Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON SHIRE PROPERTIES INC.
DECISION

Dispute Codes MNR, MNDC, OLC, ERP, RP, PSF, FF

Introduction

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

- a monetary order for the cost of emergency repairs and compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement, pursuant to section 62;
- an order requiring the landlord to make emergency and regular repairs to the rental unit, pursuant to section 33;
- an order requiring the landlord to provide services or facilities required by law, pursuant to section 65; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord's two agents, "landlord ET" and "landlord DA" (collectively "landlord") and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. Landlord ET confirmed that she is the property manager and landlord DA confirmed that he is the portfolio manager and both confirmed that they had authority to represent the landlord company named in this application, at this hearing. Both landlord ET and the tenant called into the teleconference when it began at 9:30 a.m. Landlord DA called into the teleconference late at 10:10 a.m., stating that he had a prior engagement. This hearing lasted approximately 81 minutes in order to allow both parties, particularly the tenant who spoke for most of the hearing time, to fully present their submissions.

Landlord ET confirmed receipt of the tenant's application for dispute resolution hearing package and the tenant confirmed receipt of the landlord's written and USB evidence package. In accordance with sections 88, 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's application and the tenant was duly served with the landlord's evidence package.

At the outset of the hearing, the tenant confirmed that he had not filed a claim in the Provincial or Supreme Courts of B.C., regarding this tenancy matter. I cautioned the tenant that he could not obtain double recovery at both the Residential Tenancy Branch ("RTB") and the above Courts. I notified the tenant that the RTB had exclusive jurisdiction over tenancy matters, with the exception of claims above the RTB monetary limit of $25,000.00, which must be filed in the Supreme Court of B.C. The tenant confirmed that he was aware of and agreed to the above.

During the hearing, the tenant confirmed that he did not require any emergency repairs to be done, nor did he pay for the cost of any emergency repairs. Accordingly, these portions of the tenant's application are dismissed without leave to reapply.

Issues to be Decided

Is the tenant entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the tenant entitled to an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement?

Is the tenant entitled to an order requiring the landlord to make regular repairs to the rental unit?

Is the tenant entitled to an order requiring the landlord to provide services or facilities required by law?

Is the tenant entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on November 1, 2015. Monthly rent in the current amount of $1,903.00 is payable on the first day of each month. A security deposit of $925.00 was paid by the tenant and the landlord continues to retain this deposit. A written tenancy agreement was signed by both parties and a copy was provided for this hearing. The rental unit is an apartment. The tenant seeks a monetary order of $2,000.00 from the landlord, which includes the $100.00 application filing fee. The tenant seeks $281.11 for the purchase of an air purifier, $1,000.00 for a "loss of enjoyment" and $618.89 for a "loss of health." The tenant seeks a repair to the gap underneath the kitchen sink in his rental unit. The tenant further seeks an order for the landlord to talk to his next-door neighbour ("neighbour") to ask if he can move from his unit, or the landlord can relocate him to another unit away from the tenant, in the same building. The tenant seeks quiet enjoyment of his rental unit and better air quality, free from the smoke of his neighbour.

The tenant said that he lived in his rental unit for approximately one year, with no cigarette smoke issues. He stated that his neighbour moved into the unit next door and began "chain smoking" inside the unit. The tenant explained that he began reporting his neighbour to the landlord for smoking around November 23, 2016. He maintained that there were gaps and holes in the wall between the two units, causing the second-hand smoke to "seep" through into his unit. He confirmed that he complained to the landlord about excessive second-hand smoke entering his rental unit and he was ignored. He noted that the issue has never been fully rectified by the landlord, as the landlord has simply asked him to move from the rental building. He said that his asthma has returned and his sleep apnea has worsened, due to the smoke entering his unit. The tenant provided clinical records from his doctor and the results of a sleep study to support his claims. He said that this has affected his quiet enjoyment of the rental unit. The tenant explained that he should not be forced to move from the rental building just because it is a smoking building because he is entitled to clean air in his rental unit pursuant to the smoke-free housing policy in the province.

The tenant stated that he has a background in law and he informed the landlord that the "thin skull principle" had to be applied, where the landlord has to consider the tenant's pre-existing and current

medical conditions and afford him enhanced rights in his tenancy at the rental unit. He explained that the landlord began responding to the smoke complaints, once he became aggressive and began calling and emailing the landlord consistently. The tenant agreed that the landlord made genuine attempts to seal his rental unit from the holes and gaps in between the two units. The tenant provided numerous emails between the parties showing the communication regarding the smoke complaints. He maintained that when he filed his application at the RTB, the landlord stopped the repairs to his rental unit. He said that he has mitigated his damages and was not seeking a "financial windfall" from the landlord. The tenant claimed that he purchased an air filter to purify the air in his rental unit and sought medical advice and treatment in order to deal with his medical conditions. The tenant provided a receipt, email and photograph of the air filter purchase.

Landlord ET testified that the landlord cares about the tenant's health and medical conditions. She stated that the building is a smoking building and the tenant was aware of this when he moved into the rental unit. The tenant disputed this, saying that he was verbally told by the landlord that it was a non-smoking building and that two of their three buildings in the complex are non-smoking. Landlord ET denied that the landlord verbally advised the tenant that it was a non-smoking building. She explained that the tenant should not have moved in if he had the serious medical conditions that he alleges, due to cigarette smoke. She claimed that the tenant signed a tenancy agreement which did not provide for a non-smoking clause.

The landlord provided a timeline of events in the written evidence package. Landlord ET maintained that the landlord has made concerted and continuous efforts to assist the tenant in ensuring a smoke-free rental unit using a different, holistic approach. She stated that sealing the tenant's rental unit is the solution to the smoke problem and that there are also other sources of smoke, including people from outside the building, not just the neighbour. The landlord provided documents confirming that repairs were done to the tenant's rental unit and the neighbour's front door, in order to address the tenant's complaints. She said that the landlord is willing to continue maintenance and return to the rental unit to determine what other repairs need to be done; the tenant reported that the only repair he was currently seeking inside his unit is for the gap underneath the kitchen sink to be sealed.

Landlord ET maintained that the tenant personally approached the neighbour to complain directly until the tenant was advised not to do so because the landlord said that he was harassing the neighbour, who called the police on one occasion. The landlord provided incident reports about the above as well as an email from the neighbour. The landlord asked that the tenant leave the landlord to deal with the neighbour. Landlord ET stated that the tenant made numerous complaints to the landlord and she provided screen shots of her email inbox, as well as numerous emails between the parties. She noted that the tenant complained frequently and it became onerous for the landlord to respond to every single complaint. The landlord provided incident and security reports regarding the tenant's complaints about the smoke and the efforts that the landlord made to address the issues.

Analysis

Overall, I find that the tenant was somewhat unprepared for this hearing. While he submitted written evidence prior to the hearing date, the tenant used hearing time to look through his paperwork in order to formulate his claim. The tenant had to search for dates, emails and references, in order to properly explain his claim. I allowed him to do this, in order to provide him with a fair and equal opportunity to present his claim at the hearing. I note that the tenant filed his application for this hearing on December 13, 2016, and had until this hearing date on January 18, 2017, to prepare and gather evidence for this hearing.

Repairs, Services, and Orders

I order the landlord to inspect and repair the gap under the kitchen sink in the rental unit by January 19, 2017. Both parties agreed to the above, during the hearing. If the parties disagree as to whether the above has been completed or whether the repair is sufficient, both parties have leave to reapply at the RTB.

I dismiss the tenant's application for an order requiring the landlord to compel the tenant's neighbour to move from the rental unit or to relocate the neighbour to another rental unit in the building. This is not an appropriate request from the tenant. I cannot order the landlord to end another tenant's tenancy or require the landlord to use its own resources to relocate another tenant to another unit in the building.

Monetary Claim

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim on a balance of probabilities. To prove a loss, the tenant must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the landlord in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the tenant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I dismiss the tenant's application for a monetary order of $1,900.00 without leave to reapply, for a loss of quiet enjoyment, a "loss of health," and for the air purifier that the tenant purchased for his rental unit. The landlord disputed these claims. The rental building is a smoking building, which was inherited by the landlord from the former owner. There is no clause in the tenant's written tenancy agreement, indicating that this is a non-smoking building or that there are penalties for smoking inside one's rental unit.
I find that the tenant failed to meet part 2 of the above test to show that the landlord was negligent in dealing with the smoke problem with the tenant's neighbour. I find that the landlord made reasonable efforts to deal with the smoking issue. I find that there was no unreasonable delay in the landlord's response to the tenant's complaints. Initially, the landlord had difficulty contacting the neighbour in order to report the tenant's concerns, as per the landlord's emails to the tenant. I find that it takes some time for the landlord to arrange for inspections and repairs to be done and the landlord could not respond immediately to all of the tenant's complaints, particularly when they were so numerous and frequent. For example, in an email, dated December 12, 2016, landlord ET said that she received 16 complaint emails from the tenant in a two-day period from December 10 to 12, 2016. The landlord also received numerous phone calls from the tenant, in addition to the emails. When the landlord completed repairs, the tenant continued to complain, so the landlord continued to arrange for more work to be done.

I find that the landlord adequately responded to the tenant's complaints, the landlord spoke to the neighbour multiple times and asked him to smoke on the balcony rather than inside his unit, and asked the neighbour to be mindful of the tenant's health concerns. The landlord recommended that the neighbour by an air purifier for his own unit in order to assist with the tenant's complaints and the

neighbour did so. The landlord viewed the air purifier, provided a photograph of it, and provided an email from the neighbour stating that he bought the air purifier on the landlord's recommendation.

The landlord sent its own agents as well as repair personnel to the rental unit multiple times in order to inspect and seal different parts of the unit in order to try to prevent smoke from entering the unit. The landlord submitted photographs and repair notes indicating that seals around outlets and kitchen pipes were installed in the tenant's rental unit, an outside door seal was installed on the tenant's and the neighbour's front doors, and a door sweep was replaced on the tenant's door.

The landlord submitted security and incident reports, indicating that they followed up on the tenant's complaints and had security personnel respond to the tenant's complaints, check the areas for smoke, and contact the landlord, as well as repair personnel fix the affected areas. The landlord submitted a photograph of a posted sign at the exterior of the building to ensure that there was no smoking under the "overhang" or near the apartment balconies and quoted the City bylaw. The landlord said that the overhang area is less than 50 feet away from the tenant's rental unit, so this was another attempt to assist him.

I find that the landlord made reasonable and repeated efforts to assist the tenant to get rid of the smoking smell. The tenant agreed that the landlord made efforts to repair and seal his rental unit and the situation has improved, even though he does not feel that it has been completely alleviated. I find that there may be other factors contributing to the smoking smell in the tenant's rental unit, including the fact that this is a smoking building and other tenants are permitted to smoke in their rental units and their balconies and outside the rental building. Landlord ET claimed that she noticed an increase in cigarette butts in the flower bed outside of the rental building.

I find that the tenant voluntarily chose to buy an air purifier in order to improve the quality of the air in his rental unit. He was not required to do so. He said that this helps him because of his health issues. I find that the landlord is not responsible for the tenant's preferences and choices. I find that the tenant is not entitled to reimbursement for this device. As noted above, I find that the landlord made reasonable efforts to address the tenant's complaints and improve the air quality in his rental unit.

I also find that the tenant failed to meet part 3 of the above test, as he was unable to provide a complete and clear breakdown for the $1,618.89 sought for a "loss of enjoyment" and "loss of health." The tenant said that the $618.89 sought for a loss of health was a low amount that was reasonable and fair, and he wanted the total of all of his monetary claims to add up to $2,000.00. He said that he was seeking $25.00 per day from November 23, 2016 to December 17, 2016 and from January 1 to 18, 2017, for a loss of enjoyment. The above days adds up to 43 days x $25.00 per day equals $1,075.00, not $1,000.00 as claimed by the tenant. During the hearing, the tenant was unsure of his claim for a "loss of enjoyment" and was counting the days that he was affected by the smoke, according to emails he sent to the landlord.

As the tenant was mainly unsuccessful in this application, I find that he is not entitled to recover the $100.00 filing fee from the landlord.

Conclusion

I order the landlord to inspect and repair the gap under the kitchen sink in the rental unit by January 19, 2017. If the parties disagree as to whether the above has been completed or whether the repair is sufficient, both parties have leave to reapply at the RTB.

With the exception of the above repair order, the remainder of the tenant's application is dismissed 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: February 03, 2017

Residential Tenancy Branch