



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Amber Properties
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC; OLC; RR; ERP; PSF; FF

Introduction

This Hearing was convened in response to the Tenants' Application for a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; for an Order the Landlord to comply with the Act, regulation, or tenancy agreement; for an Order that the Landlord provide regular and emergency repairs; for an Order that the Landlord provide services and facilities required by law; for a reduction in rent; and to recover the filing fees associated with this application from the Landlord.

Both parties signed into the Hearing and provided affirmed testimony. They were given a full opportunity to be heard, to present evidence and to make submissions.

It was determined that the Tenants served the Landlord with their Application for Dispute Resolution, as amended, and the Notice of Hearing package by registered mail.

It was also determined that the parties exchanged copies of their documentary evidence.

Preliminary Matter

It is important to note that the Tenants provided additional documentary evidence after the Hearing which was not considered. Evidence must be provided to the Residential Tenancy Branch and served upon the Respondent as soon as possible, but in any event at least five clear days before the date of the Hearing.

Issue(s) to be Decided

- Are the Tenants entitled to monetary compensation and a reduction in rent?
- Are the Tenants entitled to the Orders sought?
- Are the Tenants entitled to recover the filing fee from the Landlord?

Background and Evidence

Pursuant to a written agreement, the tenancy started on June 1, 2013. Monthly rent is \$920.00, due on the last day of each month. The Tenants paid a security deposit in the amount of \$460.00 at the beginning of the tenancy.

The female Tenant HH provided the following testimony:

HH stated that the Tenants were living in unhealthy conditions and that the Landlord denies that such conditions exist. She submitted that the Landlords are in breach of several provincial statutes, including: *Residential Tenancy Act*, *Environmental Management Act*, *Business Practices and Consumer Protection Act*, and a federal statute: *Canadian Human Rights Act*.

She testified that the Tenants viewed the rental unit on April 4, 2013. They noticed that it was uncomfortably warm in the rental unit and asked if the thermostat worked. The Landlord's agent advised them that the wall mounted thermostat did not work and showed them where the working thermostat was located. The Tenants moved into the rental unit on May 11, 2013.

HH stated that on September 5, 2013, the male Tenant discovered silver droplets on the carpet near the wall. On closer inspection, the Tenants discovered that the glass vial under cover of the wall mounted thermostat was broken and that the silver droplets were mercury. HH submitted that the thermostat was disconnected years ago, but not removed. She stated that the Landlord did not properly maintain the equipment in the rental unit. HH submitted that no one knows for how long the rental unit has been subjected to the mercury spill.

HH submitted that the mercury spill should be treated the same way as any spill that impacts a large area. She stated that from May 11, 2013, until September 5, 2013, it was possible that the mercury was spread by routine vacuuming to both bedrooms, the living room and hallway which was an area of more than 600 square feet. HH stated that the fire department and the restoration company both agreed that the spill was dangerous and required specialized remediation. HH stated that the Tenants' vacuum cleaner was considered contaminated by the fire department. She stated that the fire department ordered that the carpet be replaced and all appliances and furniture be thoroughly cleaned.

HH stated that the Landlord did not follow the required procedure and accused the Tenants of exaggeration when they requested that the procedures be followed. HH stated that the Landlord performed a screen test to check for mercury vapour in the

rental unit, but did not perform the required quantitative sampling. She stated that the temperature of the rental unit was not warm enough when the Landlord's screening test was done and that not enough samples were taken. Therefore, the Tenants hired an expert in November, 2013, to perform the test properly. The Tenants provided a copy of the expert's report and the analysis in evidence. HH testified that Tenant's expert reported much higher than safe levels of mercury in the rental unit.

HH stated that the Tenants are "still where we were on September 18th": the floors are still contaminated; furniture is still piled up; the Tenants cleaned the rental unit themselves to the best of their ability; the Landlord does not communicate with them; and the Tenants have the windows open 24/7 in an attempt to minimize the harmful effects of mercury vapour. HH testified that deep cleaning and retesting for mercury levels should be done before new floors are installed.

HH testified that children are more susceptible to the affects of mercury poisoning and that they are unable to care for their granddaughter while the rental unit is still contaminated.

HH testified that the Tenants do not want to move out of the rental unit because it took them a long time to find a home in the location of the rental unit, and its closeness to amenities.

The Tenants seek compensation, as follows:

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|---|-------------------|
| Full rent abatement for nine months (plus additional abatement until remediation is completed) | \$7,983.00 |
| Cost of materials to protect furniture | \$30.15 |
| Cost of Tenant's independent inspection | \$577.50 |
| Extra day care costs (plus additional costs until remediation is completed) | \$1,750.00 |
| Cost of replacing vacuum | \$85.72 |
| Cost of Tenant's mercury analysis | \$312.90 |
| Tenant's labour (cleaning) | \$492.00 |
| Cost of cleaning materials | \$59.91 |
| Lawyer's fees | \$28.00 |
| Loss of income | \$600.00 |
| Personal Injury and aggravated damages | <u>\$1,500.00</u> |
| TOTAL claim (plus additional rent abatement and day care costs until remediation is complete) | \$13,419.18 |

The Tenants provided more than 70 pages of documentary evidence and 60 photographs in support of their application.

The Landlords gave the following testimony:

The Landlords testified that they reported the mercury spill to their insurance company in an expeditious manner. The Landlords stated that the Tenants did not carry tenants' insurance, in breach of a clause in the tenancy agreement.

The Landlords and their insurer relied on the report of a representative from an environmental consulting company, who performed testing which indicated: "All sample results recorded with the instrument were below the (ATSDR) action level (requirement for further remediation)". Therefore, the Landlords submit that the carpet needs to be replaced, but no further remediation is required.

The Landlords submitted that the Tenants' own evidence indicates that "the health authorities were unanimous in their opinion that after carpet removal the real danger has been removed and denied the inspection re-addressing [the Applicants] to the building management".

The Landlords submit that they have complied with Section 32 of the Act and that they have provided the Tenants with a rental unit that complies with the health, safety and housing standards required by law".

The Landlords submit that the broken mercury vial was a latent defect, and would not be normally discovered by routine or reasonable inspection. The Landlords submit that neither the Landlord nor the Tenants discovered the broken vial at the time of the move-in Condition Inspection.

The Landlords stated that the Tenants are exaggerating the scope of the spill. They dispute the Tenants' testimony that the spill must be treated in the same manner as an "industrial spill". The Landlords' position is that the mercury leak was "minor and required disposal of the Tenants' vacuum, removal of existing carpet and replacement of the carpet". The Landlords testified that the Tenants don't want to replace the carpet with new carpet. They stated that the Tenants want laminate flooring installed instead.

The Landlord submitted that the Tenant HH took her own air samples for analysis and therefore the results cannot be relied upon because they were not taken by an expert.

The Landlords' position on the Tenants' claim is as follows:

- Full rent abatement for nine months \$7,983.00. Disputed. The Landlords submit that if a breach of the Act is found, the Tenants should be entitled to limited abatement.
- Cost of materials to protect furniture \$30.15. Agreed.
- Cost of Tenant's independent inspection \$577.50. Agreed. The Landlords dispute the validity of this report; however, they do not dispute this expense because the insurance company did not make its own report available to the Tenants.
- Extra day care costs \$1,750.00. Disputed. The Landlords submit that this cost was not suffered by the Tenants, but by another party (the child's parents).
- Cost of replacing vacuum \$85.72. Disputed. The Landlords submit that this portion of the Tenants' loss would have been covered by tenants' insurance, but the Tenants did not have such insurance.
- Cost of Tenant's mercury analysis \$312.90. Agreed. The Landlords dispute the validity of this report; however, they do not dispute this expense because the insurance company did not make its own report available to the Tenants.
- Tenant's labour (cleaning) \$492.00. Disputed. The Landlords submitted that the Tenants undertook to do this voluntarily during a dispute between the parties with respect to the extent of cleaning that was required.
- Cost of cleaning materials \$59.91. Agreed. This is a minimal out-of-pocket expense that is not disputed.
- Lawyer's fees \$28.00. Disputed. The parties should each bear their own costs of legal counsel.
- Loss of income \$600.00. Disputed. The Landlords submit that this portion of the Tenants' loss would have been covered by tenants' insurance, but the Tenants did not have such insurance.
- Personal injury and aggravated damages \$1,500.00. Disputed. The Landlords submit that the Tenants have not proven this portion of their claim.

The representative for the insurance company stated that she has no issue with re-testing the rental unit for mercury contamination. She stated that the Tenants will have to move out of the unit for any deep cleaning and carpet replacement to take place.

The Landlords provided almost 60 pages of documents, including photocopies of 14 photographs, in evidence.

Analysis

The Dispute Resolution process determines disputes between Landlords and Tenants under the *Residential Tenancy Act* and regulation and the *Manufactured Home Park Tenancy Act* and regulation. The director has no jurisdiction to determine disputes

under the *Environmental Management Act*, *Business Practices and Consumer Protection Act*, or *Canadian Human Rights Act*.

Section 67 of the *Residential Tenancy Act* provides that if damage or loss results from a party not complying with the Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Before a Dispute Resolution Officer can make an order under section 67 of the Act, the applicant must first prove the existence of damage or loss; that it stemmed from the other party's violation of the Act, regulation, or tenancy agreement; that the monetary amount of the claim was verified; and that the applicant took steps to mitigate or minimize the loss or damage. The applicant must provide sufficient evidence on the civil standard, the balance of probabilities. When these requirements are not satisfied, and particularly when the parties' testimonies are at odds, in the absence of other substantive independent evidence the burden of proof is not met. In this case, the burden is on the Tenants to prove their claim against the Landlords.

Section 7(2) of the Act states in part that a party who claims for compensation for damage must do whatever is reasonable to minimize the damage or loss. In this case, the Tenants did not have tenant's insurance which would have covered their loss of employment income, the cost of staying in a hotel while the rental unit is remediated, and any loss of possessions as a result of the mercury spill. Therefore, I find that the Tenants did not take reasonable steps to minimize the damage or loss claimed with respect to replacing the vacuum cleaner and lost income.

The Tenants have claimed aggravated damages and personal injury. I find that the Tenants did not provide sufficient evidence that they suffered personal injury as a result of the mercury spill. The letter written by the Tenants' doctor makes no reference to any ill effects that the Tenants suffered as a result of the mercury spill. Residential Tenancy Policy Guideline 16 provides the following with respect to aggravated damages:

[Aggravated damages] are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. (Losses of property, money and services are considered "pecuniary" losses. Intangible losses for physical inconvenience and discomfort, pain and suffering, grief, humiliation, loss of self-confidence, loss of amenities, mental distress, etc. are considered "non-pecuniary" losses.) Aggravated damages are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer's willful or reckless indifferent behaviour. They are measured by the wronged person's suffering.

- *The damage must be caused by the deliberate or negligent act or omission of the wrongdoer.*
- *The damage must also be of the type that the wrongdoer should reasonably have foreseen in tort cases, or in contract cases, that the parties had in contemplation at the time they entered into the contract that the breach complained of would cause the distress claimed.*
- *They must also be sufficiently significant in depth, or duration, or both, 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. Aggravated damages are rarely awarded and must specifically be sought.*

The Tenants were present when the Condition Inspection Report was completed. Neither party noticed at the time of the inspection that the wall thermostat was damaged or that the mercury vial was broken. I find insufficient evidence that damage was caused by the deliberate or negligent act or omission of the Landlord, either before or after the mercury was spilled. I find that the Tenants provided insufficient evidence to support a claim for personal injury or aggravated damages.

I find that the Tenants have submitted insufficient evidence to prove, on a balance of probabilities, that the mercury spill from the thermometer vial was of such significance to require remediation similar to remediation for large spills. I further find that the Tenants did not provide sufficient evidence that the second test for mercury contamination was required, or that the air sampling for that second test was completed correctly. Therefore, I find that the Tenants did not provide sufficient evidence to support their claim for labour costs in cleaning the rental unit. However, during the Hearing, the Landlords and their insurance representative agreed to do an additional clean-up and mercury screening test before new flooring is installed.

With respect to the kind of flooring that is installed, I note that the Landlord has the right to install whatever kind of flooring it desires, as long as it complies with the provisions of Section 32(1) of the Act. During the Hearing, the Landlords' agents stated that they would consult with the Tenants before reaching a decision.

I accept the Landlords' submission that extra daycare costs were suffered by a party other than the Tenants and therefore this portion of their claim is dismissed.

I find the Tenants' claim for total rent abatement to be unrealistic and unreasonable. I find that the Tenants provided insufficient evidence that the value of the tenancy was reduced by 100%. The Tenants have had use of the rental unit, and I find that some, if not most, of any loss of use is a result of their refusal to allow the Landlords to replace the flooring. This portion of their claim is dismissed.

There is no provision in the Act for recovery of legal fees. This portion of the Tenants' application is dismissed.

The Landlords agreed to a portion of the Tenants' claim and therefore, I award the Tenants the following monetary award:

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|---|----------------|
| Cost of materials to protect furniture | \$30.15 |
| Cost of Tenant's independent inspection | \$577.50 |
| Cost of Tenant's mercury analysis | \$312.90 |
| Cost of cleaning materials | <u>\$59.91</u> |
| TOTAL MONETARY AWARD | \$980.46 |

Pursuant to the provisions of Section 72(2)(a) of the Act, I order that the Tenants deduct their monetary award from rent due to the Landlord.

With the consent of the Landlord, I Order that a second screening test be done by a professional inspector and an analysis for mercury contamination be completed by a professional authority. I Order that this test be completed before the new flooring is installed. I further Order that the Landlord provide the Tenants with a copy of the report.

The Tenants have been largely unsuccessful in their application and I find that they are not entitled to recover the cost of the filing fee from the Landlord.

Conclusion

The Tenants may deduct \$980.46 from future rent due to the Landlord.

The Landlord is ordered to ensure that a screening test is done by a professional inspector and an analysis for mercury contamination be completed by a professional authority. I Order that this test be completed before the new flooring is installed. I further Order that the Landlord provide the Tenants with a copy of the report.

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 07, 2014

Residential Tenancy Branch

