Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CENTURY 21 PRUDENTIAL ESTATES RMD. LTD.
and [tenant name suppressed to protect privacy]

Decision

Dispute Codes:

MNDC, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for a rent abatement for devalued tenancy and damages for costs.

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 the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

Issues to be Decided

Is the tenant entitled to a retro-active rent abatement for devalued tenancy and other damages?

Background and Evidence

The tenancy began on December 1, 2003 and rent was $820.00 per month. A security deposit of $375.00 was paid.

The tenant testified that, when she first moved into the unit in 2003, there were some dark patches staining the wall around the window and the tenant reported this to the caretaker, who assured her that it was of no concern.

The tenant testified that several years into the tenancy, she began to exhibit increasingly severe allergies and bronchial symptoms that escalated to the point she had to undergo repeated surgeries and other medical treatments. The tenant testified that it was suggested by her doctor that the nature of her symptoms may indicate exposure to environmental mould toxins.

The tenant testified that, because of concerns about her deteriorating health and the possible connection to a mouldy environment, she contacted a company specializing in testing air samples for air-borne mould contamination and engaged them to conduct air testing in the suite. The tenant testified that a report was issued confirming that there were two types of unhealthy mould found to be air borne in the unit. The two contaminants are Penicillium/Aspergillus and Stachybotrys Chartarum.

A copy of the report was submitted into evidence. The tenant testified that she provided copies of this report to the landlord and to the agent of the landlord.

The tenant stated that she suspected that the mould growth was due to a deficiency on the outside wall, as this area had discoloration and there appeared to be evidence of moisture infusion in the past. The tenant testified that the company she engaged to do air samples recommended that further on-site investigation should be done to find out the source. According to the tenant the report stated that a physical examination of suspicious areas was necessary and that this would require removing drywall to look for water infusion.

The tenant also pointed out that there was an incident during her tenancy involving a leak in the plumbing serving the dishwasher. The tenant stated that this had finally been repaired after 5 months, but there was no way for her to tell whether or not the leak created mould growth inside the walls.

The tenant testified that, although she had reported the mould problem and the report results to the landlord on March 7, 2011, she was disappointed with the landlord's failure to respond. The tenant testified that she did not receive a response until approximately one month later when the landlord offered to send in a handy man to clean vents, drains and windows. In evidence were numerous emails from the tenant to the landlord about her concerns with respect to inaction.

The tenant hired a second mould specialist in an attempt to find out what must be done to locate the source of the mould spores and submitted this report to the landlord as well. The tenant stated that, despite verifying the presence of unhealthy mould, through two specialized companies, the landlord did not act appropriately to protect her by taking immediate steps to ensure that her rental unit was safe.

The tenant testified that, by the end of April 2011, the deterioration of her health had escalated to the point where she felt that the environment was unsafe to live in and she spent some periods of time living temporarily with friends, before she finally felt it necessary on May 12, 2011 to vacate the unit that had been her home since 2003. The tenant testified that this decision was a difficult one but she believed that her medical condition was being caused and worsened by a contaminated environment.

The tenant stated that, in addition her health concerns , she had incurred significant costs and supplied a detailed list of expenditures that totaled $45,750.00 in costs and losses as a result of the unresolved mould problems. The items included health expenses, loss of employment, cleaning and detoxifying costs, new furniture, off-site accommodation and moving expenses. The tenant stated that she has limited her claim to the $25,000.00 maximum permitted under the Residential Tenancy Act

The landlord disputed the tenant's testimony and argued that they did not ignore her concerns. The landlord pointed out that, during the period in question, they were reviewing her report with an expert and they were in serious discussion about this matter with the strata corporation and condominium management.

Copies of correspondence between the landlord and others were in evidence. One communication from the property manager/realty company, dated May 19, 2011, observed that that there appeared to be a problem with mould around the window area and outside wall.

The landlord pointed out that they did not have the authority to penetrate walls of the condominium complex and they required the approval and participation of the strata management before they could examine the infrastructure for mould. However, before they could implement a more thorough investigation and obtain the approval of the Strata Council, the tenant had already vacated.

The landlord acknowledged that the tenant's environmental specialist had raised numerous concerns. However, after the landlord consulted with a person with a background in toxicology, who reviewed the report, he felt that the results of the tenant's air-borne spores analysis did not raise any significant alarm with respect to the health and hygiene of the unit, despite the limited presence of some dangerous strains of fungi spores.

The landlord submitted into evidence, a copy of the tenant's environmental contractor's report featuring notations and comments apparently from the landlord's expert, that were hand-written in the margins of the original report document.

The landlord stated that the tenant's report showed that, in fact, some of the various fungi strains had lower spore counts inside the unit as compared to the external environment. The landlord pointed out that even those hazardous strains that indicated higher spore counts than the external air, were not elevated to the point where they would likely cause a health risk for most. The landlord pointed out that the real problem is the fact that this tenant has a particular sensitivity to mould.

Moreover, the landlord testified that they later investigated the alleged mould problem and did not find any water infusion in the walls of the unit. The landlord submitted an undated, unsigned copy of a memo from the realty/property management company reporting that there was no evidence found of any water infusion within the exterior wall near the window. Photos were submitted showing the area with the drywall and trim removed. The property manager who wrote the memo speculated that the tenant may have caused the moisture and the mould by watering plants in the proximity.

The property manager also stated that, after the tenant moved out, the unit was vacant for 8 months and subsequent occupants have never reported any mould.

Analysis

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, and
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 landlord's obligation under the Act, I find that section 32 of the Act states that, 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.

I find that, to meet this obligation, the landlord would be expected to respond promptly to a report of a potential health problem, such as mould, without undue delay and keep the tenant apprised of any progress or plans.

While I find that the presence of mould does not necessarily constitute a violation of section 32 of the Act, by the landlord, the question to be considered is whether or not the landlord's response to the mould complaint and subsequent intervention, if any, was sufficient to comply with their obligation under section 32 of the Act.

In this instance, the tenant may have appeared overly anxious or impatient to the landlord. However, given that she genuinely believed her health was in serious jeopardy by living in this environment and the fact that she had medical and environmental data to support this conclusion, I find that the tenant was justified in trying to insist on immediate and decisive intervention of some kind by the landlord.

I do accept the landlord's testimony that the landlord was likely contemplating the matter as soon as the complaint was received, as confirmed by the copies of communications in evidence. I accept the landlord's testimony that they did not have the authority to proceed with an investigation of the internal surfaces of the exterior wall or around the window, because of the strata bylaws.

That being said, I find that, under the Act a tenant still has a right to expect safe, hygienic accommodation that does not pose a health risk and has a right to expect a timely response from the landlord to any allegations that the unit has been compromised by toxins.

At the very least, I find that the landlord should have immediately initiated a professional investigation of the matter sufficient to allow the landlord to provide reassurance to the tenant, who was anxious because she had good reason to suspect that remaining in the suite was not healthy.

With respect to the landlord's testimony that they disagreed that the tenant's environmental report had indicated a significant health risk, I find that, the landlord did apparently seek feedback from an expert in the field of toxicology. The landlord testified that the notes written on the report, by their toxicologist, helped to interpret the data contained in the report. The landlord pointed out that, based on these notes, he concluded that there was minimal environmental hazard associated with the high number of certain mould spore strains found in the air.

However, I do not find the handwritten comments from this third party, which are undated and unsigned, to be sufficient evidentiary support for the landlord's conclusion that the mould spore count from the air sample readings would not significantly impact the occupant's health. I note that the individual who provided the written comments was

not present as a witness during the hearing and therefore could not give affirmed testimony, nor was she available to be cross examined on the notations.

I find that, once the question of air quality was initially raised by the tenant, through a scientific report from qualified experts, the landlord had two choices. The landlord could either have chosen to accept and act upon the data provided by the tenant, without undue delay, or the landlord could have immediately employed their own environmental contractors to assess the spore counts and seek out possible sources of the contamination.

I find that, when it comes to allegations of potential danger to the health of an occupant, prompt intervention is a basic expectation, primarily to confirm that the rental unit is safe for habitation. Failing this, I find it likely that a tenant would not be assured that that her personal health and safety were not being placed at risk. This is especially relevant because this particular tenant was genuinely suffering from escalating medical problems which her physician had cautioned were known to be associated with mould exposure.

I acknowledge that, after several months of investigation later conducted by the landlord, once the tenant vacated, the physical examination of the rental unit confirmed that no source of mould or water infusion was present. However, I find that the landlord's observation that the visible mould around the window was most likely caused by the tenant herself, was not supported by any evidentiary proof.

I find it is not clear whether or not another test measuring the unit for air-borne fungal strains was ever subsequently conducted by the landlord in order to refute the tenant's data or to ensure that the contaminants shown on the tenant's report had not increased.

In any case, I find that the landlord's final conclusion that there was no sign of mould growth nor water infusion, is not a relevant factor with respect to the issue under dispute. This issue before me relates solely to the tenant's claim that she was forced to relocate in May 2011 because of an unresolved concern about mould contamination in the suite that was not adequately addressed by the landlord in a timely, effective, manner under the Act.

Given the evidence presented at this hearing, I find that the landlord did not fully meet their responsibilities under section 32 of the Act, to respond proeprly, and without undue delay, to the tenant's concerns about mould contamination

Having found that the landlord did not fully comply with their obligations under the Act, I find that the tenant may be entitled to compensation for proven expenditures that directly resulted from this.
In this regard, I find that the tenancy was severely devalued for the final two months due to the tenant's anxiety about the presence of possible toxic mould and the landlord's apparent failure to act in a decisive way to find out if any genuine health risks

existed and then proceeding to deal with the matter by engaging specialists in mould remediation, or at least by keeping the tenant informed about what measures were being planned to address her serious concerns.

Therefore, I find that the tenant is entitled to a rent abatement of $820.00 for the month of March 2011, $820.00 for April 2011.

I also find that the tenant is entitled to be reimbursed for $420.00 for the cost of the environmental test and $504.00 to pay for the Mould Experts test, which would normally be an expense bourn by the landlord, under the Act. I also find that the tenant is entitled to compensation for the $418.88 cost of the hepa vacuum rental.

I find that the remainder of the tenant's monetary claims were not sufficiently supported by evidence, such as receipts and the tenant's claims for loss of earnings and health costs were not sufficiently proven to be directly caused by the landlord's failure to comply with section 32 of the Act, nor related to the condition of the rental unit.

Based on the testimony and evidence I find that the tenant is entitled to compensation of $3,082.88 in damages comprised of $1,640.00 rent abatement for March and April 2011, $924.00 for the costs incurred by the tenant for the two reports, $418.88 for the cost of renting a heap vacuum and the $100.00 cost of the application.

I hereby grant the tenant a monetary order under section 67 for $3,082.88. This order must be served on the Respondent and is final and binding. If necessary it may be filed in the Provincial Court (Small Claims) and enforced as an order of that 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 monetary compensation.

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: June 10, 2013

Residential Tenancy Branch