Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNECT FFT

Introduction

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

- 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.

The landlord was represented by their legal counsel, MG, in this hearing. 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.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties were also clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour Both parties confirmed that they understood.

The landlord confirmed receipt of the tenants' dispute resolution application ('Application') In accordance with section 89 of the *Act*, I find that the landlord duly served with the Application. All parties confirmed receipt of each other's evidentiary materials and that they were ready to proceed with the hearing.

Issues(s) to be Decided

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

Are the tenants entitled to recover the filing fee for this application from the landlord?

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 this application and my findings around it are set out below.

This month-to-month tenancy began on November 1, 2020, and ended on November 1, 2021 after the tenants were served with a 2 Month Notice to End Tenancy for Landlord's Use on July 5, 2021 in order for the landlord to move in.

The tenants are seeking compensation in the amount of $18,700.00, for the landlord's failure to comply with section 49 of the *Act.* The tenants feels that the landlord failed to occupy the home as required by the *Act* after discovering that the home was sold.

The landlord does not deny that the home was sold. The landlord's evidentiary package included a Contract of Purchase and Sale for a possession date of June 30, 2022. Counsel for the landlord notes that the home was listed for sale on May 2, 2022, at least 6 months after the tenants had vacated the rental unit. Counsel also confirmed that some minor renovations were done in the rental unit, which were completed while the landlord occupied the rental unit, including new flooring which took four days, and painting, which took three days. Counsel submits that the landlord had decided to retire after catching Covid in April 2022, and subsequently sold the rental unit.

The landlord submitted copies of their hydro bills, and noted that gas was included and paid for by the strata as part of the strata fees. The landlord's evidentiary materials also include an email addressed to a member of strata counsel dated November 1, 2021 confirming that the unit was no longer being rented out. The email also notes that the landlord had intended to do some minor renovations in November and December, including laminate flooring, washroom countertop replacement, and painting. Counsel explained that the reason the landlord had sent the email was because strata counsel was threatening to impose a bylaw violation fine for renting out the rental unit.

The tenants argued that the landlord failed to provide sufficient evidence showing that they did in fact occupy the rental unit for the required period. The tenants note the low hydro bills, and also questioned why the landlord did not have specific evidence

showing that they moved in, including the payment of any move-in fees. The tenant included an email they sent on December 30, 2022 to a party inquiring about a movein/out fee, to which the reply was “A fee of $30.00 to cover normal wear and tear shall be charged to a strata lot for each”. The tenant argued that the hydro bills are no sufficient to prove occupation by the landlord, and the tenant questioned why the landlord did not have any proof of the move, such as receipts for a moving company, or photos of the unit on or about November 2, 2021 when the landlord had moved in.

The landlord responded that there was no move-in fee for the building, and argued that the photos show a furnished unit.

Analysis

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*
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> > *(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 further 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.*

6-month occupancy requirement
The landlord, close family member or purchaser intending to live in the rental unit must live there for a duration of at least 6 months to meet the requirement under section 51(2).

RTB Policy Guideline 2a also notes that the onus is on the landlord to prove that they did accomplish the purpose for ending the tenancy for at least 6 months:

A tenant may apply for an order for compensation under section 51 of the RTA if a landlord (or purchaser) who ended their tenancy under section 49 of the RTA has not:

• accomplished the stated purpose for ending the tenancy within a reasonable period after the effective date of the notice to end tenancy,
• or used the rental unit for that stated purpose for at least six months beginning within a reasonable period after the effective date of the notice.

The onus is on the landlord to prove that they accomplished the purpose for ending the tenancy under section 49 of the RTA and that they used the rental unit for its stated purpose for at least 6 months.

As noted in the policy guideline, the onus is on the landlord to prove that they accomplished the purpose of ending the tenancy under section 49 of the *Act*, and for at least 6 months. In this case, as it is undisputed that the landlord did sell the property,

the question is whether the landlord met the burden of proof to support that they did in fact occupy the rental unit as the term occupy is contemplated in the legislation.

I have considered the testimony and evidence of both parties, and I find that although there is evidence that the landlords did take possession of the rental unit for the duration of six months, the landlord failed to provide sufficient evidence to support that they did in fact occupy the rental unit during that time. Although I accept that the renovations were not extensive, and could have been completed while the unit is occupied, the landlord did not provide any evidence to support that they actually occupied the rental unit, especially for the full six month duration. I note that the photos used for the listing do show furniture and decor, but close examination of the photos do not show any personal possessions inside the home. Although understandably a real estate listing would necessitate the removal of personal items, with the exception of these photographs which were part of the tenant's evidence package, the landlord did not provide or reference any evidence to show that any personal items such as clothing, personal belongings, or toiletries were moved to the rental unit. I find that the landlord did not submit sufficient evidence to support that they had moved in or out of the rental unit, or actually occupied the home, whether this is supported by invoices, receipts, photos of the same furniture and décor in the previous or new home, or whether this be in the form of witness testimony or statements.

The landlord also submitted evidence to show that the hydro bill was transferred to their name. In light of the various factors that may affect hydro usage and billing, I find that the existence of an account in the landlord's name, or even use of electricity on the account, do not necessarily prove occupation as the term occupy is defined in the legislation.

I find that the landlord has not met the burden of proof to support that that they had in fact occupied the rental unit for six months. I must now consider whether there were extenuating circumstance for failing to do so.

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 note that the landlord's statement referenced an unexpected bout of covid-19 that affected the landlord and their spouse in April 2022, after which the landlord and their spouse decided to retire and move out of the rental unit.

I do not find this explanation qualifies as an extenuating circumstance as the landlord did not provide any evidence to support that they had in fact been ill, and secondly, the landlord failed to explain how their illness had prevented them from occupying the rental unit for at least six months. I find that the landlord's explanation does not fall under the definition of extenuating circumstance as set out in the *Act* and *Policy Guidelines*.

I find that the landlords have failed to prove that they had occupied the rental unit for six months. I am also not satisfied that they were unable to do so due to extenuating circumstances. Accordingly, I find that the tenants are 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 tenants in the amount of $18,600.00.

As the tenants were successful with their application, I allow the tenants to recover the filing fee.

Conclusion

Pursuant to section 51(2) of the *Act,* I find the tenants are entitled to a monetary order in the amount of $18,600.00. I also find that the tenants are entitled to recover the filing fee. The tenants are granted a total monetary order of $18,700.00.

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: January 30, 2023

Residential Tenancy Branch