Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

LAT

RP

RR

FF

Introduction

This was a hearing to dealt with the tenant's Application for Dispute Resolution requesting monetary compensation for the cost of emergency repairs, an Order to allow the tenant to reduce the rent for repairs, services and facilities agreed upon but not provided, an Order to compel the landlord to make repairs and an Order to permit the tenant to change the locks. Both the landlord and the tenant appeared and each gave testimony in turn.

Issue(s) to be Decided

The issues to be determined based on the testimony and the evidence are:

- Whether the tenant is entitled to monetary compensation for verified costs for cleaning and repairs incurred due to the landlord's proven violation of the Act or Agreement .
- Whether there is proven justification that the landlord should be ordered to complete repairs required under the Act for health or safety reasons.
- Whether the tenant is entitled to a rent abatement reducing the rent for services and facilities not provided. This determination is dependant upon

whether the claimant presented proof of the existence of a devaluation of the tenancy due to the landlord's failure to comply with the Act or agreement.

- Whether the tenant should be granted an order permitting the tenant to change the locks on the unit.

The burden of proof is on the applicant to prove that that the condition of the unit required emergency repairs, which the landlord failed to address contrary to section 62(3) of the Act, thereby, forcing the tenant to incur the costs or would otherwise justify an order for repairs or compensation against the landlord pursuant to section 32 of the Act. The burden of proof is also on the tenant to prove that services and facilities were restricted and the amount by which the tenancy was devalued, and to prove that an order to change the locks is warranted.

Background and Evidence

This tenancy began on May 1, 2009 with rent set at $2,000.00 and payment of a security deposit of $1,000.00. The tenant testified that the landlord did not conduct a move-in inspection report. The tenant testified that when the tenant moved in, the unit was not in a clean condition. Submitted into evidence by the applicant/tenant in support the application were numerous photographs of the unit. The tenant testified that a substantial number of repair issues became evident and the tenant gave the landlord a list of the problems. The tenant testified that the landlord told the tenant to "go ahead" and have the repairs done and that the tenant would be reimbursed. These repairs included plumbing leaks and drainage problems, nonfunctioning smoke detectors, burned-out light bulbs, broken parts on the dishwasher, some electrical problems, security issues, lack of vent covers, and a missing doorknob. The tenant testified that the cleaning and repairs were done by the tenant with minor expenditures including $45.86 for toilet parts, $47.00 for replacement smoke detector batteries and bulbs and approximately $50.00 for replacement part for the dishwasher. The tenant testified that the tenant was not reimbursed for any of the labour or materials and

is seeking compensation for some of the materials for a portion of the work done. The tenant is no longer seeking an order against the landlord to complete emergency repairs or other repairs.

In regards to the devalued tenancy, the tenant testified that when the tenant viewed the rental unit, the tenant was pleased that the home featured a hot tub. The tenant testified that at the time the tenancy was being negotiated, the landlord had stated that the tub was not used by the landlord for the past six months but functioned fine the last time it was used. The tenant testified that in addition to lawn care, hydro & gas being the tenant's responsibility, there was a clause in the tenancy agreement stating ; "*hot tub is not the landlord's responsibility*", which the tenant understood meant that the ongoing maintenance of the tub would be solely the tenant's responsibility. The tenant readily signed the agreement. The tenant testified that, at no time did the landlord give a clear indication that t the hot tub was totally nonfunctional. The tenant's expectation was that the tub could be used. The tenant feels that the loss of this facility warrants a rental rate reduction of $200.00 per month.

The landlord testified that the residence was reasonably clean when the tenant took possession. The landlord acknowledged some repairs were needed but stated that the tenant did not provide the landlord with an opportunity to do the work and instead did the repairs on their own. The landlord stated that it did not know that the smoke alarms were not working and that there were only a few light bulbs burnt out. The landlord testified that the dishwasher was functional at the start of the tenancy. The landlord stated that the landlord had lived there without incident just prior to the tenancy beginning and left the premises reasonably clean and in good repair overall. The landlord stated that attempts were made to do the move-in inspection report , but that the tenant was never available.

In regards to the lack of a working hot tub, the landlord's position was that the tenancy agreement is clear in stating that the hot tub is not the landlord's responsibility, which the tenant willingly agreed to. The clause in the agreement,

according to the landlord, would obviously indicate to any reasonable person, that the landlord wanted no involvement with the hot tub and did not warrant it's state of repair. The landlord testified that, although the tub had been successfully used six months prior to the tenancy, the landlord did not know whether or not the tub was actually working and made no representation to the tenant that it was currently functional at the time. The landlord stated that a rental unit such as this, had it included a working hot tub, would be valued at $200.00 more per month than the tenant was now paying. The landlord stated that, in fact, the tenant gave no indication during rental negotiations that the hot tub was a major issue and seemed more interested in the auxiliary rental unit on the premises. The landlord testified that the tub was bought as a used item and was approximately 20 years old. At the time the tenant viewed the rental unit, the tub was empty and the landlord felt it was the duty of the tenant to request that the tub be tested if the tenant wanted to make absolutely sure it was fit for use. The landlord stated that the tenant received good value for the unit particularly as it encompassed another income suite in the price which substantially lowered the tenant's rental outlay. The landlord felt that this was the pivotal attraction for the tenant, not the presence of a working hot tub.

The landlord's witness, a plumber familiar with the unit, stated that the building was in good, clean repair when the tenant took possession and that there were no major problems. The plumber stated, when asked, that he had never tested nor assessed the condition of the hot tub, but he made the observation that, at the end of its useful life such a fixture could start to incur costly repairs.

Analysis

In regards to an applicant's right to claim damages from the other party, Section 7 of the Act states that if a landlord or tenant does not comply with the Act, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act or agreement and that this non-compliance resulted in costs or losses to the Applicant. The evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

The tenant is alleging that the landlord did not comply with Act in maintaining the unit properly and doing necessary repairs. Section 32 (1) of the Act states that a landlord must provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

The Act states that a tenant must also maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and must repair damage to the rental unit caused by the tenant. However, the tenant can not be held liable for normal wear and tear.

In regards to emergency repairs, these are defined in section 33 as repairs that are urgent, necessary for the health or safety of anyone or for the preservation or

use of residential property. I find that the required repairs to the plumbing were likely in that category and the tenant is entitled to be reimbursed for the plumbing repairs in the amount of $50.00. I find that the repair to the dishwasher would fall within the landlord's responsibility under section 32 of the Act. The fact that the appliance was broken during the tenancy does not make it the responsibility of the tenant. The landlord has no proof that the appliance was damaged through abuse by the tenant. I find that a problem with the dishwasher would be considered as normal wear and tear unless proven otherwise. I find that the modest amount being claimed by the tenant would likely amount to less than what the landlord would have incurred using outside professionals and I grant the tenant compensation of $50.00. I find that the landlord would also be responsible for the maintenance of the smoke alarms under the Act. I find that when the unit was turned over to the tenants, it should have been in reasonably good repair, which would have included ensuring that there were working light bulbs throughout the residence. I find that the tenant is entitled to be reimbursed $50.00 for the alarm batteries, bulbs and a token amount for the cleaning.

In regards to the matter of the non-functioning hot tub, under the Act the landlord would normally be obligated to furnish the fixture in good working order from the outset and also would be completely responsible for all maintenance issues relating to the fixture. However, in this instance the landlord was attempting to rely on a term in the tenancy agreement that states: "*Hot tub is not landlord's responsibility*" in order to free the landlord from the landlord's usual obligations in regards to this particular item.

I note that both parties testified that during a conversation between the parties prior to the signing of the agreement, the landlord made a statement that the hot tub had not been used for six months but was working the last time the landlord used it. I find that, although the tenant had evidently made it clear that the tenants were looking forward to enjoying the use of the hot tub, the landlord neglected to inform the tenant that the tub was completely non-functional at the current time or at least had a high risk of not working. According to the landlord,

this was because the landlord was not aware that the tub was broken. I note that, despite this alleged lack of knowledge, the landlord made a point of including a provision in the tenancy agreement about the landlord not being responsible for the hot tub. The landlord is now contending that the provision of a functioning hot tub was excluded from the agreement by this statement. The landlord's position was that the tub was not a feature covered by the tenant's monthly rent and the tenant therefore had no basis to expect that the tub was one of the facilities available for use. In fact, the landlord pointed out in his testimony that, had the residence featured a functioning hot tub, the rent would have been set at $200.00 more per month.

If it is found that the hot tub *was* a feature of the rental premises, section 27(2) of the Act would still permit a landlord to terminate or restrict such a service or facility if the landlord: (a) gives 30 days' written notice, in the approved form, of the termination or restriction, and (b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

I accept the tenant's testimony that the tenant believed that the hot tub was functional, based on the verbal representations initially made by the landlord. The provision in the tenancy agreement stating that the landlord was "not responsible" for the hot tub, was apparently interpreted by the tenant to mean that the tenant agreed to take on the responsibility for the ongoing maintenance of the hot tub. I find that the tenant's testimony that the tenant did not expect the unit to be broken to be believable.

Section 6(3) of the Act provides that a term of a tenancy agreement is not enforceable if:

(a) the term is inconsistent with this Act or the regulations,

(b) the term is unconscionable, or

(**c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.** (my emphasis)

In this instance, I find that the wording of the term in the tenancy agreement is not as clear as it could have been, particularly as it was meant to excuse one party from a specific statutory obligation assigned under the Act.

I find that the landlord was not able to give a logical reason why the purported meaning of the term was not expressed in a more concise manner. For example, to ensure that the meaning of the term was accurately interpreted, it could have stated, “This agreement and the rental rate charged does not include the provision of a functional hot tub for the tenant’s use.”

Moreover, I find that the verbal statements made earlier by the landlord appear to insinuate, or were perceive by the tenant to mean, that the tub would likely work. I find that nothing stated by the landlord prior to signing the agreement served to indicate that there was a high risk that the fixture was totally useless, merely that it hadn’t been used for a long period of time.

The landlord’s testimony confirmed that the landlord was the last user of the fixture and the tenant testified that they found some of the pipes had actually been disconnected. I find it odd that this landlord would neglect to test the tub and fail to have the plumber take a look at it while he was on site, given that, according to the landlord, the rent would be $200.00 more with a working hot tub. I do not accept the landlord’s statement that it was incumbent on the tenant to request that this, or any other fixture or appliance for that matter, be tested in the tenant’s presence in order to rely on the presumption that the items were functional. In fact, I find that there is a valid presumption that everything in the unit should work and it is the incumbent upon the landlord to notify the tenant when this is not the case.

Section 5 of the Act also provides that landlords and tenants may not avoid or contract out of this Act or the regulations and any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find that, in regards to the hot tub, there was a reasonable expectation that it was functional and that its use was included in the rent, unless expressly stated

in written form that the item was not usable and was excluded from the services and facilities upon which the rental rate was based. I find that a landlord cannot avoid the maintenance and repair provisions in the Act nor successfully contact out of the Act merely by inserting a general statement that "*the landlord is not responsible…."* . In order to make the term valid and enforceable, the landlord had an onus to ensure that the tenant completely understood what the intention and the impact of this term entailed before finalizing the agreement. Whether intentional or not, I find that there was a lack of transparency in this matter and from the tenant's perspective, the tenancy was devalued from the outset.

Given the above, I find that in this instance a rental abatement is justified. I set the amount of reduction at $200.00 as put forth by both parties as a reasonable value. I further order that the tenant's rent, now being $1,800.00 per month, will not include use of the hot tub in the future.

In regards to the issue of the landlord's right to enter the rental unit and the change of locks, I find that under the Act, the landlord is entitled to enter the premises with the appropriate written notice as set out by section 29 (1) which states that a landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies: (a) the tenant gives permission at the time of the entry, or not more than 30 days before the entry; or (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information: (i) the purpose for entering, which must be reasonable; (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees.

In addition to the mandatory information listed above, I order that the written notice from the landlord must also include the names and the role or credentials of the person(s) who will be accessing the premises.

I find that the tenant is required under the Act to either remove the lock installed by the tenant forthwith or provide the landlord with keys to the unit.

Conclusion

I hereby grant the tenant a monetary order under section 67 for $900.00, comprised of $150.00 for repair work and cleaning conducted by the tenant, $200.00 retro-active rent abatement for May 2009, $200.00 rent abatement for June 2009, $200.00 rent abatement for July 2009, a partial refund of $100.00 from the $1,000.00 security deposit paid and the $50.00 fee paid for this application. I order that the tenant deduct $900.00 from the next rental payment owed to the landlord as a one-time abatement to satisfy the above monetary order.

I hereby order that effective August 1, 2009, the current monthly rate for the rental unit will be reduced from $2,000.00 per month to $1,800.00 per month and that the rent does not include the use of a hot tub on the premises.

I further order that the landlord is required to adhere to the Act by giving 24 hours written notice before entering the rental premises listing the purpose for entering, the date and the time of the entry, the names and the role or credentials of the person(s) who will be accessing the premises.

Finally, I order that the tenant must remove the lock or otherwise ensure that the landlord has a copy of any keys to the unit as required by the Act.

July 2009 _____

Date of Decision Dispute Resolution Officer