



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes

For the tenant – CNR, MNDC, ERP, RP, AAT, FF, O

For the landlord – OPR, MND, MNR, MNSD

Introduction

This decision deals with two applications for dispute resolution, one brought by the tenants and one brought by the landlord. Both files were heard together. The tenants seek to cancel the 10 Day Notice to End Tenancy, they seek a Monetary Order for money owed or compensation for damage or loss under the *Residential Tenancy Act, (Act)*, regulations or tenancy agreement, An Order for the landlord to make emergency repairs, an Order for the landlord to make repairs, an Order for the landlord to allow access to the unit of site for the tenants and to recover their filing fee. The landlord seeks an Order of Possession for unpaid rent, a Monetary Order to recover unpaid rent, and for damage to the rental unit, the landlords also seek an Order to keep the tenants security deposit.

I am satisfied that both parties were served with notice of this hearing. Both parties appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in written form, documentary form, to cross-examine the other party, and make submissions to me. On the basis of the solemnly affirmed evidence presented at the hearing I have determined:

Issues(s) to be Decided

- Are the tenants entitled to cancel the 10 Day Notice to End Tenancy?
- Are the tenants entitled to a Monetary Order for money owed or compensation for damage or loss?
- Are the tenants entitled to an Order for the landlord to carry out emergency repairs for health or safety reasons?
- Are the tenants entitled to an Order for the landlord to carry out repairs to the unit, site of property?

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- Are the tenants entitled to access to the basement of the property?
- Is the landlord entitled to an Order of Possession?
- Is the landlord entitled to a Monetary Order for damage to the unit, site or property?
- Is the landlord entitled to a Monetary Order to recover unpaid rent?
- Is the landlord entitled to keep the tenants security deposit?

Background and Evidence

Both Parties agree that the tenants rented the upstairs unit of this property from a third party and entered into a tenancy agreement for the upstairs unit with this landlord on July 01, 2010. The tenants and landlord then entered into another agreement for the tenants to rent both the upstairs and the basement from the landlord starting on October 01, 2010 after the other tenant living in the basement was evicted. This agreement was signed on September 01, 2010. The tenants rent for the upper unit was \$1,300.00 and they agreed to continue to pay this amount until the basement was repaired to allow them full occupancy of the house. The rent would then increase to \$1,650.00 per month. Rent is due on the 1st day of each month. The tenants paid a security deposit of \$825.00 on September 01, 2010 when they entered into this new agreement.

The landlord served the tenants with a 10 Day Notice to End Tenancy for unpaid rent on November 15, 2010. This Notice states that the tenants have five days to pay the outstanding rent, dispute the Notice or the tenancy will end on November 25, 2010. The landlord states the tenants did not give her a rent cheque until November 24, 2010 and she seeks an Order of Possession.

The landlord states the tenants have not caused any damage to their rental unit and she included this section in her application in error. The landlord also states she now has the outstanding rent from the tenants so no longer requires a Monetary Order or an Order to keep the tenant's security deposit.

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The tenants seek to cancel the 10 Day Notice to End tenancy. The tenants testify that they attempted to give the landlord their rent cheque for November when they paid their rent on October as the landlord was going on vacation. They state the landlord said she would not take that cheque then but would collect it when she returned from her vacation on November 07, 2010. The tenants testify that they received an e-mail from the landlord on November 08 telling them she was back from vacation and to leave their rent cheque by the back door and she would collect it. The tenant's state the landlord failed to pick up the cheque as agreed and they then put it in the mail box and e-mailed the landlord to let her know where she could collect it. On November 10, 2010 the tenants received an e-mail from the landlord asking them to post the cheque to her. The tenant testifies she posted the rent cheque on November 11, 2010. They state the landlord claimed she did not receive this cheque and the tenants then put another cheque in the landlords' mailbox on November 24, 2010. The tenants state they made every effort to pay the rent for November but the landlord failed to collect it as agreed and then kept changing the arrangements. The tenants therefore seek to cancel the 10 Day Notice.

The tenants state that they have been unable to move into the basement and to rent the entire house as per their new lease agreement with the landlord. They state there was a flood discovered in the basement on September 10, 2010 and a fire also occurred in the basement on September 27, 2010 caused by an unqualified contractor employed by the landlord to lay a floor in the basement. Both incidents required an insurance claim and the restoration company started work to rectify the damage. The tenants testify that they initially had access to the basement and helped with the clean up and some painting but the restoration company stopped work and the key box was removed. This prevented the tenants gaining access to the basement and some of their belongings stored there. The tenant's states they contacted the restoration company and were told the landlords claim was denied as she would not provide details of her contractor who caused the fire. The male tenant testifies that he then called the insurance company and was told the landlord had stopped her claim.

The tenants want the work to recommence to repair the basement so the tenancy agreement they have with the landlord to rent the entire property can be fulfilled without further delays. In

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the meantime the tenants want access to the basement level as the fuse box, furnace and water heaters are located in this area and they require access in case there are any problems.

The landlord testifies that the insurance company is still engaged to work on the flood that occurred in the basement and the claim for the fire damage is still progressing. The landlord denies stopping her claim and states the tenancy agreement is frustrated due to the damage in the basement which was out of her control. She states the tenants will not be able to move into the basement due to this. The landlord agrees that she will have a key to the basement cut for the tenants so they can access this area in an emergency.

The tenants seek an Order for the landlord to carry out emergency repairs to the upstairs unit. They claim the landlords' unqualified contractor has caused damage to the outside light fixture when he carried out other repairs. They fear the wiring has been damaged in some way and this could potentially cause another fire.

The tenants seek an Order for the landlord to repair the front door sill which is causing a leak into the basement and creating a significant amount of mould which could cause health problems in the upstairs unit. The tenants also seek an Order for the landlord to repair the back steps, which are rotten, to prevent injury.

The tenants seek a Monetary Order to damage caused to some of their property by the landlords' contractor she employed to paint the outside areas of the property. The tenants claim this contractor over sprayed paint onto some garden pots, a table, a second table, chairs and umbrella set and a bar-b-que. The tenants state these items were not new so they only seek to compensation to the sum of \$200.00 for this damage. The tenants claim they do not want the contractor to come back to their unit to try to remedy this damage as he has been proven to be incompetent.

The landlord does not dispute that the tenants' belongings were damaged by her contractor. The landlord states she would like the opportunity for this contractor to try to clean the paint from the tenant's belongings. The landlord states she will get an electrician in to look at the

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wiring for the light switch and she will have the back steps repaired. The landlord states the damage to the basement cannot be completed until the restoration company return to repair the other damage in the basement caused by the flood and fire.

The tenants state when they entered into this new tenancy agreement on September 01, 2010 they paid \$825.00 to the landlord as a security deposit which was half their new rent for the entire house. The tenant request the landlord to return the sum of \$225.00 if it is found that the tenancy agreement is frustrated and they remain at the lower rent of \$1,300.00.

Analysis

I have carefully considered all the evidence before me, including the affirmed evidence of both parties. With regard to the landlords application for an Order of Possession based on the 10 Day Notice issued for unpaid rent. It is my decision that the tenants did attempt to pay the rent for November to the landlord in October. The tenants attempted to give the landlord this cheque on two separate occasions which the landlord failed to collect. I also find the tenant's evidence credible that they posted the cheque to the landlord on November 11, 2010 and final left a second cheque in her mail box. As I find the tenants are not at fault in the nonpayment of rent for November I find the Notice to End Tenancy has no force or effect and is therefore cancelled and the tenancy may continue.

The landlords' claims for Monetary Orders for damage and unpaid rent are dismissed as the tenants have caused no damage to the rental unit and have paid their rent. I further find the landlord is not entitled to keep the tenants security deposit and this section of her application is also dismissed.

With regard to the tenant's application for a Monetary Order for damages to their personal property, I find the tenants have provided sufficient evidence to show that their garden furniture, pots and bar-be-que have been sprayed with paint. I also find the amount claimed is a reasonable claim to compensate them for this damage. The landlord has requested the opportunity to have her contractor who caused the damage to come back to attempt to remove the paint from the tenant's belongings. However, I find the tenant's arguments in this matter

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justified that this contractor should not be allowed to attempt to remove the paint and consequently I uphold the tenants claim for a Monetary Order to the sum of **\$200.00** pursuant to s. 67 of the *Act*.

With regard to the tenants application for an Order for the landlord to make emergency repairs to the rental unit; Section 33 of the *Act* covers what repairs can be classed as emergency repairs. In this instance the tenants are concerned about a light fixture outside the house after some other repair work was carried out by the landlords contractor which resulted in this light fixtures failure to work. As any problems with electrical systems require immediate attention to determine the problem; **I Order the landlord** to have a qualified electrician assess the problem and repair it within 48 hours.

With regard to the tenants claim for repairs to the unit, site or property, Section 32 of the *Act* states 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 make it suitable for occupation by a tenant. The landlord does not dispute that repairs are required to the rental unit and consequently **I Order the landlord** to repair the front door sill to prevent further water leakage into the basement and to repair the damage done to the basement from this leak, including the removal of any mould within a reasonable period of time not exceeding one month. **I also Order the landlord** to repair the back steps to prevent injury within a reasonable time frame not exceeding one month.

With regard to the tenants access to the basement; it is my decision that the landlord and tenants entered into a legally binding agreement starting on October 01, 2010 for the tenants to rent the entire house. The tenants have been prevented from using the basement portion of the house due to a flood and a fire. The landlord argues that this was beyond her control and therefore the agreement is frustrated. I have considered this argument and refer both parties to the Residential Tenancy Policy Guidelines #34. In essence this states that a contract is frustrated where, without the fault of either Party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. It also goes on to say that mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have

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been frustrated so long as the contract could still be fulfilled according to its terms. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

While I accept that the landlord did not cause the flood to the basement I do find that she employed unqualified contractors to carry out work in the basement which resulted in a fire. I also find all work has been stopped on the basement which has prevented the tenants occupying this as per their tenancy agreement but if the work was completed then the tenants would be able to take possession of the basement level of the house. I find therefore that the tenancy agreement is not frustrated and the landlord must fulfill her obligations as a landlord in ensuring the repairs to the basement are carried out in a timely manner to allow the tenants to use the entire property as per the tenancy agreement. **I therefore Order the landlord** to seek remedy to this problem through whatever means necessary either by instructing the insurance company to carry out the work or completing the work through her own qualified contractors if her insurance claim is denied. If the landlord fails to comply with this repair work within a reasonable time frame not exceeding three months that will allow the tenants to occupy the entire house the tenants are at liberty to seek compensation from the landlord for a loss of part of their agreed upon living accommodation by filing an application for dispute resolution.

I Order the landlord to provide the tenants with a key to the basement to allow them access to the furnace, hot water tank and fuse box within 48 hours.

As the tenants have been successful with their claim I find they are entitled to recover the **\$50.00** filing fee from the landlord pursuant to section 72(1) of the Act.

Conclusion

The landlords' application is dismissed in its entirety without leave to reapply.

The tenants application to cancel the 10 Day Notice to End Tenancy dated November 15, 2010 is upheld. The Notice is cancelled and the tenancy may continue.



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I HEREBY FIND in favor of the tenants monetary claim. A copy of the tenants decision will be accompanied by a Monetary Order for **\$250.00** comprised of \$200.00 in compensation and the \$50.00 filing fee. The order must be served on the respondent and is enforceable through the Provincial Court as an order of that Court.

I ORDER the landlord to make emergency repairs to the light fixture within 48 hours of receiving this decision.

I ORDER the landlord to make repairs to the front door sill, the water leak in the basement, as a result of the damaged door sill, and to remove any mould present in the basement within a reasonable time frame not exceeding one month of receiving this decision.

I ORDER the landlord to repair the back steps to ensure they comply with health and safety codes within a reasonable time frame not exceeding one month of receiving this decision.

I ORDER the landlord to provide the tenants with a key to the basement within 48 hours of receiving this decision.

I ORDER the Landlord to ensure the basement is fit for occupancy by the tenants as per the tenancy agreement between the Parties signed on September 01, 2010. This work must be completed within a reasonable time frame not exceeding three months of receiving this decision.

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 02, 2010.

Dispute Resolution Officer