Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC FF

Preliminary Issues

The Tenants filed their application for dispute resolution on October 9, 2015, seeking monetary compensation of $3,637.00. In the Tenants' November 16, 2015 evidence submission they included a typed monetary claim document indicating they were seeking compensation in the amount of $5,000.00.

Section 59(2) of the Act stipulates that an application for dispute resolution must (a) be in the applicable approved form, (b) include full particulars of the dispute that is to be the subject of the dispute resolution proceedings, and (c) be accompanied by the fee prescribed in the regulations.

The *Residential Tenancy Branch Rules of Procedure # 2.11* provides that the applicant may amend the application without consent if the dispute resolution proceeding has not yet commenced. The applicant **must** submit an amended application to the Residential Tenancy Branch and serve the respondent with copies of the amended application [emphasis added].

In this case the Tenants did not file an amended application and simply listed the additional claim amounts in their evidence. Accordingly, I declined to hear matters which involved amounts not claimed on the original application and those additional amounts were dismissed, without leave to reapply.

Introduction

This hearing convened on December 10, 2015 with Arbitrator A. Holmes to hear matters pertaining to an Application for Dispute Resolution filed by the Tenants on October 9, 2015. Arbitrator Holmes adjourned the hearing to allow for service of evidence and issued an Interim Decision on December 16, 2015.

Arbitrator Holmes heard evidence relating to service of evidence and ordered the Landlord to serve their evidence to the Tenants within 3 days of receipt of the Interim Decision. The Tenants had submitted evidence they had vacated the rental unit on October 18, 2015. As a result Arbitrator Holmes determined the reconvened hearing would be scheduled to hear the Tenants' request for a monetary order for money owed

or compensation for damage or loss under the *Act,* Regulation, or tenancy agreement and to recover the cost of the filling fee.

Section 1 of the Act defines a landlord in relation to a rental unit, to include the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord permits occupation of the rental unit under a tenancy agreement, or exercises powers and performs duties under this Act, the tenancy agreement or a service agreement. The hearing reconvened via teleconference on March 14, 2016 and continued for 66 minutes. The teleconference hearing was attended by the Landlord, her Agent, and both Tenants. The Landlord's Agent presented all evidence on behalf of the Landlord and translated information on behalf of the Landlord.

Each person gave affirmed testimony. I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

Two packages of evidence were received from the Tenants by the Residential Tenancy Branch (RTB). 19 pages of evidence were received on October 19, 2015 and 34 pages of evidence were received on November 16, 2015. The Tenants affirmed that they served the Landlord with copies of the same documents that they had served the RTB. The Landlord acknowledged receipt of these documents and no issues regarding service or receipt were raised. As such, I accepted the Tenants' submissions as evidence for these proceedings.

On November 28, 2015 the Landlord submitted 37 pages of evidence to the RTB. The Landlord affirmed that they served the Tenants with copies of the same documents that they had served the RTB as ordered in the Interim Decision. The Tenant acknowledged receipt of these documents and no issues regarding service or receipt were raised. As such, I accepted the Landlord's submissions as evidence for these proceedings.

Both parties were provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Following is a summary of those submissions and includes only that which is relevant to the matters before me. Although I have considered all relevant documentary evidence not all of that evidence is listed or referenced in this decision.

Issue(s) to be Decided

Have the Tenants proven entitlement to monetary compensation?

Background and Evidence

The parties entered into a fixed term tenancy agreement which began on May 1, 2014 and switched to a month to month tenancy after April 30, 2015. Rent of $1,250.00 was

payable on the first of each month. On March 19, 2014 the Tenants paid $625.00 as the security deposit.

The rental unit was described as being a two bedroom two bath apartment. The male Tenant, his pregnant wife and their seven year old child occupied the rental unit.

Near the beginning of August 2015 the Tenants began to smell a sewer smell coming from the drain from the bathtub in the master bedroom ensuite. On August 13, 2015 they reported the sewer smell to the Landlord and on August 17, 2015 the Landlord arranged for her handyman to attend the rental unit. The Handyman poured a chemical down the bathtub drain and requested the Tenants keep the windows open and run water down the drain.

The Tenants submitted the sewer smell continued to emanate throughout the rental unit even though they kept the bathroom and bedroom doors closed. They stated they requested the Landlord bring in a licensed plumber and she refused. They informed the Landlord the female Tenant was pregnant and told her how dangerous sewer gas could be to their unborn child and to all of them living in the rental unit. The Tenants asserted the Landlord refused to spend the money to bring in a plumber and she wanted to continue with pouring a mixture of bleach, baking soda, and water down the drain. As a result the Landlord was constantly at the rental unit imposing on the Tenant's quiet and enjoyment and privacy.

The Tenants submitted evidence where the Landlord refused to speak directly with the Strata. They said the Landlord told the Tenants to contact the Strata contact and to copy the Landlord on the emails. On September 21, 2015 the Strata had a professional plumber attend the rental unit.

The Tenants asserted that despite their requests for repairs the sewer smell continued for almost two months before they moved out on October 18, 2015. They asserted their entire family was forced to sleep in their son's bedroom as they could no longer be exposed to the hazardous effects of smelling the sewer gas. They also felt they could no longer have guests over due to the sewer smell. The Tenants submitted evidence outlining the hazards of exposure to sewer gas.

The Tenants provided copies of email communications between themselves and the Landlord. In one of the emails the Landlord told the Tenants if they were not happy they could leave without giving notice. On October 15, 2015 the Tenants informed the Landlord they would be ending their tenancy agreement and vacated the property by October 18, 2015.

The Tenants argued they should be entitled to $3,637.00 compensation which is comprised of: $625.00 for the return of their security deposit; $712.00 for their security deposit paid to their new apartment; $500.00 for moving costs; $300.00 utilities; $100.00 for lost wages to search for an apartment; $100.00 for the move in fee for their

new apartment; $50.00 mail costs to serve their application and evidence; $50.00 filing fee; and $1,200.00 for the difference in their rent costs for a year.

The Tenants testified the amounts claimed, as listed above, also included a request for loss of quiet enjoyment for August and September 2015. They submitted evidence the Landlord offered them a rent reduction of $300.00 for October 2015. They stated they applied that $300.00 rent reduction to their $625.00 security deposit, which was being held by the Landlord, and both agreed at the move out those amounts would be their rent payment for October 2015. A copy of the move out report was submitted into evidence which stated the aforementioned agreement.

The Landlord testified she had attended to the Tenants' requests for repairs promptly and had her handyman attend to the issue of the sewer smell. The Landlord submitted evidence that she was dealing with her own medical issues at the same time and argued she attended to the Tenants' requests as best she could. She stated when her handyman could not resolve the problem she agreed to have the Strata come aboard to assist in resolving the issue as supported by the evidence. The Landlord asserted she had to pay all of the costs incurred by the Strata for plumber fees.

The Landlord argued the Tenants were the cause of the problem as they had removed the drain stopper which caused a vacuum effect after the Tenants filled the bathtub and then drained it. The vacuum effect would suck out the water from the P-trap and allow the sewer smell to enter into the rental unit.

The Landlord denied all of the allegations presented by the Tenants and pointed to her evidence which was proof she paid to have a professional plumber attend the rental unit to repair a problem that did not exist. The Landlord argued the plumbers did not find a problem and never detected the sewer smell.

The Tenants disputed the Landlord's submissions and stated it was the Landlord's handyman who removed the bath tub stopper. They asserted from the start of their tenancy they had problems with the drain stopper closing when they were having a shower. They reported the issue to the Landlord at the start of the tenancy in May 2014 and her handyman came and removed the drain stopper. They said the handyman did not know how to put the drain stopper back together so he suggested they leave it out of the tub while showering and then set it back into the tub when taking a bath.

Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

Section 7 of the *Act* provides as follows in respect to claims for monetary losses and for damages made herein:

7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Section 32 of the *Act* requires a landlord to maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

In cases where a landlord is unable to or has failed to complete required repairs within a reasonable period after the tenant gives written notice of the failure, Section 45(4) of the *Act* provides the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

I accept the evidence the Landlord told the Tenants they could leave without notice. I further accept the Tenants gave notice to the Landlord on October 15, 2015, of their intent on ending the tenancy and the Tenants remained in possession of the unit until October 18, 2015. Therefore, I find this tenancy ended October 18, 2015, pursuant to section 45(4) of the *Act.*

In many respects the covenant of quiet enjoyment is similar to the requirement on the Landlord to make the rental unit suitable for occupation which warrants that the Landlord keep the premises in good repair. For example, failure of the landlord to make suitable repairs could be seen as a breach of the covenant of quiet enjoyment because the continuous breakdown of the rental unit would deteriorate occupant comfort and the long term condition of the unit.

Residential Tenancy Policy Guideline 6 stipulates that it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises. That being said a tenant may be entitled to reimbursement for loss of use of a portion of the property or loss of quiet enjoyment even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Plumbing projects or repairs conducted in condo or apartment buildings often involve access or work in units directly above, below, or beside the unit requiring the repair. Such repair work takes time and may involve repeated visits or entry to the rental unit which may involve the loss of use of space, loss of quiet enjoyment, and in some cases loss of privacy.

Based on the foregoing, I find it undeniable that the Tenants suffered a loss of quiet enjoyment from the beginning of August 2015 to October 18, 2015 when they vacated the rental unit. In addition, I have no doubt the landlord/tenant relationship became acrimonious given that the female Tenant was pregnant; the male Tenant was working nights and would be woken up during repairs; and the Landlord was dealing with her own medical issues.

In consideration of issues as described by the Tenants I do not consider this matter to have been a temporary discomfort or inconvenience. Rather, I find the mere presence of a sewer gas smell inside a condo unit could be a major disruption or concern. I accept these Tenants were concerned about their seven year our child and unborn child which forced the Tenants to sleep in one bedroom. I further accept there were numerous interruptions to their quiet enjoyment when the Landlord, her handyman or plumbers needed to gain access to attend to the issues.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this 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.

Policy Guideline 6 states: "in determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed".

After consideration of the totality of the evidence before me, I find the Tenants are entitled to compensation for the loss of quiet enjoyment. In determining the amount of the award I considered the following: the loss of quiet enjoyment which restricted the Tenants' use of the master bedroom and ensuite bathroom for almost 3 months; the Landlord's access to the unit without proper notice on several occasions; the effort put forth by the Tenants to try and resolve the sewer smell issue; and the $300.00 compensation previously provided by the Landlord.

I accept the Tenants' submissions that they all slept in their son's room. However, I must consider use of a bedroom is normally used for rest or sleeping and the Tenants continued to use the remainder of the rental unit, excluding the master bedroom and ensuite, during the last three months of their tenancy. Therefore, I find the Tenants are entitled to compensation for loss of quiet enjoyment equal to 10% of their rent, or

$125.00 per month, for each of the three months August, September, and October 2015; for a total award of $375.00, pursuant to section 67 of the *Act*. The Tenants already received $300.00 compensation from the Landlord in October 2015 which leaves a balance owed to the Tenants of **$75.00** ($375.00 - $300.00).

The Tenants entered into an agreement the Landlord would keep their $625.00 security deposit as payment towards October 2015 rent. Therefore, I decline to award the return of that deposit to the Tenants and the request is dismissed, without leave to reapply.

The Landlord is not responsible to pay the Tenants' security deposit for a different rental unit. The choice to move was made by the Tenant's and the Landlord bears no responsibility to pay the Tenants' security deposit to a different landlord. Accordingly, I dismiss the request of $712.00 without leave to reapply.

In regards to the claims for $500.00 for moving costs; $300.00 for utility hook ups; $100.00 for lost wages to search for an apartment; $100.00 for the move in fee for their new apartment; and $1,200.00 for the difference in their rent costs for a year, I find the Landlord does not bear the burden of these costs. While I appreciate the Tenants had some medical concerns about staying in the rental unit, I find the Tenants made the choice to move instead of mitigating their losses, as required by section 7 of the *Act.* A form of mitigation could have been relocating temporarily until the matters were resolved. Therefore, I find the Tenants bear the burden to pay for their move and all associated costs, not the Landlord. Accordingly, the amounts listed here regarding costs involved in moving and totalling $2,200.00, are dismissed without leave to reapply.

In regards to the claim for $50.00 mail costs for bringing this application forward, I find that the Tenants have chosen to incur these costs which cannot be assumed by the Landlord. The dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of Act and to recover the cost of the filing fee. Costs incurred due to a service method choice are not a breach of the Act. Therefore, I dismiss the Tenants claim for mail costs, without leave to reapply, as they are costs which are not denominated, or named, by the *Residential Tenancy Act.*

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Tenants have partially succeeded with their application; therefore, I award recovery of the **$50.00** filing fee, pursuant to section 72(1) of the Act.

The Tenants have been issued a Monetary Order for **$125.00.** This Order must be served upon the Landlord and may be enforced through Small Claims Court.

Conclusion

The Tenants were partially successful with their application and have been awarded monetary compensation of $125.00.

This decision is final, legally binding, and 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 18, 2016

Residential Tenancy Branch