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 seeking a rent abatement, damages for costs and losses, aggravated damages and an order to force the landlord to complete repairs to the rental unit.

At the outset of the hearing, the parties advised that the tenant had surrendered complete possession of the rental unit to the landlord on December 15, 2012. Therefore the portion of the tenant's application seeking an order for repairs to the rental unit is now moot.

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

At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and this evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered the evidence and testimony provided.

Preliminary Matter

The parties had each submitted a substantial amount of evidence that was received on file and served on each other prior to the hearing date.

The landlord confirmed the individual pieces of evidence he received from the tenant on, or about, November 26, 2012 when the tenant's application was filed. However, the landlord objected that he had only received the tenant's last evidence package on January 4, 2013, which included a copy of a building inspection report dated December 29, 2012, a CD, a chronology of events, copies of communications, a witness statement and receipts. The landlord felt that this evidence package should not be considered as it had not arrived *at least* 5 days prior to the hearing.

The tenant pointed out that the landlord's evidence was not served to the tenant by mail and was received on December 31, 2012 though an email message. The tenant's

position is that, after receiving this improperly served evidence, she still sent in her response to the landlord's submissions as quickly as possible, given the landlord's delay in submitting his evidence package. The tenant stated that the landlord was not prejudiced by having received her last evidence package on January 4, 2013, which the tenant pointed out was 5 days before the hearing.

The landlord argued that the reason his evidentiary submission was delayed, and the reason it was served by email, was because of the fact that the tenant moved out and did not leave any written forwarding address. The landlord testified that he did not get the address until the end of December 2012. The landlord also pointed out that he was not given an adequate opportunity to properly respond to the tenant's final package.

I find that, Residential Tenancy Proceedings Rules of Procedure, Rule 3.5 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding.

Rule 4.1 of the Residential Tenancy Proceedings Rules of Procedure states that if the Respondent intends to dispute an application, the evidence upon which the Respondent intends to rely must be received as soon as possible and at least 5 days before the dispute resolution hearing, or in cases where that is not possible, the evidence must be filed with the Residential Tenancy Branch and received by the Respondent <u>at least 2 days prior to the hearing</u>.

The "*Definitions*" portion of the Rules of Procedure states that when the number of days is qualified by the term "*at least*" <u>then the first and last days must be excluded</u>, and if it is being served on a business, it must be served on the previous business day. Weekends or holidays are excluded in the calculation of days for evidence being served on the Residential Tenancy Branch. (my emphasis)

In this instance I find that the tenant's application was made on November 26, 2012. I find that the landlord's evidence could have been served on the tenant until December 15, 2012, while the tenant was still in possession of the rental unit. I do accept that the tenant did receive the landlord's evidence, albeit by email, on December 31, 2012, because the tenant confirmed receipt of this evidence during the hearing.

I find that the tenant's final evidence package contained complex and detailed information, particularly the report from the building Inspector and the contents of the CD. I accept the landlord's position that he was not given adequate time to rebut the tenant's final documentary evidence.

Given the above, I will only consider the evidence properly served within the required timelines from both parties. However, I will consider verbal testimony from both parties instead of the recently received evidentiary submissions.

Issues to be Decided

Is the tenant entitled to a rent abatement for devalued tenancy and other compensation for damages?

Is the tenant entitled to aggravated damages?

Background and Evidence

The tenancy began in October, 2010 and the rent, as of September 1, 2012, was $886.00 per month. A security deposit of $425.00 was paid.

The tenant testified that she reported a problem with mould to the landlord in August 2012, after finding visible evidence of mould throughout the rental premises, including the box springs of the beds, walls, carpeting and clothing. The tenant submitted photos of areas and items showing mould or mildew.

The tenant testified that during the tenancy, she and her children were plagued by medical problems which she, and her medical specialists, attributed to the fact that the tenant was living in a mouldy environment causing bronchial and allergy symptoms and aggravating a prior asthmatic condition. The tenant submitted medical reports with the diagnosis and copies of prescriptions.

The tenant acknowledged that the landlord did promptly respond to her initial complaint, and she was aware that he had consulted with a contractor and was apparently advised to conduct a complete inspection of the unit, which entailed removing drywall to examine the internal structure to discover a possible source for the mould. The tenant pointed out that the landlord declined to follow this professional advice he received from his own contractor.

The tenant testified that the landlord chose to merely remove the mildewed carpet, under which the cement floor was seen to be wet. The tenant testified that, after drying the floor with heat, some brand new flooring was installed.

The tenant testified that, she discarded the mouldy box springs from both bedrooms and washed down everything including the walls, furnishings and clothing.

The tenant testified that, after the flooring renovation, the unit still seemed to be damp and she and her children continued to suffer bronchial symptoms.

According to the tenant, by mid-November 2012 it became obvious to them that the moisture infusion had not abated. The tenant testified that she discovered that the new flooring was damp with moisture under the bed in her child's room. The tenant submitted photos showing water pooled on the surface of the new flooring. The tenant then looked under the mattress in her room and found extensive mould damage to the mattress. The tenant stated that she had to discard both of the contaminated mattresses. The tenant is claiming reimbursement for the ruined beds, one of which was purchased in May 2007 for $1,325.00, as confirmed by a receipt, and the other that had been purchased approximately 3 years ago for $700.00. The tenant feels she is entitled to be compensated for the loss.

The tenant testified that she immediately notified the landlord about the return of the mould and requested that he engage a qualified mould expert to assess the problem properly. The tenant testified that the landlord began to act in a vindictive manner towards her and refused to effectively address the problem. The tenant stated that the landlord should have hired properly-trained experts to ensure that the mould was completely eradicated and to show that there was no health danger present in the unit.

The tenant testified that she had bought temporary replacement mattresses for $166.88 to be used for sleeping in the living room, where there was less moisture.

According to the tenant, she continued to demand that the landlord take action to no avail. The tenant testified that one day the landlord suddenly showed up at her door, barged in and began taking photos of the rental unit, ignoring their protests.

The tenant testified that she believes that there is a serious infrastructure issue causing dampness in the rental unit and the landlord was remiss in not dealing properly with this.

The tenant testified that, after sleeping in the living room waiting for the landlord to act, she finally hired a building inspector to inspect the rental unit at a cost of $295.00. The tenant testified that the inspector issued a report confirming that the rental unit was subject to excessive moisture likely stemming from problems with the infrastructure. The tenant stated that the report indicated that that an internal examination of the walls was necessary. The tenant is claiming compensation of $295.00 to reimburse her for the cost of the inspection report.

The tenant stated that, when it became clear that the landlord had no intention of complying with the Act to make sure that the premises were fit for safe habitation, she finally felt it necessary to move out for the sake of her family's health. The tenant is claiming $525.00 for the cost of moving.

The tenant is claiming a rent abatement for the loss of quiet enjoyment and loss of use of a portion of the rental unit for the period from August 2012 to the end of the tenancy in December 2012. The tenant stated that she felt her rent should be reduced by 50% for the entire period in question.

The amount of abatement the tenant feels entitled to is $3,544.00 due to mould issues over the period from September 2012 to the end of December 2012.

The tenant is claiming aggravated damages for non-pecuniary losses with respect to the adverse impact of the mould problem on the family's health. The tenant is also seeking a refund of the $475.00 security deposit. The total monetary claim is for $5,769.00

The landlord stated that when he came to inspect the home before purchasing it in March 2012, the tenant would not cooperate to allow him to thoroughly inspect the suite, and therefore he was not able to detect any water or mould problems at that time.

The landlord acknowledged that the tenant reported mould in August 2012, and the landlord pointed out that he did take immediate action as soon as the mould was first reported.

The landlord stated that he chose not to follow all of the recommendations of the first contractor because he did not want to start removing the drywall, in consideration of the tenant, as this demolition would have been disruptive to the tenancy. The landlord pointed out that he did act to fix the problems by removing the carpets and completely replacing the flooring. The landlord testified that he honestly believed that this action successfully eradicated all of the mould.

The landlord testified that, after the new flooring was installed, the rental unit was completely free of mould and moisture and there were no concerns at all for several months. According to the landlord, he continued to believe that all was well, until the tenant suddenly reported moisture and mould on November 25, 2012. The landlord testified that he did respond at that time and tried to hire a concrete inspector to find out whether the condition of the exterior concrete was the reason for the water infusion. However this contractor never showed up and the tenant had already moved out by December 15, 2012.

The landlord believes that the mould had returned because of the tenant's actions in keeping two mould-infested mattresses in the unit after the initial mould incident, despite the landlord's instructions to remove all contaminated furnishings. The landlord is of the opinion that, because the tenant had only discarded the box springs in September 2012, this allowed mould spores from the mattresses to remain in the unit and multiply. The

landlord pointed out that the contaminated mattresses were resting directly on the floor, which inhibited proper air circulation.

The landlord stated that he feels the tenant also contributed to the mould problem by turning off the baseboard heaters and failing to keep the rental unit clean.

The landlord stated that he felt the tenant's possessions should be replaced through the tenant's own insurance, and he should not be held liable for the loss of the beds.

The landlord also stated that the tenant should not be entitled to any rent abatement for the period for August 2012 because he had responded to the first mould complaint and took immediate measures that he felt would solve the problem. The landlord testified that, because the rental unit was apparently fine for several months thereafter, and no problems were ever reported until close to the end of November 2012, the tenant should not be entitled to any abatement for the intervening months of September, October or November, 2012.

The landlord disputed that the tenant's health issues are, in any way, related to the mould and stated that there was no evidence linking the tenant's condition to the rental unit, other than the tenant's subjective reports to her physician. The landlord pointed out that the tenant or others have regularly been smoking within proximity of the entry door to the unit and the landlord felt that this had likely aggravated the health of the inhabitants.

Analysis

Security Deposit

With respect to the return of the $425.00 security deposit, I find that these funds are held in trust for the tenant and do not belong to the landlord. I find that the landlord has not returned the deposit, nor has he made an application to keep the security deposit, despite his testimony that the tenant's forwarding address was received by the landlord at the end of December 2012.

I find that section 38 of the Act states that within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit or pet damage deposit to the tenant or make an application for dispute resolution to claim the deposit.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed, or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the

tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I find that this tenant's security deposit was $425.00 and because the landlord failed to follow the Act in retaining the funds being held in trust for the tenant, the tenant is entitled to compensation equal to double the deposit, amounting to $850.00.

Monetary Damages

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 portion of the tenant's application seeking a rent abatement from August 2012 until the end of the tenancy, I find that the landlord did respond to the complaint in made in August 2012 and did take action, which he genuinely felt did address the mould problem. I accept the landlord's testimony that he was not aware that the mould had returned until November 25, 2012 and I find that the tenant is not entitled to a rent abatement for August 2012, September 2012 and October 2012.

However, I find that in November, the landlord did not comply with the Act to ensure that the persistent mould problem was finally dealt with. I find that the landlord failed to engage a qualified mould expert, once he became aware that the problem had not been resolved as he believed.

For this reason, I find that the tenant is entitled to a partial rent abatement of 35% restricted to the month of November 2012, in the amount of $310.00. I find that the tenant is also entitled to a full rent abatement of $886.00 for the month of December 2012, during which the tenant had arranged to live elsewhere.

In regard to the tenant's claim for moving costs, I find that the tenant genuinely felt that there was a health issue and moved out as a last resort after first trying to work with the landlord towards a solution.

While I find that the tenant would have incurred moving costs at the end of her tenancy regardless of when the move occurred, this family was inconvenienced by having to move prematurely. I find that this warrants partial compensation in the amount of $150.00 toward the tenant's costs of vacating the unit.

In regard to the tenant's claim for the $295.00 cost of the building inspector report, I find that the tenant's hiring of an inspector was warranted, given the landlord's failure to take action with respect to the mould problem that returned in November 2012. I find that the landlord now has the benefit of this report for his own use to determine what should be done about the water infusion and mould. I find that the tenant is entitled to be reimbursed $295.00 for the cost of the report.

With respect to the damaged mattresses and box springs, Awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. Where an item has a limited useful life, it is necessary to reduce the replacement cost by the depreciation of the original item. In order to estimate the pro-rated value of the replaced item, reference will be made to normal useful life of the item as provided in Residential Tenancy Policy Guideline 40.

I find that the tenant did provide evidence confirming the original purchase of one new mattress set in 2007 in the amount of $1,325.00.I find that the average useful life of furniture is set at 10 years and, because the set is approximately 5.5 years old, the compensation must be prorated at 45% of the original value of the mattress, amounting to $596.25.

Based on the above, I find that monetary damages to which the tenant is entitled include, $310.00 rent abatement for November 2012, $886.00l rent abatement for the month of December 2012, $150.00 for moving costs, $295.00 reimbursement for the building inspection report and $596.25 for one of the damaged bed sets, for total damages of $2,237.25. The tenant is also entitled to a refund of $850.00 representing double the security deposit paid. The total compensation being granted is $3,087.25.

<u>Aggravated Damages</u>

With respect to the tenant's unspecified claim for aggravated damages, I find that an arbitrator may grant aggravated damages as an award, or an augmentation of an award, of damages in compensation for physical inconvenience and discomfort, pain and suffering, grief, humiliation, loss of self-confidence, loss of amenities, mental distress and other intangible losses, which are considered to be "non-pecuniary" in nature. Aggravated damages are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer's willful or reckless indifferent behaviour.

I find that the conditions must be sufficiently significant in depth, or duration, or both, such that they represent a significant influence on the wronged person's life. They are awarded where the person wronged cannot be fully compensated by an award for pecuniary losses.

In the case before me, I find that there are not sufficient grounds to award aggravated damages. I find that, while the tenant endured inconvenience and physical and emotional upheaval, the damages of $3,087.25 being awarded for monetary losses do adequately compensate the tenant for her losses.

Based on the evidence, I find that the tenant is entitled to a monetary order in the amount of $3,087.25 and I hereby grant a monetary order in this amount. This order must be served on the landlord and, if unpaid, may be enforced through an order from Small Claims Court.

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

Conclusion

The tenant is partially successful in the application and is granted a monetary order for damages and for double the amount of the security deposit paid at the start of the tenancy.

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: January 31, 2013.

Residential Tenancy Branch