



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNDC OLC ERP RP 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, to obtain Orders to have the Landlord comply with the Act, regulation, or tenancy agreement, to make emergency repairs for health or safety reasons, and to make repairs to the unit site or property, 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*, served personally to the Landlord's office on December 13, 2010. The Landlord confirmed receipt of the hearing documents and a copy of the entire evidence submitted by the Tenant.

The parties 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.

Preliminary Issues

The Landlord's legal counsel (Counsel) stated that they are of the opinion that this dispute resolution process is not the correct forum to hear the Tenant's claim for damages of personal injury. She argued that claims for damage or loss of personal injury should be heard in Provincial Court.



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Section 67 of the *Residential Tenancy Act* recognizes monetary remedies. The *Residential Tenancy Policy Guideline # 16* provides that the legislation allows a landlord or tenant to make a claim in debt or in damages against the other party where there has been a breach of the tenancy agreement or the Act. Damages are monies awarded to a party who has suffered a loss which the law recognizes. Claims may be brought under the *Residential Tenancy Act* in Tort and/or Breach of Contract. A Dispute Resolution Officer may hear a claim in tort as long as it arises from a failure or obligation under the legislation or the tenancy agreement. Based on the aforementioned I accepted jurisdiction of the Tenant's application and the hearing proceeded.

When confirming receipt of evidence between the parties it was noted that the Tenant provided the Landlords with two sets of evidence while the *Residential Tenancy Branch* received only one package consisting of six pages. The Tenant requested the opportunity to submit his additional evidence after the hearing. Legal counsel for the Landlord advised that their evidence consisted of several of the same documents that were in the Tenant's first evidence package.

After careful consideration I denied the Tenant's requests to submit additional evidence after the hearing, in accordance with section 11.5(b) of the Residential Tenancy Branch Rules of Procedure. I found that both parties had ample time to submit their evidence to the *Residential Tenancy Branch* prior to the hearing, in accordance with the *Residential Tenancy Branch Rules of Procedure*; therefore if I were to accept additional evidence from the Applicant Tenant after the hearing it would be unfairly prejudicial to the Respondent.

Issue(s) to be Decided

1. Has the Landlord(s) breached the *Residential Tenancy Act*, regulation, or tenancy agreement?
2. If so, has the Tenant met the burden of proof to substantiate his claim for damages or loss, as a result of that breach?
3. If so, has the Tenant met the burden of proof to have Orders issued for the Landlord to comply with the Act and repair the rental property?

Background and Evidence

I heard undisputed testimony that the parties entered into a fixed term tenancy agreement effective July 1, 2010 which is set to switch to a month to month tenancy after June 30, 2011. Rent is payable on the first of each month in the amount of \$3,800.00. On June 3, 2010 the Tenant paid \$1,900.00 as a security deposit. The tenancy agreement provides the Tenant authority to sublet the self contained basement suite.

The Tenant testified that the rental unit is a very nice house of approximately 5600 square feet consisting of a basement which is about ½ below ground with a basement suite and separate storage area for the upstairs, the main floor has a kitchen, living room, dining room, family room, office and a full bath, and the upper level has 5 bedrooms, 2 full baths, a hallway leading into a thin sunroom with patio doors leading out onto the upper deck. He stated that he has always paid his rent in full however he has had a litany of problems since the onset of his tenancy. He stated that he has never had full enjoyment of the house which began with a sewer back up that occurred on July 3, 2010. There was raw sewage in the basement and it took the Landlord over a week to make a proper claim with their insurance before a restoration company came

aboard. They first sent two guys in with a shop vac and finally after he complained to the Landlord they initiated an insurance claim.

The Tenant stated that he basically became the site manager constantly letting trades people in and out of the unit to conduct the restoration. He was not able to rent out the basement suite during the restoration process which caused him to suffer a loss of rental income which he relies on to assist with his rent payments. He was finally able to rent out the suite effective September 10, 2010 when he entered into a verbal tenancy agreement for \$900.00 per month. It was later determined that the basement required additional remediation work as there was the presence of mold which he alleged was making his tenant ill with a severe sore throat. His tenant moved out of the unit October 12, 2010 and her symptoms subsided after only one week of being out of the unit. He returned his tenant's October rent of \$900.00 and her security deposit of \$900.00 so he only collected one payment of \$900.00 towards rent.

On October 11, 2010 the sink in the basement suite back up causing a flood in the kitchen and all down the hallway. On October 12, 2010 the subtenant informed the Tenant she was moving out. A meeting was held in the basement of the rental unit with the Landlord, the Agent, the Tenant, and the restoration company. Everyone agreed that the kitchen required a full remediation which included flooring and drywall, extending down into the hallway. The Landlord's insurance approved the claim for the kitchen restoration and the work took over two months to complete and was finally finished in mid December 2010. The parties also discussed the presence of mold in the bathroom during the October 12, 2010 meeting. They suspected there was mold in the walls and flooring after they had picked up the carpet, which was soaking wet, and found that the plywood subfloor was rotten. The downstairs bathroom remains unrepaired to this date and the Tenant has seen no efforts made on the part of the Landlord to initiate the restoration.

There was a second issue which occurred around September 12, 2010 when there was a big rain storm. The Tenant saw that there was water pouring down the inside of the big picture window in the family room, on the main floor, and onto his leather couch. He advised that this was not simply a little leak. There were six or seven locations on the window where there was a steady stream of water dripping inside the unit. He called the Landlord to report the leak. When there was no action he e-mailed on October 12, 2010 stating that there must be moisture in the wall in the family room and that he suspects the water was dripping off of the upper deck which was not well maintained. He believes the water is running off of this deck, into the wall and possibly traveling into the ceiling of the family room as well as down the header above the window and into the walls and possibly into the basement. When there was still no action to repair the family room leak he sent another message to the Landlord on December 7, 2010 advising them that the water was coming from the upper deck.

After several complaints the Landlord finally initiated the mold testing. The Tenant did see someone come and look at the deck just prior to the mold testing however nothing has been done to the deck since. He was advised the Landlord received the results of the mold testing on November 30, 2010 and he did not receive the report until December 6, 2010 when he was issued an illegal notice to end the tenancy.

The Tenant is seeking monetary compensation of \$25,000.00 which includes compensation for illness plus a loss of value to his tenancy due to the presence of mold in the rental unit. He stated that his family and he have had health issues as a result. He argued the person who conducted the tests informed him that he would not go into the basement suite without a respirator. The Tenant confirmed he does not have medical evidence to support his claim of illness and stated that his daughter has been ill with a sore throat, has had difficulty breathing and stomach pains. His wife, son, and he

have suffered a skin rash. He stated that he was relying on his oath that his family has suffered health problems since moving into the rental unit. His witness, who is the father of his tenant from the basement suite, could testify that his daughter was ill while in the suite and that after she moved out it only took her a week before she began to feel better. He did not have his witness standing by as he is away on vacation.

The Tenant confirmed that he and his family have remained in the rental house the entire time. They believe the problem comes from the basement suite so they have closed the three doors which lead from their area into the laundry room and the suite. The house is heated by hot water based board heating and not forced air so they feel there is no risk of the mold spores being spread into their area of the house. He referred to a copy of the mold report which was provided in the Landlord's evidence which supports his statement that the mold in the main floor family room area is not as heavy and is not labelled as "toxic mould" as is the case in the basement suite. He argued that it is not easy to move a family of six when children are involved in events in their current neighbourhood nor is it easy to find a house big enough to accommodate all of their furniture.

The Tenant has contacted contractors to obtain information on what is required to make the repairs in the family room and in the basement. He argues the remediation and restoration work can be done in a couple of days while they continue to remain living in the house as the contractors can put up plastic walls and use air machines to prevent the mold particles coming into their area. Currently they have the windows open in the family room to keep the room aired out and they are not using it at this time. He wants to keep his family in the unit and requests the Landlord be ordered to have the repairs completed as soon as possible. He also requested that he be granted an order so he would not have to pay rent while the repairs are being done in order to have the Landlord initiate the repairs and complete them as soon as possible. In addition he is

seeking a reduction in rent of \$900.00 per month for every month he has not been able to rent the basement suite and for every month it remains vacant after the repairs are completed. He argues that the unit can only be rented to students who attend the university which is close therefore he will not be able to rent the suite unit September 2011 when the school year begins.

In response to the Tenant's claim for monetary compensation for illnesses suffered, Counsel responded that there is no evidence to substantiate his claims for personal injury. There are no names listed on the details of his claim, no documents to substantiate the presence of an illness, no medical documents to support that there were no previous health issues, and no evidence from a medical doctor to link the alleged symptoms to the presence of mold. Counsel is of the opinion that the Tenant has not met the onus of proof to support his claim.

The Landlord and the Agent testified that they had agreement for certain things however did not agree with all of the Tenant's testimony. First they confirm there was a sewer backup on July 3, 2010 however the Tenant called a local repair company in without the Landlord's permission. The Landlord had someone inspect the sewer backup on July 4, 2010 and then had a plumbing company do cleanup work on July 5, 2010. Their insurance company hired the restoration company on July 8, 2010 and the work order for the repairs was signed on July 23, 2010. The Landlord's insurance company took over the job when the claim was initiated so the Landlord did not control the job site.

The Landlord hired the company to conduct the mold report on November 23, 2010 and they received the report November 29, 2010. They had their more experienced staff review the report and requested a decision from their managing brokers. They were advised that their managing brokers determined there was the presence of serious

substances in the rental unit so they were instructed to end the tenancy. A letter was issued to the Tenant informing him of the results of the mold testing and that they were giving him notice that they were ending the tenancy. The owners of the property offered the tenant \$7,600.00, an amount equal to two month's rent, as compensation for ending the tenancy early however the Tenant refused. The Landlords are of the opinion that the property is "uninhabitable" and requested that the tenancy be ended. They stated that they had gone to the *Residential Tenancy Branch* to seek a manner that they could end this tenancy however they were told that because these conditions do not meet the requirements for frustration they could not end this tenancy because it was a fixed term agreement.

The Landlord stated that they have already paid the Tenant \$1,200.00 towards the devaluation of his tenancy for the period of the sewer backup restoration. They also returned a total of \$1,800.00 of rent as compensation for the loss of rent that could be collected from the suite for the months of October and November 2010 (2 x \$900.00).

The Landlord and Agent argued that the Tenant and his family cannot live in the rental unit when the walls are opened up because there is a risk of the mold spores travelling to their area. They claim the repairs will take about 4 to 5 months. They were insistent that the property is now uninhabitable and they do not want to further expose the Tenant and his family to the mold.

A discussion followed whereby the parties attempted to reach a settled agreement. However, the discussion broke down about the time the hearing was about to end. I asked each party individually if they wanted to reconvene the hearing to continue the discussion or if they wanted to end the hearing and have my decision issued based on

the application before me. All participants requested that the hearing be concluded and my decision be issued based on the matter(s) before me.

In closing the Landlord, Agent, and Counsel expressed that the Landlord is very concerned for the Tenant and his family's safety. They wanted to stress the sense of urgency of this matter.

Analysis

I have carefully considered all of the testimony and documentary evidence which included, among other things, a copy of a December 8, 2020 e-mail, copies of moving quotes, written submissions by Counsel, a copy of the tenancy agreement and addendum, the "Mold Air Testing Report", a copy of the December 6, 2010 letter issued by the Landlord to end the tenancy, a letter dated November 19, 2010, and a copy of the \$1,200.00 monetary agreement between the Tenant and Landlord which was signed by the Tenant on September 2, 2010.

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

The Tenant has sought monetary compensation for illnesses suffered by him and his family which he testified was in relation to the presence of mold in the rental unit. In the absence of medical documentation to support the allegations of the presence of illnesses and support that they were the result of being in the presence of mold, I find the Tenant has provided insufficient evidence to meet the test for damage or loss, as listed above, and I dismiss his claim for personal injury, without leave to reapply.

The evidence supports the basement of the rental house is in a state requiring remediation of mold, restoration and repair; and that there is the presence of a water leak coming off of the upper deck, down the header and into the wall and family room around the big window, requiring remediation of mold, restoration and repair. The Landlord has refused to conduct the repairs arguing that the unit is “uninhabitable” and the work cannot be performed while the unit is occupied. The mold testing report indicates the presence of three different types of mold. The report states one “species was detected in the basement sample only. This species of mold is considered toxic and should not be found in a normal indoor environment..” That being said, there are no reports from the local health authority or the municipality which indicates the remainder of the rental house is uninhabitable or that it must be vacant to conduct the remediation and repairs. Based on the above, there is insufficient evidence to prove the rental house is “uninhabitable”.

After careful consideration of the evidence, I find the Landlord's refusal or delay to complete the repairs is a breach of section 32 of the Act, which states a landlord is required under section 32 (1) of the Act to provide and maintain residential property in a state of decoration and repair that complies with (a) 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. Section 32 (5) of the Act states a landlord's obligations under subsection (1)(a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement. Therefore, in accordance with section 62 of the Act, I hereby Order the Landlord to comply with the *Residential Tenancy Act* and repair the rental property in a manner that complies with local health and municipal regulations. Repairs are to be initiated immediately upon receipt of this decision and completed in a timely fashion.

I accept the Tenant's argument that he cannot rent out the basement suite until the mold remediation and the restoration of the unit is completed. The tenancy agreement provides the Tenant has rented the entire house and is permitted to sublease the basement suite. Therefore, by failing to complete the required repairs the Landlord is not only in breach of Section 32 of the Act, but also in breach of the tenancy agreement. That being said the Tenant has continued to inform the Landlord of the issues as they arise and continues to request repairs get completed so the tenancy can continue. Based on the aforementioned, I find the Tenant has met the burden of proof to establish the test for damage or loss, as listed above, and I hereby approve his request for a rent abatement of \$900.00 per month for December 2010 and January 2011, and to further reduce his rent by \$900.00 per month until the repairs to the basement have been completed and the suite is suitable for occupation; whether or not the Tenant has entered into a new sublease for the basement suite.

Furthermore the Tenant's use of the family room has been restricted and will continue to be restricted until the repairs of that area are completed; thus reducing the value of his tenancy from the time he received the mold report on December 6, 2010 onward.

Therefore I approve the Tenant's request for rent abatement for the period of December 2010 and January 2011 and an additional rent reduction, until the repairs are completed, at \$150.00 per month.

The Tenant is entitled to rent abatements for a total amount of \$2,100.00 (\$900.00 + 900.00 + 150.00 + 150.00) for December 2010 and January 2011. This full amount may be deducted from the February 2011 rent payment.

Based on the above, the Tenant's monthly rent will be \$2,750.00 (\$3,800.00 – 900.00 – 150.00) effective February 1, 2011 and continuing until such time that the Landlord has completed the repairs.

The Tenant has primarily been successful with his application, therefore I award recovery of the \$100.00 filing fee.

Conclusion

I HEREBY ORDER the Landlord to comply with the *Residential Tenancy Act* and initiate repairs to the rental unit, immediately upon receipt of this decision.

The Tenant's rent has hereby been reduced to **\$2,750.00** per month, effective February 1, 2011, and continuing until such time as the repairs have been completed to both the family room area and the basement.



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The Tenant may deduct the one time monetary award of **\$2,200.00** (\$2,100.00 rent abatement plus \$100.00 filing fee) from his February 1, 2011 rent payment.

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: January 17, 2011.

Residential Tenancy Branch