Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 8868 INVESTMENTS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC FF; MNDC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

This hearing also dealt with the tenants' cross-application pursuant to the *Act* for:

- a monetary order for money owed or compensation for damage or loss 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.

The landlord's two agents, landlord OC ("landlord") and "landlord OL" and the tenant HR ("tenant") attended the hearing and were each given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord confirmed that she is the building manager and landlord OL confirmed that he is the operations manager for the landlord company named in both applications and that both had authority to represent the landlord company as agents at this hearing. The tenant confirmed that she had authority to represent her husband, "tenant BP," the other tenant named in both applications. This hearing lasted approximately 98 minutes in order to allow both parties to full present their submissions.

Both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I find that both parties were duly served with the other party's application.

Issues to be Decided

Is either party entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

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

Both parties agreed that this tenancy began on December 1, 2012 and ended on February 28, 2015. The landlord confirmed that three fixed term tenancy agreements were signed with the tenants, for one year each, from December 1 to November 30 of the following year. The last written fixed term tenancy agreement was from December 1, 2014 until November 30, 2015 and both parties initialed beside the provision indicating that the tenants would vacate the rental unit at the end of the fixed term. A copy of the latest written tenancy agreement was provided for this hearing. The landlord became the new building manager of the rental unit building in September 2014, while the landlord company ownership of the building remained the same.

Monthly rent in the amount of $1,950.00 was due on the first day of each month. Both parties agreed that a security deposit of $975.00 was paid by the tenants and the landlord returned this deposit to the tenants. A written forwarding address was provided by the tenants on March 13, 2015.

The landlord seeks $1,950.00 in rental loss for March 2015 and $1,346.30 in rental loss from April 1 to 21, 2015. The landlord originally sought $1,462.50 for April 2015 rent but reduced this amount at the hearing, due to a miscalculated proration. The landlord confirmed that the tenants breached the tenancy agreement by vacating before the end of the fixed term on November 30, 2015. The landlord testified that rental losses were mitigated by the landlord's efforts to re-rent. The landlord testified that advertisements were placed on online websites on February 3 and 5, 2015, as well as a sign in front of the rental building on January 31, 2015. The landlord provided copies of the website advertisements. The tenants disputed that the landlord posted advertisements immediately, claiming that the landlord was not in the rental building on January 31, 2015, which was a weekend, to post the sign in front of the building. The tenants also claimed that the landlord did not post website advertisements until February 5, 2015, as the tenants checked the company website and inquired with the landlord on February 4, 2015 about this. The tenant noted that the landlord incorrectly advertised the location view of the unit, which took approximately two weeks to correct, after the tenants brought it to the landlord's attention. The landlord confirmed that the advertisements were refreshed and reposted often and that very few people attended showings at the rental unit. Landlord OL noted that the winter season is a slow time to re-rent, and that the monthly rent is expensive, which detracts many tenants. The tenants claimed that the tenants first moved into this unit in the winter in December 2012 and it was possible to rent the unit in the winter season. The landlord confirmed that the rental price was lowered from $1,950.00 to $1,850.00 in order to

attract potential tenants. The landlord claimed that a new tenant was found to re-rent the unit as of April 22, 2015.

The tenant stated that the tenants believed that their tenancy agreement was a month-to-month tenancy and that they could leave after providing one month's notice to the landlord because this is what the landlord told them. Landlord OL confirmed that a three-month fixed term option was possible if the tenants were unhappy and wanted to sign a shorter fixed term tenancy agreement, but stated that the tenants did not communicate their unhappiness to the landlord at the time of signing the latest tenancy agreement. The tenant stated that she was unaware of this shorter fixed term option, that it was not offered to the tenants, and the landlord was well aware of the tenants' unhappiness due to their multiple complaint letters, letters which the landlord lost from the tenants' file.

The tenant confirmed that the tenants gave one month's notice to vacate before the end of the fixed term because of the landlord's breach of material terms of the tenancy agreement. The tenant indicated that the biggest breach committed by the landlord was losing the tenants' confidential file with their banking and personal information. The tenant stated that the landlord advised her that her file was empty and therefore, all the information was lost and could be misused by other people. The tenant stated that she did not alert the police about this issue because she did not want them to get involved. Landlord OL denied the tenants' claim, indicating that the tenants' personal file was in front of him during the hearing and that all of their confidential information, including banking information, was there. The tenant stated that the landlord shared personal information with another rental building after she inquired about the unit for rent, while landlord OL confirmed that the landlord company owns the other rental building, who called the landlord for a reference check.

The tenants seek a monetary order of $3,900.00, which is two month's rental loss, for the landlord's multiple breaches, a diminished value to their tenancy and hardship, breach of privacy, trust and confidence in the landlord. The tenants stated that the rental building was dirty and not cleaned appropriately. The tenant noted that she had to vacuum the hallway outside her rental unit once per month because her husband had allergies. Landlord OL stated that the rental building is cleaned daily, that the carpets are steam cleaned and the windows are washed periodically and he sees this occurring as his own office is located in the rental building. Landlord OL disputed the tenants' complaints, stating that they were resolved, as one was a plumbing issue which was fixed immediately, that there were no police complaints of break-ins in the building, and that the fire protocols were followed because a fire building inspector ensured compliance. Landlord OL indicated that the landlord company is a professional company, which charges a high rent in order to properly and efficiently maintain and service this building and that access to management is given to tenants on a daily basis.

The tenants noted that the pool in the rental building was under renovation during their tenancy, such that they could not use it, diminishing the value of their tenancy. Landlord OL confirmed that the pool was 52 years old and was in need of maintenance, as it was drained, re-tiled and

repainted during a six month period. The landlord stated that the pool was monitored for usage prior to the repair, such that it was hardly used by many tenants, and that the repair had to be done during the summer months when it was dry weather. The landlord confirmed that the pool is not an amenity on the tenancy agreement and the tenants are not entitled to compensation for the loss of its use, as it is only listed as a facility in the landlord's rental advertisements to tenants.

The tenants maintained that the laundry rooms in the rental building were restricted to 12-hour rather than 24-hour usage during a portion of their tenancy. Landlord OL confirmed that this happened for approximately 1.5 years but it was rectified in August 2014, when it was changed back to 24-hour usage. Landlord OL confirmed that the restriction was due to flooding, robbery and insurance coverage concerns, and that a new machine payment system was installed, such that the concerns were resolved. Landlord OL confirmed that the tenants still had access to the laundry, only the hours were reduced. The tenants stated that due to the change in laundry usage hours, which was done haphazardly at the landlord's choice, the tenants were unable to do laundry at certain hours due to their work schedules, the laundry machines were busier due to the restrictions, and they had to complete dry-cleaning on certain occasions instead.

Analysis

Section 45(1) of the *Act* requires the tenants to provide one month's written notice to the landlord to end their tenancy. However, an exception to this notice period exists in section 45(3), which states that if the landlord has breached a material term of the tenancy agreement and failed to correct it within a reasonable period after the tenants give written notice of the failure, the tenants may end the tenancy effective on a date after the date the landlord receives the notice.

I find that the tenants were not entitled to end their fixed term tenancy early as there was no breach of material terms of the tenancy agreement. I find that the tenants failed to sufficiently prove that the landlord lost their confidential file, as landlord OC testified that it was in front of him during the hearing. Even so, the tenants did not file any charges or seek investigation by police for this matter, which is a criminal issue rather than a tenancy issue. I also find that the tenants failed to sufficiently prove, by way of photographic, documentary or witness evidence, that the condition of the rental building was so dirty, due to the landlord's failure to reasonably clean and maintain, that it caused them to suffer from health problems, such that it was a material breach of their tenancy agreement. I also find that the tenants failed to prove that the landlord did not complete required repairs, did not meet fire building codes and did not address safety concerns regarding alleged break-ins in the building. The landlord disputed the tenants' claims and the tenants failed to provide documentary or witness evidence regarding same. I also find that restricted use of laundry facilities and a loss of use of the swimming pool were not material to this tenancy agreement, such that the tenants were entitled to end their tenancy on those bases.

Section 45 of the *Act* states that tenants cannot give notice to end the tenancy before the end of the fixed term. If the tenants do, they could be liable for a loss of rent during the period when the unit cannot be re-rented. In this case, the tenants vacated the rental unit on February 28, 2015, before the completion of the fixed term on November 30, 2015. Section 7(1) of the *Act* establishes that tenants who do not comply with the *Act*, *Regulation* or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss. As such, the landlord is entitled to compensation for losses it incurred as a result of the tenants' failure to comply with the terms of the tenancy agreement and the *Act*.

I find that the landlord is entitled to $1,462.50 for March 2015 rental loss which represents a 25% reduction in the amount claimed by the landlord of $1,950.00. I find that the landlord is entitled to $673.15 for April 2015 rental loss which represents a 50% reduction in the amount claimed by the landlord of $1,346.30. I have made these deductions due to the landlord's partial failure to mitigate the rental loss. I find that the landlord failed to immediately advertise the rental unit, as claimed by the tenants and as noted in the dates of the advertisements provided by the landlord. I also find that the landlord failed to correctly advertise the location view of the unit, such that this may have detracted potential tenants. I also find that the landlord had a reasonable time period of two months in February and March 2015 to find potential tenants and that the landlord took a longer period of time in April 2015 to secure new tenants. I find that it took longer to re-rent the unit due to the high price being advertised and other market factors outside of the tenants' control.

When a party makes a claim for damage or loss the burden of proof lies with the applicant to establish a claim, in accordance with section 67 of the *Act*. To prove a loss, the applicant must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the other party in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the applicant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

As noted in my comments above, I find that the tenants failed to sufficiently prove the dirty state of the rental building, that break-ins that were not appropriately addressed by the landlord, issues regarding violation of fire building codes, and unreasonable failure by the landlord to perform repairs. I find that the landlord adequately addressed the tenant's complaints, as testified to by landlord OL at this hearing. Accordingly, I find that the tenants are not entitled to compensation for the above claims as they have failed to the above test.

Residential Tenancy Branch ("RTB") Policy Guideline 22 states the following with respect to termination and restriction of services and facilities:

> *In a tenancy agreement, a landlord may provide or agree to provide services or facilities in addition to the premises which are rented. For example, an intercom entry system or shared laundry facilities may be provided as part of the tenancy agreement. A definition of services and facilities is included in the Residential Tenancy Act and the Manufactured Home Park Tenancy Act 1 (the Legislation).*
>
> *A landlord must not:*
> - *terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or*
> - *terminate or restrict a service or facility if providing the service or facility is a material term of the tenancy agreement.*
>
> *A landlord may restrict or stop providing a service or facility other than one referred to above, if the landlord:*
> - *gives the tenant 30 days written notice in the approved form, and*
> - *reduces the rent to compensate the tenant for loss of the service or facility.*
>
> *Where the tenant claims that the landlord has reduced or denied him or her a service or facility without reducing the rent by an appropriate amount, the burden of proof is on the tenant.*

RTB Policy Guideline 16 states the following with respect to types of damages that may be awarded to parties:

> *An arbitrator may only award damages as permitted by the Legislation or the Common Law. An arbitrator can award a sum for out of pocket expenditures if proved at the hearing and for the value of a general loss where it is not possible to place an actual value on the loss or injury. An arbitrator may also award "nominal damages", which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right.*

I find that the tenants are entitled to nominal damages for the loss of the use of the pool and the restriction in laundry services. Laundry facilities and common recreational facilities (in this case, the swimming pool) are defined as a "service or facility" under section 1 of the *Act*. Although the tenants did not prove the actual amount of their losses, by way of receipts or other documentary evidence, I find that they still proved losses that entitle them to nominal damages.

I find that both parties agreed that the pool underwent renovation, such that the tenants were unable to use the pool during this time. Although the pool is not listed as an amenity in the tenancy agreement, it is advertised as a facility by the landlord to potential tenants, including these two tenants. It is a facility offered by the landlord to all tenants in the rental building and these two tenants have the right to use this facility as part of their tenancy. The landlord did not offer an alternative pool or pool pass for the tenants to use during this lengthy renovation period. The landlord did not provide the tenants with compensation or a reduction in rent due to the loss of the use of the pool during this time period. I find that the tenants are entitled to $100.00 in nominal damages for the loss of the use of the swimming pool at the rental building during the renovation period when the tenants were residing at the unit.

I find that both parties agreed that the laundry rooms were restricted from unlimited 24-hour use to 12-hour use. The tenants are entitled to access the laundry rooms as part of their tenancy, as it is a facility offered by the landlord and tenants pay a fee for such usage. The landlord claims that the reduction in usage is not a loss of use, just a reduction. However, it is still a restriction in hours, such that the tenants were unable to use the laundry because of their work hours, the laundry rooms were busier than usual so they were unavailable at times and the tenants had to get dry-cleaning done. The landlord even restored the 24-hour access after the 1.5 year period, thereby acknowledging that all tenants should have full access to the laundry rooms. Regardless of the landlord's reasons for restricting access, they were not shown to be due to the tenants' behaviour and therefore, the landlord is responsible for this restriction in usage. The landlord did not offer alternative laundry access during this lengthy restriction period. The landlord did not provide the tenants with compensation or a reduction in rent due to the restriction in laundry services during this time period. I find that the tenants are entitled to $100.00 in nominal damages for the restriction of the laundry room hours at the rental building.

As the landlord has already returned the tenants' security deposit, it cannot be offset against the monetary award at this hearing.

As both parties were only partially successful in their applications, I find that neither party is entitled to recover the $50.00 filing fee paid for their application.

Conclusion

I issue a monetary order in the landlord's favour in the amount of $1,935.65 against the tenants as follows:

Item	Amount
March 2015 Loss of Rent	$1,462.50
April 2015 Loss of Rent	673.15
Tenants' Loss of Use of Pool	-100.00
Tenants' Restriction in Laundry Facilities	-100.00
Total Monetary Award	**$1,935.65**

The landlord is provided with a monetary order in the amount of $1,935.65 in the above terms and the tenant(s) must be served with this Order as soon as possible. Should the tenant(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: November 12, 2015

Residential Tenancy Branch