Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, MND, MNDC, FF, CNC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession for cause pursuant to section 55;
- a monetary order for damage to the rental unit, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover her filing fee for this application from the tenant pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to the Act for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant was assisted by his agent from a community outreach group (the agent). The tenant and his agent elected to call two witnesses. Witness A is a former resident of the building. Witness B is a current resident of the building.

The tenant testified that he personally served the landlord with the dispute resolution package on 6 November 2014. The landlord confirmed that she received the tenant's dispute resolution package. On the basis of this evidence, I am satisfied that the landlord was served with the dispute resolution package pursuant to section 89 of the Act.

The landlord testified that she personally served the tenant with the dispute resolution package on 20 November 2014. The tenant confirmed that he received the landlord's dispute resolution package and evidence. On the basis of this evidence, I am satisfied

that the tenant was served with dispute resolution package and evidence pursuant to sections 88 and 89 of the Act.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for cause? Is the landlord entitled to a monetary award for damage or loss arising out of this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenant?

Should the landlord's 1 Month Notice be cancelled? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

The tenancy began 1 March 2014. Monthly rent of $1,000.00 is due before the first. The landlord collected a $500.00 security deposit on 5 March 2014 that she testified she continues to hold.

On 13 September 2014, the tenant had visitors to the rental unit. One of the visitors was a thirteen year old boy and the son of one of the guests (the child). The child weighs approximately ninety pounds. On 13 September 2014, the child became stuck in the elevator. The child was stuck in the elevator for approximately thirty minutes. The landlord testified that the child told the landlord that he had been jumping in the elevator.

The landlord testified that when the elevator maintenance company attended at the building, they found that the elevator had been put onto its safeties. The landlord testified that jumping was the only reason that could cause an elevator to be put onto its safeties. The tenant's agent disagreed with this conclusion. The landlord testified that the child's extraction from the elevator and elevator repairs cost $485.10. The landlord seeks to recover this cost from the tenant.

I was provided with an invoice from the elevator maintenance company dated 17 September 2014. The invoice sets out the following details:

Reported Problem: Passenger Entrapment
Found 13 Year Old Boy Jumping in Elevator – Elevator on Safeties

The landlord provided this invoice to the tenant and asked that he reimburse the landlord for the expense. The tenant testified that he did not believe that the child had caused damage to the elevator. The tenant testified that he asked the child if he had been jumping in the elevator and the child told him that he had not been jumping in the

elevator. The tenant's agent testified that she had also spoken with the child and he told the agent that he had not been jumping in the elevator. The agent testified that the child told her that he panicked in the elevator because he felt like he was suffocating and that the child sat down on the floor and stood up a couple of times. The agent submitted that the notes on the invoice were done on the basis of information relayed to the elevator maintenance company by the landlord.

On 22 September 2014, the landlord testified that she saw the same child that had been stuck in the elevator running through the halls of the building with two other teenagers. The landlord told the children that they were not welcome in the building. The landlord testified that she received two complaints from other residents of the building who complained about the children's behaviour. I was provided with letters from these residents. The residents complain that the children were running up and down the hallways banging on doors of the various units. The tenant testified that on this date, the children were not visitors of his unit, but had arrived at the building to visit another family on the same floor.

Witness A testified that he was a tenant of the landlord's building from April 2011 to August 2013. Witness A provided sworn testimony that he became stuck in the elevator in July or August of this year when he came to the building to visit a family who live on the second floor. Witness A remained trapped in the elevator for approximately 45 minutes to 1 hour. The landlord confirmed that Witness A became trapped in the elevator in July or August. Witness A testified that it is common knowledge that the elevator in the building would become stuck and that it has happened many times this year. Witness A testified that another resident (the daughter of Witness B) said that she would only use the stairs because she was scared to use the elevator.

Witness B is another tenant of the landlord's. Witness B has lived in the building for 42 months. Witness B testified that there is a problem with the elevator. Witness B testified that her daughter has become stuck in the elevator at least three times. Witness B's daughter told Witness B not to use the elevator and to take the stairs. The landlord testified that she had no knowledge of Witness B's daughter's problems with the elevator. The landlord testified that once one is stuck in the elevator one could not exit the elevator without assistance from outside. Witness B testified that the daughter was able to pull the doors open.

The landlord testified that it was common for the elevator to become stuck, but that the elevator would stop working for other reasons. The landlord provided me with an email from the elevator maintenance company dated 27 November 2014 that stated that:

> *…there was a trouble call out on August 18, 2014 in which the door locks were adjusted for proper operation. There hasn't been any further trouble calls outs since*

The email enclosed the maintenance report for the elevator as at 27 November 2014. This report sets out that on 4 February 2014, another child had put the elevator on its safeties by jumping in it.

On 31 October 2014, the landlord testified that she served the 1 Month Notice to the tenant by delivering it through the mail slot. The tenant confirmed that he received the 1 Month Notice. On the basis of this evidence, I find that the tenant was served with the 1 Month Notice on 3 November 2014 pursuant to sections 88 and 90 of the Act.

The 1 Month Notice was dated 31 October 2014 and had an effective date of 30 November 2014. The 1 Month Notice indicated three reasons for cause:

- The tenant or person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord.
- The tenant has caused extraordinary damage to the unit/site or property/park.
- The tenant has not done required repairs of damage to the unit/site.

The landlord testified that the tenant has December's rent by cheque. The landlord testified that she has not provided a receipt to the tenant.

Analysis

I will deal with the issue of the 1 Month Notice first.

Subparagraph 47(1)(d)(i) of the Act permits a landlord to terminate a tenancy by issuing a 1 Month Notice in cases where a tenant or person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property. Pursuant to paragraph 47(1)(f), a landlord may terminate a tenancy in cases where a tenant or person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property. Paragraph 47(1)(g) of the Act sets out that a landlord may also terminate a tenancy where a tenant does not repair damage to the rental unit or other residential property, as required under section 32, within a reasonable time.

In an application for an order of possession on the basis of a 1 Month Notice, the landlord has the onus of proving on a balance of probabilities that at least one of the reasons set out in the notice is met.

I find that knocking an elevator onto its safeties is not extraordinary damage within the meaning of the Act. While this is "damage", it does not rise to the level of "extraordinary damage". Accordingly, the landlord may not avail herself of paragraph 47(1)(f).

I accept the tenant's evidence that, on 22 September 2014, the children were not guests of the tenant's. I find that the landlord has not proven, on a balance of probabilities that the disturbance caused by the children on 22 September 2014 was caused by persons

permitted on the residential property by the tenant. Accordingly, the landlord may not avail herself of subparagraph 47(1)(d)(i).

Subsection 32(3) of the Act requires a tenant to repair damage to the rental unit or common areas that was **caused** by the actions or neglect of the tenant or a person permitted on the residential property by the tenant. Caused means that the actions of the tenant or his visitor logically led to the damage of which the landlord complains.

I was provided evidence by the tenant, Witness A and Witness B, that there were persistent problems with the elevator in the months prior to the time the child became trapped in the elevator. The landlord testified that this problem was fixed. The landlord and tenant provided conflicting evidence as to whether the child said he was jumping. I was provided testimony by the tenant's agent that the child reported that he stood up and sat down several times in the elevator once it became stuck. I do not put any weight on the notes of the elevator maintenance company in determining causation as it is unclear how this conclusion was reached.

In this case, I find, on a balance of probabilities, that the elevator became stuck as a result of a continuation of the persistent problems the elevator faced around that time and that it became put on its safeties as a result of the child standing and sitting in the stop and stuck elevator. I find that this does not constitute "cause" within the meaning of section 32(3). Accordingly, the landlord may not avail herself of paragraph 47(1)(f).

As I have found that the tenant's guest did not "cause" the damage to the residential property, the tenant is not responsible for the cost of the elevator repair or the child's extraction.

The landlord's application is dismissed without leave to reapply.

As the landlord has failed to substantiate the basis for the 1 Month Notice, the tenant's application is allowed. The 1 Month Notice is cancelled. The tenancy will continue.

As the tenant was successful in this application, I find that the tenant is entitled to recover the $50.00 filing fee paid for this application.

Paragraph 72(2)(a) of the Act sets out:

> If the director orders a party to a dispute resolution proceeding to pay any amount to the other...the amount may be deducted...in the case of payment from a landlord to a tenant, from any rent due to the landlord...

In this case, I order that the tenant is entitled to deduct a total of $50.00 from a future month's rent in order to recover the expense of his filing fee.

Conclusion

The landlord's application is dismissed without leave to reapply.

The 1 Month Notice is cancelled. The tenancy will continue.

The tenant is entitled to deduct a total of $50.00 from one month's future rent.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the *Residential Tenancy Act*.

Dated: December 09, 2014

Residential Tenancy Branch