



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, RP, O

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order to the landlord to make repairs to the rental unit pursuant to section 33; and
- other remedies, described by the tenant in his application as a retroactive rent reduction for the loss of use of his balcony.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that he has received the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) posted on his door on April 13, 2012. The landlord's agent, the building manager, confirmed that on April 6 or 7, 2012 she received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on or about March 31, 2012. I am satisfied that these documents and the parties' written evidence were exchanged with one another in accordance with the *Act*.

Although I had not received four photographs submitted by the tenant prior to this hearing, the landlord confirmed that she had received this photographic evidence in advance of the hearing. My decision includes my review of the tenant's photographic evidence which I received shortly after this hearing was concluded.

At the hearing, the tenant testified that he had recently applied for dispute resolution to cancel the landlord's 1 Month Notice. He said that a hearing date had been set for May 3, 2012. The landlord confirmed information submitted in the landlord's written evidence package that the landlord intended to apply for dispute resolution to recover \$25,000.00 from the tenant for the damage to the balcony. She testified that the landlord has not yet filed an application for dispute resolution.

Although I recognized that both parties appear to be in the process of seeking additional decisions and orders from the Residential Tenancy Branch, the only matter duly before

me at the time of this hearing was the tenant's application for a monetary Order and repairs. I advised the parties that I was hearing only the tenant's application for a monetary Order for reduced rent and requested repairs.

Issues(s) to be Decided

Is the tenant entitled to a monetary Order for loss or damage arising out of this tenancy? Should an order be issued to the landlord requiring the repair of the rental unit?

Background and Evidence

This tenancy commenced on August 1, 1997, initially as a fixed term tenancy scheduled to end on March 31, 1998. After the expiration of the first term, the tenancy continued as a periodic tenancy. Current monthly rent is set at \$947.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$325.00 security deposit paid on March 7, 1997.

The parties agreed that the tenancy agreement included the tenant's rental of a 5 foot by 10 foot wooden balcony in this rental building. This balcony had no roof or cover, but most of the other balconies in the building were covered. Over time the condition of the tenant's balcony, where the tenant had placed planters and many plants, deteriorated to the point where the tenant and landlord exchanged a number of letters and emails regarding its condition. On December 22, 2005 and January 2, 2007, the building's owner an/or building manager sent letters requiring the tenant to remove all plants, plastic and other items that were then on the tenant's balcony. The landlord's building manager (the landlord) testified that the balcony gradually deteriorated as a result of the tenant's use of the balcony as a greenhouse for his plants and the weight of dirt, planters and his frequent watering of these plants.

The tenant testified that as of January 2009, he stopped using that portion of his balcony furthest from the building because the balcony was beginning to drop and presented a safety hazard. He continued seeking repair of the balcony, but the landlord did not take action to repair his balcony. He said that at one point the balcony dropped approximately 4 inches, then dropped again 8 inches in total. He testified that he removed his remaining plants and planters from the front of the balcony about 3 months before the balcony collapsed completely on February 8, 2012. He said that in the period shortly before the balcony fell it was leaning at a 45 degree angle.

The tenant applied for a monetary Order of \$8,190.00 for a reduction in monthly rent of \$285.00 for the 30-month period prior to March 2012, the date of his application for dispute resolution. He entered into written evidence a monetary order worksheet that included his following calculations to support his application for a monetary Order:

- *Loss of 50 square feet of balcony – 30 months @ \$135.00 per month = \$3,690.00;*
- *Loss of business space – 30 months @ \$50.00 per month = \$1,500.00;*
- *Loss of leisure space – 30 months @ \$100.00 per month = \$3,000.00.*

In one of his written submissions and at the hearing, the tenant testified that he had miscalculated the amount of his requested monetary Order. He asked for permission to revise his requested monetary Order to \$9,760.00, the corrected amount of his monetary claim against the landlord for loss of value of his tenancy for services and facilities the landlord committed to provide but for which the tenant has not received value. As the tenant had not amended his application for dispute resolution and I was not satisfied that the landlord had been given a proper opportunity to meet the case against the landlord for this increased claim, I declined the tenant's request to increase the value of the monetary Order he was seeking.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party.

In this case, there is agreement that the tenancy agreement included an uncovered wooden balcony. There is also undisputed evidence that the balcony deteriorated over time and eventually tumbled to the ground on February 8, 2012. There was a history of emails and letters with respect to the deteriorating condition of the balcony in the years leading to the demise of the tenant's balcony.

I accept the tenant's undisputed evidence that he discontinued using much of the balcony as of January 1, 2009. From January 1, 2009 until approximately November 2011, he used only the "front" portion of the balcony where he continued to leave his plants and planters. From November 2011 until the February 8, 2012 collapse of the balcony, he had no effective use of the balcony.

Based on the evidence before me, I find that the tenant is entitled to a monetary Order for the loss of use of his balcony, as this was a facility that the landlord committed to provide as part of the tenancy agreement, but which was unavailable to the tenant as of January 1, 2009. Undisputed evidence was given that balconies on the other side of

the building have been repaired by the landlord in recent years and balconies on the tenant's side of the building are scheduled for repair or replacement, likely this year. I find little merit to the landlord's claim that the weight of the tenant's plants and planters, estimated by the tenant to be 200 pounds at the most, should have caused a properly maintained and repaired balcony to deteriorate and eventually collapse as it did on February 8, 2012.

While I find that the tenant is entitled to a monetary Order for a retroactive reduction in rent, I agree with the tenant's observation in his oral and written evidence that quantifying the amount of his entitlement to a rent reduction is difficult. I have carefully considered the tenant's oral and written evidence regarding the worth that he attached to his balcony from the perspective of the loss of living space, leisure space and space where he conducts his business consultations. I do not share his view that the loss of use of an uncovered 50 square foot wooden balcony should lead to a rent reduction of \$285.00, over 30 % of his total current monthly rent. While I sympathize with the attachment that the tenant had to his use of this balcony space for gardening, interacting with clients and enjoying the south view of his rental unit, I do not accept that the loss of this space should result in a retroactive rent reduction in the magnitude requested in his application.

For the period from January 1, 2009 until December 31, 2009, I accept that the tenant is entitled to a reduction in his monthly rent of \$40.00, an amount which recognizes that the tenant was still able to gain some benefit from the front portion of the balcony over this period. This results in a rent reduction of \$480.00 over this period.

By the beginning of January 2010 and after the tenant had lost use of a portion of his balcony for a one-year period, I find that the tenant must have realized that the landlord was not undertaking repairs and that the tenant would likely have to initiate other means of recovering rent if the tenant believed that he was not receiving the services and facilities that the landlord committed to provide at the commencement of this tenancy. Over the period from January 1, 2010 until October 31, 2011, I find that the tenant was acquiescing in paying monthly rent to the landlord without seeking an order from the Residential Tenancy Branch to either obtain repairs or to obtain a reduction in his monthly rent. I find that the tenant's lack of action over this period disentitles him to the retroactive rent reduction he is seeking for the period from January 1, 2010 until October 31, 2011. For this reason, I dismiss the tenant's claim for a retroactive reduction in rent over this period without leave to reapply.

I find that this situation changed significantly as of November 1, 2011, when the tenant recognized that the condition of the balcony had deteriorated to the extent that he

needed to remove all of his planters and plants from that portion of the balcony he had been continuing to use. As of that date, he had no use of the balcony whatsoever, and the deteriorating condition was demonstrated by its eventual collapse on February 8, 2012. Within two months of the collapse of the balcony, the tenant applied for dispute resolution. I find that for the period since November 1, 2011 when the tenant has not enjoyed any use of the balcony, the tenant is entitled to a rent reduction of \$60.00 per month. As of the date of this decision, this results in a total rent reduction of \$360.00 for the period from November 1, 2011 until April 1, 2012.

In total, I find the tenant is entitled to a retroactive rent reduction of \$840.00 for the loss of enjoyment of his balcony since January 1, 2009.

I order that the tenant's current monthly rent as of May 1, 2012 be reduced by \$60.00 from \$947.00 to \$887.00 to reflect the loss of his balcony. Once the tenant's balcony is replaced, I order that his monthly rent be increased to that which would be allowed under their existing residential tenancy agreement (e.g., currently \$947.00).

I have also considered the tenant's application for repairs to his rental unit arising out of the loss of his balcony. Although the landlord testified that the owner of the property intends to repair and replace balconies on the tenant's side of this building, likely this year, she said that there is no scheduled date for the commencement of this work. As this tenancy may not continue as a result of the landlord's issuance of the 1 Month Notice and this decision reduces the tenant's monthly rent to reflect his loss of the balcony, I make no order regarding the tenant's application for the commencement of repairs. I dismiss this element of the tenant's application with leave to reapply, pending the determination to be made in his application to cancel the landlord's 1 Month Notice.

Conclusion

I issue a monetary Order in the tenant's favour in the amount of \$840.00 which compensates the tenant for rent paid for facilities that were committed to but not provided by the landlord during this tenancy.

I set the current monthly rent for this tenancy at \$887.00. Once the tenant's balcony is replaced, I order that the monthly rent be increased to that which would be allowed under their existing residential tenancy agreement.

I dismiss the tenant's application for an order requiring the landlord to undertake repairs to the balcony with 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: April 25, 2012

Residential Tenancy Branch