



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, OLC, ERP, RP, PSF, MNSD, CNR, OPR, MNR, , FF

Introduction

A hearing was set for 10:30 am on November 23, 2016, to deal with an application by the tenant for orders compelling the landlord to comply with the Act, regulation or tenancy agreement; to make repairs to the rental unit; to provide services or facilities required by law; and to pay compensation to the tenant for damage or loss. The tenant also applied for return of the security deposit and pet damage deposit. Both parties appeared.

The parties advised that they had two other applications set for 9:00 am on November 24. One was the landlords' application for an order of possession based upon a 10 Day Notice to End Tenancy for Non-Payment of Rent or Utilities; a monetary order; and an order permitting retention of the security deposit and pet damage deposit in partial satisfaction of the claim. The other was the tenant's application for an order setting aside the notice to end tenancy. It turned out that those applications were also scheduled for me. The parties advised that there was substantial overlap in the evidence filed on all three applications.

The tenant had amended her claim by substantially increasing the amount and served the amendment on the landlords less than fourteen clear days before the hearing. The landlords had served the tenant with some of their evidence less than seven clear days before the hearing.

The parties agreed that the following procedure would be adopted:

- All three applications would be heard and decided together.
- The hearing and decision would include consideration of the tenant's amended claim.
- The landlords' late evidence would be accepted into evidence.
- The hearing would be conducted during the time slots set aside for both hearings on November 23 and 24. The parties were advised that if additional time was required a continuation would be scheduled.

All of the evidence filed on all three applications were reviewed. The parties confirmed that they had received all of the evidence filed by the other side and were prepared to proceed.

I heard one of the tenant's witnesses and part of the tenant's oral testimony in the time set aside for the hearing on November 23. At the end of the hearing the tenant advised that she had

other witnesses to be heard and I asked her to have them on the call the next morning. She said she would. When I closed the hearing I reminded everyone that the hearing would continue the next morning.

When I convened the hearing on November 24 at 9:00 am, as scheduled, only the landlords were on the line. I waited for fifteen minutes to give the tenants an opportunity to call in. At 9:15 am, the male tenant called in. He explained that he had forgotten about the hearing. The female tenant never did call in nor did anyone call in on her behalf to ask for an adjournment. After the male tenant joined the call I proceeded with the hearing. I heard the male tenant and then the landlords. At the end of the landlords' testimony the male tenant had an opportunity to give brief rebuttal evidence before the hearing ended, as scheduled, at 10:30 am.

All of the written evidence submitted by the female tenant as well as the oral testimony she gave on November 23 has been considered in the preparation of this decision.

On the application to rent and the tenancy agreement the female tenant used one surname. This is the name the landlords' used on their application for dispute resolution. On both of the tenant's applications she used a different surname. It was obvious in the hearing that both names relate to the same individual so the style of cause has been amended to reflect both names used by the female tenant.

Issue(s) to be Decided

- Is the 10 Day Notice to End Tenancy for Non-Payment of Rent dated October 2, 2016, valid?
- Are the landlords entitled to a monetary order and, if so, in what amount?
- Is the tenant entitled to a monetary order and, if so, in what amount?
- Should a repair order be made and, if so, on what terms?
- Should any other order be made against the landlords and, if so, on what terms?
- What disposition should be made of the security deposit and pet damage deposit?

Background and Evidence

This fixed term tenancy commenced December 15, 2016. According to the written tenancy agreement the term will expire December 31, 2016 with the tenancy to continue thereafter as a month-to-month tenancy. The monthly rent of \$1075.00 is due on the first day of the month. The tenants paid a security deposit of \$537.50 and a pet damage deposit of \$537.50. A move-in inspection was conducted and a move-in condition inspection report completed.

When this tenancy started the female tenant and her boyfriend were living together and signed the tenancy agreement as co-tenants. The male tenant moved out at the beginning of August but remains on the tenancy agreement.

The rental unit is a basement suite, approximately 1100 square feet. In addition to kitchen and living area, the rental unit has two bedrooms, an office space and one bathroom. The bathroom does not have a bathtub; only a shower. The upper level of the house is a separate rental unit.

The entrance to the rental unit is from an exterior door at the rear of the house. There is an unfinished storage room near the entry door. There is also additional storage space under the stairs. The under stairs storage is accessed by a door, which the tenant described as snug-fitting. There is a common wall between the bathroom and the under stair storage area. The bathroom sink is located on this wall.

The interior walls of the under stair area are unfinished. There is insulation stuffed between the walls studs but it is not covered with plastic or any other covering. When the tenants moved in there were some boards on the floor of the area left by the landlords or previous tenants. The male tenant said he went into this area briefly at the start of the tenancy and he did not smell anything. The landlords did not inspect the area at the start of the tenancy.

The landlord testified that the insulation that was in this area is a type that is no longer sold – Fiberglass with asphalt craft paper back. The craft paper backing is brown, black tar is sprayed onto the paper backing and the pink Fiberglass is sprayed onto the tar.

The utilities are shared with the upstairs tenants. The landlord testified that all utilities are on equal payment plans so the tenants paid \$125.00 per month, also due on the first day of the month, until the annual settle up account was received from each utility. The landlord testified that when calculating the division of the utilities between the two levels she considers the number of people living on each level and the square footage of each level. The upper level is a little large than the lower so pays a lesser proportion. The landlord testified that she did not factor in the tenant's children when calculating the claim for unpaid utilities.

When the tenants moved into the unit they had two cats and a puppy. The female tenant's daughter has a dog that is officially registered to her mother's house but visits frequently when the girls are with the tenant. The female tenant's daughters also have a guinea pig. The upstairs tenants do not have cats.

In her written material and her oral testimony the female tenant described some of her personal difficulties. She was married before and has two daughters, aged 11 years and 9 years. Starting in November 2015 her children lived with her mother full-time. Between November 2015 and June 2016 she and her ex-husband gradually increased their time with the children until the children were living full-time with the tenant and her ex-husband. Their arrangement is that the children spend alternating weeks with each parent.

Her evidence also included references to anxiety issues and depression. The female tenant testified that she has been seeing her doctors for a variety of issues including fatigue, stomach pain, and respiratory problems. They have prescribed medication for her gut, which she says is

starting to help. She is currently taking medication for depression and in the past has taken medication for anxiety. She said her doctors are still trying to determine the cause of her health problems but have not yet given her a diagnosis. When asked if she had told her doctors about her living situation the tenant replied that she had.

The tenant frequently referred to her anxiety issues when describing her reluctance to go into the storage spaces, particularly if they were enclosed or might have “creepy-crawlies” in them.

It was not a problem-free tenancy. The landlords served the tenants with 10 Day Notices to End Tenancy for Non-Payment of Rent in February, March and May. The landlords also filed copies of letters of complaint about the noise and odors caused by the tenants’ construction projects and the amount of clutter in the back yard.

At the end of July the male tenant advised the landlords that he and the female tenant were separating and he was moving out of the rental unit. After some discussion about the rights and responsibilities of co-tenants including the fact that if he gave notice to end tenancy it would end the tenancy of both he and the female tenant, a discussion that continued into August, the male tenant decided not to give notice to end tenancy and remained on the tenancy agreement.

The landlords filed proof of a payment by the female tenant in September in the amount of \$1050.00. It appears that the payment was made on September 7.

The male tenant testified that he had done some work for the landlords at the agreed upon price of \$150.00 and that a \$150.00 was deducted from the September rent for that work. The landlords agreed that the tenants were to be credited \$150.00 for the work but said it was deducted from the August rent. The male tenant responded that when they talked about the deduction the August rent had already been paid so they agreed that it would be deducted from the September rent.

No documentation regarding the August payment was filed in evidence.

The female tenant testified that she had winter clothes and assorted keepsakes stored in cardboard boxes and plastic bins in the under stairs storage area. She testified that she had just put them at the front of the space and quickly closed the door. She did not look in the area.

On September 18 she opened the door and smelled something so disgusting that she threw up. She did not go into the space because of her anxiety issues. She closed the door and called the male tenant.

The male tenant testified that he did look under the stairs after receiving the call from the female tenant. He said the insulation was black and the smell in the area was bad. He contacted one of the landlords about the situation. In his initial text message to the landlord he said there was a minor issue at the rental unit.

The landlord testified that she received a complaint from the male tenant on September 18. Because she lives in a different community she had her sister go to the rental unit the next day. While her sister was in the storage area she and the landlord were communicating by cell phone. The sister reported that the walls and the exposed pipes were dry. She could not tell whether there was water on the floor because of the boards that were stored there. Her sister described the smell in the area as stale.

The tenants did not accept this report. The male tenant sent the landlord some photographs of the storage area. The landlord said that after she received the photographs she was very concerned so she arranged to have her sister and nephew attend at the rental unit on September 23. They removed the insulation and put everything in a clear plastic bag. The nephew reported that the insulation was wet and there were fresh cat urine and cat feces in the area. Both the landlords and the tenants filed photographs that showed some insulation on the floor and some pulled away from the wall.

The bag with the insulation was left outside of the rental unit for disposal later.

Both parties filed photographs of the closed up bag were filed in evidence. There is pink and black material visible through the plastic. Both tenants testified that the contents were wet and the bag smelled bad. Neither opened the bag to determine whether there were, in fact, cat feces in the bag although they vehemently denied the possibility of their cats getting into the storage area.

On September 27 the tenant bought a mold testing kit from Home Depot for \$16.85. She sent a sample to the AIHA accredited lab on October 3. The tenant testified that she took the samples from the dark spots on the drywall under the stairs after the insulation was removed.

The lab report describes the analysis method used as direct microscopic exam. The analysis identifies that *Pencillium/Aspergillus* and *Stachybotrys* were present in the sample. The columns under the headings "Raw Count", "Spores per m³", and "Percent of Total" are blank. The Conclusion is "Unusual" which is defined in the report as "the presence of current or former growth observed in the analyzed sample. An abundance of spores are present, and/or growth structures including hyphae and/or fruiting bodies are present and associated with one or more of the types of mold/fungi identifies in the analyzed sample. The only "Observation or Comment" on the report is "Presence of current or former growth observed".

The fine print on the report states, among other things:

- "A mold report is only one aspect of an indoor quality investigation . . . These determinations are in no way meant to imply any health outcome or financial decisions based solely on this report. For questions relating to medical conditions you should consult an occupational or environmental health physician or professional."

- Immediately after the section headed “Possible Allergic Potential” is the phrase “Not an opinion or an interpretation”.

In the explanatory comments about *Stachybotrys* the report explains that wet spored mold must generally be dried out and disturbed before spores can be found in the air. Spores of this type of mold should not be observed in significant numbers in the air above background/control. If growth and/or significantly higher than background/ control spore numbers are reported, corrective action should be considered to eliminate the water source, reduce moisture levels and/or spore numbers in the living space.

The report describes the various sampling methods used to detect mold. Surface sampling, which this was, is described as “being useful for differentiating between mold growth and stains of various kinds”. This type of sampling is used to identify the type of mold ground that may be present and help investigate water intrusion. The report also states that surface sampling can help the interpretation of building inspections when used correctly.

The report also explains that the generally accepted method of testing air quality is to take reference samples from outdoors or “non-complaint” areas and compare those results to the samples taken in the “complaint area”. This is the same information that was given to arbitrators in a training session on mold claims.

There is no evidence of any air quality sampling having been done, either before or after the under stairs area was cleaned by the landlords.

On October 9 the other landlord, who also lives in a different community, attended at the rental unit. The date and time of this visit were agreed upon with the female tenant in advance. The landlord said she spent about three hours working in the storage area. She cleaned away some surface spores with a mold remover. The surface spores wiped away easily. In a few places she cut away small areas of the drywall – about three inches by three inches. She said the smell in the area was just of stale air. The landlords’ photographs taken on October 9 show a dry area, with no black spots on the walls.

The landlord returned the next day and painted the area with an oil-based stain blocker. She swept everything up and left. The landlord testified that the area was dry.

The tenant’s aunt testified that she visits her niece at least once a week. Because she is a smoker she is usually outside smoking when she visits. She said that there was not as pronounced a smell at the rental unit until September and October. The witness described being at the rental unit the first week in October when she noticed a musty smell. She said her eyes and nose were sore; she felt nauseous; she had a funny taste in her mouth; and she felt like falling asleep at the table. When she went outside she felt better.

The female tenant filed photographs of some bubbled paint on the bathroom side of the wall. Her contention was that the bubbles were caused by the mold pushing through the drywall from behind. She testified that prior to mid-September she had not noticed the bubbled paint but she did say she had not really looked before either. The male tenant testified that the paint looked the same throughout the tenancy.

The tenant claimed that she was unable to work because of the ill health she suffered and continues to suffer as a result of her exposure to mold. She has claimed loss of income in the amount of \$8640.00 calculated as 40 hours per week at \$18.00 per hour for 12 weeks.

In support of her claim she filed a letter from her employer stating that since September 1 the female tenant could have been working full-time but because she is ill has only been working sporadically. No information was provided by either the female tenant or her employer as to how many hours the tenant has actually worked since September 1. The landlord's letter says the female tenant shows signs of fatigue, headache and upset stomach.

There was other information about the female tenant's work history in the evidence. The male tenant testified that while he and the female tenant were living together she worked about half the time and paid half the rent.

Part of the evidence was a text message conversation between the male tenant and the landlords that occurred at the end of July. The male tenant advised the landlord that he and the female tenant were separating. There followed a discussion about the legal rights and responsibilities of co-tenants. In response to the landlord's query as to whether the female tenant was working the male tenant responded "she works a little bit, couple days here and there, not enough to live on anyways, and certainly not enough to provide for children".

In a text message to the landlord dated September 24 the female tenant told the landlord that she was back at work full-time and going to school: "I'm emotionally screwed up right now but being at work and having meetings with specialists have been helping me get my life back on track."

The tenant testified that she washed the clothes that had been stored under the stairs at the laundromat several times but was unable to get the smell out. Finally, she just threw everything away. The tenant says it was about 2 ½ garbage bags of clothes including her daughters' winter wear. She filed a random assortment of receipts from a year previous as an indication of the items that were in the storage area. Interestingly, although the tenant filed 41 photographs of various things, none were of any of the items that were stored under the stairs. I did not have the opportunity to ask the tenant whether it was just the items stored in cardboard boxes that were damaged.

The tenant also claims the replacement cost of a king size mattress and box spring. She says that it was stored in the storage room near the entrance door. She did not often go into this

area because of her anxiety issues. One day she in the spring she went into the room and found water on the floor. She did not know how long the water had been there. The box spring and mattress were wet. She moved them into the living room and then, sometime later moved them into a bedroom that she is using as a storage area. She says that items are stained; a section of the mattress appears to be opening up; and she cannot get the smell out of the box spring.

The landlord said that the tenants did complain to her about a leak in the storage room in the summer. At that time the mattress and box spring were in the bedroom, which was so full of stuff she could not get in. The tenant again raised the issue of the storage room leaking when she was at the unit on October 23.

The parties presented different theories about the cause of the water leak in the storage room.

Analysis

Validity of the 10 Day Notice to End Tenancy for Non-Payment of Rent or Utilities

Section 26(1) of the *Residential Tenancy Act* provides that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulation or the tenancy agreement, unless the tenant has an order from the Residential Tenancy Branch allowing the tenant to withhold payment of all or any portion of the rent.

This information is set out in the 10 Day Notice to End Tenancy which specifically states under "Information For Both Landlords and Tenants" that: "The tenant may not withhold rent unless ordered by an arbitrator, or the tenant has paid for emergency repairs and provided the landlord with receipts and a written description of what happened."

This has been the law, and has been set out on the form, for many years. I find it highly unlikely that the Residential Tenancy staff would have advised the tenant to withhold the rent pending the outcome of this hearing.

The tenant had no legal right to withhold payment of rent pending the outcome of her application. As a result the 10 Day Notice to End Tenancy for Non-Payment of Rent dated October 2, 2016 is valid. The tenancy is ended. The landlords are granted an order of possession effective two days after service.

Test for Damages

On any claim for damage or loss the party making the claim must prove, on a balance of probabilities:

- that the damage or loss exists;
- that the damage or loss is attributable solely to the actions or inaction of the other party; and,
- the genuine monetary costs associated with rectifying the damage.

In a claim by a landlord for damage to property, the normal measure is the cost of repairs or replacement cost (less an allowance for depreciation), whichever is lesser. In a claim by a tenant for loss to chattels the normal measure of damages is the market value of the item, not the replacement value.

Landlords' Claim for Damages

The landlord's evidence is that the female tenant paid \$1050.00 in September. This represents short payment of the rent of \$25.00 and non-payment of the utilities for September, not a short payment of rent in the amount of \$150.00.

The landlords' evidence is that the tenants paid \$1065.00 towards utilities, which is the equivalent of \$125.00 per month from December 15 to August 31. After deducting the actual amount due for utilities for the unit to October 15, 2016 - \$1223.35 - from the amount paid by the tenants - \$1065.00 – the landlords claim \$93.87 for unpaid utilities.

I find that the landlords have established a total monetary claim against the tenants in the sum of \$2268.87 comprised of unpaid rent for September in the amount of \$25.00, unpaid rent for October and November in the amount of \$2150.00, and unpaid utilities up to and including October 15, 2016 in the amount of \$93.87.

Female Tenant's Claim for Damages

The tenant attempted to present a thorough case. In addition to the results of the mold test and general information about the health effects of exposure to mold, she also included evidence from friends and family describing her health since September. However, very significantly, there was nothing from her doctors including the results of the usual allergy tests, stating that any of her health difficulties were the result of exposure to mold, even though she has told her doctors about conditions in the rental unit.

The most that the mold test establishes is that the spots on the wall of the under stair area were mold. There is no evidence that the air quality in the living area was negatively affected, either before the tenant complained to the landlords, or more importantly, after the landlords cleaned the area. If the tenant cannot establish that the air quality in the living space was negatively affected by the spots of mold under the stairs, she has not established the first element of all of her claims for damages.

The landlords submitted evidence in support of an alternate reason for a foul smell under the stairs, namely, cats somehow getting into the area and fouling it.

Both parties filed photographs of a bag filled with pink insulation and some dark material. The photographs are not clear enough for me to distinguish whether the black spots are mold, cat feces or tar covered craft paper. The same must be said of the photographs taken in the under stairs area of disturbed insulation.

Although the tenants knew that the landlords were saying the cause of the smell was cat feces and urine, neither took the simplest of steps to disprove the landlords' claims – that of opening up a plastic bag and checking for themselves. As a result they were not able to give sworn testimony as to whether there were cat feces in the bag or not.

The tenant's evidence does not establish that the condition of the rental unit is the sole reason for her health difficulties or her inability to work. Her own evidence is that she has a variety of health and personal issues, some of which came to a head in September. Many of these issues could also be a cause of her current health issues or her absence from work. Further, the evidence presented related to her claim for loss of income was incomplete and contradictory. The claim for loss of income is dismissed.

With regard to the tenant's claim for loss of clothing and other personal possessions stored under the stairs, if the cause of the odor was the cats, the landlords are not liable for any damage that may have resulted. It is only if the tenant can establish that the odor was caused by mold that the landlords would be liable.

As pointed out in the previous section of this decision the female tenant's evidence regarding this has a glaring omission – there are no photographs or any other evidence to substantiate her claim about the volume of material damaged, if any. If items were stored in tightly closed plastic bins they should not have been affected by any smell under the stairs, regardless of the cause.

The tenant's evidence does not establish, on a balance of probabilities, any of the required elements of a claim. She has not established that the damage or loss actually exists, that the condition of the rental unit is the sole reason for the damage claimed, or a reasonable estimate of the loss. The claim for damage to the items stored under the stairs is dismissed.

The claim for replacement of the mattress and box spring is also dismissed. The photographs filed by the tenant do not show any damage that would affect the utility of the bed.

In her evidence the tenant complained of two instances where she said the landlords entered the rental unit illegally. The evidence did not establish any breach of the legislation.

As the tenancy is ending the application for repair orders is irrelevant.

Conclusion

- a. The 10 Day Notice to End Tenancy for Non-Payment of Rent dated October 2, 2106, is valid. The landlords are granted an order of possession effective two days after service. If necessary, this order may be filed in the Supreme Court and enforced as an order of that court.
- b. The landlords have established a total monetary claim of \$2368.87 comprised of unpaid rent and utilities as set out above in the amount of \$2268.87 and the \$100.00 fee they paid to file their application. Pursuant to section 72(2) I order that the landlords retain the security deposit of \$537.50 and the pet damage deposit of \$537.50 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of \$1293.87. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that court.
- c. All claims made by the tenant are dismissed.

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: November 29, 2016

Residential Tenancy Branch