



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **MNDCT MNETC FFT**

Introduction

This hearing was convened by way of conference call in response to the Tenants' application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act"). The Tenants seek:

- a monetary order for compensation from the Landlord related to two 2 Month Notices to End Tenancy for Landlord's Use of Property ("2 Month Notices") pursuant to section 51;
- an order to seek a monetary order for compensation from the Landlord pursuant to section 51; and
- authorization to recover the filing fee of the Application from the Landlord pursuant to section 72.

An agent ("JZ") for the Landlord and one of the two Tenants ("HK") attended this hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure* ("RoP"). The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

HK stated the Tenants served the Notice of Dispute Resolution and their evidence (collectively the "NDRP Package") on the Landlord by registered mail on August 22, 2022. HK submitted into evidence a copy of the Canada Post receipt for service of the NDRP Package on the Landlord to corroborate his testimony. JZ acknowledged the Landlord received the NDRP Package. As such, I find the NDRP Package was served by the Tenants on the Landlord in accordance with sections 88 and 89 of the Act.

Preliminary Matter – Service of Evidence by Landlord on Tenants

JZ stated the Landlord uploaded her evidence to the Residential Tenancy Portal but admitted the Landlord did not serve her evidence on the Tenants. Rule 3.15 of the RoP states:

3.15 Respondent's evidence provided in single package

Where possible, copies of all of the respondent's available evidence should be submitted to the Residential Tenancy Branch online through the Dispute Access Site or directly to the Residential Tenancy Branch Office or through a Service BC Office. The respondent's evidence should be served on the other party in a single complete package.

The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Except for evidence related to an expedited hearing (see Rule 10) and an additional rent increase for capital expenditures application (see Rule 11), and subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

See also Rules 3.7 and 3.10.

The Landlord did not serve her evidence on the Tenants. As such, the Landlord did not comply with Rule 3.15 of the RoP. As I need to review the tenancy agreement with the parties during the hearing. I will accept the tenancy agreement submitted by the Landlord to the RTB. However, I will not admit the Landlord's remaining evidence for this proceeding. I told JZ that she had the option of providing oral testimony, or calling witnesses to provide testimony, on the contents of the inadmissible evidence.

Issues to be Decided

Are the Tenants entitled to:

- a monetary order for compensation from the Landlord related to the two 2 Month Notices?
- a monetary order for compensation from the Landlord?
- recover the filing fee for the Application from the Landlord?

Background and Evidence

While I have turned my mind to all 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 principal aspects of the Application and my findings are set out below.

HK and JZ agreed to the following facts:

- the tenancy commenced on May 1, 2019, for a fixed term ending April 30, 2019
- the Tenants were required to pay rent of \$1,800.00 was payable on the 1st day of each month
- paragraph 2(ii) of the tenancy agreement stated the Tenants were required to vacate the rental unit at the end of the fixed term and the parties initialed the boxes next to this paragraph.
- notwithstanding the vacate clause in paragraph 2(ii) of the tenancy agreement, due to the COVID-19 pandemic, the fixed term of the tenancy was extended by the Landlord by one year to April 30, 2020 and, after April 30, 2022, the tenancy went to a month-to-month tenancy
- the Tenants paid a security deposit of \$900.00
- the Tenants vacated the rental unit on May 16, 2022
- the Landlord returned the Tenants' security deposit

Based on the foregoing, I find there was a residential tenancy between the parties and that I have jurisdiction to hear the Application.

HK submitted into evidence two 2 Month Notices. The first 2 Month Notice ("First 2 Month Notice") was dated May 3, 2022 and required the Tenants to move out of the rental unit by July 6, 2022. The First 2 Month Notice stated the reason for ending the tenancy was the rental unit would be occupied by the landlord or the landlord's spouse. JZ stated the First 2 Month Notice was served on the Tenants by email on May 3, 2022. HK acknowledged the Tenants received the First 2 Month Notice.

JZ stated the Tenants complained the move-out date of the First 2 Month Notice did not comply with the requirements of the Act. HK submitted into evidence a copy of a second 2 Month Notice dated May 5, 2022 ("Second 2 Month Notice") that required the Tenants to move out of the rental unit by August 1, 2022. JZ stated the Second 2 Month Notice was served on the Tenants by email on May 5, 2022. HK stated the Tenants received

the Second 2 Month Notice. The Second 2 Month Notice stated the reason for ending the tenancy was the rental unit would be occupied by the Landlord or the Landlord's spouse. JZ stated the Landlord obtained the consent of the Tenants to the withdrawal of the First 2 Month Notice. HK denied the Tenants gave the Landlord consent to the withdrawal of the First 2 Month Notice.

HK submitted into evidence a copy of an email dated May 16, 2022 and stated the Tenants served it on the Landlord on May 6, 2022. In that email, the Tenants stated they were arranging for moving and that May 16, 2022 was the target date but the Tenants had to arrange for a moving company and the elevator. HK submitted into evidence a copy of an email dated by email on May 9, 2022. In that email, the Tenants stated the moving was confirmed and they would move out on May 16, 2022 and requested that the move-out inspection be performed, and to hand over the keys, in the afternoon of May 16, 2022. JZ acknowledged the Landlord received these two emails. HK stated the Tenants were seeking the return of the unused portion of the rent they paid for May 2022 and for one month's compensation for June 2022.

JZ stated the Landlord moved into the rental unit on June 25, 2022 and occupied the rental unit until April 2023. HK disputed JZ's testimony and stated the Landlord never used the rental unit for the purpose stated in the First or Second 10 Day Notices.

Analysis

Sections 49(2) and 49(3) and 51 of the Act state:

- 49(2) subject to section 51 [tenant's compensation: section 49 notice],
a landlord may end a tenancy
 - (a) 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
 - (i) not earlier than 2 months after the date the tenant receives
the notice,
 - (ii) 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

- (iii) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy, or

[...]

- (3) A landlord who is an individual may 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.

51(1) A tenant who receives a notice to end a tenancy under section 49 [*landlord's use of property*] 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.

- (1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

- (1.2) If a tenant referred to in subsection (1) paid rent before giving a notice under section 50, the landlord must refund the amount paid.

- (2) 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 the landlord or purchaser, as applicable, does not establish that*

- (a) *the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and*

- (b) *the rental unit, except in respect of the purpose specified in section 49 (6) (a), 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.*

- (3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as applicable, from

- (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, and
- (b) using the rental unit, except in respect of the purpose specified in section 49 (6) (a), for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

[emphasis in italics added]

The tenancy commenced on May 1, 2019, for a fixed term ending May 1, 2019. Paragraph 2(ii) of the tenancy agreement stated the Tenants were required to vacate the rental unit at the end of the fixed term and the parties initialed the boxes next to this paragraph. However, due to the COVID-19 pandemic, the Landlord agreed to extend the fixed term by one-year to May 1, 2020 and the Landlord agreed the tenancy would become a month-to-month tenancy. Based on the foregoing, I find the Landlord waived the requirement for the Tenants vacate the rental unit at the end of the fixed term on April 30, 2020. As such, in order for the Landlord to end the tenancy so that she could occupy the rental unit, she was required to serve the Tenants with a Two Month Notice to end Tenancy for Landlord's Use of Property.

JZ stated the Landlord served the First 2 Month Notice, dated May 3, 2022, on the Tenants by email on May 3, 2022. The First 2 Month Notice required the Tenants vacate the rental unit by July 6, 2022. HK acknowledged the Tenants received the First 2 Month Notice. Section 53 of the Act states:

- 53(1) If a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) or (3), as applicable.
- (2) If the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.
- (3) In the case of a notice to end a tenancy, other than a notice under section 45 (3) *[tenant's notice: landlord breach of material term]*, 46 *[landlord's notice: non-payment of rent]* or 50 *[tenant may end tenancy early]*, if the effective date stated in the notice is any day other than 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, the effective date is

deemed to be 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

- (a) that complies with the required notice period, or
- (b) if the landlord gives a longer notice period, that complies with that longer notice period.

Residential Tenancy Policy Guideline 11 ("PG 11") provides guidance on amendments, withdrawal and waiver of a notice to end tenancy. Part C of PG 11 states in part:

C. WITHDRAWAL OF NOTICE TO END TENANCY

A landlord or tenant cannot unilaterally withdraw a notice to end tenancy. A notice to end tenancy may be withdrawn prior to its effective date only with the consent of the landlord or tenant to whom it is given.

A notice to end tenancy can be waived only with the express or implied consent of the landlord or tenant (see section D below).

It is recommended that withdrawal of a notice to end tenancy be documented in writing and signed by both the landlord and the tenant.

I find the Tenants did not consent to the withdrawal of the First 1 Month Notice. As the move-out date stated on the First 2 Month Notice did not comply with subsection 49(2)(1)(i) of the Act, the move-out date was deemed, pursuant to section 53(3)(a) of the Act, to be changed to July 31, 2022. As such, I find the First 2 Month Notice was valid, notwithstanding the incorrect date for move-out stated on the First 2 Month Notice. As there is no evidence the Tenants consented to the withdrawal of the First 2 Month Notice, I find the Second 2 Month Notice was not effective because it was served before the deemed effective date of the First 2 Month Notice, being July 31, 2022.

The First 2 Month Notice stated the reason for ending the tenancy was the rental unit will be occupied by the Landlord or the Landlord's spouse. Pursuant to section 51(2) of the Act, the Landlord has the onus to establish that she used the rental unit for the purpose stated in the First 2 Month Notice within a reasonable period after the effective date of the 2 Month Notice and that the rental unit has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period of time after the effective date of the Notice. Rule 6.6 of the RoP states 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. JZ stated the Landlord moved into the rental unit on June 25, 2022 and lived in it until April 2023, being more than 6 months of occupation.

The Landlord's evidence was not accepted into evidence. HK disputed JZ's testimony and stated the Landlord never used the rental unit for the purpose stated in the First or Second 10 Day Notices. JZ did not call any witnesses to testify they saw or otherwise knew the Landlord moved into the rental unit before, or within a reasonable period after the effective date, and occupied the rental unit for at least 6 months after commencement of occupation. The Landlord had the opportunity to serve the Tenant, and submit to the Residential Tenancy branch, in accordance the requirements of section 3.15 of the Act, with evidence she complied with the requirements of section 51(2) of the Act but she did not do so.

Although I declined to admit the Landlord's evidence submitted late to the RTB, I reviewed that evidence after the hearing. I find that the documents submitted by the Landlord indicate that the elevator was reserved and that the strata fees were paid but there is nothing to indicate that it was actually the Landlord, or Landlord's spouse, who moved into the rental unit, as opposed to another tenant. As such, I find the Landlord has not established, on a balance of probabilities, that she complied with the requirements of section 51(2) of the Act. JZ did not provide any testimony that there were extenuating circumstances that prevented the Landlord from using the rental unit for the purpose stated in the First 2 Month Notice. As such, I find there were no extenuating circumstances that would allow me to consider whether the Landlord was entitled to be excused from paying the compensation pursuant to section 51(3) of the Act. Based on the foregoing, I find the Landlord must compensate the Tenants for an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement. Pursuant to section 51(2) of the Act, I order the Landlord to pay the Tenants \$21,600.00, being 12 times the monthly rent of \$1,800.00.

I accept the Tenants paid the rent for May 2022. HK provided a copy of a written notice served on the Landlord by email on May 6, 2022, in which the Tenants stated they were arranging for moving and that May 16, 2022 was the target date but the Tenants had to arrange for a moving company and the elevator. I find this email only told the Landlord the Tenants were contemplating moving out on May 16, 2022 but they had not completed the arrangements for move-out. As such, I find the email date May 6, 2022 was not sufficient to trigger the provisions of section 51(1.2) of the Act.

HK provided a copy of a written notice served on the Landlord dated May 9, 2022 and stated the Tenants served it on the Landlord by email on May 9, 2022. In that email, the Tenants stated their move was confirmed and they would move out on May 16, 2022. I find this email was definitive and it was sufficient for comply with the provisions of section 51(1.2) of the Act. The Landlord acknowledged receipt of the email on May 10, 2022. As such, I find the notice given by the Tenants on May 9, 2022 became effective on May 20, 2022, being 10 days after the date JZ received the email. Based on the foregoing, I the Tenants are entitled to the return of 11 days of rent they paid for May 2022. However, the Tenants did not make a claim in the Application for reimbursement of the unused rent the paid for the month of May 2022. I am unable to amend the Application to add this claim as the Landlord was not put on notice that the Tenants were making such a claim. As such, I must dismiss this claim.

Pursuant to section 51(1), the Tenants are entitled to receive from the Landlord, an amount that is the equivalent of one month's rent payable under the tenancy agreement. As such, pursuant to section 51(1) of the Act, I order the Landlord to pay the Tenants \$1,800.00.

As the Tenants have been successful in the Application, I order the Landlord to pay \$100.00 to the Tenants to reimburse them for the filing fee for the Application pursuant to section 72 of the Act.

Conclusion

The Tenant is granted a Monetary Order for \$12,100.00 calculated as follows:

Item	Amount
Compensation equal to 12 Months' Rent at \$1,800.00 per month	\$21,600.00
Compensation for last month's rent for July 2022	1,800.00
Reimbursement of Tenant's Filing Fee	\$100.00
TOTAL	\$23,500.00

The Tenant is provided with this Order on the above terms and the Purchasers must be served with this Order as soon as possible. Should the Purchasers fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court 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: May 11, 2023

Residential Tenancy Branch