



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ERP, RP, PSF, OPC, MND, MNSD, MNDC, FF

Introduction

These two hearings dealt with cross Applications for Dispute Resolution filed by the parties.

The Tenants were requesting orders for the Landlord to make emergency repairs for health or safety reasons, to make repairs to the unit or property, to provide services or facilities required by law or the tenancy agreement and to recover the filing fee for the Application. The Tenants amended their claim to include a monetary order for compensation for losses under the Act or tenancy agreement.

The Landlord filed his Application requesting that the tenancy end due to cause, and requested monetary orders for damage to the rental unit or property, for compensation under the Act or tenancy agreement to keep all or part of the security deposit, and to recover the filing fee for the Application. The Landlord amended his monetary claim to request an additional amount in compensation.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note the first hearing, which occurred on July 28, 2011, was adjourned to allow both parties to provide further evidence on particular issues. This evidence was received and reviewed in the course of making this determination.

Issue(s) to be Decided

Are the Tenants entitled to the repairs and monetary relief sought?

Is the Landlord entitled to the monetary relief sought?

Is the tenancy going to continue?

Background and Evidence

The parties entered into a one year, fixed term tenancy agreement on February 26, 2011. The tenancy began on March 1, 2011. The rent was set at \$3,000.00 per month, and the Tenants paid the Landlord a security deposit of \$1,500.00 on or about February 28, 2011. The rental unit consists of a residential house on a lot, with the upper floor having two bedrooms, one bathroom, a kitchen and living room, and a basement with two bedrooms, two bathrooms, a playroom, and a kitchenette.

On July 4, 2011, a toilet overflowed in the basement at the rental unit. According to the Tenants, over the next three days, there were three more instances where overflowing and eventually flooding occurred. The evidence indicates that a serious flood occurred in the basement containing some raw sewage from the toilets. The basement toilets, shower and kitchen sink all backed up.

The Tenants contacted the Landlord regarding the overflowing toilet on July 4, 2011.

From the testimony of both parties, it is clear that the conversations that occurred at that time, and over the course of the next few days, were both emotional and tension filled.

Both parties alleged the other was responsible for the cleanup of the basement of the rental unit. The Landlord alleges that the Tenants intentionally caused the flood to occur. He alleges the male Tenant told him he was a Landlord in a large city in the United States and by their laws the landlord is always responsible to repair the home. The Landlord alleges that during the initial telephone call the Tenant told him he would sue him if the basement in the rental unit was not fixed and then hung up from the telephone call.

The Tenants allege that the Landlord told them that in Canada Tenants were responsible for all of the rental unit and would have to pay for the damages caused by the flood.

The Landlord contacted a plumbing company on the night of July 4, however, the Tenants called the Landlord a second time on July 4 and told him they no longer required a repair. The Landlord alleges the Tenants did this because they wanted to sue him.

The Tenants testified they became terrified they would be stuck with a large bill and that is why they unclogged the toilet themselves with a plunger and then phoned the Landlord to cancel the plumber.

According to the testimony of the Tenants, they and their children's nanny were able to keep the sanitary system working over the next day or two, by using a toilet plunger; however, a major flood occurred on July 6, 2011.

A great deal of hearing time was dedicated to the evidence around telephone calls between the parties from July 4 to 6. The Landlord testified he focused on this time because, he alleges, the Tenants intentionally caused the flood to occur during the time between the July 4 initial call and the July 6 call to report the major flood. He testified that he believes the Tenants opened the taps upstairs to allow the basement to flood.

After the Tenants contacted the Landlord on July 6 to report the major flood, the Landlord attended the rental unit with a professional plumber. The plumber provided the Landlord with an invoice dated July 14, 2010. (I accept that the incorrect date on the invoice was a typographical error.)

The Landlord submits that the plumber inspected the line with a video camera and used an auger to partially clear the line. The Landlord submits that the pipe was still partially clogged by, "... compacted baby pad toilet paper." [Reproduced as written.]

In the invoice the Landlord's plumber wrote the following comments:

"... video inspected sanitary line and located blockage at approx. 50 feet...
... video inspection showed blockage had images of toilet paper...
... augered line several times to approx. 115 feet...
...video inspection line is still plugged...
... Recommendation: requires excavation on issued area..."

[Reproduced as written.]

The Landlord testified and provided evidence that the next day he hired a day labourer and excavated the line. The Landlord alleges he found a "... compacted roll of toilet paper and small toy that had clogged pipe..."

The labourer wrote a statement as well, which was entered into evidence by the Landlord. The labourer writes, "... I found an old clay sewage pipe and a new one

beside it. I opened both of them. The old one was out of service and the new one was clogged by a roll of toilet paper that came out by pressure of trapped water behind it.”

[Reproduced as written.]

The Landlord testified that the Tenants apologized twice after this. The Landlord believed that they were apologizing for causing the flood.

The Landlord says that following his excavation of the line the Tenants were not sorry any more for what had happened. He submits they threatened to sue him if he did not remove the flooring in the basement and put in new flooring. He testified the Tenants provided him with a long list of other repairs to be performed on the rental unit.

The Tenants testified they were apologizing to the Landlord for the amount of work he had to do, and not agreeing they were liable for the flood.

The Tenants testified that they became concerned with the Landlord as he told them he was not going to make repairs to the rental unit and they would face the significant cost of doing this work.

At or around this time, the Tenants informed the local media and a television crew made a report on the incident, which was broadcast on television.

The Tenants hired their own plumber to investigate the cause of the flood. The Tenants' plumber attended the rental unit on July 17, 2011, and writes the following:

“The sewer camera revealed that the plumbing system underground within the building to be free of obstruction and intact. I also found with the camera that the piping closer to the south property line to have root infiltration which had recently been cleaned by another plumbing company before me. I asked for a report by the previous plumber and the tenant informed me that she has not received anything from the owner.”

“I witnessed the [Landlord] on [TV broadcast] stating that he found a roll of toilet paper which he claims caused the flood. I find this highly improbable because toilet paper is manufactured to slowly dissolve when in contact with fluids and any appropriately sized drain cleaning auger would have no difficulty in removing an obstruction of toilet paper.”

“The tenant informed me that the previous plumbing company tried to clear the lines with a drain auger but was not successful. This also indicates that the problem is with the piping or root infiltration causing a blockage.”

"I find that the most credible cause of the flood is a backup caused by root infiltration within the last six meters of the South property line which was covered by bushes."

[Reproduced as written.]

The Tenants submit they were also suspicious of the toilet paper as it was pure white and had no debris on it. They questioned how it could be so white so many feet down the line from the house. The Tenants also testified that they found, what they allege to be, roots from the drain line hidden in a bush on the side of the property. The Landlord did not deny the toilet paper was white when he first showed it to the Tenants.

After the Landlord did not proceed to restore the basement, the Tenants contacted a restoration company which began work on the basement. According to the Tenants the restoration company informed them that the basement was not habitable due to the waste water entering the area. The Tenants moved their family and the nanny into the upper portion of the rental unit.

The Tenants testified they have found a new rental unit and are planning on moving into it at the end of August 2011.

The Tenants have claimed as follows:

a.	Restoration company charges	2,307.20
c.	Anxiety medication for Tenant	70.00
d.	Plumber to fix leak and evaluate sewer line	554.40
e.	Cleaning charge from third party	120.00
f.	Moving company charges (estimate)	475.00
g.	Repairs to rental unit (estimate)	5,830.00
h.	Return of security deposit	1,500.00
i.	Filing fee	50.00
	Total claimed	\$13,906.60

The Landlord testified that he informed the Tenants he was going to pay for the restoration of the basement but if it was their fault they would pay. He alleged throughout the proceedings that the Tenants caused this flood. At times he alleged they did this on purpose in order to get a new carpet for the basement.

The Landlord testified that he served the Tenants with a one month Notice to End Tenancy for cause.

In addition to the alleged damages due to the flood, the Landlord also claims for damages to the hedge in the yard and a retaining wall. The Landlord testified that the Tenants cut down a hedge in the backyard and made a hole in the middle of the hedge. The Landlord also claims the Tenants dismantled a retaining wall on the property.

The Landlord also claims for the water bills, which he alleges the Tenants have not paid. The Tenants are required in the tenancy agreement to pay for these.

In reply, the Tenants testified that landscaping was a term of the tenancy agreement. They testified that the Landlord made it clear to them they were responsible for maintaining the yard. The Tenants testified they trimmed the hedge back as it had not been done in years, and it would grow back in any event.

They deny there was a retaining wall and explained the Landlord was referring to a pile of rocks beside some soil in the garden. They testified these were not mortared or cemented together, they were just rocks piled on top of each other in amongst the dirt and plants.

The Tenants agreed they were to pay for the water under the terms of the tenancy agreement. They testified they had not seen a water bill from the Landlord. The Tenants were upset the Landlord had transferred the utilities into their names without notifying them.

The Landlord claims as follows:

a.	Water bill for March 2011	83.10
c.	Plumber and video inspection	764.40
d.	Carpet and tile (estimate)	1,855.04
e.	Kitchen and two washrooms (estimate)	1,037.52
f.	Drywall (estimate)	600.00
g.	Paint (estimate)	900.00
h.	Backyard retaining wall (estimate)	400.00
i.	Reinstall kitchen and two washrooms (estimate)	1,000.00
j.	Filing fee	50.00
	Total claimed	\$7,159.21

Analysis

Based on the above, all the testimony and evidence, and a balance of probabilities, I find as follows:

I find that the tenancy ended due to frustration of the tenancy agreement, pursuant to section 92 of the Act. I find the tenancy ended on July 7, 2011, due to the flood of sewage in the basement. Based on the whole of the evidence before me, I do not find that either party caused the flood to occur.

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim.

I find the Landlord failed to prove that the Tenants caused the flood. I find there are inconsistencies in the Landlord's evidence regarding the stoppage in the line, which brings into question the validity of this evidence. For example, the Landlord claims he found a child's toy and a roll of toilet paper blocking the line. At another time he claims to have found "baby pad toilet paper". The labourer hired by the Landlord does not mention a child's toy. The Landlord's plumber invoice states, "...inspection showed blockage had *images of toilet paper*." (Emphasis added.)

I find that "*images of toilet paper*" does not substantiate there was a toy or there was a roll of compacted toilet paper in the line as the Landlord alleged. "*Images of toilet paper*" could just as likely mean there were small bits of toilet paper seen. In evidence the Landlord submitted a photograph of the roll of toilet paper he alleges was stuck in the line. I note the photograph is a faxed copy of a photograph taken with a cell phone. Due to the poor image quality, this photograph is of little or no evidentiary value. I also note the Landlord did not deny or refute the Tenants' statement that they toilet paper he showed them was white and had no debris on it.

In regard to toilet paper blocking the line, the Landlord's plumber wrote that he augered the line to approximately 115 feet, while the alleged toilet paper was stuck some 50 feet away. This would mean the plumber augered the line past the area where the toilet paper was alleged to be stuck.

This is contradicted by the evidence of the Tenant's plumber, which was that the toilet paper could not have caused the blockage, "...because toilet paper is manufactured to slowly dissolve when in contact with fluids and any appropriately sized drain cleaning auger would have no difficulty in removing an obstruction of toilet paper." [Reproduced as written.]

For these reasons, I find the Landlord has failed to prove the Tenants caused the flood.

For both parties here, proving a claim for monetary damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a

breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Section 67 of the Residential Tenancy Act states:

Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

I will deal with the monetary claims of the Tenants first.

I find that the Landlord has breached section 32 of the Act, by failing to provide an entire rental unit fit for occupation by the Tenants.

While the Landlord testified he told the Tenants he would pay for the repairs to the rental unit but they would have to pay him if they were found liable, he has failed to do any remediation work in the basement as promised. I also find that his failure to begin any remediation in the basement went a great deal towards initiating this dispute and has resulted in a loss of quiet enjoyment of the rental unit by the Tenants. However, I also recognize that the Tenants added fuel to fire the problem further by involving the media. This certainly caused tensions to rise between the parties.

As to the rent payable due to the loss of full use of the unit and for loss of quiet enjoyment, I order that the rent for July and August must be reduced by \$2,000.00 per month to \$1,000.00, and therefore, the Tenants owe the Landlord \$2,000.00 in rent for both July and August. The Tenants paid the Landlord \$3,000.00 for July rent and therefore, they are **owed \$1,000.00 by the Landlord** for reimbursement of rent for July and August of 2011.

I further find the Landlord must reimburse the Tenants for the basement remediation work they have already paid for, in the amount of **\$2,307.20**. This work was certainly in the nature of emergency repairs, which the Tenants should not have had to undertake.

The Tenants also had to incur the expense of a plumber, and I allow them **\$554.40** for this. I also allow the Tenants their filing fee of **\$50.00** for the Application.

I find the Tenants provided insufficient evidence to support the claim for cleaning. I also find the Tenants did not provide sufficient medical evidence that one of them suffers from anxiety.

I do not find the Tenants are entitled to their cost of moving, as the tenancy is ending due to frustration of the contract.

Likewise, they are not entitled to claim for the estimated costs of repairs to the unit, as these were not incurred and the Tenants are vacating.

Therefore, I find the Tenants have established the following monetary compensation, subject to the offset below:

a.	Restoration company charges	2,307.20
c.	Plumber to fix leak and evaluate sewer line	554.40
d.	Filing fee	50.00
	Total amount payable by Landlord to Tenants	\$3,911.60

As to the the Landlord's monetary claims, the tenancy agreement requires the Tenants to pay for the water usage. I accept the evidence of the Landlord that the Tenants owe him **\$552.25** for the water bills.

As I have found the Landlord failed to prove the Tenants caused the flood, I dismiss his claims for the plumber and for all other repairs of the rental unit.

I also find the Landlord had insufficient evidence to prove the Tenants damaged the hedge or retaining wall at the rental unit. The Landlord failed to perform incoming condition inspection reports and therefore has no evidence of the condition of the hedge or the alleged retaining at the outset of the tenancy.

As the Landlord met with limited success in his claim, I only allow a portion of the filing fee.

a.	Water bill for March 2011	83.10
c.	Filing fee	10.00
	Total amount payable by Tenants to Landlord	\$562.25

Having made the above findings, I offset the amounts payable (\$3,911.60 - \$562.25 = \$3,349.35) and find the Landlord must pay the Tenants the sum of **\$3,349.35** immediately. I grant and issue a monetary order to the Tenants in those terms.

As to the end of the tenancy, as described above the tenancy is ending due to frustration of the contract. I also cancel the Notice to End Tenancy of the Landlord.

Nevertheless, it is clear the tenancy can no longer continue, due to the frustration of the contract and also the damaged relationship between the parties.

The Tenants are planning on moving before the end of August, however, they testified they are not sure when the new rental unit they are moving to will be completely ready. As discussed at the end of the hearing, they will give the Landlord several days notice when they have a firm date on when they are moving.

If the Tenants stay in the rental unit past the end of August, they will pay the Landlord a per diem rate of rent of \$33.33 per day.

Lastly, although the issue of the security deposit was discussed at the end of the hearing, I find that it is more appropriate that the security deposit be dealt with by the parties in accordance with the Act.

Conclusion

The tenancy is ending due to the frustration of the contract as the result of a sewage flood in the basement. The Landlord failed to prove the Tenants caused the flood. The Landlord failed to undertake repairs and the Tenants paid for the start of the restoration. The Landlord must pay the Tenants for their losses and the Tenants are granted a monetary order. The Tenants will pay a reduced rent and for the water as agreed in the tenancy agreement. The security deposit will be dealt with in accordance with the Act.

This decision is final and binding on the parties, except as otherwise provided under the Act, and 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: August 18, 2011.

Residential Tenancy Branch