

DECISION

Dispute Codes MNDC ERP RP FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenants to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, an Order to have the Landlord make emergency repairs and repairs to the rental unit, and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents, by the Tenants to the Landlord, was done in accordance with section 89 of the *Act*, where they sent the amended package via registered mail on December 16, 2009. Mail receipt numbers were provided in the Tenants' verbal testimony. The Landlord is deemed to be served the hearing documents on December 21, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*. The Landlord confirmed receipt of the hearing packages and copies of the Tenant's evidence.

The Landlord and both Tenants appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

All of the testimony and documentary evidence was carefully considered.

Issues(s) to be Decided

Are the Tenant's entitled to a Monetary Order and Order to have the Landlord make repairs under sections 32, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

The parties entered into a written tenancy on February 10, 2009 for a month to month tenancy beginning March 1, 2009. The monthly rent is payable on the first of each month in the amount of \$925.00 and the Tenants paid a security deposit of \$462.50 on February 10, 2009. The rental unit consisted of the main floor of a house with two bedrooms and one bathroom.

The written tenancy was effective March 1, 2009 however the male Tenant moved into the rental unit based on a verbal tenancy agreement on approximately November 1, 2008 and the female Tenant moved in on March 1, 2009.

The Male Tenant testified that the Tenants have accepted the notices to end tenancy, the Tenants are scheduled to move out of the rental unit on December 31, 2009, and the Tenants are now seeking a monetary order of \$3,700.00 which is comprised of six months of half the monthly rent (\$462.50 x 6) plus \$925.00 moving expenses for compensation for the Landlord's negligence and aggression.

The Tenants testified that the toilet began to plug up intermittently near the end of May 2009 and that they informed the Landlord of the problem verbally near the beginning of June. The male Tenant argued that the Landlord attended the rental unit at the beginning of June 2009 and plunged the toilet a few times and it was working okay on that day however it continued to plug up intermittently.

The male Tenant stated that they spoke with the Landlord again, verbally, and that the Landlord attended the rental unit some time near the middle of June 2009 and ran a snake down the toilet. The male Tenant argued that after the Landlord attended in mid June the Tenants purchased a new plunger, used chemical or aerosol plungers, changed the mechanism in the tank of the toilet, had the male Tenant's father attend the rental unit to snake out the toilet, however the toilet continued to plug up intermittently.

The Tenants testified about an incident which occurred sometime in July 2009, when the Landlord was out of town, and the toilet plugged and overflowed. The female Tenant stated that she attempted to call the emergency contacts but she could not get through. The female Tenant argued that while she was cleaning up the mess the emergency contact showed up at the rental unit and told the female Tenant that they did not have the authorization to call in a plumber. The female Tenant testified that it was the Landlord's daughter, who resides in the basement that got through and spoke with the emergency contact.

The Landlord testified and argued that he was never told about the alleged incident in July 2009.

The Tenants argued that they were not aware of the Residential Tenancy Branch until the beginning of November 2009 which is when they put their concerns in writing to the Landlord on November 1, 2009.

The Landlord argued that the Tenants put the wrong date on their letter as it was not delivered to the Landlord until November 3, 2009 which is the same date the Landlord issued the Tenants a notice to end tenancy.

The Tenants confirmed that they were issued the notice to end tenancy on an old outdated form on November 3, 2009 and that they found out about the Residential Tenancy Branch near the beginning of November. When asked why the Tenants did

not seek a remedy for their toilet issue sooner, the male Tenant argued that he thought the Landlord was dealing with the problem.

The Landlord's Agent testified that while she was at the rental unit cutting the grass in July 2009, during her father's holiday, she asked the Tenants if they were having any problems and the only thing they told her was that they were still having some intermittent problems with the toilet.

The Landlord testified that he was called by his daughter who resides in the basement, to attend the rental unit for sewage dripping from upstairs into the basement, at 11:00 pm on November 23, 2009. The Landlord stated that when he attended the main floor of the rental unit he was met by the male Tenant's girlfriend and her mother and that they refused the Landlord access to the rental unit. The Landlord argued that when he insisted on gaining entry to the rental unit the male Tenant was woken up and the Landlord was asked to leave the rental unit and was prevented from attending to the problem with the toilet overflowing causing sewage to drip into the basement.

The male Tenant confirmed that he was sleeping when the Landlord first attended, that his girlfriend and her mother were at the rental unit at the time, and that the Landlord was asked to leave, however the male Tenant could not testify as to who asked the Landlord to leave. The female Tenant argued that the Landlord was not asked to leave and was not prevented from attending to the problem toilet.

The male Tenant argued that the Tenants began to use the toilet for liquid waste only and that for solid waste they would go to a coffee shop or elsewhere.

The Landlord testified that the notices to end tenancy were issued because the Tenants had too many occupants in the rental unit and constantly paid their rent late.

Analysis

The Tenants have accepted the notice to end tenancy, are vacating the rental unit on December 31, 2009, and are no longer seeking Orders to have the Landlord make emergency repairs.

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant Tenants would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7. It is important to note that in a claim for damage or loss under the *Act*, the party claiming the damage or loss, in this case the Tenants, bears the burden of proof and the evidence furnished by the Applicant Tenants 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 loss or to rectify the damage
4. Proof that the claimant followed section 7(2) of the *Act* by doing whatever is reasonable to minimize the damage or loss

In regards to the Tenants right to claim damages from the Landlord, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *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.

The evidence and testimony before me supports that there was an “intermittent” problem with the toilet plugging in June 2009, which the Tenants informed the Landlord of the problem and the Landlord attended the rental unit on two separate occasions to deal with the problem. The Landlord’s daughter was informed that the toilet was still causing “intermittent” problems in mid July 2009, during the Landlord’s absence. I note there is no evidence or testimony to support that the Landlord was informed of any continuing problems with the toilet between mid July 2009 and the beginning of November 2009.

There is contradictory evidence in regards to when the November 1, 2009 letter was issued to the Landlord from the Tenants. I note that there is testimony from the Tenants which supports that they were not aware of the Residential Tenancy Act until the beginning of November 2009 which supports the Landlord’s argument that the letter was not delivered to the Landlord until after he issued the Tenants the notice to end tenancy. On a balance of probabilities it would be reasonable to conclude that the Tenants, after receiving the notice to end tenancy, researched the Residential Tenancy Act and then proceeded with providing the Landlord with written notice about the on-going problems with the toilet and filing their claim for monetary compensation.

The Tenants are seeking six months of compensation of ½ month’s rent per month for the interrupted use of the only toilet in the rental unit, which the Tenants claim plugged intermittently. While there is evidence to support that the toilet had plugged on occasion, there is also evidence to support that when the Landlord was advised of a problem with the toilet the Landlord attended the rental unit to repair the problem. I note that when the Landlord attended the rental unit in November 2009, to attend to an

emergency situation the Landlord told to leave the rental unit before having the opportunity to attend to the problem.

Section 32 of the Act states that a Landlord must repair and maintain the rental unit however a Landlord cannot be found negligent if he is not informed of an issue or if the Landlord is refused access to attend to the problem. I also note that if there was an emergency with the only toilet in a rental unit which housed two adults a reasonable person would have sought out all possible remedies in order to have the toilet repaired. Based on the aforementioned I find that the Tenants have failed to prove the test for damage or loss as listed above and I hereby dismiss their claim for \$2,775.00 without leave to reapply.

The testimony supports that the Tenants have accepted the notice to end tenancy and the Tenants have made the choice to vacate the rental unit on December 31, 2009. There is no evidence to support that the Landlord has been negligent and aggressive towards the Tenants. That being said, I find that the Tenants have failed to prove the test for damage or loss as listed above and I hereby dismiss their claim for \$925.00 in moving expenses.

As the Tenants have not been successful with their application, I decline to award them recovery of the filing fee.

Conclusion

I HEREBY DISMISS the Tenants' application, 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: December 29, 2009.

Dispute Resolution Officer