Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute codes MNDL-S, MNRL-S, FFL

Introduction

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

- a monetary order for unpaid rent and for damage to the rental unit pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The landlord and the tenant 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.

While I have turned my mind to all the documentary evidence, including witness statements and the testimony of the parties, only the relevant portions of the respective submissions and/or arguments are reproduced here.

The tenant acknowledged receipt of the Application for Dispute Resolution (Application), which was sent to them by e-mail on or about May 14, 2020. I find that the tenant is duly served with the Application pursuant to section 71 (2)(b), which allows an Arbitrator to find a document sufficiently served for the purposes of the *Act*.

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The landlord submitted that they served their evidentiary package to the tenant on August 08, 2020, by way of e-mail. The landlord referred to copies of e-mails submitted by them as their proof of service that their evidence was sent to the tenant.

The tenant submitted that they did not receive the landlord's evidentiary package.

The Tenant testified that they submitted their evidence to the Residential Tenancy Branch (RTB) but that they had not provided their evidence to the landlord as it consisted of text messages exchanged with the landlord that the landlord would already have access to.

Preliminary Matters

Rule 3.14 of the Residential Tenancy Branch (RTB) Rules of Procedure states that documentary evidence intended to be relied on at the hearing by the applicant must be received by the respondent not less than 14 days before the hearing.

After reviewing the copies of the landlord's e-mails which contained the evidentiary package intended to be sent to the tenant, I find that the tenant's e-mail address is missing two letters and is incorrect. I find that the landlord provided the RTB with the correct e-mail address when initially submitting their Application and when e-mailing the Application to the tenant, including the notice of this hearing; however, they failed to use the correct e-mail address when serving the landlord's evidence to the tenant. I further find that the landlord did not provide any other documentation to prove service of their evidence to the tenant.

Rule 3.15 of the RTB Rules of Procedure states that documentary evidence intended to be relied on at the hearing by the respondent must be received by the applicant not less than 7 days before the hearing. I accept the tenant's submission that they did not serve the landlord with their evidence.

Although I find that neither party was served with the other's evidence, I do find that there is one text message exchange dated December 18, 2019, which was submitted by both parties.

Having considered the above, and as I have found that neither party served their evidence to the other, I find that I will not accept the evidence submissions from the landlord or the tenant as they would both be prejudiced by the consideration of evidence that they have not had a chance to respond to.

Despite the above, I find that I will consider the text message exchange dated December 18, 2019, that both parties submitted. I find that neither party is prejudiced by evidence that they themselves submitted for consideration.

I further find that there is also a text, sent from the landlord to the tenant on April 04, 2020, that the tenant submitted which contains a picture of the first page of a One Month Notice to End Tenancy for Cause (the One Month Notice). I find that I will consider this text dated April 04, 2020, as I find that the landlord is not prejudiced by the consideration of a document that they signed, served and took a picture of to send to the tenant. I find that the landlord did not dispute the service of the One Month Notice to the tenant.

Finally, I find that I will consider the tenancy agreement and addendum submitted by the landlord as these documents form the basis of the tenancy and were signed by both parties. I find that the tenant is not prejudiced by the consideration of a document that they signed and initialled.

Issue(s) to be Decided

Is the landlord entitled to a Monetary Order for unpaid rent and for damage to the rental unit?

Is the landlord entitled to retain all or a portion of the tenant's security deposit?

Is the landlord entitled to recover the filing fee from the tenant?

Background and Evidence

The landlord submitted that this tenancy began on August 01, 2018, with a monthly rent of $1,450.00, due on the 31st day of each month with a security and pet deposit totalling $1,450.00 that the landlord currently retains. The tenancy agreement states that the tenant is responsible for payment of the electrical utility usage the addendum notes the initial meter reading at 7707.

The landlord and the tenant both provided in evidence a copy of a text message, dated December 18, 2019, in which the landlord questions the tenant about rent not paid in full. The tenant apologizes for the unpaid rent and states that they will pay. The tenant then states that he always pays the landlord the rent... "Even though my walls are still ripped apart from the flood and not painted." The landlord responds in the text message by stating… "When I come all painting and other necessary fixing will be done."

The tenant also submitted a copy of a text dated April 04, 2020, containing a picture of the front page of a One Month Notice to End Tenancy for Cause (the One Month Notice) dated May 04, 2020, with a stated effective tenancy end date of May 05, 2020.

On the Application, in the description of the issues, the landlord submits that they are seeking $12,271.25 for repairs such as painting in the amount of $2,887.50, a toilet cover for $96.45, a door lock for $72.60, blinds in the kitchen, $600.00 for cleaning the rental unit and $6,628.00 for replacing the floor, amongst other repair costs also being claimed. The landlord also claims $4,048.00 for unpaid rent and unpaid utilities for a total monetary claim of $16,419.25.

During the course of the hearing the landlord admitted that all documentary evidence of expenses incurred for damage to the rental unit, which were submitted to the RTB but not the tenant, consisted only of estimates and quotes for the repair or replacement of items. The landlord testified that they had not actually paid any of the amounts being claimed on the estimates for materials or labour. The landlord submitted that the painting has not been done and the rental unit was not actually cleaned due to ongoing repair work being done in the rental unit since the tenant left. The landlord testified that they are using a different contractor for the flooring repair than was on the estimate provided.

The landlord testified that the tenant moved out of the rental unit on May 05, 2020, without giving written notice to the landlord and failed to pay the rent for May 2020 as well as June 2020. The landlord admitted that they had served a One Month Notice to the tenant, at the beginning of April 2020, for the tenant to vacate the rental unit in May 2020. The landlord submitted that they did not believe the One Month Notice to be effective and that the tenant was required to give notice to end the tenancy.

The landlord testified that the tenant had a balance owing of $300.00 from December 2019, which had not been paid at the time that the tenant vacated the rental unit. The landlord also submitted that, as a result of the tenant not providing notice to end their tenancy, the tenant has outstanding unpaid rent in the amount of $1,450.00 owing from May 2020 and $1,450.00 owing from June 2020 for a total of $3,200.00 in unpaid rent.

The landlord submitted that the tenant has outstanding utilities in the amount of $848.00 for electricity usage. The landlord submitted that they had noted the meter reading in the addendum to the tenancy agreement to be 7707 KW at the beginning of the tenancy. The landlord testified that that the meter reading at the end of the tenancy was

17943 KW. On the Application the landlord calculated the electricity consumption to be 17943 - 7707 = 10,236 KW total consumption at a rate of 0.829 cents per KW for a total of $848.00 (rounded down).

The landlord admitted that they had not provided a demand letter to the tenant for the payment of the utilities during the tenancy. The landlord testified that they had not included a bill from the utility company into their evidence submission (which was not served to the tenant as referred to above) or had one available to reference at the hearing which would support the amount or rate that was paid to the utility company.

The tenant submitted that there was a flood in the basement which caused extensive damage to the rental unit and which led to the walls being ripped out by contractors. The tenant testified that the landlord stated that they would paint and do other repairs but that the landlord had not come to the rental unit to do any of the required repairs from December 18, 2019, until the tenant vacated the rental unit. The tenant stated that the rental unit was still in a state of disrepair due to the flood when they moved out.

In regards to the other repairs that the landlord is claiming, the tenant submitted that the toilet seat being claimed was already missing, the door lock was already gone through no fault of the tenant, there were no blinds in the kitchen at the time of the tenancy that would need to be replaced, the bathroom ventilation had been ripped out due to the flood and the 4 inch crack in the floor was not from the tenant’s actions.

The tenant testified that they had received the One Month Notice on April 04, 2020. The tenant admitted to not paying the May 2020 rent in the amount of $1,450.00 as they thought that the tenancy had ended on May 05, 2020, the effective date on the One Month Notice and the date the tenant moved out.

The tenant disputed owing rent for June 2020 due to the tenancy having ended as a result of the One Month Notice. The tenant also disputed owing $300.00 from December 2019 as they stated that they had paid that amount back prior to the end of the tenancy. The tenant testified that they had never been asked to pay for the utilities for the entire duration of the tenancy.

Analysis

Damage to Rental Unit

Pursuant to section 67 of the Act, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. In this case, to prove a loss, the landlord must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenant 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 landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Residential Tenancy Policy Guideline #16, regarding compensation for damage or loss states:

> *A party seeking compensation should present compelling evidence of the value of the damage or loss in question. For example, if a landlord is claiming for carpet cleaning, a receipt from the carpet cleaning company should be provided in evidence.*

Having reviewed the above evidence and testimony, I find that the landlord has not sufficiently proven their monetary loss for damage to the rental unit as a result of the actions or neglect of the tenant.

Based on the text dated December 18, 2019, I accept the tenant's undisputed testimony that there was a flood in the rental unit which caused extensive damages. I find that there was no testimony or evidence submitted to indicate that the tenant was responsible for the flood. Based on a balance of probabilities, I accept the tenant's submissions that there were contractors in the rental unit, performing work on behalf of the landlord, who left the rental unit in a state of disrepair that was not rectified by the landlord as of December 18, 2019, until the end of the tenancy.

Based on the landlord's undisputed testimony, I find that the evidence related to claims for damage to the rental unit submitted by the landlord consisted only of estimates or quotes. When questioned, I find that the landlord admitted that they did not have the unit cleaned as a result of ongoing work due to the flood and that the estimate for

cleaning was not an actual amount paid by the landlord at the end of the tenancy, due to the actions of the tenant. The landlord submitted that the rental unit has still not been cleaned due to the ongoing work being performed.

I find that the landlord submitted in their testimony that the painting estimate was also not an amount actually paid by the landlord and that there is still ongoing work in the rental unit which has prevented the rental unit from being painted yet. I further find that the landlord confirmed that the flooring estimate was not an actual amount paid by the landlord as they are using a different contractor for the flooring repair. The tenant did not provide any testimony that they had provided any receipts in their evidence submissions for actual amounts paid for the contractor currently doing repairs in the rental unit and which were directly related to the actions or neglect of the tenant.

I find that the presence of contractors in the rental unit doing work as a result of the flood brings into question whether it can conclusively be determined what damages can be attributed to the tenant's actions as opposed to the flood and resultant activities of the contractors.

I find that the landlord submitted in their testimony that they had not submitted any evidence for materials actually purchased but rather only quotes from the internet for prices of similar items that have not yet been purchased. I find that there is insufficient evidence of the actual amounts required to be compensated for the items being claimed such as receipts for those items purchased. I further find that the landlord has provided insufficient evidence to demonstrate that the need to replace these items was due to the actions of the tenant

As I have found that the landlord has not submitted sufficient compelling evidence or testimony that they have incurred a loss for damage in the rental unit as a result of the tenant's actions in negligence of the Act, I dismiss the landlords' monetary claim for damage to the rental unit, without leave to reapply.

Electrical Utility

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.

Regarding the landlord's claim for the unpaid utilities in the amount of $848.00, I find that the tenant is responsible for the electrical utilities as per the tenancy agreement. I find that it is undisputed that the tenant did not pay any amount towards the electrical utility usage for the duration of the tenancy.

Despite the above, after having reviewed and considered the testimony, I find that the landlord has not sufficiently proven the actual amount required to be compensated for the utility usage. I find that the landlord admitted that they had not submitted any evidence (in the evidence package that was not served to the tenant) of the actual amounts paid to the utility company or bills which would show the address of the units with the specific energy consumption and rates for the rental unit. I further find that the landlord did not establish the rate at which the utilities were to be charged to the tenant, either in the tenancy agreement or the addendum, or provide sufficient evidence or testimony regarding the details of the meter reading date and time at the end of the tenancy.

RTB Policy Guideline #16 states that an arbitrator may award nominal damages where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

In consideration of the above, I find that there is a clear breach of the tenancy agreement regarding the payment of utilities; however, I find that the landlord has not sufficiently proven the actual amount required to be compensated for that loss. For the reasons listed above, I have decided to award the landlord nominal damages in the amount of $424.00 for the usage of the electrical utilities, which amounts to roughly $22.00 a month for the duration of the tenancy, which I find is reasonable.

Unpaid Rent

Regarding the landlord's monetary claim for unpaid rent owing for the month of December 2019, I find that the text message dated December 19, 2019, which was submitted by both parties, supports the landlord's testimony regarding a balance of unpaid rent owing from December 2019. I find that the tenant did not provide any compelling testimony or evidence that this balance owing of $300.00 in unpaid rent from December 2019 was resolved before the end of the tenancy.

Based on a balance of probabilities and the evidence considered, I prefer the landlord's testimony and I award the landlord $300.00 for unpaid rent owing for December 2019.

Regarding the landlord's monetary claim of unpaid rent owing from May 2020 and June 2020 in the total amount of $2,900.00, I find that I have to first consider the circumstances surrounding the One Month Notice that was served to the tenant.

Section 47 of the *Act* establishes that a landlord may issue a One Month Notice to end a tenancy when the landlord has cause to do so. Section 47(4) and (5) of the *Act* stipulate that a tenant who has received a notice under this section, who does not make an application for dispute resolution within 10 Days after the date the tenant receives the notice, is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit by that date.

Despite the above, Part 2 of Ministerial Order No. M089 3(1), which came into force as of March 18, 2020, and was in effect until June 24, 2020, establishes that a landlord must not give a tenant a notice to end the tenancy during the period this order is in effect.

Having considered the above, I find that the intention of Ministerial Order No. M089 (M089), as set out under the *Emergency Program Act*, was to protect "tenants being displaced from their homes without their agreement in non-urgent circumstances" which would "increase the health and safety risks associated with the COVID-19 pandemic."

Section 62(2) of the Act allows an arbitrator "to make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act". Having considered the above, I find that the intention of M089 was intended to protect tenants from being displaced without their agreement. I further find that M089 was not intended to prevent tenants from exercising their rights under section 47(5) of the Act, when a One Month Notice is served, accepted and agreed upon by a tenant. Therefore, I find that the tenant's rights under section 47(5) of the Act, to accept conclusive presumption of the end of the tenancy, takes precedence over Ministerial Order No. M089 which restricts the service of a notice to end tenancy.

I find that the tenant did not disagree with being displaced from their home as a result of the One Month Notice served to them on April 04, 2020. I find that the tenant chose to exercise their right, pursuant to section 47 (5) of the Act, to conclusively accept the stated effective vacancy date on the One Month Notice as they moved out of the rental unit on the date that the landlord requested.

Section 68 of the *Act* allows for the One Month Notice to be amended when it is reasonable to do so. I find that the date of the One Month Notice is for a date in the

future that had not occurred at the time that the One Month Notice was issued to the tenant. For this reason, based on the above evidence and testimony, I have amended the date of the One Month Notice to reflect the day it was served to the tenant, April 04, 2020. I further find that the tenant was duly served with the One Month Notice on April 04, 2020, pursuant to section 71(c), which allows an Arbitrator to find a document sufficiently served for the purposes of the *Act*.

Based on the undisputed testimony, I find that the tenant did not make an application pursuant to section 47(4) of the *Act* within 10 days of receiving the One Month Notice. In accordance with sections 47(5) and 53(2) of the *Act*, due to the failure of the tenant to take this action within 10 days, I find that the tenant is conclusively presumed to have accepted that the tenancy ended on May 30, 2020, the corrected effective date on the One Month Notice.

Section 26 of the *Act* requires a tenant to pay rent to the landlords, regardless of whether the landlord complies with the *Act*, regulations or tenancy agreement, unless the tenant has a right to deduct all or a portion of rent under the *Act*.

I find that it is undisputed that the tenant did not pay the monthly rent for May 2020. I further find that the tenant did not submit any evidence or testimony that they were entitled to deduct any portion of the rent for May 2020. Therefore, as I have found that this tenancy ended on May 30, 2020, I find that the tenant owes the monthly rent in the amount of $1,450.00 for May 2020 and I award the landlord this amount.

As I have found that this tenancy ended on May 30, 2020, the corrected, effective date on the One Month Notice, I dismiss the landlord’s monetary claim for June 2020 rent in the amount of $1,450.00, without leave to reapply.

Pursuant to section 72 of the *Act*, I allow the landlord to retain the tenant’s security and pet deposit plus applicable interest in partial satisfaction of the monetary award. No interest is payable over this period.

As the landlord was successful in their application to recover unpaid utilities, unpaid rent and to retain the security/pet deposit, the landlord may recover the filing fee related to this application.

Conclusion

Pursuant to section 67 of the *Act*, I grant a monetary Order in the landlord's favour under the following terms, which allows the landlord to recover unpaid rent, recover nominal damages for utilities, to retain the tenant's security/pet deposit and to recover the filing fee for this Application:

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Item	**Amount**
Nominal Damage - Utilities	$424.00
Unpaid December 2019 Rent	300.00
Unpaid May 2020 Rent	1,450.00
Less the Security/Pet Deposit	-1,450.00
Filing Fee for this application	100.00
Total Monetary Order	**$824.00**

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: October 16, 2020

Residential Tenancy Branch