DECISION

Dispute Codes MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents, by the Tenant to the Landlord, was done in accordance with section 89 of the *Act*, sent via registered mail on October 1, 2009. Mail receipt numbers were provided in the Tenant's evidence. The Agent and Landlord confirmed receipt of the hearing package.

The Landlord, Landlord's Agent (Agent) and the Tenant 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.

Issues(s) to be Decided

Is the Tenant entitled to a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement under section 67 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed testimony was the tenancy began on June 1, 2004 and ended after the Tenant provided the Landlord with one month's written notice to end the tenancy effective September 30, 2007. The monthly rent was payable on the first of each month in the amount of $2,200.00 for the period of June 1, 2004 to July 31, 2007 and raised to $2,285.00 per month from August 1, 2007 to September 30, 2007. A security deposit of $1,100.00 was paid on June 1, 2004 which was returned to the Tenant, in full plus interest, during the first fifteen days of October 2007.

Both parties confirmed the rental unit is a house built in 1945 which is hooked up to sewer, has five bedrooms, four bathrooms, two kitchens, a sauna, and the property has mature trees, bushes and gardens.

The Tenant did not serve notice of her dispute resolution to the original property management company who was the agent for the Landlord for the period of June 1, 2004 to July 31, 2006. The Tenant's application named the Owner of the rental unit and the property management company who was the Landlord's Agent for the period of August 1, 2006 to September 30, 2007 of this tenancy.

The Tenant testified that she viewed the rental unit and property at least two times in April 2004 before signing the first tenancy agreement on April 28, 2004. The Tenant confirmed that she was able to see the property again in May 2004 and was allowed to move into the rental unit prior to the June 1, 2004 effective date and believes her move in date was approximately May 25, 2004. The Tenant argued that she never had occasion to deal with the owner and dealt directly with the property management companies. The Tenant stated that she had searched BC Assessment to find the owner of the rental unit and their address for service of her application for dispute resolution filed on September 29, 2009 which is two years less one day from when the tenancy ended.

The Tenant is claiming $14,000.00 in damages or losses and referred to her detailed list title "calculation of the amount claimed" which she submitted in evidence while providing the following testimony:

A) **Basement $3,421.10** ($1,631.30 + $1,433.30 + $356.50) – The Tenant argued that during the period of March 15, 2006 to July 7, 2006 there were portions of the basement that she could not use because the basement was flooded with septic and the remediation and restoration of the basement involved several different contractors which took two and a half months to complete. The Tenant has sought $1,631.30 as compensation for the restricted use of the basement during these repairs.

   The Agent advised that the cause of the septic back up was a result of the Tenant's or the Tenant's guest's negligence in turning off the power to the sump pump and that the Landlord was nice enough to put a claim through his insurance to repair the damage. The broken pipe, hidden behind the wall, was also contributed to the sump pump being turned off. The Agent argued that the damage was attended to by the previous Agent, in accordance with the Act and in a reasonable amount of time as a plumber attended the rental unit March 14, 2006. The Agent stated that given the amount of contractors involved in the restorations the job was completed in a reasonable amount of time.

The Tenant has claimed a total of $1,789.80 ($1,433.30 + $356.50) regarding a blocked drain in the basement shower from March 13, 2007 to September 30, 2007. The Tenant argued that she e-mailed the Landlord on March 19, 2007 requesting a plumber to deal with the blocked drain. The drain backed up into the basement on June 28, 2007. The Tenant claims that a plumber attended the rental unit on July 4, 5, 6, and 17, 2007 and that the drain was not repaired until approximately August 13, 2007. The Tenant claims that she was restricted in the use of her kitchen drain during this period as well as restricted in using the basement.

The Agent argued that the Tenant's March 19, 2007, e-mail does not mentioned nor request a plumber. The Agent referred to the Tenant's June 4, 2007 letter of requested repairs where it states "fix shower drain blocked with brown slimy gunk and out of use". The Agent argued that they had a plumber attend the house June 4, 5, 23, and August 13, 2007 as there were four different issues they attended to and repaired.

B) **Kitchen $150.00** The Tenant stated that she could not use her kitchen sink for a couple of days during these repairs and is seeking $150.00 for having to eat out of the house. The Tenant stated that she did not have receipts for meals purchased during these days.

The Landlord advised that the house had two separate kitchens and that the Tenant could have made her meals in the second kitchen so as not to suffer the cost or inconvenience of having to eat out.

The Tenant argued the second kitchen had a gas stove that she did not feel comfortable using as she could smell the gas when the burners were turned on. The Tenant stated that there had been a problem with the stove previously but that it had been repaired. The Tenant stated that she preferred to use the electric stove.

C) **Futons $223.00** The Tenant is seeking $223.00 to replace two futons that she states had to be thrown away due to mould. The Tenant advised the futons were purchased in 2002 however she does not know what the purchase price was on them. The Tenant argued that these were damaged as a result of the flood back in March 2006 and she did not notice they were mouldy until she moved in September 2007 and had to have them thrown out. The Tenant acknowledged that she did not check these items after the flood. The Tenant feels the mould

was a result of a lack of ventilation in the basement and argued that the Landlord failed to provide her with proper ventilation after several requests.

The Agent argued the Tenant never asked to have the basement window freed up or un-nailed to allow it to be opened and that her requests were always for additional ventilation in the basement. The Agent stated that the house was built in 1945; it is 65 years old so the basement is musty and damp given the age of the house. The Agent argued that the basement is not the general or primary living area of the rental unit and it is the main floor areas and guest suite which are the primary living areas.

D) **2 Basement Bedrooms $5,186.00** The Tenant claims for lack of ventilation in the two bedrooms. The Tenant argued that one bedroom's window was nailed shut and could not be opened while the other bedroom did not have a window in it. The Tenant confirmed that she viewed the rental unit prior to renting the unit and viewed the two bedrooms. The Tenant could not remember if she noted that there was no window in the one bedroom.

The Agent argued again that the Tenant never asked to have the basement window freed up or un-nailed to allow it to be opened and that her requests were always for additional ventilation in the basement.

E) **Den $1,037.18** The Tenant claims a shrub was overgrown in front of the den window and obstructed the window from being opened properly. The Tenant confirmed that the shrub was present and blocking the window when she viewed the house prior to renting it.

The Agent argued that the first tenancy agreement the Tenant signed stipulates that the Tenant was responsible for the gardening and that the Tenant should have trimmed the shrub back during the first year of her tenancy if she felt it was obstructing the window.

F) **Huge Garden $2,393.00** The Tenant is compensation as there was no maintenance or trimming, pruning or winter clean up done in the yard.

The Agent argued that gardening was the responsibility of the Tenant as noted in the first tenancy agreement.

The Tenant responded by saying gardening was for small weeding and plants and not to maintain the large trees and although it was written in her first tenancy agreement it was not in later agreements.

G) **The remainder $1,589.80** of the Tenant's claim is outlined in her detailed list as $550 office/study; $425 porch and gate; $135 gutters; $75 patio; $75 master bathroom; $25 basin tap leaking; and $304.80 for miscellaneous items. The Tenant claimed that all of these items were listed in her June 4, 2007, "letter of demand" where has outlined her requests for maintenance. The Tenant confirmed that she was able to continue living in the rental unit however it was very "unsightly" to see the lack of maintenance which caused the Tenant emotional strain.

The Agent argued they have complied with section 32 of the Act completing the required repairs as requested and the gardening was the Tenant's responsibility. The Agent questioned that if these requested maintenance items were that imperative then why did the Tenant not act sooner? The Agent stated that they felt the Tenant's claims were extreme and the Tenant did not make the Agent aware of specific issues throughout the tenancy while they were relevant.

The Tenant confirmed that she was aware of the remedies available to her through the Residential Tenancy Branch from the onset of her tenancy and confirmed several times during her testimony that it could take several months before a hearing would be scheduled so she decided not to proceed in that manner. The Tenant also stated more than once during the hearing, "I made a personal choice to let other things mount up so I could do one big application instead of small ones."

Analysis

All of the testimony and documentary evidence was carefully considered.

Section 7(1) of the Act provides that if a landlord or tenant does not comply with this Act, the Regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for the damage or loss which results. That being said, section 7(2) also requires that the party making the claim for compensation for damage or loss which results from the other's non-compliance, must do whatever is reasonable to minimize the damage or loss.

The party applying for compensation has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and
2. The violation resulted in damage or loss to the Applicant; and
3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

Awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. Where an item has a limited useful life, it is necessary to reduce the repair or replacement cost by the depreciation of the original item.

Basement $3,421.10 – This claim stems from a sewage back up or flood which was caused by the Tenant or the Tenant's guest shutting off the power to the sump pump and later a blocked sewer / shower drain. While the evidence supports that the remediation and restoration involved several different contractors and lasted several months, there is no evidence to support negligence or a violation of the Act, Regulation, or tenancy agreement on the part of the Landlord. I find the evidence supports the Tenant was aware of her remedies and made a personal decision not to mitigate her loss. Based on the aforementioned I find that the Tenant has failed to prove the test for damage or loss, as listed above and I hereby dismiss her claim of $3,421.10.

Kitchen $150.00 - The Tenant made a personal choice not to use the second kitchen and incur costs to eat out of the house while the main kitchen sink drain was being repaired and in doing so failed to mitigate her loss. I find the Tenant has failed to prove the test for damage or loss, as listed above and I hereby dismiss her claim of $150.00.

Futons $223.00 – The evidence supports that the Tenant caused the sewage back up or flood in the basement and the Tenant neglected to monitor or check the condition of her futons which were stored in the basement area. There is no evidence to support the actual age or the original cost of the futons. Based on the aforementioned I find that the Tenant has failed to prove the test for damage or loss and I hereby dismiss her claim of $223.00.

2 Basement Bedrooms $5,186.00 – The Tenant is seeking compensation because one of the basement bedrooms did not have a window and the other bedroom had a window which was nailed shut. There is no evidence before me to support that the

Tenant requested the nails to be removed from the window so it could be opened nor is there evidence that the Landlord or his Agent violated the Act. The tenant viewed the property prior to renting it and ought to have known there was no window in the one bedroom which would limit the amount of ventilation. I find the Tenant's requests for additional ventilation to be vague, which leads me to question if this vagueness was intentional to support the Tenant in "building her case" as she states in her evidence. Based on the aforementioned I find the Tenant has failed to prove the test for damage or loss and I dismiss her claim of $5,186.00.

Den $1,037.18 – The evidence supports the Tenant was aware of the location of the bush at the onset of the tenancy. I find the evidence supports that the Tenant was responsible for gardening at the onset of the tenancy, as stipulated in the tenancy agreement, therefore it would be reasonable to conclude that if the den window(s) could not be opened fully, because of the height of a bush, that the Tenant would prune the obstructing bush. There is no evidence to support the Tenant's claim that the Agent or Landlord were in violation of the Act. I find that the Tenant has failed to prove the test for damage or loss and I hereby dismiss her claim of $1,037.18.

Huge Garden $2,393.00 – The evidence supports the Tenant was responsible for gardening during the period of the initial tenancy agreement and the remainder of the Tenant's correspondence to the Agent or the Landlord involved requests to maintain or remove "unsightly" overgrowth, which could be interpreted as requests for cosmetic grooming. The Tenant confirmed that she was not restricted from using the grounds however she is seeking compensation for clean up that she provided on her own accord. I find there is no evidence to support that the Agent or Landlord violated the Act, Regulations, or the tenancy agreement. Based on the aforementioned I find the Tenant has failed to prove the test for damage or loss and I dismiss her claim of $2,393.00.

The remainder $1,589.80 ($550 office/study; $425 porch and gate; $135 gutters; $75 patio; $75 master bathroom; $25 basin tap leaking; and $304.80 for miscellaneous items). These claims involve requests for maintenance relate to areas of responsibility of the Landlord and the Tenant. The Tenant confirmed she was aware of remedies available to her through the Residential Tenancy Branch and the Tenant made a personal decision not to mitigate her loss. It would be reasonable to conclude that if these matters were of such significance to have caused the Tenant stress and emotional strain she would have made an effort to seek the remedies available to her during the tenancy. Based on the aforementioned I find the failed to mitigate her losses and therefore has failed to prove the test for damage or loss and I hereby dismiss her claim of $1,586.80.

I do not accept the Tenant's argument that she could not endure the one or two months to await a dispute resolution hearing to deal with these matters during her tenancy, if they were truly causing her $14,000.00 damage or loss, when she purposely waited two years less one day after her tenancy ended, the maximum allowable time, to file her application for dispute resolution.

As the Tenant has not been successful with her claim I decline to award recovery of the filing fee.

Conclusion

I HEREBY DISMISS the Tenant's 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: March 16, 2010.

Dispute Resolution Officer