed the totality of the written submission, verbal testimony and documentary evidence provided by the parties in this case, and I find that there is no evidence before me to show that the Landlord made any attempt to schedule the move-out inspection with the Tenants, in June when the Tenants move-out or even in August when the Landlord claims they found the rental unit abandoned, when though the Landlord still had the ability to contact the Tenants by email, as demonstrated in Substituted Service Decision and Order dated June 7, 2022 for the Landlord's application for these proceedings.

Section 36(2) of the *Act* set out the consequences for a landlord when the requirement completed the move-out inspection, and to make two attempts to schedule the inspection, in accordance with the *Act*, are not met, stating the following:

Consequences for tenant and landlord if report requirements not met

36 *(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord*

(a) does not comply with section 35 (2) [2 opportunities for inspection],

(b) having complied with section 35 (2), does not participate on either occasion, or

(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

I acknowledge the Landlord's submission that they claim the Tenants abandoned the rental unit; however, I find that not to be the case, as there is sufficient evidence to prove that these Tenants provided written notice to end their tenancy to the Landlord on May 14, 2022. The Landlord responded to the Tenants' emailed notice, refusing to accept the Tenants' notice and demanded that the Tenants stay in the rental unit. The Landlord was advised during the February 6, 2023, hearing that they could not force a tenant to physically stay in a rental unit if that tenant wanted to leave.

In this case, the Tenants sent notice to end their tenancy, and the Landlord received and responded to that Notice to end tenancy, therefore, this is not a case of abandoning the rental unit, and the Landlord was required to make at least two attempts to schedule a move-out inspection for this tenancy, which they did not do.

Consequently, as the Landlord made no attempt to schedule the move-out inspection, I find that the Landlord extinguished their right to make a claim against the security deposit for this tenancy and that the security deposit should be returned to the Tenants within 15 days from the day the tenancy ended or the date the Landlord had received the Tenant's forwarding address in writing, whichever is later.

In this case, I find that this tenancy ended on June 15, 2022, however, I find that there is no evidence before me to show that the Tenants have provided their forwarding address to the Landlord. Pursuant to section 39 of the *Act*, the Tenants have one year from the date this tenancy ended to provide their forwarding address to the Landlord if they wish to recover their security deposit.

As for the Landlord's remaining claims; first the $285.00 in the recovery of their costs to have the yard work completed at the end of the tenancy. The Landlord submitted that section nine of the tenancy agreement required the Tenants to maintain the yards and garden on their side of the rental property during their Tenancy and that at the end of the tenancy, the yard and gardens were completely overgrown. I have reviewed section nine of the tenancy agreement and find that the Tenants had a responsibility to maintain the yard and garden during their tenancy. I have also reviewed the four pictures submitted into documentary evidence by the Landlord and I find that these pictures show that the Tenants returned the property with the yard and garden overgrown.

Therefore, I find that the Tenants were in breach of their tenancy agreement when they returned the rental unit to the Landlord with the yard and garden overgrown and unkept, and I **award** the Landlord **$285.00** in the recovery of their costs to have the yard work completed at the end of this tenancy. I grant permission to the Landlord to retain $285.00 from the security deposit they are holding for this tenancy in full satisfaction of this award.

As for the Landlord's remaining claims for $55.99 for a new doorbell, and $294.84 for carpet cleaning, after reviewing all of the Landlord's submissions on these two remaining points, I find that there is insufficient evidence before me to substantiate the Landlord's claims for these items as there is no record of the condition of these items in

the rental unit at the end of this tenancy. Therefore, I dismiss the Landlord's claims for $55.99 for a new doorbell, and $294.84 for carpet cleaning in their entirety.

Finally, section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Landlord has only been successful on one item in their application, I decline to award the recovery of the $100.00 filing fee paid for this application.

Conclusion

I grant permission to the Landlord to retain $285.00 of the security deposit they are holding for this tenancy in full satisfaction of the award contained in this decision.

I order the Landlord to return the remaining value of the security deposit in the amount of $1,315.00 to the Tenants within 15 days of the date of this decision or the date they are provided with the Tenants' forwarding address, whichever is later.

This decision does not restrict the right of the Tenants to file for the recovery of their security deposit, and the doubling provision set out under the *Act*, if the Landlord fails to return the remaining value of their security deposit as ordered above, pursuant to sections 38 and 38.1 of the *Act*.

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: May 2, 2023

Residential Tenancy Branch