Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNSD, MNDC, MNR, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for a rent abatement for devalued tenancy and damages for costs. The hearing was also convened to hear a cross application by the landlord for an order of possession based on a Ten Day Notice to End Tenancy for Unpaid Rent and a monetary order for rent owed.

Both the landlord and tenant were present and gave testimony in turn.

Issues to be Decided for the Tenant's Application

The issue to be determined based on the testimony and the evidence is whether the tenant is entitled to a rent abatement for devalued tenancy and other damages.

Issues to be Decided for the Landlord's Application

The issues to be determined on the testimony and the evidence is whether the landlord is entitled to an order of possession and a monetary order under section 67 of the *Act*.

Background and Evidence

Landlord's Application

The tenancy began on November 1, 2010 and current rent was $1,400.00 per month. A security deposit of $700.00 was paid.

The landlord stated that the tenant refused to pay $1,400.00 rent for the months of July and August 2011 accruing arrears of $2,800.00. A Ten Day Notice to End Tenancy for Unpaid Rent was served on the tenant on July 5, 2011. The landlord testified that the tenant did not pay the arrears nor did the tenant dispute the Notice within 5 days. The landlord is seeking a monetary order for the $2,800.00 in rent and an Order of Possession. The landlord testified that the tenant also failed to pay $1,400.00 rent due on August 1, 2011.

The landlord had made a subsequent submission in which the landlord requested additional compensation including $2,800.00 loss of rent for September and October, for rental obligations to end of the fixed term tenancy agreement, to keep the $700.00 security deposit for damages, that the tenants be “removed from the property immediately”, and that the tenants be ordered to issue a public apology.

The tenant did not dispute that the rent was withheld. The tenant stated that they chose not to pay the rent because the house was not fit to live in. The tenant’s position was that the landlord was not entitled to the rent for that reason.

Tenant’s Claim

The tenant testified that the unit was represented as a 3-bedroom, 2-bathroom house and they agreed to rent it “sight unseen” for occupancy beginning on November 1, 2010. The tenant testified that the property was not cleaned when they took possession, but they were granted a rent abatement of $150.00 to clean the home. However, according to the tenant, there were also problems that affected the use of one bathroom and one of the bedrooms was unfinished and not suitable to sleep in. The tenant testified that they requested a fixed-term lease because they needed stability and the parties agreed upon a six-term lease. When they found out that they were expecting, a further lease ending October 31, 2011was agreed upon.

The tenant testified that on June 2, 2011 they reported finding mould in one of the bedrooms and bathroom to the landlord. The landlord retained a property inspector to examine the problem. The tenant stated that the property inspector’s report confirmed that there was mould contamination. The tenant testified that one of the contributing factors was the lack of ventilation due partly to a nonfunctioning bathroom fan and other deficiencies in the house. The tenant testified that they had never closed off any of the rooms.

The tenant described the mould as being wide-spread and actively present and testified that they were disinfecting and sanitizing the affected areas, but the mold growth was apparently within the walls and the contamination was escalating, affecting other areas in the home. The tenant testified that they began suffering symptoms and were advised by a doctor that exposure to mould was dangerous. The tenant stated that she realized that they had been exposed to mould spores for the entire duration of her pregnancy and was frantic with worry. The tenant testified that their dogs were also affected by respiratory problems. The tenant is of the opinion that the landlord must have known about the mould contamination prior to renting the home to them.

The tenant testified that after the initial inspection found that there was a problem, they expected the landlord to have a complete and thorough inspection done to find the

source and full extent of the problem, including testing the air and mould samples. According to the tenant, the landlord has left the problem to them to sort out instead of taking due diligent measures to ensure that the home was safe.

The tenant testified that they had to purchase cleaning products and protective gear, open windows to air out spaces, dry out rooms with fans and space heaters, dispose of porous materials and personal possessions, sanitize all items, disinfect walls, ceilings and floors, purchase replacement items, and attend the doctor's and veterinaian's clinics for treatment of respiratory problems.

The tenant stated that the landlord's failure to confirm that the home was safe to live in forced them to move into their RV motor home. The tenant also had issues with the condition and maintenance of the home with respect to some of the plumbing and electrical systems.

The tenant is claiming compensation in the amount of $17,510.00. This includes the following:

- $11,200.00 for 100% rent abatement from November 1 2010 to June 30, 2011.
- $700.00 for return of the security deposit.
- $1,000.00 veterinary costs
- $1,200 to replace personal items
- $60.00 transportation costs
- $170.00 estimated storage costs
- $1,400.00 for the RV rental including gas and ferry costs
- $200.00 cleaning costs
- $100.00 filing fee.

The landlord disputed the tenant's claim and pointed out that until recently the tenants were delighted with the home and even requested another fixed-term tenancy agreement. The landlord testified that immediate action was taken immediately, as soon as the mould was reported. The landlord testified that they engaged an inspector who inspected the premises and issued a report that indicated the mould was due to the tenant's lifestyle. The landlord took issue with the following conduct of the tenants stating that they had:

1. failed to report a nonfunctioning bathroom fan and led the landlord to believe that it had been repaired.
2. did not keep the home sufficiently clean
3. did not properly heat the home with the woodstoves and gas furnace
4. closed off rooms creating cold zones and impairing air movement
5. over-reacted to the initial presence of mould, despite the fact that it is harmless

6. failed to report back about the status of whether or not they followed the inspector's recommendations for several weeks.
7. ultimately failed to follow the instructions given to remediate the mould.
8. brought previously contaminated bamboo and rattan items into the home.
9. neglected to provide access for contractors and inspectors who tried to enter on July 12, 2011

The landlord testified that the inspector re-visted the site on July 25, 2011 and found that the mould appeared to be gone. The landlord made various other allegations about the tenant's maintenance and use of the property.

The landlord testified that they had lived in the home for two years and other tenants had resided there without any problems. The landlord's position is that the tenants caused and perpetuated the mould problem and this fact is documented in the inspector's report.

With respect to the allegation about one bathroom not being usable, the landlord testified that any complaints made by the tenant were always promptly attended to, once reported. In regard to the tenant's testimony that one of the bedrooms was unfinished and not fit for use, the landlord stated that he used this room as his office for two years and found it to be suitable.

Analysis – Landlord's Application

In regard to the rent being claimed by the landlord, I find that section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement. Through testimony from both parties it has been established that the tenant did not pay the rent when it was due.When a tenant fails to comply with section 26, section 46 of the Act permits the landlord to end the tenancy by issuing a Ten-Day Notice effective on a date that is not earlier than 10 days after the date the tenant receives it. This section of the Act also provides that within 5 days after receiving a notice under this section, the tenant may either pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an application for dispute resolution. In this instance I find that the tenant did neither.

The Ten-day Notice included written instructions on page 2, informing the tenant about how and when a tenant may dispute the notice if the claim is not being accepted. Under the heading "Important Facts" the form cautions that "*The tenant is not entitled to withhold rent unless ordered by a dispute resolution officer*".

In this instance I find that the tenant was in arrears at the time the Notice was served on July 5, 2011 and the tenant did not pay the arrears and in fact continued to withhold the rent for subsequent months afterward.

In any case, section 46(5) of the Act provides that if a tenant does not pay the rent or make an application for dispute resolution in accordance with the above, then the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit to which the notice relates by that date.

I find that the tenant did not pay the outstanding rent within 5 days and did not apply to dispute the Notice and is therefore conclusively presumed under section 46(5) of the Act to have accepted that the tenancy ended on the effective date of the Notice. Based on the above facts I find that the landlord is entitled to an Order of Possession.

Under the Act, the landlord is also entitled to $1,400.00 rent owed but withheld for each of the months of June, July and August 2011 for total entitlement of $4,200.00.

With respect to the additional monetary claims and other requests that were later added by the landlord, I decline to consider these as this would have required the landlord to have submitted an amended application, which was not done.

Analysis: Tenant's Application

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 tenant.

With respect to the return of the $700.00 security deposit, I find that the tenant is always credited with the deposit as these funds are held in trust for the tenant. The deposit maybe applied against a debt or monetary award, when a claim by the landlord succeeds.

With respect to the portion of the tenant's application seeking a 100% rent abatement from November 1, 2010 to June 30, 2011 totalling $11,200.00, I find that, until June 2011, the tenancy had satisfactorily proceeded without any significant disputes, during which period the tenant apparently resided in the unit. I find that the factors that affected the tenancy did not arise until June 2011 when the issue of mould became a concern. I find that a claim for damages must be based on an actual loss of money or value suffered by the claimant and to meet the test for damages, these must stem from a violation of the Act on the part of the landlord. Accordingly I find that the tenant is not entitled to any rent abatement for the months of November 2010 to the end of May 2011.

With respect to the tenants other monetary claims, I find that section 32 of the Act imposes responsibilities on the tenant to 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.

I find that to meet the tenant's obligation under section 32 of the Act, the tenant is required to report any problems to the landlord, such as mould, without delay. I find that the tenant met this obligation by reporting the mould issue immediately to the landlord.

Under section 32, 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. I find that, to meet this obligation, the landlord would need to respond to a report of a problem, such as mould, without undue delay. I find that the landlord did respond to the report of mould by contracting an inspector without delay. I find that this action brought the landlord in compliance with the Act at that time.

I find that, after the report was issued, some of the concerns apparently related to flaws or vulnerable characteristics of the infrastructure with respect to deficient ventilation, insulation and heat. While the report did make reference to the tenant's "lifestyle" it is evident that this was not the sole factor affecting the growth of mould. That being said, a

failure to ensure that the home was adequately heated could cause cold spots which would facilitate mould. The landlord has alleged, but not proven, that the tenant was at fault for neglecting to properly heat the home.

I find that in referring to the "*back bedroom*" the inspector's report recommends that the landlord should "*further ensure that this room has an adequate source of heat and proper air circulation during the winter months*."

The report notes that:

> "*There is no functional central heating or mechanical ventilation system installed in the home"…* "*Some rooms have no direct source of heat and poor conditions for adequate ventilation. This condition, combined with the minimal amount of insulation seen at the home is likely to be a contributing factor to the conditions suitable for the growth of mold."*

The report goes on to point out that:

> *"Best practices are that all exterior walls, including the foundation to a point 3 feet below grade, should have a continuous barrier (R12 min) and a vapor barrier. Steps should be taken to ensure continuous air circulation, as well as insulation and heat sources throughout all parts of the house."*

The report discusses the bathroom and cites the lack of a normally functioning ventilation fan as a contributing factor. There is a detailed discussion in the report about an isolated and unheated basement area as well

Given the above, I do not accept the landlord's position that the tenant is solely responsible for creating the mould problem. I find that a family who is living in a reasonably normal manner, should not normally trigger rampant growth of mould.

I accept the tenant's testimony that they did follow the instructions in the report to the best of their ability. I find that a tenant is not usually required to rectify an inherent deficiency as part of their duties under the tenancy. In any case, their restorative actions were limited only to cleaning, adding extra heat and continuous air circulation with fans. The tenants understandably felt that this interfered with their quiet enjoyment of the rental unit, which is a right under the Act. It is clear that these aggressive measures would not restore mould damage already done nor would they be a viable long-term solution to any pre-existing infrastructure concerns.

However, I find that the tenant's expectation that the landlord could immediately eliminate the mould problem and confidently ensure that the home be cleared of any mould was not a realistic one, as the extent of the problem evidently requires drastic intervention which would likely take time. There would need to be more analysis and

possibly some renovation work, which would probably necessitate that the unit be vacant.

While I find that the landlord did not violate the Act and did respond sufficiently to meet section 32 of the Act, I also find that the tenancy contact was devalued significantly by the appearance of mould. Whether scientifically justified or not, exposure to household mould is a concern, particularly for parents and I find that it is understandable for a tenant to err on the side of safety. Given the symptoms they suffered, which may not be proven to be related to exposure to or an allergy to mould, the tenant's suspicions regarding the possible health effects of mould are understandable.

I find that, during the month of June, the tenant was forced to worry and expend substantial time trying to eradicate the mould, which undoubtedly interfered with their quiet enjoyment of the suite. With respect to the month of July and August , during which the tenant evidently felt that it was too risky to remain in the unit with their newborn, I find it clear that the hardship of living in the RV was seen by the tenant to be the lesser of two evils.

I acknowledge that the landlord is of the opinion, right or wrong, that the tenant is over-reacting to the possible risk of this mould. I also do not know what further action the landlord could have taken to reassure the tenant or guarantee that there was absolutely no risk, as demanded by the tenant. However, the fact is that the rental unit is contaminated with mould and the landlord is required under the Act to find an adequate solution to the problem. As this tenancy is now ending, that unimpeded opportunity will soon be available to the landlord.

Given the above, I find that the tenant is entitled to a rent abatement of $700.00 for the month of June, $1,400.00 for July, and $1,400.00 for August 2011.
I find that the tenant's claims for $1,000.00 for veterinary costs, $1,200 to replace personal items, $60.00 for transportation costs, $170.00 for storage costs, $1,400.00 for the RV rental including gas and ferry costs and $200.00 for cleaning do not sufficiently meet elements 2 and 3 of the test for damages and as such must be dismissed.

I find that the total compensation owed to the landlord is $4,200.00 and the total monetary compensation owed to the tenant is $3,500.00.

Conclusion

Based on the testimony and evidence I find that the landlord is entitled to an Order of Possession. I hereby issue an Order of Possession in favour of the landlord effective two days after service on the tenant. This order must be served on the Respondent and is final and binding. If necessary it may be filed in the Supreme Court and enforced as an order of that Court.

Based on the testimony and evidence I find that the landlord is entitled to compensation of $4,200.00 in rent and the tenant is entitled to compensation of $3,500.00 in damages. In setting off these two amounts, I find that $700.00 is remaining in favour of the landlord. I hereby order that the landlord is entitled to retain the tenant's $700.00 security deposit in full satisfaction of the landlord's claim.

I order that each party is responsible for their own application fees.

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: August 15, 2011.

Residential Tenancy Branch