Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, OLC, RP, FF, O

Introduction

This hearing dealt with the tenants' Application for Dispute Resolution seeking a monetary order; an order to have the landlord comply with the *Residential Tenancy Act (Act)*, regulation or tenancy agreement; and an order to have the landlord make repairs to the unit.

The hearing was conducted via teleconference and was attended by the male tenant; his advocate and two agents for the landlord.

During the hearing the landlord's agent requested an amendment to exclude his name as a respondent in this Application. The landlord testified the tenancy agreement does not name him as the landlord but rather the company that owns the residential property. Based on this testimony, I accept the person named as a respondent is an agent for the landlord only and I amend the tenants' Application to exclude the agent's name.

At the outset of the hearing the tenant identified that he had not received the landlord's evidence until Thursday October 13, 2011by email and that he was not able to see it until Friday October 14, 2011. The tenant testified, as a result, he had been unable to review the evidence with his advocate. The tenant sought to have the landlord's evidence excluded. The landlord offered to adjourn for the tenant to have more time review the evidence, the tenant declined.

The tenant testified he served the landlord with a copy of his Application for Dispute Resolution and notice of hearing documents on September 1, 2011, the day he submitted his Application to the Residential Tenancy Branch (RTB). He also testified that he served the landlord with his evidence on Thursday October 6, 2011.

RTB Rules of Procedure 3.1 states an applicant must serve a respondent with copies of their Application for Dispute Resolution; notice of the hearing; a dispute resolution proceeding information package; the details of any monetary claim being made; and any other evidence accepted by the RTB with the application *or* that is available to be served.

Rule 3.5 states that copies of any documents, photographs, video or audio evidence that are *not available to be filed with the application*, but which the applicant intends to rely upon as evidence must be received by the RTB and served on the respondent at least 5 days before the dispute resolution proceeding.

Rule 4.1 also states that copies of any documents, photographs, video or audio evidence that the applicant intends to rely upon as evidence must be received by the RTB and served on the applicant at least 5 days before the dispute resolution proceeding.

"At least" is defined in the Rules of Procedure as excluding the day RTB receives the evidence; the day of the hearing; and any weekend days or statutory holidays in between. By these rules, keeping in mind the statutory holiday on October 10, 2011, the latest evidence could be submitted by either party was October 6, 2011.

Upon review of the evidence submitted by the tenants all of it, with the exception of a letter from the landlord's roof installer and a letter from the female tenant's physician, was dated prior to August 11, 2011 and so was available at the time the tenants submitted their Application.

Rule 3.1 above indicates the tenants should have provided the majority of their evidence to both the respondent and the RTB when they first applied for Dispute Resolution.

As such, I find no legitimate reason for the tenant to withhold the majority of evidence they intended to rely upon until the deadline for both parties to submit their evidence. I further find that as a result of the tenants withholding their evidence until the deadline for the submission of all evidence, the landlord had no ability to serve his evidence in response to the tenants' evidence and case within the stipulated deadlines in the Rules of Procedure.

Therefore, in recognition of the above; in conjunction with the tenants' opposition to adjourning the hearing; and the unavailability of the tenants' advocate from September 28 to October 14, 2011, I accepted the landlord's evidence and advised the tenant that he could provide any testimony he felt relevant to the landlord's submissions.

The tenant identified that he received the landlord's evidence via email. Section 88 and 89 of the *Act* stipulate how documents must be served on the other party. Neither section contemplates the use of email. Despite the landlord using a method of service not acceptable under the *Act* the tenant acknowledged receipt of the documents via email and I find sufficient service of the landlord's evidence for these proceedings.

The tenant had submitted a CD with additional photographic and/or video evidence. The landlord acknowledged receipt of this evidence and confirmed that he was able to view the material. However, I was unable to view any of the material with the technology available to me and I advised the parties that I would not be able to consider the evidence contained on the CD but that both parties were able to provide any testimony they wanted to in relation to the contents of the CD.

At the end of the hearing the tenant requested that I again attempt to view the material on the CD and to consider it if I was able to. Despite not being able to view the material based on technological restrictions, to view the material outside of the hearing without the ability of either party, but in particular the landlord, to provide testimony in relation to the content would not meet the principles of administrative fairness and I declined the tenant's request.

Both parties had an opportunity to provide testimony, refer to their evidence and make any submissions. Both parties provided substantial documentation and testimony relating to the issue of whether or not the tenants had or sheltered a pet or pets, I find the majority of this testimony to be unrelated to this dispute and have not considered the details of that testimony in this decision.

Issue(s) to be Decided

The issues to be decided are whether the tenants are entitled to a monetary order for compensation for damage or loss; an order to have the landlord comply with the *Act*, regulation or tenancy agreement; and an order to have the landlord make repairs to the unit and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 13, 14, 27, 28, 29, 32, 67, and 72 of the *Act.*

Background and Evidence

The landlord submitted copies of two tenancy agreements signed by the parties providing the following details:

- Signed by the parties on November 11, 2008 for a 12.5 month fixed term tenancy beginning on December 15, 2008 for a monthly rent of $1,750.00 due on the 1st of each month with a security deposit of $875.00 paid. This tenancy agreement included that the landlord would provide heat to the rental unit.
- Signed by the parties on July 1, 2009 for a 12 month fixed term tenancy beginning on July 1, 2009 for a monthly rent of $1,700.00 due on the 1st of each month with a security deposit of $875.00 paid. This tenancy agreement excluded the provision of heat.

The landlord submits the rental unit is located on a section of the roof of a 3 storey walk up and is a one bedroom with a bathroom and large rooftop deck.

The parties agree that at the start of the tenancy the landlord had indicated that heat was included in the rental amount. The landlord testified that he had been under the impression that the entire building was heated from a central heating system that all other units on the residential property were heated from.

The tenants questioned the amount of the hydro bill and both parties determined that this rental unit was cut off from the central heating and that heat was provided through

electric baseboard heaters. The tenant does not object to the new tenancy agreement that reduced their rent and placed the onus on the tenants to pay for heat.

While the landlord compensated the tenants $300.00, in recognition of the additional costs the tenants had made as a result prior to the new tenancy agreement, the tenants now seek an additional compensation for monies spent on heating prior to the change in the tenancy agreement. The tenant submitted a hydro bill for the period from December 15, 2008 to April 1, 2009 in the amount of $478.83.

The landlord testified once he had confirmed that the rental unit was not connected to the central heating system the parties came to the agreement of completing a new tenancy agreement and compensation in the amount of $300.00, the landlord felt the matter was concluded.

The tenant testified that when they moved into the rental unit there was a substantial amount of garbage, broken furniture and junk on the roof. The tenant states the landlord's agent (at the time) assured him that it would be removed, however, after several months the tenant states that he spent 20 hours removing this debris from the roof and seeks compensation at a rate of $20 per hour.

From the start of the tenancy the tenants submit there were a number of deficiencies that were identified to the landlord and specifically in writing on January 28, 2009 that were not repaired, in some cases at all or until just recently. The tenants submit that they repaired baseboard trim; electric and cable outlets; buying and installing bulbs and missing light fixtures. The tenant had provided receipts to the landlord, in the amount of $59.82 but was never reimbursed.

The tenants also submit that they lived with a broken dishwasher for 18 months and that they were not provided with a mailbox key or a door buzzer code for the first two months of the tenancy. The tenants had also requested repairs to the screen doors in the rental unit and they submit it took 20 months to make these repairs. The tenants seek compensation of 20 hours at $35.00 per hour for the total time spent on addressing the repair issues and $500.00 for loss of use of the dishwasher, mailbox and buzzer.

The tenants also seek aggravated damages for the landlord's entry into the rental unit on at least one occasion without the prior consent of the tenants and without proper written notice and for being subjected to egregious and outrageous conduct of the landlord such as verbal abuse and veiled threats. The landlord asserts that he is just not like that – he would never yell at or verbally abuse tenants.

The tenants submit they were informed in September 2010 that the landlord would be replacing the roof on the residential property and as a result the tenant would need to move items off of their deck and storage locker. The tenants have submitted several emails between them and the onsite agent in which the agent indicates in that no start date has been determined and he will inform them when he has one.

In one email dated November 30, 2011 to all tenants the onsite agent states “We’re just waiting for better weather to get started. The job will take about two weeks....I’ll let you know as soon as we get a start date.”

The tenants submit that on May 17, 2011 they awoke to a crane and several workers loading equipment on the roof and the onsite agent told him that day he had to move everything off the deck immediately; that he returned on May 18, 2011 and told the tenant he had to move everything out of the storage locker immediately; and that on May 19, 2011 the onsite agent returned again and told the tenant to move everything that had just been moved onto the roof from the deck and the storage shed into the tenant’s rental unit.

As a result the tenant states the rental unit was reduced in usable size from 850 to 200 square feet. In addition, as the male tenant works from home, the cluttered space restricted his access to his reference and work material and he also had to find offsite space to work.

The landlord submits the tenants were given at least one weeks’ notice of the start of the deck removal and that the onsite agent sent an email on May 18, 2011 advising all of the tenants that the work would begin on May 19, 2011.

The parties agree that after work began on the roof that it stopped but was incomplete on May 27, 2011. The landlord provided testimony and evidence confirming that the roofing had been stopped due to deficiencies in the installation and that as a result the completion of the roofing was delayed until July 21, 2011. The tenants provided that the roofing and railing repair was completed by July 29, 2011.

The tenants seek a full refund of all rent paid for the 72 days the roofing was under construction and the deck was made useable. The tenant also seeks compensation for 8 days of work that he had to take off to move belongings and deal with matters related to the roof/deck repair and an additional 4 days of work because he could not use his home office. The landlord submits the onsite agent moved most of the belongings from the deck but that the tenant declined the offer to move storage room contents.

The tenants also seek compensation for the removal and dismantling of an outdoor grill; composter and 1 year’s worth of compost from the deck/roof. The tenants assert the landlord was aware of these items on the deck and that he had obtained approval from a previous onsite agent and that the current agent had completed an inspection in the fall of 2010 and never requested these items be removed.

The agent testified he did not recall seeing these items when they completed the inspection. The agent further testified the tenants did not have landlord’s approval to have these items on their deck and that the grill was actually a metal interior fireplace insert and highly unsafe on a wooden deck.

The total compensation sought by the tenants is outlined in the following table:

Description	Amount
Rent abatement	$4,209.60
Lost income	$3,000.00
Aggravated Damages	$2,000.00
Loss of grill and composter	$800.00
Addressing repair issues during tenancy	$700.00
Lack of mailbox key/buzzer code/dishwasher	$500.00
Compensation for heating charges	$400.00
Cleaning roof at start of tenancy	$400.00
Light bulbs/fixtures	$59.82
Total	$12,069.42

While the tenants acknowledge that all of the previous deficiencies have been repaired in the rental unit the safety of the deck has not yet been addressed. The tenants testified the landlord had completed some more work on the deck as late as last week. The landlord contends that all work to the railing, except for painting is now complete and that they were not aware that some of the deck boards require replacement.

The tenants seek an order to be able make the repairs themselves and for reasonable compensation to make the repairs.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Based on the letter dated January 28, 2009 I accept the tenants have established the landlord had failed to provide some light fixtures and bulbs at the start of the tenancy. However, from the receipts submitted two are credit card receipts dated December 16, 2008 (for $32.89) but they do not indicate what was purchased; one from a plastics company is dated May 21 (no year provided); and one is undated but lists bulbs in the amount of $17.97.

As the receipts dated December 16, 2008 predate the date the landlord was informed in writing of the deficiency I find the tenant failed to provide the landlord with notice to make the repair and as such is not entitled to reimbursement. In relation to the receipt

dated May 21 and the one with no date, as there is no year noted on the receipts I cannot determine if the receipts were issued prior to the start of the tenancy. As such, I find the tenants have failed to establish the value of this loss and I dismiss this portion of their Application.

In relation to the tenants' claim for compensation for cleaning the roof at the start of the tenancy, I accept from the tenants that the debris was scattered on the rooftop adjacent to the deck belonging to the rental unit. I also accept the landlord's position that the roof top itself does not belong to the rental unit and the landlord had no obligation to this tenant for removal of the debris, unless it was impacting the tenants' use of the rental unit.

As per the tenants' testimony and evidence the tenant was concerned about debris flying off the roof and causing injury to others below and the creation of habitat for animals. I find the tenant has failed to establish that failure to remove this debris was a violation of the *Act*, regulation or tenancy agreement; I dismiss this portion of the tenants' Application.

I accept the parties entered into a new tenancy agreement resulting from a discrepancy in the provision of heat for the rental unit. I also accept the parties agreed, at the time to compensation for the tenants in the amount of $300.00 or the equivalent amount of the reduction of rent over the course of the 6 months of the tenancy the tenants were unknowingly paying for heat.

However, as the tenants have submitted one hydro bill in the amount of $478.83 with no explanation or break down as to how they determined they suffered a loss of $700.00 in total, I find the tenants have failed to establish the value of this loss. I dismiss this portion of the tenants' claim.

I accept the tenants have established, from the January 28, 2009 letter to the landlord that they informed the landlord, through his agent, that the dishwasher was not working. I accept from the landlord's written evidence that the dishwasher was replaced in June 2010. I also accept the tenants established they informed the landlord in the same letter, a month and half after the start of the tenancy, that they did not have a door buzzer code and a mailbox key.

While the tenants did not provide any additional testimony or documented statements that indicate they informed the landlord any earlier than this letter I find that it would be reasonable for the tenants to not have to ask the landlord for these items but rather the landlord should have provided them on the first day the tenants were entitled to access to the rental unit.

As such, I find the tenants have established a loss was suffered as a result of the tenancy; that they have established the value of loss in the value of the tenancy; and that they took reasonable steps to mitigate this loss.

Under Section 32 of the *Act* the 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 having regard for the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Section 33 defines emergency repairs as urgent; necessary for the health or safety of anyone or for the preservation or use of the residential property and made for the purpose of repairing: leaks in pipes or the roof; damaged or blocked water or sewer pipes or plumbing fixtures; the primary heating system; damaged or defective locks; or the electrical systems.

While Section 33 goes on to say that if a tenant has attempted to contact the landlord twice by phone at the emergency contact number provided by the landlord for emergency repairs and the tenant has given the landlord a reasonable time to make emergency repairs that are necessary the tenant may make the repairs and the landlord must reimburse the tenant for any amounts paid for the repairs. Section 32 does not provide the same opportunity for repairs not considered to be emergency repairs.

In the case before me, with the possible exception of the electrical outlet repairs, repairs to the baseboard trim and cleaning a patio mess do not constitute emergency repairs. Further, although the repairs to the electrical outlet are ones that could be considered emergency repairs the tenants have provided no evidence that the repairs were necessary for the health or safety of anyone or for the preservation or use of the residential property. As such, I find the tenants have failed to establish a loss resulting from a landlord's violation of the *Act*, regulation or tenancy agreement.

As to compensation for the removal of the grill and composter and use of the shed, as the tenancy agreement requires the tenant obtain approval to have these items on their deck, in order to make a claim for their removal the tenants must provide evidence that they had the landlord's permission.

In relation to the use of the shed, it is my understanding the tenants are allowed to use the shed at no additional charge and there is no longer a dispute on this matter. Related to the grill and composter, I accept the agent's assertion that the tenants did not have the landlord's written permission.

As the landlord's agents completed an inspection of the unit in the fall of 2010, presumably, at least in part, to determine if the tenants were contravening the tenancy agreement, I find it unlikely that the landlord would have failed to notice a composter and a fireplace insert on the deck. As such, I find that the landlord provided an implied acceptance of the tenants' use of the composter and the grill.

However, the tenants are seeking $800.00 as compensation for these items removal but have failed to provide any documentary evidence or explanation as to how this amount was determined and as such, I find the tenants have failed to establish the value of this loss and I dismiss this portion of their application.

In regard to the tenants claim for aggravated damages resulting from the landlord accessing the rental unit without the tenants' permission or presence and for the "egregious and outrageous conduct" throughout the tenancy I accept:

1. From the tenants' written submission, the landlord informed the tenants of an inspection scheduled for October 13, 2010 between 1 and 3 p.m. and that after the landlord did not attend the tenant left the rental unit at 3:45 p.m.
2. From the landlord's written submission, that the landlord had scheduled all units in the residential property were to be inspected in the above noted timeframe. I also accept the landlord entered the tenants' unit at 4:00 p.m.

Section 29 of the *Act* stipulates that a landlord, who does not have permission from the tenant, may enter a rental unit if at least 24 hours and not more than 30 days before the entry the landlord gives the tenant written notice that includes the purpose for entering, which must be reasonable and the date and time of the entry.

While I accept that indicating a two hour time frame to complete all inspections on the property may have been, in hindsight, unrealistic there is no requirement that the tenant be in attendance when the landlord completes an inspection. As the landlord entered the rental unit outside of the time frame indicated on the notice of entry, I find the landlord did violate Section 29. However, as the tenant was aware of the landlord's intent to and reasons for entering on that date I find this breach to be insignificant.

In terms of the tenant's position of how the landlord treats the tenants in an abusive manner, when faced with disputed testimony it is incumbent on the party making a claim against the other to provide corroborating evidence or witness testimony to substantiate their claim. As the tenants have failed to provide such evidence, I dismiss the tenants' Application for aggravated damages.

In relation to the roof repairs, I accept the roof installation took much longer than expected by both the landlord and the tenant. I find that as a result of where the rental unit is located in the residential property these tenants were likely affected more than any other tenants in the property. I also note that because of the distinct nature of the rental unit location the use of the deck and storage shed are a major component of the unit itself.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

In many respects the covenant of quiet enjoyment is similar to the requirement on the landlord to make the rental units suitable for occupation which warrants that the landlord keep the premises in good repair. For example, failure of the landlord to make suitable repairs could be seen as a breach of the covenant of quiet enjoyment because the

continuous breakdown of the building envelop would deteriorate occupant comfort and the long term condition of the building.

Residential Tenancy Policy Guideline 6 stipulates that “it is necessary to balance the tenant’s right to quiet enjoyment with the landlord’s right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.”

In the case before me, I find the tenants had to reduce, in essence, the size of the rental unit for the duration of the roof installation, rebuilding of the deck and shed. I accept the landlord’s submission that the duration was at least 65 days from the start to the end of the project. I find it undeniable that the tenants suffered a loss of quiet enjoyment, and therefore a subsequent loss in the value of the tenancy for that period. As a result, I find the tenants are entitled to compensation for that loss.

Policy Guideline 6 states: “in determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed”.

Based on the tenant’s submission that they were restricted to approximately 200 square feet from the regular 850 sq feet of the rental unit I find the tenants are entitled to a 75% rent abatement for the 65 day period as noted above. Based on a per diem rate of $56.67, I find the tenants are entitled to $2,762.66 for this compensation.

In relation to the tenants’ claim for lost income for the 4 days that the tenant states his office space was unavailable, Section 7 of the tenancy agreement stipulates “Tenants and guests shall use the premises for private residential purposes only, and not for any illegal unlawful or commercial or business purpose.” As such, I find the landlord is not responsible to compensate the tenant for loss of income based on a purpose that is not allowed under the tenancy agreement.

As to the 8 days of lost income the male tenant is claiming to deal with the roofing issues such as moving his items around several times and on short notice, in light of the landlord’s testimony the landlord’s agent completed much of the moving and offered to complete the other moving, and with no other evidence to corroborate the tenants claim, I find the tenants have failed to establish that they took all reasonable steps to mitigate this loss and I dismiss this portion of the tenants’ Application.

Finally, in relation to the remaining work to repair the deck, I order the landlord to complete all repairs to the railings, including painting, and replacement of any rotting deck boards within two weeks of receipt of this decision.

Should the tenants have any concerns about the safety of the deck after this work is completed they are at liberty to file an Application for Dispute Resolution for a rent reduction based on the landlord's failure to comply with this order.

Conclusion

I find the tenants are entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **$3,312.66** comprised of $2,762.66 rent abatement; $500.00 for lack of mailbox, access code, and dishwasher; and $50.00 of the $100.00 fee paid by the tenants for this application, as they were only partially successful.

This order must be served on the landlord. If the landlord fails to comply with this order the tenants may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

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: October 17, 2011.

Residential Tenancy Branch