Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing was convened by way of a telephone conference call in response to an Application for Dispute Resolution (the "Application") made by the Tenant for money owed or compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), regulation or tenancy agreement. The Tenant also applied for the return of her security and pet damage deposits and to recover the filing fee from the Landlord.

The Tenant and an agent for the Landlord (the "Landlord") appeared for the hearing and provided affirmed testimony throughout the hearing. The Landlord called a witness during the hearing who also provided affirmed testimony. The Landlord confirmed that she had received the Tenant's Application by personal service as well as the Tenant's documentary and photographic evidence. The Landlord also confirmed that she had not provided any evidence prior to the hearing.

The hearing process was explained to the parties and they had no questions about the proceedings. Both parties were given a full opportunity to present their evidence, make submissions to me, and cross examine the other party and the witness on the evidence provided. I have considered the evidence provided by the parties in this base but I have only documented the evidence which I relied upon to making findings in this decision.

Preliminary Issues

The Tenant had indicated in the details section of her Application that this file was a cross file for the Landlord's Application which was already heard by a different Arbitrator between the same parties on September 11, 2014 (the file number of which appears on the front page of this decision). During the hearing of September 11, 2014, the previous Arbitrator made a final and legally binding decision that the Landlord was entitled to keep the Tenant's security and pet damage deposits.

Section 77(3) of the Act and the legal doctrine of *Res judicata* prevents a matter from being heard twice after a legal and final decision has already been made on the same matter. Therefore, as the matter relating to the Tenant's deposits has already been dealt with in a previous hearing, I am unable to deal with this matter again. As a result, I dismiss this portion of the Tenant's Application. The hearing continued to determine the Tenant's Application for monetary compensation.

Issues to be Decided

- Has the Tenant disclosed a basis on which she is entitled to monetary compensation under the Act, regulation or tenancy agreement?
- Has the Tenant provided sufficient evidence to show the Landlord breached the Act, regulation or tenancy agreement?

Background and Evidence

The parties agreed that this tenancy started on December 1, 2010 for a fixed term of one year that was scheduled to end on May 31, 2014. Rent under the tenancy agreement was payable by the Tenant in the amount of $830.00 on the first day of each month.

The Tenant testified that on February 9, 2014 she came home to a flood in her bathroom which was emanating from the bath tub. This caused the electricity to short out. The Tenant contacted the Landlord by email the next day at which point the rental suite was attended by a plumber on the same day. The plumber determined that the problem was more serious than a simple leak and would probably require the involvement of a restoration company.

The Tenant testified that the Landlord and an insurance adjuster attended the rental suite on February 12, 2014. On February 13, 2014, the Tenant arrived home to find a lock box on her door which had been put on by the restoration company. The Tenant testified that there was a loud dehumidifier operating in the suite which caused her severe headaches because it was showing that it required servicing. The Tenant testified that there was a hazardous material sign which was posted to the kitchen wall. A photograph of this was provided into written evidence and indicates that no drywall or linoleum is to be removed.

The Tenant testified that on February 14, 2014 she informed the Landlord that the bathtub was still leaking and that no work was being done to stop the leak. The Tenant testified that she did not have access to her shower during this time.

The Tenant testified that a plumber arrived on February 17, 2014 to make the toilet and sink available for use. The Tenant explained that during this work, the plumber pulled away the bath surround which in turn exposed black mold. The Tenant provided a photograph of the black mold which indicates that it existed in the silicon caulking behind the surround of the bath tub.

The Tenant testified that there was also an existing hole in the kitchen floor which had also filled with wet dirt. The Tenant explained that on February 19, 2014 she took a sample of the black mold off the bath tub and some of the dirt in the kitchen hole and sent them to a private company for analysis. The Tenant referred to the report that was provided into written evidence which indicates the presence of large amounts of mold colonies in the sample. The Tenant explained that when she got the results on March 4, 2014 she relayed them to the Landlord by e-mail; however, the Tenant was unable to provide the e-mail evidence relating to this.

The Tenant testified that on February 21, 2014 the restoration company brought two blowers to replace the dehumidifiers into the rental suite. The Tenant explained that one of the blowers was positioned in the bathroom where the mold was and one was positioned in the kitchen towards the hole. The Tenant provided photographic evidence of one blower positioned in the kitchen and one in the bathroom.

The Tenant testified that within hours of her coming home to the rental suite after the blowers had been placed inside the rental suite, she began to experience itchy eyes, sneezing and terrible sinus headaches. The Tenant testified that she called the Landlord to ask about being put up in a hotel but the Landlord refused.

The Tenant testified that she went to a walk in clinic at the end of February 2014. After describing her situation and her symptoms to medical staff, she was immediately scheduled for a chest and sinus x-ray which determined that the Tenant should have a CT scan of her sinuses.

The Tenant testified that on March 5, 2015, the restoration company removed the blowers and hazardous materials sign and cut out large areas of drywall in the kitchen and bathroom. The Tenant submitted that this exposed fibre glass insulation. As a result, the Tenant put up plastic over these arears in an effort to reduce contamination of the air for which she provided photographic evidence for.

The Tenant explained that she could not take any more of the situation and was not willing to live in a rental suite that was not fit for occupancy. The Tenant started to look

for a new place to move to on March 6, 2014. The Tenant testified that at the end of March 2014, she gave written notice to the Landlord to end the tenancy and moved out of the rental suite on April 2, 2015 after vacating and cleaning the rental unit.

When the Tenant was asked about her monetary claim, the Tenant submits that the restoration company exposed her to mold because they used blowers to blow the mold and fibre glass insulation around the rental unit which led to her medical problems. The Tenant referred to a medical examination report produced by her doctor which details a consultation date of February 3, 2015 with the Tenant. The doctor writes the Tenant's complaint as explained to him by the Tenant and then goes on to write:

> *"[The Tenant] has chronic sinusitis that clearly started after the events described above. I feel it is highly likely that the above events were the cause of sinusitis given that she had not prior sinus symptoms".*
>
> [Reproduced as written]

The Tenant explained that her monetary claim comprised of a parking charge for a medical visit and the cost of having the mold sample tested. However, the majority of the Tenant's claim relates to claims for lost wages in the amount excess of $5,000.00. When the Tenant was asked about this, the Tenant explained that the Landlord had made her sick from the mold exposure and that often she could not perform her job as a massage therapist during the time the flooding event occurred up until the time she left the rental suite and thereafter. When the Tenant was asked about these losses, she referred to a typed document which lists the amount of hours she did not work on certain dates and the losses associated with this. The Tenant makes a total claim of $6,897.55 against the Landlord; $1,200.00 of this amount relates to anticipated future loss for surgery that she is scheduled to have for medical issues alleged to be caused by the airborne mold.

The Landlord did not dispute that a flood had occurred in the rental unit, but submitted that she had acted in a diligent and timely fashion in getting a plumber straight away to the Tenant's rental unit and calling a restoration company to remedy the problem when it was determined it was a bigger problem. The Landlord explained that it was the insurance company that assigned the restoration company and not the Landlord. The Landlord submitted that major leaks like the one in the rental suite cannot be fixed overnight and it takes time to investigate the issues and determine a remedy action plan. The Landlord called the manager of the restoration company who had performed the remediation work in the rental unit to provide testimony on this issue.

The witness explained that they have to first determine if the drywall contains asbestos before they can remove it which was the reason for the notice posted on the kitchen wall. The witness testified that they were attempting to dry out the moisture in the walls with the dehumidifiers and the blowers. However, parts of walls that were heavily saturated with water had to be cut out.

The witness was not aware of any mold until he had seen the Tenant's evidence. The witness testified that the mold shown in the Tenant's photographs was a small amount which he estimated to be 4-6 square inches that is commonly found around and behind bath surrounds; however, this did not have the potential to cause serious harm as to his knowledge there was no evidence to suggest it was airborne.

The witness explained that they have set protocols for dealing with toxic black mold and there was certainly no indication that this was required in the rental suite. The witness stated that if his staff had discovered the mold as shown in the Tenant's photographs, they would have removed it straight away.

The witness confirmed that when drywall is removed and left open, it is not harmful and there is no need to put up plastic to cover it as if this was required they would have done it. The witness confirmed that it was unlikely that mold ingrained into silicon caulking wold have been blown around the rental unit. The Tenant cross examined the witness and asked if the blowers were put on fibre glass insulation could this cause them to become airborne. The witness confirmed that this was a possibility.

The Landlord continued her testimony by submitting that the Tenant's examination report of the sample she had taken from the rental suite was not reliable because the Tenant was not qualified to take such a sample. The Landlord further submitted that there was no evidence to suggest how the samples were taken or whether the ones taken from the rental suite were the ones that were examined. In addition, no air samples were taken to verify the Tenant's claim that the mold had been made airborne by the restoration company. The Landlord submitted that if the restoration company had any concern about the existence of mold and that it had been made airborne by them, they would have followed their professional obligation to deal with it under their protocols. The Landlord also casted doubt on the Tenant's medical evidence by submitting that the doctor wrote cautiously in his report that it was highly 'likely' the mold in the rental suite caused the Tenant's medical issues. However, this was not conclusive evidence. The Landlord also submitted that she had done some research on the Tenant's medical condition described in the report and discovered that the main cause of this condition was asthma or genetics.

The Landlord explained that they did not wish ill on the Tenant and did everything they could do to remedy the problem so that the Tenant could continue to live in the rental suite. The Landlord explained that in the previous hearing on September 11, 2014, the Tenant was provided with $1,047.00 in compensation for having to go through the flooding incident.

The Landlord also pointed to the Tenant's claim for lost wages, citing the fact that producing a typed list of dates and times when the Tenant could not work does not verify these losses. The Landlord stated that the Tenant failed to provide evidence that these were times when she was actually scheduled to work and that due to her medical problems she missed out on the amounts claimed.

The Landlord explained that the Tenant had failed to get rental insurance at the start of the tenancy and if she had, she would have been able to go to a hotel. The Landlord explained that she would have been willing to pay the Tenant's deductible on her insurance policy but as the Tenant failed to get rental insurance, the Tenant did not mitigate her loss and the Landlord should not be held responsible for providing her with a hotel. The Landlord concluded that they had done everything reasonable under the Act to deal with the flooding incident.

Analysis

A party making an Application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities which the party making the claim must meet. Awards for compensation are provided in Sections 7 and 67 of the Act. Accordingly, an Applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

If a party is unable to meet any of the requirements of the above test, then the Application must fail. The Tenant alleges and suggests that the restoration company used by the Landlord caused mold and fiber glass particles to be circulated around her rental suite which led to her medical problems. The Tenant now claims from the Landlord the ensuing costs that resulted from the flooding event.

Therefore, I turn my mind to the evidence provided by the parties and make my findings based on the balance of probabilities. Firstly, I find that the only evidence provided by the Tenant of mold existence in the rental suite comes from the Tenant's photographic evidence which indicates a small amount of mold that existed in the caulking behind the bath tub surround. I am not convinced how a small amount of mold contained within some caulking would be the sole and definitive cause of the Tenant's medical complaints which are serious in nature.

Secondly, the Tenant claims that she is having her medical problems because the restoration company blew mold and fiberglass particles into the air. However, I find that the Tenant has not provided sufficient evidence to show that the mold in the bath tub had become airborne and then went on to then cause the Tenant's medical problems.

In analyzing the medical evidence provided by the Tenant, I find that the Tenant alleges that she began experiencing symptoms straight after the restoration company had put in blowers into the rental suite in February **2014**. However, the Tenant did not have a consultation with her doctor until one year later in February **2015**. Furthermore, I find there is no evidence to suggest that the doctor authoring the medical report visited the rental suite at the time the event occurred and then made a conclusive and convincing finding that it was the mold or fiber glass in the rental suite that was the direct and sole cause of the Tenant's medical issues. Therefore, I find that this medical evidence is not reliable and sufficient for me to base my findings on.

In considering the Tenant's claim that the restoration company blew mold around the rental suite, I find the Tenant has not provided sufficient evidence to meet the burden of proof for this allegation. I am not convinced that the Tenant had put the Landlord or the restoration company on notice of her fears that the blowers were causing her medical issues so that they could have investigated and responded to this concern. Notwithstanding the Tenant's evidence that there was indeed the presence of mold found by the bath surround as verified by the expert analysis, I find that this is not sufficient evidence that this mold was made airborne by the restoration company. There was no independent analysis of the air quality taken at the time of the event to prove that that the mold from the bath tub or the fiber glass was present in the air.

I find the witness testimony that the restoration company followed proper procedure in ensuring the flooding event was remedied properly was credible and convincing. This is based on the fact that this company had been assigned by the Landlord's insurance company and was qualified to deal with flooding events. I find it unlikely that the restoration company would have intentionally, inadvertently, or neglectfully engaged in a practice that would have caused a small amount of mold in the bath tub surround to

become airborne. I also accept the witness testimony that the hazardous notice placed on the kitchen wall related to the non-removal of the drywall before it had been cleared for the presence of asbestos, and not because this pointed to the presence of mold in the rental suite.

In examining the parties' evidence to determine if the Landlord had breached the Act, I find that the evidence points to the fact that the Landlord responded appropriately and in a timely fashion to deal with the flooding event in the most reasonable way that she could. The mold indicated in the Tenant's photographs was behind the bathtub surround and this would not have been evident to the Landlord at any time during the tenancy before the flooding event occurred. Furthermore, I find that in relation to the Tenant's complaints about not having access to her bathroom facilities and the inconvenience this flooding event caused her, the Tenant was already provided with monetary relief for this in the previous hearing of September 11, 2014.

I also find that the Tenant has failed to verify the losses claimed for her wages. I find the typed letter by the Tenant listing the massage appointments she missed is not sufficient to show that these appointments existed and were subsequently cancelled due to the Tenant's medical problems.

Based on the foregoing, I find the Tenant has failed to meet the four part test outlined above. I find that the Tenant has provided insufficient evidence to show the Landlord breached the Act and therefore, the Landlord cannot be held liable for the subsequent losses the Tenant claims in her Application.

Conclusion

The Tenant has failed to meet the burden of proof for the test for loss. Therefore, the Tenant's Application is dismissed in its entirety **without** leave to reapply.

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 24, 2015

Residential Tenancy Branch