

Residential Tenancies Tribunal

Decision 19-0837-05

John. R. Cook
Adjudicator

Introduction

1. The hearing was called at 11:05 am on 28 November 2019 at the Government Service Centre, Motor Registration Building, 149 Smallwood Drive, Mount Pearl, NL. It was reconvened and adjourned on 15 January 2020.
2. The applicants, [REDACTED] and [REDACTED], hereinafter referred to as “tenant1” and “tenant2”, respectively, participated in the hearing. The respondent, [REDACTED], hereinafter referred to as “the landlord”, also participated. He was represented at the hearing by [REDACTED] (“[REDACTED]”).

Issues before the Tribunal

3. The tenants are seeking the following:
 - An order for a refund of the remaining \$175.00 of the security deposit,
 - An order for a refund of rent in the amount of \$925.00, and
 - An order for a payment of \$504.85 in compensation for inconvenience.
4. The landlord is seeking the following:
 - An order for a payment of rent in the amount of \$123.33,
 - An order for a payment of \$92.00 in compensation for damages,
 - An order for a payment of \$175.00 for the costs of cleaning, and
 - Authorization to retain \$175.00 of the security deposit.

Legislation and Policy

5. The jurisdiction of the Director of Residential Tenancies is outlined in sections 46 and 47 of the *Residential Tenancies Act, 2018*.

6. Also relevant and considered in this case is section 14 of the *Residential Tenancies Act, 2018* and Policy 9-3 Claims for Damage to Rental Premises.

Issue 1: Refund Rent - \$925.00

Relevant Submissions

The Tenant's Position

7. The tenants entered into a 1-year, fixed-term lease with the landlord on 01 June 2019 and a copy of the executed lease was submitted with the tenants' application (█ #1). The agreed rent was set at \$925.00 and it is acknowledged in the lease that the tenants had paid a security deposit of \$695.00.
8. The tenants terminated the lease and vacated the unit on 27 October 2019 and a copy of the termination notice was also submitted with their application (█ #2). That notice was issued under section 21 of the *Residential Tenancies Act, 2018* (notice when premises uninhabitable) and it had an effective termination date of that same day.
9. The tenants stated that on 01 October 2019 their toilet became blocked and it overflowed. They also claimed that sewage was backing up into the toilet and into the shower. Additionally, they complained that there were general drainage issues in all the sinks in the rental unit. In support of that claim, the tenants submitted a video, which they stated was taken on 01 October 2019, showing that the toilet was draining slowly. They also submitted photographs of the toilet and the shower floor, as well a video showing that the sink was gurgling.
10. They testified that they attempted to reach the landlord about this issue on 01 October 2019, but they received no response. The tenants stated that they had telephoned the landlord twice and that they had sent him 4 text-messages on that day, and they had also left him a voicemail message. In support of that claim, the tenants submitted copies of their phone records showing that they had sent text-messages and made phone calls on that day.
11. On 25 October 2019, the tenants contacted the City of St. John's and had an inspector, █, visit the unit to inspect the toilet. They stated that █ confirmed that there was an issue with the plumbing at the unit.
12. On 27 October 2019, the tenants hired a plumber and a copy of his invoice was submitted at the hearing. On that invoice the plumber writes that the toilet is backed up and he stated that until such time as the toilet is fixed, he "would consider the unit to be uninhabitable as human waste has been in the toilet not flushing".

13. The tenants claimed that after they had received no response from the landlord on 01 October 2019, and as the toilet would not work, they vacated the unit and resided elsewhere.
14. The tenants argued that as they were not residing at the unit during the month of October 2019 and as the unit was deemed uninhabitable because of the problems with the toilet, which was not addressed by the landlord, they are entitled to a refund of the rent they had paid for that month.

The Landlord's Position

15. The landlord stated that he was in [REDACTED], [REDACTED] on 01 October 2019 and he denied that he had received any text-messages, telephone calls or voicemail messages from the tenants on that date. He submitted his own phone records at the hearing showing that there was no activity on his phone between 29 September and 02 October 2019.
16. He also pointed out that there was an issue with the tenants' rent payments in October 2019 and on 23 October 2019 [REDACTED] contacted the tenants about that issue. [REDACTED] pointed out that no mention was made to him at that time that there was any issue with the toilet or plumbing at the rental unit.
17. The landlord stated that the first time he was notified that there was a problem with the toilet was on 25 October 2019 when he was contacted by [REDACTED]. The landlord stated that he immediately contacted his plumber and the earliest he was able to visit the unit was on 27 October 2019. He went to the unit on that date and the landlord stated that the toilet merely had to be plunged.
18. The landlord argued that there was no plumbing issue at the unit, though. His invoice from his plumber states that the toilet just had to be plunged and he pointed to an e-mail from that plumber from 28 October 2019 who writes that there were no drainage issues at the rental unit and that the toilet was blocked because an excess amount of toilet paper had been flushed down it.
19. The landlord also pointed to an e-mail from [REDACTED] in which he writes that he noted that the toilet was clogged on 25 October 2019 and that that issue was resolved on 28 October 2019.
20. Furthermore, the landlord pointed to the tenant's own invoice from her plumber in which he writes that the sinks and bathtub at the unit had no drainage issues. He also submitted an e-mail from that plumber in which he writes that there was only an issue with the toilet, not with the drainage in general. In that e-mail, though, this plumber states that the tenants did not contact him to address the issue with the toilet but only to carry out an inspection and make a determination on the habitability of the apartment.

21. The landlord argued that a blocked toilet does not make a rental unit uninhabitable. He also argued that it is not his responsibility to plunge blockages that are caused by the tenants' misuse of the toilet. He stated that this was something that the tenants ought to have addressed themselves.
22. Additionally, he argued that the tenants had not taken all reasonable steps to address this issue. He pointed out that even if they had reached out to him on 01 October 2019 via text-message and telephone, after receiving no response, they ought to have tried to reach him on the following day, or in the days following that. He also pointed out that the tenants were provided with 2 e-mail addresses that they could have used to try to contact the landlord. He also reiterated that the tenants' made no mention of plumbing issues on 23 October 2019 when they were speaking with ■■■.
23. With respect to the tenant's claim for a rebate of rent, the landlord argued that the tenants' had use of the apartment during October 2019 and they should therefore pay the rent for that month. Although the tenants stated that they did not reside there during October 2019, all of their possessions were in the unit during that month.

Analysis

24. I accept the tenants' claim that there was an issue with the toilet on 01 October 2019. I also find that their evidence establishes that they had reached out to the landlord on that same day via text-message and by telephone, with no response.
25. However, despite the fact that the evidence shows that the tenants had tried to communicate with the landlord on 01 October 2019, I accept his testimony that those messages did not reach him. This probably had to do with the fact that he was on a different continent and there are sometimes issues with telephone service after international travel.
26. It was not disputed at the hearing that the tenants made no other effort to reach the landlord between 01 October and 25 October 2019 about the plumbing issue and there was no dispute that that matter was not raised during the 23 October 2019 phone call with ■■■. In that respect, I agree with the landlord that the tenants had not made a reasonable effort to have the matter addressed. Had they been more diligent, this matter could have been cleared up at the beginning of the month.
27. I also agree with the landlord that the tenants could have addressed the issue themselves and I find it curious that they instructed their plumber not to clear the blockage on 27 October 2019.

28. Furthermore, the landlord's evidence establishes that the matter with the toilet was that it was merely blocked and I find that the tenants had not presented enough evidence to establish that there was a general plumbing or drainage issue at the rental unit.
29. Although the blocked toilet was undoubtedly an inconvenience and interfered with their enjoyment of the rented premises, I find that as the tenants failed to mitigate the inconvenience that they had suffered. For that reason, their claim for a rebate of rent does not succeed.

Decision

30. The tenants' claim for a rebate of rent does not succeed.

Issue 2: Compensation for Inconvenience - \$504.85

Relevant Submissions

The Tenants' Position

31. In addition to the rebate of rent, addressed in the previous section, the tenants also argued that because the landlord had not addressed the plumbing issue, they should also be compensated the costs that they had incurred in moving to a new apartment. They are also seeking the costs of hiring the plumber on 27 October 2019.

Analysis

32. I accept the tenants' claim that having to move to a new apartment is an inconvenience and the tenants' evidence established that they had incurred costs to complete that move.
33. However, as I found in the previous section, I find that the tenants did not take reasonable steps to notify the landlord of the plumbing issue and they did not mitigate the losses they had suffered as a result.

Decision

34. The tenant's claim for compensation for inconvenience does not succeed.

Issue 3: Cleaning - \$175.00

Relevant Submissions

The Landlord's Position

35. The tenants paid a security deposit of \$695.00 on 30 May 2019 and receipt of that deposit is acknowledged in the submitted rental agreement.
36. After the tenants vacated, the landlord returned to the tenants \$520.00 of that deposit and retained \$175.00. The landlord stated that he had retained \$175.00 of the security deposit as a cleaning fee and he pointed to the lease which states:
 - \$175.00 cleaning fee charged upon vacancy. Any rental deficiencies should be reported within 7 days of occupancy.
37. The landlord argued that as the tenants had signed the lease agreement, he was entitled to keep \$175.00 as there was a written agreement in place.

The Tenants' Position

38. The tenants acknowledged that they had agreed to pay a \$175.00 cleaning fee in the lease and they stated that they had signed the agreement in good faith.
39. However, the tenants argued that the landlord had broken their lease agreement as the unit was uninhabitable because of the plumbing issues there. They argued that as the landlord had not kept up his end of the agreement, they are no longer under any obligation to comply with the other clauses in the lease.
40. The tenants further argued that the rental unit did not require cleaning after they had vacated and they pointed to their pictures of the rental unit attached to their application.

Analysis

41. Section 14 of the *Residential Tenancies Act, 2018* deals with security deposits and the relevant subsections state:

Security deposit

14. (8) A security deposit is not an asset of the landlord but is held by the landlord in trust and may be used, retained or disbursed only as provided in this section.

(9) Not later than 10 days after the tenant vacates the residential premises, the landlord shall return the security deposit to the tenant unless the landlord has a claim for all or part of the security deposit.

(10) Where a landlord believes he or she has a claim for all or part of the security deposit,

(a) *the landlord and tenant may enter into a written agreement on the disposition of the security deposit; or*

(b) *the landlord or the tenant may apply to the director under section 42 to determine the disposition of the security deposit.*

42. The point of collecting a security deposit is to protect the landlord from financial strain after a tenancy ends because of a failure of a tenant to meet her obligations. Typically, these obligations would include the requirement to pay rent or the obligation to keep the premises clean and repair damage.
43. After a tenancy ends, and where the tenant has failed to meet her obligations, that security deposit can be dealt with in 1 of 2 ways. The landlord and tenant can enter into a written agreement on the disposition of the deposit or they can apply to the Director of Residential Tenancies to have the Board determine its disposition.
44. In this case, the landlord is arguing that there is a written agreement in place because of the clause that was written into the lease, quoted in paragraph 36, above. I disagree and I find that that clause is void as it is a devise to supersede the letter and intention the *Residential Tenancies Act, 2018*.
45. Section 14.(8), just quoted, states that a security deposit is not an asset of the landlord and, unless he has a claim to it because the tenant failed in one of her obligations, s. 14.(9) states that it is to be returned to her within 10 days. But if the clause the landlord had written into the lease agreement is valid, these 2 sections of the *Act* have to be ignored. According to the lease, a portion of the deposit becomes an asset of the landlord, even if the tenant had not failed in any of her obligations, and that portion of the deposit will not be returned.
46. But a landlord cannot avoid his obligations or any of the requirements of the *Residential Tenancies Act, 2018* by writing clauses into rental agreements that state that certain sections of that *Act* do not apply. As such, I find that there is no written agreement on the disposition of the security deposit.
47. I also find that the landlord is not entitled to keep any portion of the deposit for cleaning. No evidence was presented by the landlord to establish that the unit needed cleaning after the tenants moved out, and the tenants' own pictures show that the unit was left in a clean state.

Decision

48. The landlord's claim for a cleaning fee does not succeed.

Issue 4: Rent - \$123.33

Relevant Submissions

The Landlord's Position

49. The landlord pointed out that the tenants had entered into a 1-year, fixed-term lease that was not set to expire until 30 May 2019.
50. After ■■■ had informed him that there was an issue with the toilet, he had his plumber visit the unit on 28 October 2019 at which point he found that the tenants had vacated. He stated that he had been given no prior indication that the tenants were vacating.
51. Regarding the termination notice that the tenants had submitted with their application, the landlord pointed that that notice was not issued to him but was rather posted to a door at the rental unit.
52. The landlord stated that after he discovered that the tenants had vacated, he immediately began advertising the unit and he was able to secure new tenants for 06 November 2019. He testified that these new tenants paid a pro-rated rent for the period from 06 November to 30 November 2019, but he complained that he had suffered a loss of rental income for the first 5 days of that month.
53. The landlord argued that as the tenants had not given him a proper notice that the rental agreement was terminating, he is entitled to compensation in the amount of \$123.33 for the lost rental income he suffered in November 2019.

The Tenants' Position

54. The tenants pointed out that their plumber had deemed the unit uninhabitable.
55. The tenants acknowledged that they had posted the termination notice to the door of the rental unit, but they stated that this was an acceptable way to serve a notice on a landlord and they claimed that they had received that advice from staff at Residential Tenancies.

Analysis

56. Section 35 of the *Residential Tenancies Act, 2018* states:

Service of documents

35. (1) *A notice or other document under this Act other than an application under section 42 shall be served by a tenant on a landlord by*

(a) giving it personally to the landlord;

- (b) giving it to a person 16 years of age or older who apparently lives with the landlord;*
- (c) posting it in a conspicuous place on the landlord's premises;*
- (d) placing it in the landlord's mailbox or under a door in the landlord's premises;*
- (e) sending it to the landlord by prepaid registered mail or prepaid express post at an address
 - (i) where rent is payable,*
 - (ii) provided under subsection 7(7) or (8), or*
 - (iii) where the landlord carries on business;**
- (f) sending it electronically where
 - (i) it is provided in the same or substantially the same form as the written notice or document,*
 - (ii) the landlord has provided an electronic address to receive documents, and*
 - (iii) it is sent to that electronic address; or**
- (g) sending it to the landlord by courier service at an address set out in paragraph (e).*

- 57. The landlord is right to point out that posting a termination notice to the residential premises is not a valid way to serve a landlord a termination notice. As the termination notice was not properly served, it is not a valid notice.
- 58. I'll also point out that while I agree with the tenants' plumber that not having a working toilet does make a rental unit unfit for habitation, the evidence does not support the tenants' contention that this issue was a result of the landlord not adequately maintaining the unit. Even the tenants' own plumber states that there is no drainage issue at the unit, and the landlord's plumber concluded that too much toilet paper had been flushed down the toilet. This evidence suggests that the inhabitability of the unit was not the landlord's fault, but the tenants'.
- 59. I conclude, therefore, that the tenants had not properly terminated this lease.
- 60. Where tenants vacate residential premises without first properly terminating their lease, they are considered to have abandoned the property and are liable for any damages caused as a result of that abandonment, including any loss of rental income suffered by the landlord, so long as the landlord mitigates that damage by trying to secure new tenants as quickly as possible.

61. I accept the landlord's claim that he was able to secure new tenants almost right away and he only suffered a loss of rent in the amount of \$123.33. As such, his claim succeeds in that amount.

Decision

62. The landlord's claim for a payment of rent succeeds in the amount of \$123.33.

Issue 5: Compensation for Damages - \$92.00

Relevant Submissions

63. The landlord submitted an invoice showing that he was charged \$92.00 to have his plumber visit the unit and have the toilet plunged.
64. He also pointed to an e-mail from his plumber in which he writes that there was nothing wrong with the toilet or the drainage at the rental unit and that the cause of the blockage was that there was an excess amount of toilet paper flushed down the toilet.

Analysis

65. The preponderance of the evidence submitted at the hearing suggests that the toilet was likely clogged by the tenants putting too much toilet paper in the toilet. Neither of the plumbers who visited the unit in late October 2019 nor ■ gave any indication that the landlord was responsible for that issue or that there were any drainage issues at the unit. As such, the landlord's claim succeeds.

Decision

66. The landlord's claim for compensation for damages succeeds in the amount of \$92.00.

Issue 6: Security Deposit - \$175.00

67. The landlord had retained \$175.00 of the security deposit as it was agreed in the lease that the tenants were required to pay a cleaning fee. I have already determined under Issue 3, above, that the landlord claim for that fee is invalid.
68. Nevertheless, as the landlord's claim for rent and damages has succeeded, he shall retain the deposit and set it off against those costs.

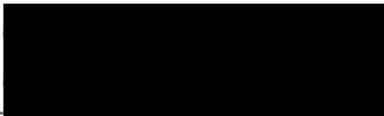
Summary of Decision

69. The landlord is entitled to the following:

- Rent..... \$123.33
 - Compensation for Damages..... \$92.00
 - LESS: Security Deposit (\$175.00)
- Total Owing to Landlord \$40.33

23 April 2020

Date



John R. Cook
Residential Tenancies Tribunal