



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, ERP, RP, RR

Introduction

This hearing was originally scheduled to be heard April 9, 2013 and was joined with a Landlord's Application for Dispute Resolution. Both parties appeared or were represented at the April 9, 2013 hearing during which time I confirmed service of hearing documents upon each other and the Branch. I also severed the Applications due to time constraints and because the issues identified by the parties in their respective applications were unrelated. The April 9, 2013 hearing dealt with the landlord's application and the April 24, 2013 hearing date dealt with the tenant's application. Separate decisions have been issued with respect to each application. Accordingly, the remainder of this decision deals only with the tenants' application and it is not necessary to read the decision issued for the landlord's Application in conjunction with this decision.

Procedural Issue – Identity of named landlord(s)

The tenant had identified two individuals as the landlord in filing this application. One of the persons identified as the landlord on the tenant's application (referred to by initials "PS") is identified as the landlord on the written tenancy agreement. The landlord's agent appearing at the hearing ("GM") confirmed that he currently acts as agent for the owner of the property ("PK") and that PS was an agent for the owner when the tenancy agreement was entered into. GM confirmed that PS still acts for the owner from time to time. GM argued that the owner of the property should be named as the landlord in this Application for Dispute Resolution and PS should be excluded as a named landlord as he is an agent for the owner.

I was not provided documentary evidence to show ownership of the property. I also found GM's request to exclude an agent from an Application for Dispute Resolution inconsistent with a previous Landlord's Application for Dispute Resolution filed in respect of this tenancy (file no. 804974) where GM names himself as a landlord for this rental unit even though he is an agent. Nevertheless, I refer to the Act and Residential

Tenancy Policy Guideline 26: *Agents* in considering the landlord's request to exclude PS as a named landlord.

Section 1 of the Act defines landlord as follows::

"landlord", in relation to a rental unit, includes any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
 - (i) permits occupation of the rental unit under a tenancy agreement, or
 - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
- (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
- (c) a person, other than a tenant occupying the rental unit, who
 - (i) is entitled to possession of the rental unit, and
 - (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;
- (d) a former landlord, when the context requires this;

[my emphasis]

Even though I was not provided evidence as to ownership of the property I find it unnecessary to review such documentary evidence in making a determination as to whether PS meets the definition of landlord. Considering PS's actions included:

- naming himself as the landlord in preparing the written tenancy agreement, that both the landlord and tenants have relied upon during this tenancy to enforce their respective rights and obligations;
- collecting rent on behalf of the owner, whether that be himself or PK, and;
- managing and repairing the property, either on behalf of himself or PK;

I find these activities consistent with the definition of landlord as provided by the Act. As I heard that PS still acts as the landlord's agent from time to time, and in the absence of documentary evidence as to the ownership of the property, I find insufficient grounds to conclude PS no longer meets the definition of landlord.

Residential Tenancy Guideline 26: *Agents* provides information with respect to proper naming of a party and adding a party to an application for arbitration. If I were to accept GM's submission that PS was an agent for the owner when the tenancy formed, I note that there is no indication in the written tenancy agreement that PS was acting as an agent. In such cases, the policy guideline provides the following:

- iii) where the agent does not disclose that she or he is acting as an agent and purports to act as a principal.

The agent may be named in the application. Upon becoming aware of the existence of a principal the principal may be added as a party or named in another application. Again, an order may be made against either the principal or the agent, or both.

[my emphasis added]

In light of the above, I grant GM's request to amend the Application, in part, by adding the owner PK as a named landlord. I reject the GM's request to exclude PS as a named landlord as I am satisfied PS meets the definition of landlord, whether it be as owner or agent, and agents may be named in an Application for Dispute Resolution. I have also corrected the spelling of PS's name to reflect the spelling on the tenancy agreement.

I have also amended the Application to include the female tenant's name as she continues to reside in the unit, fully participated in both hearing dates in seeking resolution to this dispute, and to be consistent with previous decisions and Orders issued with respect to this tenancy.

Issue(s) to be Decided

1. Has the tenant established an entitlement to a Monetary Order and/or a rent reduction for repairs not made or other damage or loss under the Act, regulations or tenancy agreement?
2. Is it necessary to issue repair or emergency repair orders to the landlord?

Background and Evidence

The tenancy commenced in June 2009 and the tenants currently pay rent of \$1,248.00 per month. This dispute revolves mainly around outstanding repair issues in the tenants' bathroom.

Tenants' position

The tenants submitted that approximately 1 ½ to 2 years ago the landlord's maintenance person(s) removed a section of drywall over their bathtub (approximately ½ of the length of the bathtub) in response to repeated leaking from the plumbing that services the unit above theirs. After removing the drywall the landlord did not have the ceiling patched unless last week. Due to the prolonged exposure to leaking water pipes and moisture from the tenant's shower, mushrooms have formed on the exposed wood and the wood has even rotted in some areas. The tenants submit that they have health problems that have been exacerbated by exposure to mould and fungi.

The tenants state that in recent weeks maintenance person(s) attended their unit and proceeded to scrape the mushrooms off the wood and attach a sheet of drywall. The tenants claim the maintenance person did not apply any sort of anti-mould or anti-fungal product before patching the drywall. The tenants are of the position the mould and mushrooms will resurface without proper treatment.

In addition, the tenants submit that in order to use water in the bathroom by way of the sink faucet, the bathtub faucet, and the toilet, they must first turn on the main water valve. The tenants explained that the main valve must be turned off as the faucets leak so badly. The tenants also submitted that they have to plunge the toilet in order for it to flush properly.

The tenants' advocate pointed to a fire by-law inspection document that indicates there was a water leak in unit #8, the unit above the rental unit, for which the landlord received an order to repair.

In addition to repair orders, the tenants are seeking compensation of \$15,000.00 in damages for the landlord's neglect to make necessary repairs and the impact it has had on the tenants' health and quality of life. The tenant explained that this amount was calculated as approximately one half of the rent they paid for the past two years.

Evidence provided for this hearing included copies of the tenancy agreement, a previous dispute resolution decision and order, an inspection report prepared for

Vancouver fire by-law violations; and, several photographs of the exposed ceiling cavity, depicting large growths of mould and/or mushrooms and areas of rotten wood.

Landlord's position

The landlord agent GM submitted that when the ceiling was patched recently, the work crew applied an anti-mould product, known as Kilz, before attaching the drywall and that applying such a product is an acceptable way to treat mould.

GM acknowledged that he was uncertain as to how long the ceiling cavity had been exposed as this was done before he took over management of the property. I was not provided the date when GM began managing this property; however, GM identified PS as the agent managing the property before him.

PS testified that the ceiling was exposed only a couple of months ago and suggested that the tenants had raised this as an issue in retaliation for the landlord serving the tenants with a Notice to End Tenancy for unpaid rent.

GM indicated the landlord is prepared to send a plumber to the tenants' unit to address issues with the faucets and toilet; however, the tenants did not include such issues in the Application for Dispute Resolution, written submission, or by way of any previous request for repairs.

With respect to the tenant's monetary claim, GM submitted that the tenants had not previously requested repairs and that upon receiving repair requests the landlord takes appropriate action so as to protect the landlord's property. GM suggested that the tenants had not requested repairs of the landlord.

The landlord submitted that the tenants have turned away the landlord's previous attempts to access the unit, say for example for pest control treatments. The tenants responded by indicating that the landlord had not given them 24 hour written notice to enter and the landlord's previous attempts to gain entry had been at inappropriate times. The tenants confirmed that they wish to receive written 24 hour notice in order for the landlord to enter. The landlord did not oppose this request and the tenants were informed of the landlord's right to enter pursuant to a 24 written notice of entry even if the tenants are not home at the scheduled time.

During the hearing, it was discussed that the landlord currently holds two Monetary Orders against the tenants for unpaid rent and that the landlord is willing to offset their Monetary Orders against any Monetary Order given to the tenants.

Analysis

Under the Act, a landlord is obligated to repair and maintain a rental unit in a manner that complies with health, safety, building standard laws; and, ensure that it is suitable for occupation by the tenant, having regard for its age, character and location.

Where a tenant requires a repair it is reasonable to expect that the tenant notify the landlord of the repair issue in order to mitigate the tenant's loss, and allow the landlord a reasonable amount of time to make the repair determined necessary and sufficient. A tenant may be entitled to compensation where the tenant shows that the tenant notified the landlord of the repair required, or the landlord otherwise knew or ought to have known a repair was required, and the landlord did not make reasonable efforts to make the necessary repair in a timely manner. Loss of use or enjoyment that is temporary is generally not compensatory.

In filing this application and as supported by the written submission, I find the tenants identified a significant repair issue with respect to an exposed ceiling cavity and growth of mould and /fungi. I was provided conflicting testimony as to when the drywall was removed from the bathroom ceiling by the landlord's maintenance person(s). The tenants asserted that it was taken down 1 ½ to 2 years ago; whereas, PS submitted that it was taken down only recently. I find the tenants' testimony more likely than that of PS considering:

1. the size and number of mushrooms growing on the exposed wood, as shown in the tenants' photographs;
2. rotten wood appearing in the tenants' photographs; and,
3. GM's statement that the drywall was taken down before he began managing the property.

Since it was the landlord's maintenance person(s) that removed a significant portion of the bathroom ceiling I find the landlord knew, or ought to have known, that further action was required to patch the ceiling to avoid exposing the ceiling cavity to often warm and moist air from the bathroom which is a recipe for mould and/or fungus growth and rotten wood. Therefore, I find the landlord's failure to treat the wood and sufficiently patch the ceiling for 1 ½ to 2 years is not only excessive and a violation of the statutory duty to repair and maintain, but also negligent.

Residential Tenancy Policy Guideline 16 provides for claims in damages. The guideline provides, in part,

MONETARY REMEDIES²

The Legislation allows a landlord or tenant to make a claim in debt or in damages against the other party where there has been a breach of the tenancy agreement or the Act. Damages is money awarded to a party who has suffered a loss which the law recognizes. Claims may be brought in Tort and/or Breach of Contract.

Claims in Tort

A tort is a personal wrong caused either intentionally or unintentionally. An arbitrator may hear a claim in tort as long as it arises from a failure or obligation under the Legislation or the tenancy agreement. Failure to comply with the Legislation does not automatically give rise to a claim in tort. The Supreme Court of Canada decided that where there is a breach of a statutory duty, claims must be made under the law of negligence. In all cases the applicant must show that the respondent breached the care owed to him or her and that the loss claimed was a foreseeable result of the wrong.

Types of Damages

An arbitrator may only award damages as permitted by the Legislation or the Common Law. An arbitrator can award a sum for out of pocket expenditures if proved at the hearing and for the value of a general loss where it is not possible to place an actual value on the loss or injury.

[my emphasis added]

Having found the landlord negligent with respect to the duty to repair and maintain the property, I find the tenants entitled to damages. I award the tenants for the general loss attributable to living with a bathroom that has an exposed ceiling, complete with significant growth of mould and/or fungi. I find the photographs depict a disgusting and unhealthy environment that is likely to impact one's use of not only the tub and shower area but the entire bathroom. I have also factored in to my decision that this is the tenants' only bathroom in their unit and they did not have the benefit of another bathroom in the unit. Therefore, I consider the bathroom a principal room in the unit and find it appropriate to attribute 25% of the monthly rent to the bathroom.

I have not granted the tenants' request for damages of 50% of their monthly rent as I find this request excessive considering I was not presented evidence that any other areas of the rental unit were impacted by lack of repairs in the bathroom.

As the tenants have satisfied me that the bathroom ceiling was removed at least 1 ½ years ago I award the tenants \$5,616.00, calculated as: \$1,248.00 monthly rent x 18

months x 25%. I provide a Monetary Order to the tenants for this amount to serve upon the landlord.

The landlord holds two Monetary Orders against the tenants in the amounts of: \$1,298.00 dated March 1, 2010 and \$375.00 dated March 8, 2013. The tenants are authorized to deduct from rent, the balance of their Monetary Order after offsetting the unpaid balance of the landlord's Monetary Orders. By offsetting the Monetary Orders the landlord's Monetary Orders will be considered to be fully satisfied and no longer enforceable.

To illustrate: if the landlord's Monetary Orders have not yet been satisfied the tenants would be able to withhold \$3,943.00 from subsequent month's rent payments (\$5,616.00 – \$1,298.00 – \$375.00).

Should the tenants withhold rent in partial satisfaction of their Monetary Order, I strongly encourage the tenants to keep an accounting of the amounts offset against their Monetary Order and the amounts of rent withheld and provide that accounting to the landlord in lieu of a rent payment. The landlord may prepare such an accounting and give it to the tenants to foster a mutual understand and avoid a future dispute.

Should the tenancy end before the tenants are able to recover the balance of their monetary award, they may enforce the unrecovered portion of the Monetary Order by filing it in Provincial Court to enforce as an Order of the court.

I make no further monetary award with respect to the leaking faucets or ill flushing toilet as I am unsatisfied by the evidence before me that the tenants put the landlord on notice, in writing, that such repairs were required or that the landlord knew of the repairs required to the plumbing. Also, the award granted above takes into account the tenants' loss for the entire bathroom.

Repair Orders

Although the ceiling has been recently patched, the tenants asserted that the landlord's maintenance person(s) did not treat the ceiling cavity with anti-mould or anti-fungal treatment before patching it. The landlord's agent stated that the ceiling cavity was appropriately treated with Kilz. Considering the landlord's agent was not present during the repair and the tenants were; the landlord did not produce the maintenance person(s) as witnesses; and, my earlier findings that the landlord's agent PS lacked credibility, I find I prefer the tenants' submissions over that of the landlord.

In light of the above, I issue the following ORDER to the landlord:

- Remove the ceiling patch recently installed in the tenants' bathroom; treat all affected areas of the ceiling cavity with the appropriate anti-mould and/or anti-fungal product; replace all rotten wood; and, then proceed to patch the ceiling without undue delay. The landlord must also ensure that the drywall seams are appropriated taped, mudded (or caulked where necessary), sanded, and painted.
- The landlord has two weeks after receiving this decision to fulfill the above.

Given the landlord's previous negligence in attending to the repairs in this unit, I also find it necessary and appropriate to issue an ORDER to the landlord to:

- Have a certified plumber attend the rental unit for purposes of inspecting and making necessary repairs to the plumbing fixtures, pipes and/or valves in the tenants' bathroom. This order includes ensuring the faucets are not dripping water when turned off and that the toilet properly flushes so that a plunger is not required on a regular basis.
- The landlord has two weeks after receiving this decision to fulfill the above.

Other Orders

To facilitate the above repairs and in considering the tenant's request, I ORDER the landlord to give the tenants a written 24 hour notice of entry that complies with section 29 of the Act.

Section 29 provides the following with respect to written 24 hour notice of entry:

(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:

- (i) the purpose for entering, which must be reasonable;
- (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 tenants are cautioned that the above repairs will likely require multiple entries in to their unity by the landlord and/or the landlord's maintenance or trades persons. Further, upon giving a tenant a written 24 hour notice of entry that complies with section 29, the landlord is permitted to enter the tenants' unit even if the tenants are not home at the

scheduled time. It is expected that the tenants will not unreasonably interfere with the landlord's need to gain entry in to their unit so as to fulfill the above repair orders.

Should the landlord fail to comply with any of the above ORDERS the tenants are at liberty to file another Application for Dispute Resolution seeking further remedy.

Conclusion

The tenants have been awarded compensation of \$5,616.00 due to the landlord's negligence in repairing their bathroom. After deducting the unpaid balances of the Monetary Orders previously issued to the landlord with respect to this tenancy the tenants are authorized to withhold rent until such time the monetary award is satisfied.

Repair orders have been given to the landlord in this decision along with an order for the landlord to give the tenants written 24 hour notice of entry in order to facilitate the repair.

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 26, 2013

Residential Tenancy Branch