Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes Tenant: MNECT FFT
Landlord: MNDL FFL

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the "Act") for Orders as follows:

The landlord requested:

- a monetary order for money owed or compensation for damage or loss pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant requested:

- a monetary order for compensation for money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing by the attending parties. Both parties confirmed that they understood.

Both parties confirmed receipt of each other's applications for dispute resolution hearing package ("Applications") and evidence. In accordance with sections 88 and 89 of the *Act*, I find that both the landlord and tenant were duly served with each other's Applications and evidentiary materials.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for losses or damage?

Is the tenant entitled to a monetary order for compensation for money owed under the *Act*, regulation, or tenancy agreement?

Are either of the parties entitled to recover the costs of their filing fees for their applications?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of these applications and my findings around it are set out below.

This fixed term tenancy began on June 1, 2018 ,and continued on a month-to-month basis after June 30, 2019. While the tenant's application notes that rent was set at $575.00 per month, the landlord's application and the tenancy agreement state that rent was set at $550.00, payable on the first of the month. The landlord had collected a security deposit of $275.00, which was returned at the end of the tenancy.

It was undisputed by both parties that this tenancy had ended on September 30, 2021, after the tenant was served with a 2 Month Notice by the landlord on July 30, 2021 in order for the landlord or their spouse to move in.

The tenant is seeking compensation equivalent to twelve times the monthly rent, which is the maximum amount the tenant may apply for under the *Act* for the landlord's failure to comply with section 49 of the *Act.* The tenant feels that the landlord failed to occupy the home as required by the *Act.*

The landlord does not dispute that the home was still vacant as of the hearing date, and that they have not been occupying the property. The landlord's spouse, DV, testified that they are a contractor and that the landlord was unaware of the numerous issues and state of the home until they took possession of the home after the tenant moved out. DV submitted an affidavit as well as photos to support that there were extenuating reasons that have prevented them from occupying the home as intended.

DV submits that once they were able to take possession of the home, they realized that the home had many cracks and water leaks that needed attention. While restoring the

property, the landlord asked a friend, JS, to act as a security guard to prevent squatters while the property was being repaired. The landlord submits that JS lived there rent-free in JS's own motorhome. An email was from JS was provided in evidence confirming JS's role in this matter.

The landlord provided bank statements to support that they had attended at many businesses near the rental property. The landlord submitted a statement from SM, an owner of a renovation company, that supports the landlord's view that the home is unlivable until renovations are completed. The statement states that SM is an owner of a renovation company that was started 8 years ago. SM states that they are friends with the landlord, and that they were asked by the landlord to assist with installing a new roof on the property in 2022. SM states that the project was scheduled for June and July, but was not completed until September 2022. SM also provided the opinion that "the whole house needs to be renovated to make it livable" due to various reasons such as soft spots I the flooring where SM "thought there was rot".

DV states that there were several other reasons for the delay in renovating the home and moving in, including their medical condition due to a 2019 motor vehicle accident, as well as medical issues between February 2022 and March 2022 which prevented the DV from being able to attend at the rental property. DV testified that they suffered from a hematoma in their back, and had to wait until June 2022 to start working on the property again. The landlord denies that the home has been re-rented, or used for any other purpose since the tenancy has ended. DV testified that they had purchased the home with the intention to eventually move into it for retirement.

The tenant argued that the landlord was aware of the issues such as the leaking roof prior to taking possession as this was a "project home". The tenant believes that the home was re-rented, as observed by the neighbours. The tenant submitted a statement from a neighbour who stated that the premises were now occupied by a man who informed them that "he was living there for free because he will be doing renovations to the house".

The landlord also submitted a monetary claim in order to recover their losses associated with the removal of a dead tree on the property. The landlord is seeking the following monetary claims:

Item	**Amount**
Stump Removal	$525.00
Estimated Damage	5,000.00

Total Monetary Order Requested	$5,525.00

The landlord is seeking the above monetary order related to the loss of a 40 year old apple tree on the property. The landlord testified that the apple tree was damaged by the tenant, and is not replaceable due to the age of the tree. The landlord testified that they cannot readily quantify the loss as the tree offered the landlord much enjoyment, and due its maturity cannot be simply replaced. The landlord testified that the tree provided shade, produced apples, and had a swing attached that the landlord enjoyed. The landlord testified that a new tree would not be able to perform these functions that the landlord enjoyed.

DV testified that the stump was 3 feet, and 24 inches wide in diameter, which required the attendance of a company to attend and grind up the stump and clean up the debris. The landlord submitted photos as well as an invoice for the stump removal.

The tenant testified that a huge branch had fallen off of the tree in 2018 due to multiple windstorms, and that the branch had caused the tenant to lose power in the workshop where the tenant's freezer was. The tenant testified that they had only pruned the tree, and did not cut it down. The tenant testified that they had informed the landlord about the fallen branch and loss of power, and that the landlord did not want to address it.

The tenant submitted a statement from a neighbour who states that they were in attendance the day the tenant called the landlord about the tree branch. The neighbour states that they observed seeing the landlord with a man on the day that the tenant was cutting up the fallen part of the tree, and that they appeared happy that the tenant was dealing with the tree, and cleaning up the mess. The neighbour testified that the only part of the tree that was left at the end of the tenancy was a 3 foot stump.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove, on a balance of probabilities, that the tenant had caused damage and losses in the amounts claimed by the landlord in relation to the tree stump.

In light of the disputed testimony, I find that the landlord had failed to establish that the tenant had caused damage to the apple tree. I find that the tenant had provided evidence which demonstrates that on a balance of probabilities, that the tree was damaged in a storm, and that the tenant had cleaned up the damage with the landlord's knowledge and implied consent.

I note that section 37(2)(a) of the *Act* stipulates that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and that sections 23 and 35 of the *Act* require the landlord to perform both move-in and move-out inspections, and fill out condition inspection reports for both occasions. In this case, the tenancy had ended on September 30, 2021, and the landlord had only filed this application for losses associated with the apple tree on January 17, 2023, over a year and half after the tenancy had already ended. As observed by the neighbour, the tree stump was visible on the day the tenant had moved out. I find that the landlord had the opportunity and obligation to inspect the rental property at the time the tenant moved out, but did not pursue any compensation related to the loss of the apple tree until well after the tenancy had already ended. I note that the invoice is dated December 3, 2022, which shows that the stump removal was performed over a year after the tenancy had already ended. I find that this supports that the stump removal was a decision made by the landlord after the tenancy was over, and was not a loss that can be associated with the tenant's contravention of the *Act* or tenancy agreement. Accordingly, I am dismissing the landlord's monetary claim for damage and losses without leave to reapply.

As the landlord was not successful with their claim, I also dismiss the landlord's monetary claim for recovery of the filing fee without leave to reapply.

I will now consider the tenant's application for compensation related to the 2 Month Notice.

Section 51(2) of the *Act* reads in part as follows:

> *51(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*

(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.

(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 the case may be, from

(a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or

(b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

RTB Policy Guideline 2A clarifies the meaning of “vacant possession”, and what it means to occupy a rental unit or home:

Vacant possession

*Other definitions of “occupy” such as “to hold and keep for use” (for example, to hold in vacant possession) are inconsistent with the intent of section 49, and in the context of section 51(2) which – except in extenuating circumstances – requires a landlord who has ended a tenancy to occupy a rental unit to use it for that purpose (**see Section E**). Since vacant possession is the absence of any use at all, the landlord would fail to meet this obligation. The result is that section 49 does not allow a landlord to end a tenancy to occupy the rental unit and then leave it vacant and unused.*

At the time of the hearing, the landlord admitted that they have yet to occupy the property. As noted above, by leaving the unit vacant, the landlord failed to satisfy the 6 month requirement to occupy the rental unit. I must now consider whether there were extenuating circumstances that prevented the landlord or their spouse from being able to occupy the home.

Policy Guideline #50 states the following about “Extenuating Circumstances” in the context of compensation for ending a tenancy under section 49 of the *Act.*

An arbitrator may excuse a landlord from paying compensation if there were extenuating circumstances that stopped the landlord from accomplishing the purpose or using the rental unit. These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation. Some examples are:

- *A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies before 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 didn’t notify the landlord of any further change of address or contact information after they moved out.*

The following are probably not extenuating circumstances:

- *A landlord ends a tenancy to occupy a rental unit and they change their mind.*
- *A landlord ends a tenancy to renovate the rental unit but did not adequately budget for renovations*

I find that the reasons provided by the landlord for failing to occupy the home within a reasonable amount of time do not meet the definition of extenuating circumstances as set out in the *Act* and *Policy Guidelines*. I make this finding based on several reasons.

I note that a significant amount of time has passed since the tenant had vacated the property. The tenant moved out pursuant to the 2 Month Notice on September 30, 2021, and as of the hearing date May 23, 2023, the landlord has yet to occupy the property, or even confirm a timeline for when they planned to do so.

Although the landlord did establish that the home required renovations and repairs, the landlord confirmed themselves that DV is a contractor. As shown by the evidence, DV had the assistance of friends who were assisting DV with the renovations and repairs, such as with the roof, and had years of experience and knowledge performing this kind of work on homes. Although I recognize that DV did suffer some medical issues in during the repairs, such as the hematoma and inability to attend at the property from February 2022 to June 2022, I do not find this explanation to be sufficient for why the repairs have taken over 20 months to complete, or why this delay could not have been anticipated by the landlord.

Due to the age of home, and the fact that DV is a contractor, I do not find it plausible that the landlord would have been unable to anticipate the amount of work required to make the home “livable”. Furthermore, as noted by DV in their own affidavit, DV suffered from injuries arising out of a 2019 motor vehicle accident. These injuries preceded the decision to end this tenancy pursuant to the 2 Month Notice. I do not find this explanation meets the definition of extenuating circumstances as DV’s physical condition was not unforeseen. I find that the landlord was well aware that DV suffered from previous injuries that could possibly hinder any repairs to be done. The failure of the landlord to anticipate any delays caused by DV’s health does not amount to an extenuating circumstance.

I find that the landlord could have considered other alternatives such as hiring contractors to assist with the renovations and repairs. Although there may have been delays due to permit wait times, the landlord did not provide any written evidence to that this was the reason for the extensive delay.

Although I accept that there may be unanticipated delays related to repairing and renovating a home before a home can be occupied by the landlord, I am not satisfied that the landlord’s explanations support why they have been unable to occupy the home after 20 months after the effective date of the 2 Month Notice.

Lastly I note that section 5 of that Act states that the *Act* cannot be avoided. As of July 1, 2021, pursuant to section 49.2 of the *Act,* a landlord must apply for an order to end the tenancy and an order of possession if all of the following apply:

> *a) the landlord has all the necessary permits and approvals required by law and intends in good faith to renovate or repair the rental unit(s)*
> *b) the renovations or repairs require the unit(s) to be vacant*
> *c) the renovations or repairs are necessary to prolong or sustain the use of the rental unit(s) or the building in which the rental unit(s) are located*
> *d) the only reasonable way to achieve the necessary vacancy is to end the tenancy agreement*
>
> *If an arbitrator is satisfied that all of these criteria are met, then they must grant an order ending the tenancy and issue an order of possession. Such an order must not end the tenancy earlier than 4 months after the date it was made*.

As noted in RTB Policy Guideline #50:

Another purpose cannot be substituted for the purpose set out on the notice to end tenancy (or for obtaining the section 49.2 order) even if this other purpose would also

have provided a valid reason for ending the tenancy. For instance, if a landlord gives a notice to end tenancy under section 49, and the stated reason on the notice is to occupy the rental unit or have a close family member occupy the rental unit, the landlord or their close family member must occupy the rental unit for at least 6 months. A landlord cannot convert the rental unit to a non-residential use instead. Similarly, if a section 49.2 order is granted for renovations and repairs, a landlord cannot decide to forego doing the renovation and repair work and move into the unit instead.

If a section 49.2 order is granted, the renovations or repairs that are accomplished must be the renovations or repairs that required vacant possession so that there was authority to grant the section 49.2 order. A landlord cannot obtain a section 49.2 order to end a tenancy for renovations or repairs and then only perform cosmetic repairs or other minor repairs that could have been completed during the tenancy.

A landlord cannot end a tenancy for the stated purpose of occupying the rental unit, and then re-rent the rental unit, or a portion of the rental unit (see Blouin v. Stamp, 2011 BCSC 411), to a new tenant without occupying the rental unit for at least 6 months.

I note that as of July 30, 2021, when the 2 Month Notice was issued, section 49.2 of the *Act* was in effect, meaning that the landlord would have had to file an application to request an order to end the tenancy and an order of possession in order to perform renovations or repairs that would require that the tenant permanently vacate the rental unit, and if the landlord was successful, the tenant would have had at least 4 months after the order was made to vacate the rental unit. As noted earlier, the landlord may not avoid the *Act,* and once a 2 Month Notice is served, the purpose set out on the 2 Month Notice cannot be substituted for another reason, even if it was valid for ending the tenancy. In this case, I find that the landlord had ended the tenancy pursuant to the 2 Month Notice in order to occupy the home, but has not, despite the fact that over 20 months has passed.

I find that the explanations provided by the landlord do not fall under the definition of extenuating circumstance as set out in the *Act* and *Policy Guidelines*. Accordingly, I find that the tenant is entitled to compensation equivalent to 12 times the monthly rent as required by section 51(2) of the *Act* for the landlord's noncompliance. I issue a monetary award to the tenant equivalent to 12 times the monthly rent.

I note that there was a discrepancy between the landlord and tenant's applications as to the amount of monthly rent that was payable at the end of this tenancy. Although the tenant had indicated that the monthly rent was $575.00 per month, the tenant did not provide any documentary evidence, whether that is in the form of receipts, proof of payment, notices of rent increase, or correspondence that supports that rent had been increased to $575.00 from $550.00 as noted on the tenancy agreement. As the onus is on the applicant to support their claim, I find that the tenant has not established that the monthly rent was set at $575.00. Accordingly, I find that the monthly rent was set at

$550.00 as noted on the tenancy agreement, and the tenant will be provided a monetary order for 12 times that amount.

As the tenant was successful in their claim, I find that they are also entitled to recover the filing fee for this application.

Conclusion

The landlord's entire application is dismissed without leave to reapply.

I issue a Monetary Order in the amount of $6,700.00 in the tenant's favour in compensation for the landlord's failure to comply with the *Act,* plus recovery of the filing fee for their application.

The tenant is provided with this Order in the above terms and the landlord(s) must be served with **this Order** as soon as possible. Should the landlord(s) 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: June 22, 2023

Residential Tenancy Branch