Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

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

- a Monetary Order for damage or compensation under the *Act*, 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 each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000."

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue- Service

Both parties agree that the tenants served the landlord with their application for dispute resolution and evidence via registered mail. I find that the above documents were served on the landlord in accordance with sections 88 and 89 of the *Act.*

The landlord testified that the tenants were served with the landlord's evidence on December 22, 2022 via registered mail. Registered mail receipts stating same were entered into evidence. The tenants testified that they did no receive the landlord's evidence. The tenants testified that their address for service listed on this application for dispute resolution is no longer correct because they moved approximately two months ago. The tenants testified that they did not provide the landlord with their new address for service.

I find that the tenants did not complete Residential Tenancy Branch Form #RTB- 42O to update their address for service and did not serve said form on the landlord. I find that the tenants' did not receive the landlord's evidence due to their own failure to provide the landlord with their new address for service. I find that the landlord served the tenants at the address for service provided by the tenants and that the tenants were therefore deemed served with the landlord's evidence on December 27, 2022, five days after its mailing, in accordance with section 89 and 90 of the *Act.* The landlord's evidence is accepted for consideration.

Issues to be Decided

1. Are the tenants entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?
2. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Background and Evidence

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

Both parties agreed that they signed a fixed term tenancy agreement for a tenancy from May 1, 2022 to May 1, 2023. The signed tenancy agreement was entered into evidence. Both parties agreed that the tenants paid the landlord a security deposit in the amount of $987.50 and a pet damage desposit in the amount of $300.00. Both parties agree that the tenants paid the landlord the first month's rent in the amount of $1,975.00. Both parties agree that the tenants did not move into the subject rental property.

Both parties agree that the landlord returned the tenants' security and pet damage deposits to the tenants via registered mail. The landlord entered into evidence a registered mail receipt for same dated May 6, 2022. In this application for dispute resolution the tenants are seeking the return of May 2022's rent in the amount of $1,975.00.

Tenant S.C. testified that they paid the first month's rent and then completed a really quick walk-through of the subject rental property with the landlord on April 29, 2022. Tenant S.C. testified that the landlord had already completed the report before they arrived and would not let them see the report. Tenant S.C. testified that after the walk-through the landlord asked her to sign the move in condition inspection report and she did.

Tenant S.C. testified that after the landlord left they realized that the subject rental property was not ready for habitation because there was a crack in the gas fireplace glass, there were gaps in the drywall, electrical wires were exposed and the property was not clean.

The landlord testified that the walk-through condition inspection report was completed with the tenants on April 29, 2022. The landlord testified that the inspection was not quick and that they spent at least five minutes in each room. The move in condition inspection report was entered into evidence. The landlord testified that the tenants did not raise any issues during the move in condition inspection. The landlord testified that the cracked fireplace glass was noted on the move in condition inspection report.

Tenant K.J. testified that he did notice issues during the move in condition inspection but the landlord would not write them down. Tenant K.J. testified that the landlord got tenant S.C. to sign the move out condition inspection report when he was out of the room. Both parties agree that the tenants received the keys to the subject rental property on April 29, 2022.

Tenant S.C. testified that after the walk-through, on the evening of April 29, 2022, the tenants sent the landlord a text message in which they asked the landlord for a rent reduction in exchange for the work needed to bring the subject rental property up to health and safety standards. The April 29, 2022 text message was entered into evidence and states:

> Hi [landlord],

> I would like you to please add the condition of cleanliness- as sub par- not move in ready, on the walk though. Upon further inspection there is hours of deep cleaning that will need to be done and I would like that recorded please and thank you. I would also like a copy emailed to me please. If doing the cleaning of this space is done by me, I hope we can have some rental compensation. Unless you can get some cleaners in. As you had told us when we first said it, that it would be cleaned and move in ready by May 1st.

Both parties agree that on April 29, 2022, after the tenants sent the above text message, the landlord called the tenants.

Tenant S.C. testified that when the landlord called them, he was upset and alleged that they would not be good tenants. Tenant S.C. testified that the landlord told them that this tenancy was not going to work and that they could not move in. Tenant S.C. testified that the landlord told them that he would give them their money back.

The landlord testified that when he called the tenants on April 29, 2022, tenant K.J. told him that he wouldn't move his children into the subject rental property. The landlord testified that he asked the tenants if they were going to move in and they told him that they would not move in.

The landlord testified that the following day, April 30, 2022, he put the subject rental property back up for rent to try to rent it out as soon as possible so that he could give the tenants back their rent money. The landlord testified that he was not able to rent out the subject rental properyt for May 2022 but was able to rent it out for June 2022. The landlord entered into evidence the tenancy agreement starting June 1, 2022 which was signed on May 7, 2022 with a new tenant. The landlord testified that he kept the tenants' rent money for May 2022 because their choice to breach the tenancy agreement resulted in him not being able to re-rent the property for May 2022.

The landlord testified that he did not stop the tenants from moving in. The landlord testified that the tenants had the keys and could have moved in at any time. Both parties agree that the tenants returned the keys via registered mail. Tenant S.C. testified that they keys were mailed out on or around May 3, 2022 and were delivered to the landlord on or around May 5, 2022. This was not disputed by the landlord.

The tenants entered into evidence an email to the landlord dated April 30, 2022 which

states:

> Here are the pictures from after the walk through on April 29, 2022 @445pm (we also have videos as well) that show the house is not move-in ready as you have said it would be, as was stated in the text message we sent you last night (April 29, 2022 @650 pm). These issues are what you are supposed to have completed before the tenancy starts, May 1st 2022 as it was agreed upon in the *Residential Tenancy Agreement* we all signed. We were not able to write issues on the walk through paper yesterday and we brought up the concerns to you when you called us on the phone @ 6:52pm. We are sending this as well because you initially refused to have the pics and vids sent to you.
>
> Health and Safety hazards such as the cracked gas fireplace glass are in breach of the Rental agreement section 10 under repairs. That crack in the gas fireplace can leak gas and carbon monoxide into the suite which is unsafe.
>
> Open electrical wires and improperly installed lighting fixtures are also a hazard.
>
> The lack of deep cleaning is also a health issue. Having drywall exposed in the bathroom and kitchen is not up to code.
>
> Lack of corner bead and of taped seams of drywall shows it was incorrectly installed and not fixed or repaired and does not meet fire code.
>
> Here is a link to some info about maintenance and repairs.
>
> [link]
>
> We were going to give you till May 31st to complete the necessary repairs but we have now seen that you have re-posted the house for rent which breached the Residential agreement already.
>
> [link to rental advertisement]
>
> ….

The tenants entered into evidence a text message exchange between the parties from May 2, 2022 which states:

Tenant: Good Morning [landlord], I am re-confirming the meeting time of 530 pm today, May 2, 2022, at the McDonalds on [redacted] for the return of our damage deposit, pet deposit and first months rent totalling $3262.50 cash. Thank you [tenants]

Landlord: The agreement is the tenancy agreement which is a one year's lease ending may 2023 you both informed me that you will not be moving to the suite therefore I need the following mailed to me your written notice signed and dated two keys returned and your forwarding address once received I will mail the damage deposit minus the cost of repair for damage u caused in kitchen wall within 14 days of receiving the above. No further text messages phone calls or communication is needed and will be either blocked or deleted unread and will be considered harassment. If I can rerent the suite before on the 15th of this month I will reimburse the rent to you at the forwarding address you give in the mail along with keys and written notice.

Tenants: Actually no

Analysis

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure 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. The onus to prove their case is on the person making the claim.

The tenants testified that the landlord breached the tenancy agreement by not permitting them to move in. The landlord testified that the tenants breached the tenancy agreement by refusing to move in. I find that had the landlord refused to allow the tenants to move into the subject rental property in the April 29, 2022 telephone call, the tenants would more likely than not, have included that information in the April 30, 2022 email.

I find that the landlord's version of events is supported by the text message exchange dated May 2, 2022 in which the landlord states that the tenants refused to move in.

Based on the evidence before me, I find, on a balance of probabilities, that in the April 29, 2022 phone call the tenants ended the fixed term tenancy agreement due to the condition of the subject rental property.

Section 45 of the *Act* states:

> (1)A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
>
> (a)is not earlier than one month after the date the landlord receives the notice, and
>
> (b)is 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.
>
> (2)A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
>
> (a)is not earlier than one month after the date the landlord receives the notice,
>
> (b)is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
>
> (c)is 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.
>
> (3)If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.
>
> (4)A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

I find that the tenants were not permitted to end the tenancy under section 45(2) of the *Act* as this was a fixed term tenancy set to end on May 1, 2023.

I find that the tenants did not inform the landlord, in writing, that they considered the condition of the subject rental property to be a breach of a material term of the tenancy and that if not corrected within a reasonable period of time, would cause the tenants to end the tenancy. I find that the April 30, 2022 email clearly states that the tenants were

going to give the landlord an opportunity to correct the issues they identified, but that they decided not to. I find that the tenants were not entitled to end the tenancy under section 45(3) of the *Act* and breached section 45(2) of the *Act.*

In the April 30, 2022 email the tenants state that the landlord reposting the subject rental property for rent was a breach of the tenancy agreement. I do not agree with this analysis. I find that in re-posting the unit for rent the landlord mitigated the loss suffered by the tenant's breach of section 45(2) of the *Act.*

Under section 7 of the *Act* a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

I find that due to the tenants' breach of section 45 of the *Act* the landlord was entitled to retain the tenants first rent payment of $1,975.00 for loss of rental income for that month. I therefore dismiss the tenants' application without leave to reapply.

As the tenants were not successful in their application for dispute resolution, I find that they are not entitled to recover the $100.00 filing fee, pursuant to section 72 of the *Act.*

Conclusion

The tenants' application is dismissed without leave to reapply.

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 17, 2023

Residential Tenancy Branch