Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ABC Realty
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes ERP, RP, PSF, OLC, MNDC, MNSD, O, FF

Introduction

This hearing dealt with the tenants' Application for Dispute Resolution seeking orders to have the landlord complete repairs; emergency repairs; provide services or facilities required by law and a monetary order. The hearing was conducted via teleconference and was attended by both tenants and the landlord.

The parties confirmed at the start of the hearing that the tenants vacated the rental unit in May 2016. As such, I find the tenants' requests for emergency repairs; repairs and to provide services and facilities are moot. I amend the tenants' Application to exclude these matters.

In addition, the tenants clarified that when they submitted their Application for Dispute Resolution they estimated that their moving costs would be $625.00. However, since the tenants have moved they have actual moving costs of $441.79. I accept the tenants are allowed to reduce their claim amount as noted here.

Upon receipt of the tenants' evidence (as noted below) I noted that the tenants' original claim included a request for $8,100.00 representing the return of rent for the period of November 2015 to April 2016. However, in their monetary order worksheet submitted the tenants indicate that the rent amount they are seeking is $8,375.00. As the tenants have provided no explanation as to why the amount of their claim for returned rent has changed I decline to allow the increase in the claim.

Because I did not have the tenant's evidence at the time of the hearing, I did not seek clarity on this issue and the tenants provided no explanation as to why the different in the amounts claim

At the outset of the hearing the parties agreed that the tenants had served the landlord with an evidence package pursuant to the Residential Tenancy Branch Rules of Procedure. The tenants submitted that they also provided a copy of their evidence package to the Residential Tenancy Branch – however no evidence was found on the file.

As the landlord had confirmed she had received the evidence I found there would be no prejudice to the landlord, I proceeded with the hearing and ordered the tenants could submit their documentary evidence as long as they submitted it no later than the end of business on November 9, 2016. The tenants submitted their evidence on November 8, 2016.

The landlord confirmed that she had not served the tenants with any evidence. She stated that she had been unable to because she had been away from her business for a period of time. The landlord could not provide any valid reason why other staff from the business could not have prepared and served evidence for the hearing during the time between when they were served with the notice of hearing in May 2016 and the hearing itself in November 2016.

Residential Tenancy Branch Rule of Procedure 3.15 requires that the respondent must ensure all evidence they intend to rely upon at the hearing is served on the applicants and submitted to the Residential Tenancy Branch as soon as possible. In all events, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than 7 days before the hearing.

As such, I found there was no reason that the landlord or her agent could not have provided her evidence at some time during the months between being served with notice of this hearing and the 7 days before the hearing that is allowed under the Rules of Procedure. Therefore, I dismissed the landlord's request to submit her evidence after the hearing started.

In complete disregard for this order the landlord submitted, on November 9, 2016, 35 pages of evidence including the landlord's list of requested compensation (even though the landlord had not submitted an Application for Dispute Resolution) and a request for a review of this decision because the parties "were not asked to swear to tell the truth".

Clearly, the landlord, who is a professional landlord, does not understand the processes involved in the dispute resolution process. I will try to provide clarity here:

1. Since, I ordered that I would not allow her to submit any documentary evidence after the hearing, she is not entitled to submit for consideration any evidence. As a result, I have not considered the evidence she has submitted whether or not it is relevant to the tenants' claim;
2. If the landlord has a monetary claim then she must file her own Application for Dispute Resolution to make such claim and pay the appropriate filing fee. She cannot submit her claim as part of evidence to a hearing that has already occurred;
3. Dispute Resolution Hearings are legal proceedings and parties are expected to tell the truth and provide honest and truthful evidence. If the landlord thought the process was flawed because an affirmation was not administered at the start of the hearing her opportunity to address this was during the hearing. I find the landlord had every opportunity during the hearing to respond to the tenants'

testimony and evidence. Furthermore, if the landlord wants to seek a Review Consideration of the decision she should be waiting until after the decision is written and then submit an Application for Review Consideration with the appropriate fee payment.

Issue(s) to be Decided

The issues to be decided are whether the tenants are entitled to a monetary order for the return of all rent; for moving expenses; for the cost of a mould report; for all or part of the security deposit and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 32, 33, 67, and 72 of the *Residential Tenancy Act (Act).*

Background and Evidence

The parties agreed the tenancy began in November 2015 for a fixed term tenancy with rent due on the 1st of each month. The tenants submitted that the rent was $1,300.00 per month and that they had paid a security deposit of $650.00. The landlord submitted that the rent was $1,150.00 plus $150.00 towards utilities and the security deposit received was $575.00.

The tenants submitted that while viewing the rental unit the landlord pointed out that there had been a water leak above the food preparation area in the kitchen but that it had been fixed years prior to the viewing.

The tenants further submitted that within a month of the start of the tenancy they leak reoccurred. They stated they contacted the landlord and requested repairs on many occasions but that despite attempts on the part of the landlord to repair the leak it continued, in part because the landlord did not send a professional to complete the work.

The tenants provided into evidence a letter dated May 3, 2016 that recounts the above circumstances and goes on to say the tenants had sent the landlord a letter dated April 22, 2016, by registered mail outlining their requests for repairs and that the landlord had failed to respond within 5 days as they had requested and as such they were ending the tenancy. The tenants did not provide a copy of a letter dated April 22, 2016 into evidence.

The landlord submitted that in December, 2015 she received text messages from the male tenant regarding the leak starting up again. She stated that he wrote that he would rip open the ceiling and fix the problems.

When that wasn't successful the landlord arranged for a plumber to attend the property to look at what was required but that the tenant wouldn't give the plumber access because he didn't speak English.

The tenants confirmed that they thought they could fix it, initially, and when they couldn't the landlord did send someone to look at it. The male tenant confirmed that he did not allow access to the rental unit for the person sent to investigate the problem.

The tenants submit that because of the landlord's inaction and the fact that they were having health problems the hired environmental engineers to conduct air quality testing. The testing confirmed the presence of Aspergillus/Penicillium and Ulocladium. The report explains that exposure can result in hay fever, asthma, and hypersensitivities. The report goes on to say that long term exposure may lead to permanent symptoms that may lead to more severe health issues and ailments.

The tenants have also provided a copy of a "Personal Medication History" from a pharmacy stating that the male tenant has no known allergies and that on May 2, 2016 he received Apo-mometasone nasal spr; salbutamol, and amoxicillin. The tenants did not provide any documentation from physicians regarding any diagnose or prescriptions. The tenants also did not provide any information regarding the medications noted in the pharmacy document.

The tenants submit that as a result of these findings and their general health they were advised by the doctor to move from the rental unit.

The tenants seek the following compensation:

Description	Amount
Rent for the period November 2015 to April 2016	$8,100.00
Moving costs (receipt submitted)	$441.79
Mould Report (invoice submitted)	$341.25
Total	$8,883.04

The parties agreed the landlord received the tenants forwarding address at the time the landlord received the tenants' Application for Dispute Resolution documents by registered mail on or about May 18, 2016. The tenants seek return of their security deposit.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Section 32(1) of the *Act* requires the landlord must provide and 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 make it suitable for occupation by a tenant.

Section 32(2) states a tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and Section 32(3) states the tenant must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the property by the tenant.

Section 33(1) of the *Act* defines "emergency repairs" as repairs that are urgent, necessary for the health or safety of anyone or for the preservation or use of residential property, and made for the purpose of repairing:

- Major leaks in pipes or the roof,
- Damaged or blocked water or sewer pipes or plumbing fixtures,
- The primary heating system,
- Damaged or defective locks that give access to a rental unit, or
- The electrical systems.

Section 33(3) states a tenant may have emergency repairs made only when all of the following conditions are met:

- Emergency repairs are needed;
- The tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs; and
- Following those attempts, the tenant has given the landlord reasonable time to make the repairs.

Section 33(4) states a landlord may take over completion of an emergency repair at any time. Section 33(5) stipulates that a landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant claims reimbursement for those amounts from the landlord, and gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

Section 33(7) allows that if a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

In the absence of any scientific evidence to refute the environmental engineers report provided by the tenants I accept the results of the report confirms the presence of harmful mould. As a result, I find the landlord has failed to comply with their obligations under Section 32 of the *Act*.

Section 7 of the *Act* states if a party to a tenancy does not comply with the *Act*, regulations or their tenancy agreement, the non-complying party must compensate the other party for any damage or loss that results.

The section goes on to state that the party who claims compensation for damage or loss that results from the other's non-compliance with the *Act*, regulation or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

I also accept, based on the testimony of both parties, that the tenants first reported a problem with plumbing above the food preparation area of the kitchen in December 2015. The parties agreed the landlord contacted the tenants and the male tenant indicated that he would take a look at the problem himself and try to fix it.

The burden rests with the tenants to provide sufficient evidence that they pursued the problem with the landlord on a diligent basis. However, I find the tenants have failed to provide evidence of their communication with the landlord for the period from first notification of the problem until May 2016 when they were intending to move out of the rental unit.

I also find that the tenants interfered with the landlord's ability to work on the problem when the tenants refused to let the person the landlord had chosen to look at the problem. In addition, I find the tenants had authourity under Section 33 to pursue making the repairs themselves.

As a result, I find, in relation to the tenant's claim for the return of the rent for the period November 2015 to April 2016; the costs for the mould report; and their moving costs, the tenants have failed to take reasonable steps available to them to mitigate any losses they suffered as a result of the landlord's failure to comply with Section 32. Therefore, I dismiss that portion of their claim.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

I find, based on the landlord's testimony that the landlord received the tenants' forwarding address on May 18, 2015 and as such had until June 2, 2016 to either return the tenants' deposit or file an Application for Dispute Resolution to claim against the deposit. There is no evidence before me that the landlord has filed an Application to claim the security deposit to the date of this hearing.

As a result, I find the landlord has failed to comply with the requirements of Section 38(1) and as such the tenants are entitled to return of double the amount of the deposit, pursuant to Section 38(6).

As to the amount of the security deposit, I note that when asked for the amount during the hearing the tenants first indicated it was $675.00 and then changed the amount to $650.00. In addition the landlord testified that it was $575.00 because the rent amount was actually $1,150.00 and not $1,300.00 as suggested by the tenants.

When one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position.

In this case, the tenants claim the deposit is higher than what the landlord submitted. As the burden rests with the tenants to prove the amount of their claim in the absence of any evidence to corroborate the amount they are claiming I accept the amount of the security deposit held by the landlord is $575.00.

Conclusion

I find the tenants are entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **$1,200.00** comprised of $1,150.00 double the security deposit and $50.00 of the $100.00 fee paid by the tenants for this application, as they were only partially successful.

This order must be served on the landlords. If the landlords fail to comply with this order the tenants may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

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: December 08, 2016

Residential Tenancy Branch