

Decision

Dispute Codes: ERP FF MNDC O RP RR MNR

Introduction

This hearing was a re-hearing of an Application for Dispute Resolution by the tenant and to hear a new application submitted by the landlord. A previous hearing was held on April 19, 2011 on the tenant's application, after which the landlord submitted a successful request for review consideration.

The landlord's application was seeking monetary compensation for repairs, strata fees and fines, and loss of rent.

The tenant was seeking monetary compensation for loss of enjoyment of the suite and devalued tenancy due to serious mould contamination. The tenant had also been seeking an order to compel the landlord to make repairs and emergency repairs on the unit. However, she has vacated and these matters are moot.

Both parties appeared and gave testimony during the conference call.

Issue(s) to be Decided landlord's Application

The issue to be determined on the landlord's application is whether the landlord is entitled to monetary compensation under section 67 of the Act for damages and loss.

Issue(s) to be Decided Tenant's Application

The remaining issue to be determined on the tenant's application is whether the tenant is entitled to monetary compensation under section 67 of the Act through a retro-active rent abatement.

Background and Evidence

The tenant testified that she moved into the unit in August 2010 and the rent was \$1,250.00. The tenant testified that the unit had been freshly painted and no mould was evident. However, according to the tenant, by the end of October 2010 there were serious signs of mould in the bedroom and a musty odour was evident. The tenant testified that she contacted the landlord and the landlord attended to view the problem. The tenant testified that the landlord advised the tenant that he would contact the building manager and have the matter looked in to. According to the tenant, the

landlord's position was that it was not within the landlord's ability to rectify problems with the building. The tenant stated that she also spoke to one of the people sent to examine the problem and was told that the mould was not a recent development and likely due to the possibility that the infrastructure of the condominium complex was compromised and it was a "leaky condo" situation. The tenant testified that the problem worsened until she could no longer stay in the bedroom at all and had to sleep in the living room. Mould had contaminated everything in the bedroom. The tenant submitted photographs showing mould-blackened walls, ceilings, sills and her personal property.

The tenant testified that she believes the landlord had knowingly entered into the tenancy agreement aware that there was a significant mould issue, and had merely painted over the problem. The tenant is seeking a rent abatement for the duration of the tenancy, reducing the rent from \$1,250.00 to \$100.00 per month for seven months to compensate for the unhealthy living conditions and loss of enjoyment of the suite. The total claim at \$1,150.00 per month is for \$8,050.00.

The landlord argued that on October 30, 2010 the tenant had reported mould forming on the ceiling and walls and the landlord responded immediately. The landlord testified that they found a small amount of mould and also noted that the tenant's rooms were stuffed with her personal effects and all of the blinds and windows were shut. The landlord stated that he instructed the tenant to turn on the fan after showering and keep a window open to ensure proper circulation of the air. The landlord testified that they also immediately contacted the building manager on November 17, 2010 to check for leakage in the building structure. According to the landlord it was later confirmed that there were no structural leaks in the building.

The landlord stated that nothing more was discussed until January 28, 2011. On January 27, 2011 after the landlord had found out that the condominium management was doing a thorough inspection of the entire building in response to leakage problems found in several other units on different floors, the landlord contacted the tenant to let her know and to check how things were. The landlord testified that the tenant confirmed that the mould was still present, but made no mention of any odour nor did she alert the landlord that the mould was spreading. The landlord testified that he advised the tenant that an investigation was being conducted by the building management and that the landlord would report the results once it was completed. The landlord testified that between January 29, 2011 and February 28, 2011 there was no contact with the tenant. However, according to the landlord, when the landlord called the tenant on March 1, 2011 on another matter, the tenant did not say anything about the odour nor the mould and nothing more was heard from the tenant until the end of April when the tenant gave notice to move on May 1, 2011.

The landlord pointed out that the landlord's family lived in the same unit for three years prior to the start of this tenancy and never had any problems with mould. The landlord testified that they had renovated the unit in July 2010 and never covered up or hid anything. In fact, according to the landlord, the unit was in pristine condition and the tenant filled out a move-in condition inspection report that confirmed this which both parties signed. However, the tenant did not give the landlord a copy of her inspection report. The landlord also questioned the tenant's claim that the contractor had disclosed information that the mould pre-existed the tenancy because of faulty insulation, particularly when the inspection of the building had not yet been completed at that time.

The landlord stated that the tenant had many opportunities to notify the landlord about the serious condition of the unit, but neglected to do so. The landlord's position is that, had the tenant dutifully reported the extent of the problem, the landlord would have had the opportunity to make emergency repairs to mitigate the damage before it worsened to the extent it did.

The landlord produced expert witness testimony that confirmed that the state of the unit was not what would be expected with humidity infusion in the structure as claimed by the tenant. The witness testified that mould in most cases is found primarily in the kitchen and bathroom, where moisture tends to be generated. However, in this case it was rampant in other rooms. The witness stated that the mould was not coming from the exterior as evidenced by the fact that a piece of drywall was removed and only showed mould on the *inside* surface. The witness also stated that the mould evidently grew at an extraordinary rate and proliferated a great deal within a nine-month period.

The landlord submitted into evidence photos of the rental unit taken in 2007, copies of emails, a copy of a notification from the strata council regarding the \$200.00 move-out fine, a copy of the report from a home inspection company, along with recent photos of the unit and photographs of other homes with similar mould patterns as that found in this rental unit. These were purported to be pictures of homes that were used to grow marijuana inside the buildings.

The landlord is claiming loss of rent for 3 months in the amount of \$3,750.00, repair bills of \$6000.00, \$100.00 strata fees and the \$100.00 cost of this application.

Analysis – Landlord's Monetary Claim

In regard to the loss of rent and the repair costs claimed by the landlord, I find that an Applicant's right to claim damages from another party is covered by section 7 of the Act which states that if a landlord or tenant fails to comply with the Act, the regulations or tenancy agreement, 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 authority to determine the amount and order payment under the circumstances.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant 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 the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord.

Section 37 (2) of the Act states that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

I find that the tenant's role in causing damage can normally be established by comparing the condition before the tenancy began with the condition of the unit after the tenancy ended. In other words, through the submission of completed copies of the move-in and move-out condition inspection reports featuring both party's signatures.

With respect to the move-in inspection, section 23(1) on the Act requires that the landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.

Both sections 23(3) for move-in inspections and section 35 for the move-out inspections state that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. Part 3 of the Regulations goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted.

In this situation, I find that the landlord failed to comply with the Act in regard to the statutory requirement to conduct a move-in or move-out condition inspection report signed by both parties, and to give a copy to the tenant.

I find the practice followed by this landlord for both the start-of-tenancy and the end-of-tenancy inspections to be noncompliant with the Act . However, I accept the landlord's evidence that no mould was evident at the start of this tenancy. I find that the tenant also confirmed this appeared to be the case. I accept that the mould developed while the tenant was in possession of the unit.

However element 2 of the test for damages requires the landlord to prove that the damage or loss stemmed from the tenant's violation of the Act or agreement.

I find that section 32 of the Act imposes responsibilities on both the landlord and the tenant for the care and cleanliness of a unit. 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, having regard to the age, character and location of the rental unit to make it suitable for occupation by a tenant. A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access. While a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant, a tenant is not required to make repairs for reasonable wear and tear.

In order to make a claim against the tenant, for damages , a violation of the Act on the part of the tenant must be proven. I find that the fact that the mould grew during the tenancy is not sufficient proof that it resulted from a violation of the Act by the tenant.

I find that determining the cause and implementing a remedy to mould is not a tenant's responsibility under the Act and requires intervention from a professional in the field. I find that the tenant reported the problem to the landlord in October 2010 and this matter was placed in the landlord's hands to take care of.

With respect to the landlord's obligations under section 32 of the Act, I find that once the problem is reported by the tenant to the landlord, the landlord then has a clear obligation under the Act to ensure that the unit is safe for occupation. I find that the fact that the tenant did not repeatedly report the situation to the landlord or give further accurate reports of the condition is not a violation of the Act as the tenant had already contacted the landlord and there were evidently others more directly involved in the matter, who would presumably provide the landlord with information.

There is an expectation in a tenancy that a landlord conduct regular inspections of the rental unit and section 29 of the Act grants the landlord a right to do so. The landlord must give the tenant at least 24 hours written notice that includes the following information:

- (i) the purpose for entering, which must be reasonable;
- (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

A landlord can inspect a rental unit on a monthly basis with written Notice. If an emergency exists and the entry is necessary to protect life or property, the landlord can enter without the written Notice.

In this situation, I find that the landlord failed to take reasonable measures to personally monitor the situation and to hire the appropriate professionals to find out the source of the mould and treat the problem in a timely fashion. I find that any damage that stemmed from the mould being unaddressed for so long was due to the landlord's lack of due diligence, not the tenant's.

Given the above, I find that the \$6,000.00 damages claimed by the landlord must be dismissed.

With respect to the landlord's claim for loss of rent, I find that the tenancy agreement was a fixed term that was to run from August 2010 to July 31, 2011. In this respect, the tenant did violate the fixed term by ending the agreement before the expiry date by moving out at the end of April 2011. However, I find that there was a genuine concern about the safety of remaining in the unit, given the amount of mould. I find that the tenant had reported the problem in October 2010 and was given information to believe that it would be taken care of. By April 2011, over 6 months had passed with no relief for the tenant who continued to pay her rent, while enduring significant inconvenience.

In any case, I find that, the landlord's duty to take care of the situation at that stage would likely have necessitated removing the tenant and arranging alternate accommodation for her, while the suite was being remediated by a professional mould expert. I find that the tenant's decision to end the tenancy, despite this being a contravention of the agreement, was justified by the fact that it may have been hazardous to the tenant's health to continue to live in the unit. Therefore I find that the landlord's claim for loss of rent must be dismissed. I do, however, find that the tenant is responsible to pay the \$100.00 strata move-out fee.

Analysis: Tenant's Application

Section 7 of the Act states that, if a landlord or tenant does not comply with the Act, or tenancy agreement, the non-complying landlord or tenant must compensate the other party 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.

In this instance, I find that the tenant had a burden of proof to prove a violation of the Act by the landlord and a corresponding loss.

The tenant was requesting a significant rent abatement of approximately 92% per month for the reduction of value of the tenancy, based on the disruption and reduced quality of the tenancy for the entire period in question.

I find that the landlord and tenant had contracted for a tenancy that included a functional rental unit that was comfortable, safe, healthy and liveable. However the premises being provided were subject to the growth of mould in several rooms in the rental unit. I find that, for the period in question, despite having reported the problem to the landlord, and being given a few verbal assurances from the landlord, the tenant was left to her own devices to deal with the mould.

I find that there is no doubt that the tenant suffered a loss of value to the tenancy and quality of life. I find that the condition of the unit gradually worsened until the actual value of the tenancy was negligible. I find that the tenant's possessions were likely contaminated with mould and the soft furnishings subject to prolonged exposure to mould are recommended to be discarded.

Section 32 of the Act requires a landlord to 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 I find that, as the mould proliferated out-of control, the landlord fell into a violation of section 32 of the Act.

I have determined that the landlord's failure to address the problem in a timely manner to bring the situation under control contravened both the Act and the landlord's responsibility under the contract. Given the above, I find that a rent abatement of 75% is warranted for the seven-month period from October 2010 when the mould was reported until the end of the tenancy on April 30, 2011. .

Accordingly I find that the tenant is entitled to a rent abatement of \$7,187.50 comprised of \$6,562.50 rent abatement, refund of the \$625.00 security deposit and the \$100.00 cost of this application, minus the \$100.00 moving fee owed to the strata.

Conclusion

I hereby grant a monetary order in favour of the tenant for \$7,187.50. This decision is final and binding. The order must be served on the Respondent and if necessary may be filed in the Supreme Court, (Small Claims), and enforced as an order of that Court.

The remainder of both the landlord's and the tenant's applications are dismissed 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: July 12, 2011.

Residential Tenancy Branch