Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes: CNR, MNDC, OLC, ERP, PSF, RR, MNR, LRE, FF

Introduction

This hearing was to deal with an application by the tenant for an order to cancel a Ten Day Notice to End Tenancy for Unpaid Rent, a monetary order for compensation for damage or loss under the Act, an order that the landlord comply with the Act and complete emergency repairs, an order restricting landlord's access and a rent abatement allowing the tenant to reduce the rent for repairs, services or facilities agreed upon but not provided.

The tenant was also requesting more time to make an application to dispute the Ten Day Notice to End Tenancy for Unpaid Rent because she had paid the outstanding rent within 5 days to cancel and had not disputed it for that reason, but the Notice was re-swerved on the tenant in December 2011, with a written notation on the document stating that the landlord was going to seek dispute resolution to obtain possession.

Both parties appeared and gave evidence.

At the outset of the hearing the parties advised that the tenant had indeed paid the rental arrears owed within 5 days of receiving the Ten Day Notice to End Tenancy for Unpaid Rent. Under the Act I find that this cancelled the Notice. Therefore the portion of the tenant's application requesting that the notice be cancelled is granted.

The landlord testified that a One Month Notice to End Tenancy for Cause was also served on the tenant. However, no copy of this Notice was in evidence and the application did not include a request to cancel a One Month Notice to End Tenancy for Cause. The tenant stated that this Notice was never served on her at all. In any case, this dispute resolution hearing was not convened to deal with a Notice For Cause so it is not a material consideration.

The remaining issues to be determined based on the testimony and the evidence are:

- Whether the tenant is entitled to a monetary order to compensate for damages for devalued tenancy.
- Whether the tenant is entitled to a rent abatement based on condition issues that exist in the unit.

- Whether the tenant is entitled to be reimbursed for the cost of emergency repairs.
- Whether the landlord should be ordered to provide the tenant with services and facilities required by law.
- Whether the landlord should be ordered under the Act to do emergency repairs.
- Whether the landlord's access should be restricted.

The burden of proof is on the tenant.

Preliminary Issue: Submission of Evidence

The tenant stated that she had only received the landlord's evidence package one week ago and the evidence had been slipped under her door instead of proper delivery.

I note that the *Landlord and Tenant Fact Sheet* contained in the hearing package states that "*copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by RTB as soon as possible*." Section 88 and 89 of the Act specifies how documents must be served.

In addition to the above, Residential Tenancy Rules of Procedure, require that the parties must submit evidence to the Residential Tenancy Office and serve all evidence being relied upon to the other party at least (5) days before the dispute resolution proceeding. If there is not sufficient time prior to the hearing, the respondent must serve their evidence at least 2 days prior to the hearing.

In the case before me, I find that the respondent's evidence was properly submitted to the Dispute Resolution file and, with respect to serving it on the applicant, I find that, it was served within the time limit. However, the fact that the landlord had placed the evidence under the tenant's door was not strictly in compliance with the Act. That being said, I still accept that the landlord's evidence was served because the tenant's testimony confirmed that she did actually receive the respondent's evidence.

Background and Evidence

The tenancy began in June 2011 as a one-year fixed-term tenancy ending July 1, 2012. The rent is $1,250.00 per month and a security deposit of $625.00 was paid.

The tenant testified that she suspected that the landlord had entered her suite without permission as the door had been found unlocked. The landlord stated that he had no

knowledge of anyone entering the suite on behalf of the landlord, and emphasized that he is aware the Act requires 24 hours written notice to access the suite.

The tenant testified that there was no heat in her unit and she was told by others in the complex that the landlord did not normally turn the heat on. The tenant testified that she purchased two space heaters and is therefore seeking $100.00 compensation. The tenant is also seeking an order to force the landlord to do emergency repairs with respect to the heating issue.

The landlord testified that the tenant had never reported a problem with heat and there would be no opportunity to address the problem until it was reported. The landlord stated that he was willing to look into the matter now that he was aware of the complaint.

The tenant testified that she had made a complaint about noise from the tenant downstairs because he was using a loud subwoofer and sound-surround, was boisterously slamming doors and leaving his radio, TV on and his bathroom fan running continually. The tenant testified that she asked the landlord to investigate and followed up with letters to the landlord. This correspondence was in evidence. The tenant testified that the landlord had made a commitment to move her to another unit when one became available, so she has been keeping her possessions in boxes ready to move while waiting patiently for the transfer to be arranged. However, according to the tenant, other suites in the building were later rented out to others without offering her the chance to move.

The tenant testified that the resident living below kept quiet for a while after he was spoken to by the landlord, but the noise resumed again within a short period. The tenant stated that comments were made by the landlord implying that the resident blow "*could do whatever he wanted*". The tenant testified that she was surprised by a warning letter accusing her of disturbing the other resident below.

The tenant testified that, on September 1, 2011, she again wrote to the landlord asking for an explanation of the warning letter she received alleging she had been making excessive noise. In her communication, the tenant also complained about the continuous noise still being produced by the resident below, and asked about the promise previously made by the landlord that she could be transferred to another unit. The tenant stated that she received no reply.

The tenant stated that she felt the occupant below was purposely trying to bother her with racket as a reprisal for the fact that she had complained about him and because she had rebuffed his efforts to date her. The tenant testified that the occupant below would intentionally turn on his radio or TV to an audible volume and then would go out

for the entire day leaving all of his these electronic devices in operation with his bathroom fan running until 10:00 at night, despite being aware that this was disturbing the tenant.

The tenant testified that, on September 23, 2011, she wrote to the landlord for the third time expressing her concerns but nothing was done at all. The tenant feels that, because of the loss of quiet enjoyment, lack of heat and broken promise to let her relocate to another suite, she deserves to have a substantial rent abatement of $6,250.00, equal to 5 month's rent, in compensation for the loss..

The tenant seeks to be released from the fixed term tenancy and has asked for moving costs of $500.00.

The landlord stated that the tenant's first complaint had been investigated and the resident below was cautioned about making excessive noise. The landlord testified that he did agree to relocate the tenant to another suite if possible, but none became vacant during the period in question.

The landlord testified that he later received a complaint from the resident living below the tenant about noise she was causing and, when he looked into the matter by visiting the resident's unit, he personally heard the applicant/tenant thumping on her floor above. The landlord testified that it was determined that the tenant's complaints were likely without merit. According to the landlord, the resident who was accused of creating unreasonable noise had lived in the building for over a decade and no other resident had complained about him, including the occupant living in the apartment just below this resident.

This testimony was disputed by the tenant, who testified that the occupant below the resident had complained to her about the sound-level of the resident's TV and music.

The landlord stated that he knew nothing of what had transpired in response to the tenant's last two letters sent on September 1, 2011 and September 23, 2011 as the tenant had communicated directly with the property management. The landlord pointed out, however, that the building was an older structure which was not very soundproof. The landlord's position is that there should be a reasonable expectation of some noise from normal day-to-day living which cannot be prevented by any landlord. The landlord stated that the tenant is not validly entitled to be compensated for loss of quiet enjoyment.

Analysis

With respect to the tenant's claim for the repairs, 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 and a tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit.

Emergency Repairs and Compensation for Repairs

The tenant had requested an order to force the landlord to comply with the Act and provide services and facilities required by law. However, I find that based on the testimony of both parties, the landlord did not take action to address the deficient heat because the tenant had not report this problem to the landlord. I find that, during the hearing, the landlord expressed a willingness to check into the situation, now that the matter has been brought to his attention. For this reason, I find that there has been no violation of the Act by the landlord.

The tenant had also requested an order to force the landlord to do emergency repairs and compensate the tenant for expenditures. Section 33(1) of the Act describes "emergency repairs" as repairs that are (a) urgent,(b) necessary for the health or safety of anyone or for the preservation or use of residential property, and(c) made for the purpose of repairing such things as major leaks in pipes or the roof, damaged or blocked water or sewer pipes or plumbing fixtures, the primary heating system, the electrical systems or other serious problem of this nature. If a tenant has attempted to have the landlord do urgent repairs without success, section 33(5) requires a landlord to reimburse a tenant for amounts paid for emergency repairs if the tenant claims reimbursement for those amounts from the landlord, and gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed. If a landlord does not reimburse the tenant, as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

Because this situation did not meet the above criteria under the Act, I find that the tenant is also not entitled to be compensated $100.00 for the purchase of the heaters.

Loss of Quiet Enjoyment

The tenant’s application requested that the rent be reduced for services or facilities not provided and loss of quiet enjoyment . With respect to compensation, I find that section 67, permits a party to be reimbursed for losses and damages if the burden of proof has been met to establish that the other party did not comply with the Act and that this non-compliance resulted in costs or losses, pursuant to section 7. 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, I find that section 28 of the Act entitles a tenant to quiet enjoyment including, but not limited to, rights to the following:

> (a) reasonable privacy;
>
> (b) freedom from unreasonable disturbance;
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> (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, to meet the test for damages, the tenant would need to prove that there was an unreasonable disturbance in violation of the Act, that it caused a loss of value to the tenancy and that the landlord was solely responsible for this situation and loss.

The tenant has alleged that the noise was unreasonable, while the landlord has pointed out that the character of the building does not prevent transmission of normal household noises. I find that there is a problem in establishing whether the noises from the resident below were normal as speculated by the landlord or excessive as alleged by the tenant.

It is always difficult for a landlord to mediate between two residents in conflict. I find that the landlord did initially investigate the tenant's first complaint about excessive noise in July 2011 and took some remedial action by talking to the other resident and by promising the tenant that she could be relocated. In this respect, I find that the landlord did meet his obligations under the Act and the agreement in July 2011.

However, I find that there was no evidence to indicate that the landlord took any further measures, despite the tenant's continued complaints that were lodged in September

2011. I find that there is an expectation that a landlord respond to a tenant's complaint in a timely and professional manner as part of the contract between them and to comply with the Act, even if the response or outcome is not favourable to the complainant.

While it is possible that the tenant is particularly sensitive and could be over-reacting to sounds from others in the building, I find that the landlord's failure to seriously investigate her persistent complaints, has put the landlord at a disadvantage in making a successful argument at this point to prove that the noise level was within reasonable parameters. Given the fact that the tenant had pursued the matter and even put her concerns in writing more than once, I find I can comfortably accept the tenant's first-hand testimony that she was being bothered by noise and that it did have a detrimental effect on the value of her tenancy.

With respect to the landlord's initial promise to consider the tenant for another unit, it is clear that the tenant took the landlord at his word and believed that a move was imminent. I accept that the tenant has had her boxes packed and was waiting anxiously for word from the landlord about an imminent move. At the very least, I find that the landlord should have responded to the tenant's inquiries about the proposed relocation, even if it was merely to clarify that no unit was presently available. Instead, it appears that the landlord chose to ignore the tenant's questions altogether.

I find that during this tenancy the noise and lack of response from the landlord have been issues that impacted the tenant's quiet enjoyment and adversely affected the value of the tenancy. I therefore find that the tenant's claim meets all elements of the test for damages, and as such the tenant is entitled to some compensation.

I find that a modest rent abatement of 10% is warranted for the four month period from September 1, 2011 until December 31, 2011 totalling $500.00 and grant a monetary order for this amount.

I also order the following:

- The Ten Day Notice to End Tenancy for Unpaid Rent dated October 4, 2011 is not in force as it was already cancelled by the tenant's payment of the arrears owed within 5 days.

- The landlord will investigate the tenant's allegation that the heat is inadequate and take measures to ensure the unit is heated properly.

- The tenant is not bound by the fixed term of the tenancy agreement and may vacate by giving written Notice served on the landlord the day before the day rent is due and effective at least one month from that date, as required under section 45 of the Act.

- The security deposit will be administered in accordance with section 38 of the Act when the tenancy officially ends.

- During the remainder of this tenancy, the parties will restrict all communications between them to written form. The tenant will also refrain from direct contact and communication with the other resident and must direct any and all concerns about this individual to the landlord. The landlord will instruct the other resident to refrain from any and all direct interaction with the tenant and require him to also bring all concerns to the landlord

- The landlord will comply with section 29 of the Act with respect to entering the rental unit. This section of the Act states that (b) at least 24 hours and not more than 30 days before the entry, the landlord must give the tenant written notice that includes:(i) the purpose for entering, which must be reasonable; and (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;

- The tenant is entitled to be reimbursed by the landlord for the $100.00 cost of this application.

- The remainder of the tenant's application is dismissed without leave to reapply

Conclusion

Based on the testimony and evidence discussed above, I hereby grant a monetary order in favour of the tenant in the amount of $600.00 comprised of $500.00 retro-active rent abatement and the $100.00 cost of this application.

I order that the Ten Day Notice to End Tenancy for Unpaid Rent is of no force nor effect and that the fixed term of the tenancy is henceforth changed to a month-to-month tenancy. I further order the landlord to comply with section 32 of the Act for repairs, section 29 of the Act to access the unit and section 38 of the Act with respect to the security deposit and that all future communication between the parties be in writing .

These orders must be served on the landlord by the tenant and are enforceable through dispute resolution.

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: December 29, 2011.

Residential Tenancy Branch