Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: MNDC, FF

Introduction

This matter dealt with an application by the Tenants for a Monetary Order for compensation for damage or loss under the Act or tenancy agreement as well as to recover the filing fee for this proceeding.

At the beginning of the hearing the Parties confirmed that the only Landlords that should have been named on the application were the owners, Wendi and Pierre Bocti. Consequently, the style of cause is amended to remove the owners' property managers as Landlords and to add instead the rental property owners.

Issues to be Decided:

1. Are the Tenants entitled to compensation and if so, how much?

Background and Evidence

This month to month tenancy started on April 1, 2008 and ended on December 15, 2008 when the Tenants moved out. Rent was $1,295.00 per month plus utilties.

Tenants' Evidence**:**
The Tenants claim that in April 2008 a handyman hired by the Landlords started various repairs to the rental property. They claim that as a result of work being done in the lower suite in April 2008, a strong chemical smell (they believed was lacquer thinner) pervaded their rental unit. The Tenants said they called the Landlords' property manager about it and he advised the handyman to open the windows in the lower unit and to advise the Tenants in the future if he would be using any strong smelling products. The Tenants said on May 2, 2008, the handyman returned to the rental property without notice to them to make repairs to a deck outside of their patio door. The Tenants said that a strong smell again pervaded the rental unit and made them and their infant child nauseous and gave them headaches.

The Tenants said that they spoke with the handyman 3 days later and he told them he was applying a resin and fiberglass matting and sanding and painting the deck. The Tenants said they asked the handyman about the resin product he was using and any

possible adverse effects and he advised them that it was supposed to be used in a well ventilated area and recommended they close their windows. The Tenants said they also asked the handyman if the dust from the sanding was hazardous but he did not respond. The Tenants said they contacted the Health Authority and Poison Control who told them they should not stay in the rental unit if the fumes were giving them headaches and nausea.

The Tenants said they were concerned because the handyman was not using a poly barrier to contain the dust from the resin and wood sanding and it was flying everywhere. Consequently the Tenants left a message for the Landlords' property manager on the evening of Friday, May 2, 2008. They claimed the smell dissipated somewhat the following day but was still noticeable. The Tenants said they did not hear back from the property manager so they called him again the following Monday on his emergency line. The Tenants said the property manager told them not to worry if there was no dust inside the house.

The Tenants said that by May 5, 2008 there was still a lingering smell of chemicals in the rental unit. The Tenants said they contacted the property manager again and he suggested again that they open their windows to ventilate the unit. The property manager came to the rental unit that day but denied smelling anything. The Tenants said they were concerned about potential adverse health effects so they left the rental unit. The Tenants said they returned to the rental unit briefly on May 6, 2009 and could still smell a strong odor but also noticed saw dust and other particles accumulating at the foot of the patio door and some window sills from the handyman sanding off the resin on the deck. The Tenants said they asked the handyman if he would poly off the area and their belongings and he said he would but never did.

On May 7, 2008 the father of one of the Tenants contacted WCB, the Health Authority and a by-law officer with the District of Peachland about the work being done on the rental unit. The Tenants claim that all of the authorities recommended that they not stay in the rental unit if the fumes were causing nausea and headaches. The Tenants said they were also advised that the fiberglass dust had cancer causing agents and that neighbors had also complained to the By-Law officer about the strong chemical smell. Consequently the Tenants said they contacted the Landlord's property manager again but he advised them that the Landlords were not willing to pay for the Tenants to stay in a hotel. The Tenants said on the advice of their doctor who they saw on May 8, 2008, and out of concern that there was fiberglass dust in the rental unit, they decided to stay in a hotel until the rental unit could be professionally cleaned by a restoration company. The Tenants said they referred the matter to a restoration company and made an insurance claim on May 9, 2008.

The Tenants said they were advised by a WCB officer that she had spoken to the Landlord's property manager to get the name of the Landlords' handyman but he refused to provide it. The Tenants also claimed that the Landlords' property manager

refused to cooperate with the restoration company or their insurance adjuster so on May 15, 2008 the Tenants gave him a written demand to do something about cleaning the unit so they could return. The Tenants said that the property manager gave them 4 Notices to Enter for May 21, 22, 23, and 24, 2008 but failed to show up for any of them. On June 3, 2008, the Landlords' property manager advised the Tenants that the Landlords were waiting for their insurance adjuster to determine what to do to the rental unit.

The Tenants said that the decks were finished on June 10, 2008 and on June 11, 2008 their belongings were removed from the rental unit by the restoration company. Cleaning commenced on or about June 18, 2008 and was completed by June 26, 2008.

The Tenants said they incurred hotel expenses for May and June 2008 of approximately $4,000.00. The Tenants admitted that their insurance company paid for their hotel accommodations but said that they had to pay rent for the rental unit for May and June 2008 plus a $500.00 insurance deductible. The Tenants also claimed that they lost the use of many amenities of the rental unit (such as the yard and deck) for these 2 months.

The Tenants also sought to be reimbursed for utility payments including a land line and wireless telephone, cable, hydro, gas and an internet game subscription as they claimed they were not able to use for the 2 month period they vacated the rental unit. One of the Tenants also claimed compensation for time he took off of work to be in the rental unit when Notices of Entry were given by the Landlord as he said he needed to be in attendance to make sure things were being done properly. The Tenants admitted that they were only asked on one occasion by the insurance adjuster to be there.

The Tenants sought to recover gas expenses for purchasing new contents to replace old ones they claim were contaminated. The Tenants also sought to be reimbursed their expenses for photocopies and photographs for this proceeding as well as compensation for their time for missing work to attend another dispute resolution hearing on September 10, 2008 to dispute a Notice to End Tenancy. In support of their application, the Tenants provided photographs of the dust accumulated by the patio door as well as a DVD showing the Landlords' handyman and 2 others sanding the deck without any containment measures and their attempts to clean up the debris. The Tenants also relied on a witness statement of Larry Burke who described his conversations with the by-law enforcement officer, the Public Health inspector and a WCB officer.

Landlords' Evidence:

The Landlords argued that the Tenants were advised prior to the tenancy that the Landlords intended to work on the lower suite and fix a soft spot on the deck. The Landlords said that they hired Mr. Ramenda to do the patio repairs and he was going to hire another person, Mr. Hetrick, who was experienced doing fiberglass work to assist.

The Landlords admitted that they did not know until sometime later that Mr. Ramenda was doing most of the deck repairs. The Landlords said that after they heard about the Tenants' complaint about the fumes, they spoke to Mr. Ramenda who said the fumes from the resin were not that strong and thought the Tenants were exaggerating. Consequently, the Landlords said they decided not to pay for the Tenants to stay in a hotel.

The Landlords said that on May 8, 2009, the work on the patio stopped because the workers felt uneasy with the Tenants video taping them after a complaint had been made to WCB. The Landlords admitted that a By-Law officer advised them that the dust from the sanding should have been contained but argued that any dust that entered into the rental unit was likely the result of the Tenants opening the patio door (which the Tenants denied).

The Landlords said that on May 11, 2009 they started looking into having air quality testing done but were advised by their insurer to wait until she could do some research. The Landlords admitted that air testing could have been done as early as May 22, 2008 but claimed that it was not until June 9, 2008 that air samples were taken. The Landlords said that one sample was taken at the front of the house and another at the end of the house. The Landlords also said that no alterations were made to the rental unit before the testing was done and one of them noted that at the time of the testing, dust was still sitting in front of the patio doors. The Landlords did not dispute, however, that one of them was confronted by one of the Tenants on June 7 or 8, 2008 because they arrived to find her in the rental unit with the windows and doors open. In any event, the Landlords said that the air testing results showed that there were only trace amounts of fiberglass in the rental unit.

The Landlords said that prior to the air testing, the air testing company told them that all that was needed was a HEPA filter to remove the dust. The Landlords said they hired a company to power wash the exterior of the rental unit and clean the furnace and ducts which commenced on June 18, 2008. One of the Landlords said that she stayed in the lower suite of the rental property for approximately a week starting on June 5, 2008 and she noticed no smell and experienced no symptoms. The Landlords also claimed that they always gave the Tenants notices when they intended to enter the rental unit.

The Landlords' property manager said that he believed the Tenants were over-reacting and acting irrationally in response to the patio work. In particular, he noted that when he inspected the rental unit on May 5, 2008, he could notice a smell but felt it was the result of the Tenants leaving windows open while the resin was being applied and that it could easily be vented. The Landlords' property manager also claimed that when he inspected the rental unit from the exterior on May 13, 2008, he could only see small amounts of dust by the patio door and window. He also argued that he was advised by the Landlords that the Tenants were confrontational with one of them on June 7th or 8th

but admitted he was not aware of the reasons for that. The Landlords' property manager denied that he was contacted by WCB.

The Landlords' handyman, Mr. Ramenda, also gave evidence regarding the work that was done. He admitted that the repair area was near the patio door and that he did not give the Tenants any notice prior to starting the deck work. Mr. Ramenda claimed that he told one of the Tenants that there would be a smell and some dust and that if the Tenant was concerned about it, she should leave the rental unit until he has done. Mr. Ramenda said he also thought he told the Tenants to leave the doors and windows closed but could not be sure about that. Mr. Ramenda also said that during the sanding work he noticed "saw dust" inside the patio door and assumed the Tenants must have had the door partly opened at some point. He admitted however, that he was unsure if the doors and windows in the rental unit were air tight. Mr. Ramenda said the initial sanding was to remove excess resin and that he did not apply fiberglass to the deck until approximately a week or two after he started the deck repairs.

Mr. Ramenda admitted that he did not use a protective poly barrier to contain the dust. He claimed that the larger particles of wood and resin dust were swept up and the smaller particles blown away. Mr. Ramenda first said the central vacuum in the rental unit was used to remove dust and fiberglass particles from the carpeted area but then claimed he used his own vacuum to do so. Mr. Ramenda admitted that after some instruction by Mr. Hetrick, he took over the work while Mr. Hetrick supervised.

In support of their position that there was no danger to the Tenants from the materials used for the repairs, the Landlords provided a copy of the Air Quality Testing Report of PHH ARC Environmental dated June 17, 2008. The Report concluded that "fiberglass fibres were identified in the air in the upper suite, but not at concentrations likely to have a significant impact on the health of the tenants." The Report recommended cleaning all surfaces with a combination of a HEPA vacuum and damp wiping followed by cleaning of the furnace and air ducts to remove any fiberglass particles. The Report also cautioned that the air samples were "limited to those areas of concern identified by the client" and that "other areas of concern may exist but were not investigated."

The Landlords also provided a Safety Data Sheet regarding the Resin used on the deck. That document notes that the product is dangerous if inhaled and may cause dizziness, headache and nausea as well as eye, skin and respiratory tract irritation. It also states that breathing small amounts during normal handling is not likely to cause harmful effects, however it also recommends limited exposure to the product and using protective equipment including a respirator.

Analysis

Section 32 of the Act says that "a Landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law….and that makes it suitable for occupation by a tenant."

Section 28 of the Act states (in part) that "a tenant is entitled to quiet enjoyment including but not limited to freedom from unreasonable disturbance and use of common areas for reasonable and lawful purposes, free from significant interference."

I find that the application of the resin to the deck of the rental property on May 2, 2008 caused the Tenants to experience headaches and nausea which are symptoms consistent with exposure to that product. I accept the evidence of the Tenants that the resin smell persisted for 3 to 4 days after the initial application and made it difficult to reside in the rental unit. I do not place a lot of weight on the evidence of Mr. Carrier, the Landlords' property manager, on this point as I found his evidence to be unreliable. In particular, I find that Mr. Carrier told the Tenants on May 5, 2008 that he could not smell an odor, however his evidence at the hearing was that he could smell a chemical odor but did not believe it was that strong and that it could be ventilated.

I also find that Mr. Carrier unreasonably discounted the Tenants' complaints about the effects of the resin because he believed they were over-reacting. I note that Mr. Carrier did not return the Tenants' initial call made on May 2, 2008 until they called his emergency line 3 days later. On cross-examination, Mr. Carrier refused to answer the Tenants' question about how many times they had called him between May 2nd and May 5th to complain about the odor. Consequently, I draw an adverse inference that Mr. Carrier did not answer that question because the answer would not have been helpful the Landlords' position in this matter. In any event, I find that the Tenants attempted to ventilate the unit without success and were therefore justified in finding temporary, alternate accommodations on May 5 and 6, 2008 until the smell could dissipate.

Similarly, I find that it was reasonable for the Tenants to be concerned about their health and safety when they found dust from the repair work inside the rental unit on May 6, 2008. In particular, Mr. Ramenda could not tell the Tenants what the chemical was that he was applying to the deck but simply advised them that he would be using resin and fiberglass and based on their investigations, they believed fiberglass dust if inhaled could be a serious health hazard to themselves and their infant child. I also find that the Tenants relied on the advice of their physician they saw on May 8, 2008 that they should not reside in the rental unit if there was fiberglass dust present. Furthermore, Mr. Ramenda admitted that he started applying the fiberglass with resin to the deck and sanding it without any containment measures within a week or two of May 2, 2008.

I further find that the Landlords' property manager received written notice on May 15, 2008 that the Tenants had vacated the rental unit due to their concerns about the safety of the rental unit. However, the Landlords did not take any steps to determine if there

was a safety issue until almost a full month later when on June 9, 2008 their had the air quality test performed. I find that this delay was unreasonable. The Landlords claimed that they were waiting for their insurance adjuster to do research on the issue because she did not believe based on her visual inspection on May 12, 2008 that there was an environmental hazard. However, there was no evidence that the Landlords' insurance adjuster was qualified to make that opinion and at the end of the day the Landlords were responsible for ensuring their rental unit was fit for occupation.

The Landlords argued that the Air Quality report is evidence that the dust from sanding the deck "was not in any way a health risk to the occupants" and that there was "no fiberglass contamination of the rental unit." However, that was not what the Report said; the Report stated that minor and trace amounts of fiberglass particles were present in the rental unit and that these "concentrations … were not likely to have a ***significant*** (my emphasis) impact on the health of the tenants." Further, the Report recommended cleaning all of the surfaces in the interior of the rental unit plus the furnace and ducts to remove the fiberglass particles that did exist. I find that the recommendation to remove even the minor or trace amount of fiberglass particles is inconsistent with the Landlords' argument that there was no health risk to the Tenants. Nowhere in the Report does it state that there was "no" health risk to the Tenants. Consequently, I find that the Tenants were justified in vacating the rental unit until it was tested and cleaned in accordance with the Report's recommendations.

I find that there is insufficient evidence to draw the conclusion that the Tenants let the dust into the rental unit as none of the Landlords' witnesses saw the patio door or windows open in the vicinity of the deck and had no knowledge if the door and windows were air tight. The Landlord also argued that the Tenants claimed in their written submissions that they opened windows and doors on May 2, 2009 to ventilate the unit, however that is not accurate. The Tenants' submissions state that Ms. Burke opened only *windows* and in her oral evidence, Ms. Burke clarified that she did not open the glass patio door. Furthermore, even if the Tenants or someone else had inadvertently opened the patio door (and I make no finding in this regard), it is unlikely that the dust would have gotten into the rental unit if Mr. Ramenda had exercised reasonable care and used a poly barrier to contain the dust outside the patio door and windows as he assured the Tenants he would do.

The Landlords also argued that the Tenants took no steps to mitigate their damages by, for example, determining if the resin used by Mr. Ramenda posed a health risk. In fact the evidence was that Ms. Burke asked Mr. Ramenda on May 5, 2008 after she had called Poison Control what the name of the resin product was that he was using but he did not know. Furthermore, I find that the Tenants did not have an obligation to discover the full extent of the health risks prior to vacating the rental unit given that by that point they had been exposed to it for 3 days and they and their infant child were experiencing headaches and nausea. Furthermore, I find that it was not until the Tenants had obtained information about the health risks associated with exposure to fiberglass that

they decided to vacate the unit for an extended period until they could be sure it was fit to be occupied.

The Landlords also argued that the Tenants failed to mitigate damages because fiberglass was not present in the environment when they vacated on May 5, 2008. However, I find that this conclusion is not supported by the evidence. In particular, the Landlords also claimed the environment was not changed and in particular, the patio door and window by the deck not opened between the time the Tenants vacated and the time air samples were taken. How then did particles of fiberglass dust manage to find their way inside the sealed rental unit after the Tenants left? Furthermore this argument is inconsistent with the Landlords' claim that the Tenants let the dust enter the unit by opening the door. As a result of these inconsistencies, I find that there is insufficient evidence to conclude that the fiberglass particles found inside the rental unit did not exist in the rental unit before the Tenants vacated.

Consequently, I find that the Tenants are entitled to compensation for loss of use of the rental unit for May 5 and 6, 2008 and May 22 – June 27, 2008. I find that it would have been reasonable for the Landlords to have taken professional investigative action within a week of receiving the Tenants' written notice to do something to ensure the rental unit could be occupied. However, it was not until June 3, 2008 that the Landlords contacted the Tenants to tell them that they still hadn't decided on a course of action. Consequently, I find that the Tenants are entitled to recover pro-rated rent payments for May 5 and 6, 2008 and May 22 – June 27, 2008 in the total amount of **$1,655.94** ($1,295.00 x 2= $2590.00/61 days = $42.46 per day x 39 days).

For the same reasons, I find that the Tenants are entitled to recover pro-rated gas, hydro and cable expenses for the same period of time that they lost the use of the rental unit. The Landlords claimed that cable was included in the rent, however, the Parties' tenancy agreement states that the Tenants were responsible for 60% of the utilities for the rental property. In the absence of any evidence to the contrary, I find that the Tenants are entitled to the following amounts:

Cable for May 2008: $86.14 x 60%= $51.68/ 31 days x 12 days = $20.00
Cable for June 2008: $45.87 x 60% = $27.52/30 days x 27 days = $24.77
Gas to May 27, 2008: $2.57 per day x 8 days = $20.56
Hydro for May 2008: $0.99 per day x 12 days = $11.88
Hydro for June 2008: $0.99 per day x 27 days = $26.73

The Tenants did not provide a copy of a gas invoice for the period, May 28, 2008 to June 27, 2008, and as a result, I award no amount for that period. The Tenants also sought to recover the cost of their mobile telephone as well as their land line. The Tenants admitted that the base charges for the mobile telephone services would be the same whether they resided in the rental unit or not but argued that their expenses were higher because they had to rely on this as their primary telephone. However, the

Tenants did not provide a copy of their detailed bill to show what calls they made (for privacy reasons) and in the absence of such evidence, I cannot conclude that they incurred a greater expense to make the same calls they would have made on a land line. Consequently I make no award for the Tenants' mobile telephone bills but award them the amount of **$56.63** as follows for the loss of use of their land line:

May 2008: $44.00 / 31 days x 12 days = $17.03
June 2008: $44.00 / 30 days x 27 days = $39.60

In the absence of any corroborating evidence regarding the amount charged to the Tenants for an internet game subscription, I find there is insufficient evidence to support that part of the Tenants' claim and it is dismissed.

I also find that the Tenants are not entitled to recover their hotel expenses because they were not out of pocket for those expenses, however they are entitled to recover the **$500.00** insurance deductible they were required to pay as a result of filing a claim with their insurer to cover accommodation expenses. I find that the Tenants are not entitled to recover their gas expenses for purchasing new articles they claimed were contaminated. In the absence of any evidence that those items were not salvageable or alternatively that this $110.00 expense was solely incurred for shopping, I find that there is insufficient evidence in support of this part of the Tenants' claim and it is dismissed.

I find that the Tenants are not entitled to recover expenses for attending the rental unit on occasions when the Landlord posted notices to enter the rental unit. Although the Tenants said they wanted to ensure things were done properly, that was their decision and not a requirement. The Tenants admitted that they were only requested on one occasion to be at the rental unit to meet with an insurance adjuster. However, in the absence of any evidence as to whether the entry occurred during work hours or why no one else was able to attend on their behalf, I find that there is insufficient evidence to support this part of the Tenants' claim and it is dismissed. Similarly, I find that the Tenants are not entitled to be compensated in this matter for time they attended a previous, unrelated RTB hearing.

I find that the Tenants are entitled to recover their reasonable expenses for photocopying documents, obtaining photographs and serving documents in preparation of ***this matter*** as follows:

Photocopying: $11.34
Photographs: $3.40
Filing Fee: $50.00

I find the Tenants are not entitled to recover photocopy expenses related to a receipt dated August 11, 2008 which was 5 months before they filed their application in this matter.

In summary, I find that the failure of the Landlords' handyman to contain odors and dust from repairs to the deck of the rental unit resulted in an unreasonable interference with the Tenants' use and enjoyment (or right to quiet enjoyment) of the rental unit for approximately a two month period. I also find that the Landlords had a duty under s. 32 of the Act to investigate the Tenants' complaints that debris and fumes from those repairs posed a risk to the Tenants' health or safety and made the unit unfit for occupation. I find the Landlords failed to do so within a reasonable period of time and further find based on the recommendations of the Air Quality report that the rental unit was not fit for occupation until it was cleaned to remove the small concentrations of fiberglass particles. Consequently, I find that the Landlords are liable pursuant to s. 67 of the Act to compensate the Tenants for the following damages they incurred:

Rent payments:	$1,655.94
Gas payments:	$20.56
Hydro payments:	$38.61
Telephone payments:	$56.63
Cable payments:	$44.77
Insurance deductible:	$500.00
Photocopies:	$11.34
Photographs:	$3.40
Filing fee:	$50.00
TOTAL:	$2,381.25

Conclusion

A monetary order in the amount of **$2,381.25** has been issued to the Tenants. If the amount is not paid by the Landlords, the Order may be filed in the Provincial (Small Claims) Court of British Columbia 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*.

July 29, 2009
Date of Decision

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