



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes: MNDC, MNSD, FF

Introduction

This hearing dealt with an Application by the tenant seeking monetary compensation for loss of value of the tenancy, due to various issues that arose and moving 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.

Preliminary Issues

Landlord's Claim

At the outset of the hearing, the landlord stated that they had made a cross application seeking their own damages against the tenant. After reviewing the evidence submitted by the landlord, I found that the landlord had never filed their own application for a dispute resolution hearing claiming damages against the tenant. The landlord had merely submitted details of monetary losses into evidence, for this hearing on the tenant's application which they wrongly believed would be considered as a counter claim

Accordingly the hearing before me today will only pertain to the tenant's application and the tenant's claim for monetary compensation.

The landlord is at liberty under the Act to file their own claim for dispute resolution through the Residential Tenancy Branch.

Amended Application

The tenant had initially applied on November 26, 2013 for compensation in the form of a retro-active rent abatement for losses during the tenancy and moving

costs. However the tenant then vacated the rental unit on November 30, 2013 and is now seeking the return of double their \$850.00 security deposit, which has not been refunded. The tenant also seeks an additional amount of \$850.00 representing double the \$850.00 pet damage deposit which was refunded to the tenants on December 15, 2013.

Issue(s) to be Decided

Is the tenant is entitled to monetary compensation for loss of value to the tenancy in the form of a retro-active rent abatement?

Is the tenant is entitled to monetary compensation for moving costs?

Is the tenant entitled to a refund of double the security deposit and pet damage deposit.

Background and Evidence

Background

The tenancy began on June 10, 2013 as a fixed term tenancy and the rent was \$1,700.00. Near the end of October, 2013, the tenant gave the landlord Notice of their intent to move effective November 30, 2013.

The tenant testified that the landlord failed to adequately address numerous condition issues that were present when they first moved in which were reported to the landlord verbally and in writing after they took occupancy and this is the basis for their monetary claims.

Rental Rate

The tenant testified that, although they agreed to rent the home for \$1,700.00 per month and signed the tenancy agreement, the rental rate being charged by the landlord was exorbitant, particularly as the house was marketed as a 5-bedroom home, but only had 4 bedrooms. The tenant is claiming an abatement of \$300.00 per month to reflect the average charge for a 4-bedroom home in the area.

Rent Abatement for Repairs

1. Refrigerator

The tenant testified that the refrigerator was leaking from the start of their tenancy leaving water on the floor and the landlord was aware of this fact. The tenant testified that, after complaining and finally submitting a written request on August 29, 2013, the landlord's handyman then made several unsuccessful haphazard attempts to stop the water leakage starting on October 1, 2013.

The tenant testified that they became more and more frustrated because they had to continually try to keep the flooring dry for their young children and pets and mould was starting to appear.

The tenant testified that after the landlord's handyman's failed attempts to stop the leaks, the landlord rejected their suggestion that a professional appliance specialist should be hired to complete the job properly.

The parties testified that the refrigerator was finally fixed by a qualified tradesperson on November 19, 2013. The tenant pointed out that the repairs occurred only after they had already given their Notice to vacate.

The tenant's position is that the landlord was in violation of the Act by not taking care of this problem earlier. The tenant testified that they found out from the previous tenant that the refrigerator was leaking during that tenancy as well and the landlord was well aware of the situation.

The landlord pointed out that the leak was a minor issue and it is their normal practice to first try the most economical solution using a handyman, after which the landlord was willing to engage an appliance repair person if necessary. In regard to the length of time it took the landlord to initiate the refrigerator repairs, the landlord stated that the tenants neglected to put their complaints in writing until August 29, 2013, two months into the tenancy. The landlord pointed out that the refrigerator worked fine for keeping the food chilled and that the water could be temporarily dealt with by placing a dishtowel on the floor near the leak.

2. Ducts

The tenant testified that on August 29, 2013 they told the landlord in writing, that hair and debris were visible in the furnace vents and dust was being blown into the suite by the furnace fans. The tenant requested that the ducts be cleaned out. The tenant testified that, instead of hiring a duct-cleaning contractor, the landlord sent the handyman over on October 1, 2013, and his shop vac only cleaned a few feet of the ductwork and failed to remove all of the contaminants.

The landlord testified that they used a 12-foot attachment and the filter was cleaned as well. The landlord pointed out that when the new renters took occupancy in March 2014, the furnace filter was found to be clean. The landlord feels that the cleaning was sufficient.

3. Malfunctioning Deadbolt

The tenant testified that they were plagued by a malfunctioning deadbolt for the entire duration of their tenancy that made locking the door more and more

difficult. According to the tenant, the striker was out of alignment with the latch which made it difficult for adults and impossible for children to operate..

The tenant testified that, after this problem was reported to the landlord, the landlord's handyman spent a lot of time removing door hardware from the entry doors and re-installing the doorknobs and locks. However, the sticking deadbolt issue was never resolved and the tenant stated that, even during the move-out condition inspection, the door in question could not be locked.

The landlord testified that only one of the three entry doors was affected, and the other two were fully functional. The landlord stated that the problem with the third door only related to the deadbolt, not the door latch itself. The landlord testified that they took all of the door knobs and locks to a qualified locksmith and everything was repaired.

4. Abatement Claim Amount

The tenant testified that, they feel their tenancy was devalued by the above issues and their family was also deprived of their right to quiet enjoyment . The tenant pointed out that they spent a lot of time and effort trying to get the landlord to do the repairs properly and working around all of the unresolved problems. The tenants are requesting a rent abatement of \$10.00 per day for the 6 months they spent in the tenancy. The tenancy was in effect for 174 days and the amount of abatement being requested for the above issues totals \$1,740.00.

The landlord's position is that they addressed the above repairs in good faith and in a timely manner. The landlord feels that a rent abatement for the above deficiencies is not warranted in any amount.

Claim for Reduced Facilities

The tenant testified that, although the contract was to include two complete bathrooms, the bathtub in the master suite never drained properly and the tub was therefore unusable. The tenant pointed out that the tub took over 24 hours to empty out the water. The tenant testified that this dire situation was reported to the landlord, who again sent in a handyman to try and clear the household drains, all of which were draining slowly.

The tenant testified that the handyman succeeded in improving drainage for the other slow drains, but was not successful in unclogging the tenant's bathtub. The tenant pointed out that the landlord finally engaged a qualified plumber, but this did not occur until November 20, 2013. The tenant testified that the bathtub drain was only fixed a few days before they were scheduled to vacate the unit.

The tenant stated that with four children the second bathtub was a material consideration in their decision to sign this tenancy agreement from the start and pay the rent of \$1,700.00. The tenant feels that the loss of the use of a bathtub in the second bathroom, reduced the value of the rental unit by \$100.00 to \$200.00 per month. The tenant stated that the loss of a second bathtub meant that the home only featured 1.5 bathrooms, while they paid full rent for a rental unit with 2 complete bathrooms and they deserve to be compensated for the loss.

The landlord does not agree with the tenant's claim for a loss. The landlord testified that the tub could still be used, despite the problem with the drain. The landlord pointed out that it is the landlord's prerogative to try to have the drains cleared in the most economical way first before calling in a plumber. The landlord testified that the tub was completely fixed and was draining well in November 2013.

Claim for Moving Costs

The tenant testified that, by the end of October 2013, they finally realized that the landlord had no interest in complying with the landlord's responsibilities under the Act. The tenant stated that they had the health and safety interests of their 4 children, including an infant, to consider. The tenant testified that when it became evident that the landlord was hesitant to bring the home up to the expected standards the tenants resigned themselves to the prospect of relocating, despite the chaos and inconvenience of finding another suitable place, having to pack and move again.

The tenant testified that, over the 6 months of their tenancy, the landlord clearly established that, in this tenancy relationship, their family would be subjected to inordinate delays and ineffectual repair attempts regarding any major or minor repair issue that was likely to arise. The tenant pointed out that they did not feel it was fair to have to seek arbitration or threaten to terminate their tenancy prior to the fixed term, to convince the landlord to fulfill a landlord's basic obligations under the Act. The tenant's position is that the landlord breached a material term of the tenancy and for this reason, the tenants were entitled to terminate their tenancy and move prior to the expiry date of the fixed term.

Because of the landlord's alleged failure to fulfill the material terms of the contract, forcing the end of the tenancy, the tenant claims \$500.00 moving costs.

In regard to mitigating the potential losses, the tenant testified that, after they let the landlord know that they were going to move effective November 30, 2013, they fully cooperated in assisting the landlord to find a replacement renter to

sublet the rental unit. However, according to the tenant, prospective renters that they showed through the unit reported back that the landlord demanded personal and confidential information that violated their privacy. The tenant testified that, for this reason, at least one interested family declined to pursue the rental. The tenant included copies of communications from the prospective renters about the landlord's requirements. The tenant stated they suspect the home could have been re-rented if the landlord had not improperly screened the potential renters.

The landlord disputed the tenant's claim that they were forced to terminate their tenancy. The landlord pointed out that the repair issues under dispute were in the process of being resolved when the tenant suddenly gave Notice to vacate. The landlord feels that the tenants were obligated by the contract to complete their 2-year fixed-term tenancy and therefore are not entitled to claim compensation from the landlord for moving costs, because it was the tenants who decided to move in violation of the contract.

With respect to finding another renter, the landlord testified that they gave their best efforts to re-renting the unit but did not succeed. The landlord pointed out that the tenant is liable to compensate the landlord for loss of rent based on the fixed term of the tenancy agreement they signed.

Analysis – Monetary Compensation

Security Deposit

Section 38 of the Act deals with the rights and obligations of landlords and tenants in regard to the return of the security and pet damage deposits. Section 38(1) states that, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address the landlord must either repay the deposits, as provided under subsection 8, or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord was in possession of the tenant's security deposit and pet damage deposit held in trust on behalf of the tenant at the time that the tenancy ended. I find that because the tenancy was ended and the forwarding address was given to the landlord shortly thereafter, under the Act the landlord should either have returned the deposit or made an application for dispute resolution within the following 15 days.

I accept that the landlord returned the tenant's pet damage deposit of \$850.00 within 15 days of receiving the tenant's forwarding address.

However, the landlord failed to return the tenant's security deposit of \$850.00 and withheld this amount for damages. The landlord did not make an application seeking an order to retain the deposit for damages or money owed.

Section 38(6) states: If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security or pet damage deposit, and

(b) must pay the tenant double the amount of the deposits

I find that the amount of the deposit now being held by the landlord beyond the 15-day deadline is \$850.00 and the fifteen days expired without the landlord complying with section 38(1), the tenant is therefore entitled to \$1,700.00.

Rental Rate

In regard to the tenant's claim for an abatement of \$300.00 per month to reflect the average charge for a 4-bedroom home in the area, I find that section 62 (1) of the Act grants a Dispute Resolution Officer the authority to determine any disputes in relation to matters that arise under the Act or under a tenancy agreement.

In this instance, I find that the tenant's claim relates to a term in the tenancy agreement setting the rent at \$1,700.00 per month. I find that the tenant is requesting that the term setting the rental rate, that was agreed-upon by both parties in the tenancy agreement be altered.

I find that section 14(1) of the Act states that a tenancy agreement may not be amended to change or remove a standard term at all. However, a tenancy agreement can be amended to add, remove or change a term other than a standard term but only if both parties agree. (my emphasis)

Accordingly, I dismiss the claim for compensation for overcharged rent.

Rent Abatement for Repairs

An Applicant's right to claim damages from another party is dealt with under section 7 of the Act which states that if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Section 67 of the Act grants an Arbitrator the authority to determine the amount and to order payment under these circumstances.

In a claim for damage or loss under the Act, the party making the claim 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, I find that the tenant bears the burden to prove the existence and value of the damage or loss stemming directly from a violation of the agreement or a contravention of the Act by the landlord.

I find that section 32 of the Act imposes responsibilities on the landlord to 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.

Section 28 of the Act also protects a tenant's right to quiet enjoyment and states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following: (a) reasonable privacy; (b) freedom from unreasonable disturbance; (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.

In the case before me, the tenant is claiming that, because:

- the refrigerator was leaking from the start of their tenancy leaving water on the floor,
- the ducts were left in a state that allowed dust and debris to be blown into the unit, and
- the deadbolt of one door was not fully functional restricting use,

the tenant should be compensated for the loss of value to the tenancy.

I find that the landlord did comply with the Act by completing most of the repairs, but I also find that this response was inordinately delayed by the landlord's failure to respond promptly and the landlord's use of workers who may not have been fully qualified for some of the repair work. I find that the tenant was forced to endure some inconvenience as a result and I accept that their tenancy was reduced in value by \$5.00 per day because of the issues..

Accordingly, I find that the tenant is entitled to compensation of \$870.00 for the 174 days during which the tenant was affected by the problems.

Rent Abatement for Loss of Use of Bathtub

I accept the tenant's testimony that they were restricted from full use of the bathtub or shower in one of the two bathrooms for almost the entire duration of their tenancy. In regard to restricting or reducing services and facilities, I find that section 27 of the Act states that a landlord may terminate or restrict a service or facility, other than an essential or material one, provided that landlord(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and (b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

In this instance, the landlord did not restrict or reduce the facility. However, I find that the effect of the landlord failing to address the repairs in a timely manner was that the tenant was deprived of the use of this facility. I do not accept the landlord's testimony that the bathtub could still be used despite the problem with the drainage.

I find that under the contract they signed, the tenant agreed to rent and pay for a home featuring 2 full bathrooms, and the tenant had a right to expect that this would be the case find that the tenant essentially only received 1.5 bathrooms without a corresponding reduction in the rent.

I also accept the tenant's position that, with six people, including four children, one of whom is an infant, the provision of a second functional bathtub was considered to be a material term of the tenancy agreement at the time it was signed

Therefore, I find that the tenant's claim meets all elements of the test for damages and find that the tenant is entitled to a rent abatement of \$100.00 per month in recognition of the reduced value of the tenancy due to the loss of use of

the tub and I grant the tenant compensation for 5 months from mid June to mid November 2013 totaling \$500.00.

Claim for Moving Costs

In regard to the tenant's position that they ended the tenancy due to a breach of a material term and therefore deserve to be reimbursed moving costs, I find that to establish that a breach of a material term in the tenancy has occurred, the claimant must satisfy the arbitrator that the following three components exist:

There must be a clear term contained in the tenancy agreement

This term must fit the definition of being "*material*"

There must be a genuine breach of the material term.

I find that that there was a clear term in the tenancy agreement for two bathrooms. However the landlord's and the tenant's positions differ as to whether this was a material term and whether or not it there was an actual violation of the term, being that the landlord did address the issue.

Determining the materiality of a term, requires a focus upon the importance of the term in the overall scheme of the tenancy agreement and it falls to the person relying on the term to present evidence and arguments supporting the proposition that the term was considered to be a material term upon which the continuation of the tenancy relies.

A material term is a term that the parties had both agreed was so important that the most trivial breach of that term would give the other party the right to end the agreement.

The question of whether or not a term is material goes to the root of the contract must be determined in every case in reference to the particular the facts and circumstances surrounding the creation of the tenancy agreement in question.

I accept the tenant's evidence that they would not have agreed to rent the unit if they were aware that it only featured one working bathtub. I find that the landlord's testimony that they were only made aware of the deficiency two months into the tenancy contradicts the tenant's evidence, including the statement from the previous tenants. I find it likely on a balance of probabilities that that the landlord was aware of a drainage problem with the bathtub at the start of this tenancy in June 2013 and I

find that this matter was only resolved by the landlord in November 2013, after the tenant had already given their Notice to move.

Given that the landlord breached a material term of this tenancy, I find that the tenant was forced to end the tenancy and is entitled to a portion of their moving costs and I set this amount at \$200.00.

Based on the testimony and evidence discussed above, I hereby order that the tenant is entitled to total compensation of \$3,370.00, comprised of \$1,700.00 representing double the tenant's security deposit, \$870.00 representing \$5.00 per day for delays in repairing the unit, \$500.00 for 5 months loss of value for the unusable bathtub, \$200.00 towards moving costs and the \$100.00 paid for the hearing..

I hereby grant the tenant a monetary order in the amount of \$3,370.00. This order must be served on the landlord and may be enforced in BC Small Claims Court if unpaid.

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

Conclusion

The tenant is partly successful in the application and is granted a rent abatement for deficiencies of the rental premises that devalued the tenancy and partial moving costs.

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: March 19, 2014

Residential Tenancy Branch

