Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, O, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant for monetary compensation for loss of value of the rental suite over a 1 1/2 month period in June and July 2011 during remediation from a flood in the rental unit. The tenant is also claiming other damages including cleaning of a carpet, cost of a pet deposit and moving costs.

Both parties appeared at the hearing and gave evidence.

Issue(s) to be Decided

The issues to be determined based on the testimony and the evidence is whether the tenant is entitled to monetary compensation under section 67 of the Act for damages or loss and a retro-active rent abatement for loss of use and value to the tenancy.

The burden of proof is on the applicant to prove all of the claims and requests contained in the tenant's application.

Background and Evidence

The tenancy began in April 2008 and ended on July 31, 2011, at which time the tenant's security deposit was returned. The rent was $1,715.00.

The tenant testified that they returned from a vacation on June 13, 2011 and were shocked to find that a flood had occurred during their absence due to a burst water pipe. The tenant stated that the landlord had already started remediation of the damage with some of the tenant's possessions moved out of harm's way and industrial fans were already operating in an attempt to dry out the water.

The tenant testified that they went to speak to the landlord and were told that the matter would be discussed in the morning. The tenant stated that the unit was unlivable at that point as the carpets in the living room, dining area, spare bedroom and entrance hallway were soaked with water. The tenant testified that the tenant's hand-woven rug in the living room was wet and water was beginning to seep under the walls and into the master bedroom. In addition, the dining room and kitchen were filled with items from

the affected areas. The tenant submitted photographs into evidence showing the state of the rental unit.

A meeting took place the following morning attended by the female co-tenant who took notes of the conversation. According to the tenant, the landlord told her that the damage was worse than originally believed. The tenant testified that, while the landlord agreed that they would be addressing the repair issues, the landlord insisted that the tenant must move all of their furnishings out of the unit. The tenant testified that the landlord's position was that the removal and storage of furnishings during the remediation process was completely the tenant's responsibility to oversee and pay for. The tenant testified that they were advised that it would take at least a week or more and that they must make their own arrangements if they found it necessary to stay elsewhere while the work was underway.

A copy of a written notice dated June 14, 2011 from the landlord was in evidence requesting that the tenant contact the landlord to discuss "*the optimal method for drying your apartment*".

On June 15, 2011 the male co-tenant spoke again with the landlord and was told that it was the landlord's position that they had no responsibility beyond repairing the actual damage to the suite. The tenant testified that the landlord made it clear that the tenant must take charge of all other matters at their own inconvenience and expense. This was confirmed in a letter from the landlord dated June 15, 2011, a copy of which is in evidence.

The tenant stated that a discussion then took place about the possibility that the tenant could move out of the unit permanently on short notice. The tenant testified that the landlord agreed that they were at liberty to do so.

The tenant testified that, however, the landlord's written communication dated June 15, 2011 only gave the tenant the following two options:

> "*we would like to state our offer as follows. Should the tenant….decide to move out and do so within the following 7 days, they may do so without penalty. After this time the 30 day notice is required as per the Residential Tenancy Act* ."

The tenant testified that, at this time, the fans were still operating and the unit was virtually unlivable. According to the tenant, they would have preferred to leave immediately. However, the female co-tenant was called away out of country for a death in the family and the male co-tenant remained as he did not have anywhere else to move to temporarily and could not possibly find a permanent place within the 7-day deadline.

The tenant testified that on June 21, 2011 the landlord advised the tenant that the carpets were now completely dry and the landlord then wanted to proceed to replace the underlay. A copy of a letter from the landlord dated June 21, 2011indicated that,:

> "Even though your apartment now is totally dry, *we still need to remove the current underlay from the carpets in the affected areas. This is to prevent any mildew, spores or mould from forming. To stop any deterioration of the air quality in your apartment, this needs to be done in the near future. To do this you are required to move all your furniture off the affected carpet area*."

The tenant testified that the unit was not fully dry and they could still feel moisture from the carpets and a musty odour permeated the unit. The tenants testified that one of the tenants suffers from a serious asthmatic condition which was aggravated by the state f the suite. The tenant testified that she was on medication that had to be doubled during this period.

The tenant testified that they were aware that the landlord needed clear access to do the necessary repairs. However, there was no place within the unit where they could store their furnishings and it was clear to the tenant that the entire carpeting would need to be replaced, as evidenced by the photos showing the condition. The tenant pointed out that, in fact, all of the carpets were later replaced by the landlord. The tenant testified that, at the time the landlord was demanding they clear out the rooms, they were not willing to pack up everything, pay to have their possessions moved out, incur costs to have them stored and then bear the added expense of having them repositioned in their unit again. The tenant testified that the landlord did not offer any other storage options in the complex.

The tenant stated that, given the landlord's ultimatum, they made the only decision they could, and gave their one-month notice on June 30, 2011, to vacate the unit permanently effective July 30, 2011. The tenant stated that they had no choice but to endure the conditions and live in the unit "as is" for the duration of the tenancy.

The tenant is claiming $4492.47 including the following:

- $945.00 moving expenses
- $128.74 miscellaneous expenses
- $47.04 address change notice
- $335.69 to clean the area carpet
- $400.00 expense for the pet-damage deposit at the new residence
- $2,636 rent abatement from June 13, 2011 until July 31, 2011.

The landlord agreed with the tenant's testimony with respect to the date of the meeting, and the fact that the landlord's position was that the tenant would be responsible for removing and protecting their own furnishings while the repair work was underway. However, the landlord stated that the tenant was never instructed to completely remove all of their furnishings from the unit, only to move them elsewhere while each affected area was being dried out and repaired. The landlord testified that, although the carpets were eventually replaced after the tenant vacated, there was no plan for that to be done as part of the remediation and there was no need for the tenant to vacate the unit nor to completely remove all of their furnishings from the unit for the repairs to be done.

According to the landlord, the tenant had the option of merely piling furnishings into another room or the outside hallway for a brief period while the under pad of each affected area were replaced. The landlord testified that this could have been done with minor inconvenience to all concerned. According to the landlord, the fact that the tenant did remain and managed live in the unit during the latter part of June and the entire month of July 2011 supports the landlord's position that the unit was fit for habitation. The landlord's position is that there is no justification for a rent abatement beyond 8 days. The landlord testified that the drying out process was finished within one week in June 2011 and the remaining task of replacing affected portions of the underlay would only have taken one more day, had the tenant cooperated. The landlord testified that all that was expected of the tenant was to do their part by temporarily rearranging their furnishings to clear each "affected" area for the underlay replacement and reinstallation of the existing carpet.

With respect to the moving costs, the landlord testified that it was the tenant's own choice to move instead of accommodating the landlord's workers and the tenant should be responsible to pay their own expenditures that flowed from their decision. The landlord pointed out that, despite the fact that the flooding was in no way the tenant's fault, any losses stemming from unforeseen event with respect to the tenancy or the tenant's possessions would have been reimbursed by the tenant's own insurance as required in the tenancy agreement. The landlord referred to a term in the tenancy agreement that stated:

> *"LIABILITY AND INSURANCE. The tenant agrees to carry sufficient insurance to cover his property against loss or damage from any cause and for third-party liability and the tenant agrees that the landlord will not be responsible for any loss or damage to the tenant's property."*

The landlord's position is that the tenant could not hold the landlord liable for any losses that should have been covered by their own insurance had the tenant complied with the required term under the tenancy agreement.

The tenant argued that they could not possibly have moved their furnishings and other possessions elsewhere in the unit because there was simply no room to do so, particularly as most of the unit was compromised by water damage. The tenant argued that the landlord did not give them any other viable option except to give one-month notice to leave under the Act and endure the conditions until they finally departed .

Analysis - Monetary Compensation

With respect to monetary claims, section 7 of the Act states that if a landlord or tenant does not comply with this Act, or their 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 the authority to determine the amount and to order payment under these circumstances. The evidence 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 to prove a violation of the Act and a corresponding loss. Section 62 (1) of the Act grants a Dispute Resolution Officer the authority to determine disputes in relation to which the Residential Tenancy Branch has accepted an application for dispute resolution, and (b) any matters related to that dispute that arise under the Act or a tenancy agreement.

Section 62 (2) allows a Dispute Resolution Officer to make any finding of fact or law that is necessary or incidental to making a decision or an order under the Act and to make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act or agreement.

With respect to the tenant's claim for reimbursement for having to pay a $400 pet-damage deposit to obtain a new residence, I find that this claim is a refundable deposit and therefore fails elements 1 and 2 of the test for damages. I find that his portion of the tenant's claim must be dismissed.

I find that the tenant had an obligation to protect their own personal possessions from damage through tenant's insurance as required under the tenancy agreement. For this reason, I find that the tenant's claim for $335.69 for the cost of cleaning their area rug, fails to meet element 2 of the test for damages and loss and must be dismissed.

However, I do not accept the landlord's submission that the tenant was totally liable for clearing out furnishings and otherwise physically preparing areas in the unit to assist with the landlord's flood remediation process. I find that, in fact, clearing the affected areas to conduct proper repairs is an integral part of any emergency remediation for which a landlord is responsible.

I find that section 32 of the Act imposes an obligation on the landlord to maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law to make it suitable for occupation by a tenant. Section 33 of the Act also places the responsibility for any emergency repairs squarely upon the landlord to deal with, failing which the Act provides that the tenant is entitled to be compensated.

I find that, regardless of any agreed-upon terms included in a tenancy agreement, a landlord is not permitted to delegate or transfer its own responsibility for some tasks and obligations from the landlord to the tenant.

Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if

> (a) the term is inconsistent with this Act or the regulations,
>
> (b) the term is unconscionable, or
>
> (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Section 5 of the Act states that Landlords and tenants may not avoid or contract out of this Act or the regulations and that any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find that, while it is a reasonable expectation to require a tenant to properly insure their own personal possessions against damage and loss, and also to cooperate in accommodating the landlord's statutory duty to conduct repair work, it is beyond a reasonable expectation to require that the tenant directly assist with the remediation process itself as a term of tenancy.

I do not accept the landlord's testimony that the tenant had an option of merely repositioning the furnishings for each room or "affected area" to another spot in the unit. I find it evident that the majority of the unit was seriously compromised by flooding and

the photos clearly show that there was simply too much furniture to stack or shuffle to one side of the sparse remaining space. I find that the landlord's suggestion that the tenant could have piled some of their possessions outside of the unit in the hallway, even for a brief period, to be unworkable and ill-advised.

I find that forcing a tenant to immediately pack, stack, remove or reposition furniture and personal possessions and store them elsewhere within the unit or off site for a period of time, in order to facilitate emergency repairs by the landlord, constitutes an improper delegation of the landlord's mandatory duty under sections 32 and 33 of the Act. .

I also find that the landlord's interpretation of the insurance term in the contract implies that a tenant must obtain an insurance package that essentially indemnifies the landlord from their legal obligations under the Act and the contractual responsibility to provide premises that meet the basic standards of being warm, dry and safe.

Section 27 of the Act states that a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or if providing the service or facility is a material term of the tenancy agreement. I find that being the tenant being able to freely use all facilities in the unit for daily living without significant impediment qualifies as a material term of the tenancy. I find that this material term was compromised for approximately 1 ½ months.

Section 28 of the Act states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following: (a) reasonable privacy; (b) freedom from unreasonable disturbance; (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*; (d) use of common areas for reasonable and lawful purposes, free from significant interference. I find that this tenant was deprived of their rights under section 28 of the Act for the latter half of June and all of July 2011.

I find that the landlord's refusal to negotiate, assist or give some support to the tenants with respect to finding a solution for relocating their possessions and finding temporary accommodation, caused an impasse that stalled the remediation of the unit. I find that the landlord's proposal that the tenants either leave within 7 days or be required to give the landlord a full month Notice also created a situation where the tenants, who had no role in the flooding, had little choice but to terminate their tenancy with one-month notice and thereby endure the existing deficient conditions for the final month.

Consequently, I find that the tenancy was significantly devalued during July 2011due to adverse living conditions beyond the control of these tenants. I find it clear that the landlord had no inclination to do anything further to remediate the unit until the tenant had finally vacated. It is evident that once the tenant gave written notice to vacate, the

landlord chose to leave things in an “as is” condition for the remainder of the tenancy because of the unresolved access issue.

Given the above, I find that the tenant successfully met elements 1, 2 and 3 of the test for damages to justify compensation. I also find that the tenant’s decision to vacate permanently, as opposed to a two-stage costly move, served to mitigate the potential damages, thereby meeting element 4 of the test for damages.

It is clear that the landlord did not meet its obligations under several sections of the Act and the agreement. I find that there is no doubt that this tenancy was devalued as a result and that the need to vacate was also a direct consequence of the course of events described above.

Given the above and based on the evidence and testimony, I find that the tenant is entitled to total compensation of $3,806.78 comprised of a retroactive rent reduction in the amount of $2,636.00, moving costs of $1,0374, reimbursement for the cost of the address-change in the amount of $47.04 and the $50.00 cost of the application.

Conclusion

Based on the testimony and evidence discussed above, I hereby issue a monetary order in favour of the tenant in the amount of $3,806.78. This order must be served on the landlord and may be enforced through Small Claims Court if necessary.

This decision is final and binding and was 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: December 05, 2011.

Residential Tenancy Branch