Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, RP, FF

Introduction

This hearing was convened by way of conference call concerning an application made by the tenants seeking a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement; for an order that the landlord make repairs to the unit, site or property; and to recover the filing fee from the landlord for the cost of the application.

The hearing did not conclude on the first scheduled date and was adjourned by consent. My Interim Decision was provided to the parties.

The hearing commenced on the second scheduled date and both tenants, as well as Legal Counsel and an agent for the landlord attended the hearing. Both tenants gave affirmed testimony and the landlord's Legal Counsel was given the opportunity to question each of them. The landlord's agent did not testify. The tenants and the landlord's Legal Counsel were also given the opportunity to make submissions.

The parties also provided evidentiary material to the Residential Tenancy Branch and to each other, however some evidence provided by the landlord was not received by me prior to the hearing but was received by the tenants. The tenants opposed inclusion of 2 Affidavits provided by the landlord sworn by an unnamed landlord (AKD) because he did not attend for cross examination. The tenants were permitted to rebut the Affidavit evidence, and the landlord's counsel was permitted to send to me by facsimile a copy of the missing evidentiary material after the hearing concluded, which I have now received.

No other issues with respect to service or delivery of documents or evidence were raised and all evidence has been reviewed and is considered in this Decision.

Issue(s) to be Decided

- Have the tenants established a monetary claim as against the landlord for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement, and more specifically for loss of use of portions of the rental unit?
- Should the landlord be ordered to make repairs to the unit, site or property?

Background and Evidence

The first tenant (DWW) testified that this fixed term tenancy began on May 1, 2011 and expired on May 31, 2012 after which it revered to a month-to-month tenancy, and the tenants still reside in the rental unit. Rent in the amount of $1,650.00 per month is currently payable on the 1st day of each month and there are no rental arrears. At the outset ofr the tenancy the landlord collected a security deposit from the tenants in the amount of $800.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a 2-story single family dwelling, and only the 2 tenants reside there.

A copy of the tenancy agreement has been provided which names the tenants and a landlord. The tenant testified that the landlord named in this application is not the same name as that contained in the tenancy agreement, however the tenant had given post-dated cheques for rent, leaving the payee blank, and the person who cashed the cheques is the person named as landlord in this application, and submits is the proper party to be served.

The tenant further testified that on June 12, 2016 the tenant went golfing and upon his return to the rental unit he found water in the front entrance about an inch deep. The hot water tank was leaking so the tenant turned it off and called the landlord's agent who gave the tenant another person to call. The tenant did so and advised that he would start vacuuming with a shop vac, which he did for about 5 ½ hours and retrieved about 30 or 35 gallons of water from the floor. A fair bit of the carpet was soaking wet, being half of the recreation room and about 40% of the storage area, as well as the entry and laundry room, but they were not carpeted and not damaged by the water.

The next day the tenant received a call from a plumber who said he was going to fix it and arrived to change out the hot water system He told the tenant the older one was about 20 years old.

The next day, June 14, 2016, the tenant received a call from a restoration company who met the tenant at the rental unit. Some fans and 2 dehumidifiers were placed in the rental unit. However, since there was no deposit from the landlord, that's all the restoration fellow was willing to do and he left without lifting the carpet. Later, the restoration company called saying that the tenants had to remove everything from the

lower level of the rental home. The tenant called the landlord's agent requesting a shipping container to put belongings in, but the landlord denied the request. The tenant had moved some belongings from the wet to the dry area of the carpet.

On June 20 the restoration people came back saying they wanted a retainer from the landlord but didn't get it. The tenant advised that the tenants' belongings were on the dry part of the carpet, and they were good with that. The restoration people cut out carpet and took out wet underlay and left the tenants' belongings on the dry part of the carpet.

The tenant kept hounding the landlord about fixing the problems. A tradesman arrived with laminate flooring on August 1, 2016, but on August 4 the tradesman cut his hand with a saw and had to go to hospital. Later the tradesman asked the tenant to call the landlord's agent about getting paid, so the tenant confirmed to the landlord that the work was done. All flooring was in, and the tradesman put up drywall with screws and then left.

In both September and October, 2016 when the tenant went to pay rent, he asked about repairs still required and the landlord named in the tenancy agreement refused to call the landlord's agent about it. The landlord called the tenant in October saying he was going to India for 3 months and asked for post-dated rent cheques for 3 months. Rent was usually paid by cash. The tenant provided the post-dated cheques leaving the payee name blank and someone wrote in the name of the landlord collecting payment, who is the landlord named on the Tenant's Application for Dispute Resolution.

The landlord was back in the country by February 1, 2017 and called the tenant. The tenant advised that a hearing had been conducted with the Residential Tenancy Branch and the tenant was successful in obtaining a monetary order, that the tenant cancelled the January rent cheque and that it would take until March, 2017 until the monetary order was recovered by withholding rent. The tenant provided a copy of the Decision to the landlord by email and asked what was happening about fixing the house. The landlord said he didn't know. The tenants owed the difference between the rent due for March and the monetary order and the parties agreed to meet. The tenant paid the difference and asked for a receipt. The landlord agreed with the tenant's calculation and signed a receipt. The landlord wouldn't provide an address, but an email address, to which the tenant provided a copy of the Decision.

In March, 2017 the other tenant received a text message from a realtor and the parties discussed getting the house fixed. On March 31, 2017 a tradesman walked through and said he'll be back. Drywall needs to be put on, taped, sanded, painted, and baseboards still have to go back on. The tenants have moved their belongings 4 times

to accommodate tradespeople, and have not been able to move any of it back because the work still isn't done. The tenants cannot use most of the TV room or garage or bookcases because everything is all stacked up. Some belongings are stacked in other rooms not damaged, making them unavailable for use, or partially unavailable. The third bedroom has only about 28 square feet of unusable space, but that room was for grandchildren and the tenant can't put a bed in it. Photographs have been provided. The tenant testified that they have been deprived of the use of about 40% of the house. Also walls were open due to having no drywall, a squirrel got in and the tenant had to get an animal trap. The tenants originally thought it was a rat and bought rat traps, but the receipt for that has been lost. A copy of the squirrel trap has been provided.

The tenant also testified that the letter from the restoration company provided in the landlord's evidence package contains incorrect information, stating that the tenants have not been cooperative. The landlord has only been at the rental unit on one occasion during the third week of July and not since. The landlord's agent has never attended since the leak started. The tenant denies that any service people have been held up, and the tenants have been trying to get the landlord to fix the house since rent was paid in July. Also, realtors have been there to show the rental unit at least 4 times, but no tradespeople have been there since August 4, 2016, with the exception of one fellow who showed up to look at what repairs were done, but he never returned. Generally, the tenant would ask the landlord about it and a week or so later a realtor would show up.

The tenants had applied for dispute resolution and were successful in obtaining a monetary order against the landlord in December, 2016 wherein the tenants were awarded about $4,300.00 for the period of June 12 to November 30, 2016. A copy of the resulting Decision has not been provided, however the tenants have provided a Monetary Order Worksheet and a document entitled "Damages Claim," setting out the following claims:

- $2,920.80, for 4 months from December, 2016 to March 31, 2017 @ $730.20 per month;
- $59.67 for the cost of photographs;
- $27.51 for Canada Post mail charges;
- $20.00 for 2 rat traps;
- $78.93 for the squirrel trap;
- for a total claim of $3,106.91.

The tenant testified that the claim is for the period of December 1, 2016 to March 31, 2017 for loss of use of the rental unit. A floor plan and calculation sheet have also been provided.

The tenant also rebuts the facts contained in the landlord's Affidavits, and submits that little weight should be applied because the persons who swore them are not available for cross examination.

The second tenant (PAO) testified that the tenants have been trying to get the landlord to have the repairs finished, but no one has shoed up. The tenant wants the house back so they have been helpful.

The tenants have not provided any written requests, by way of a note, text or email to the landlord or the landlord's agents about drywall and baseboards.

Submissions of the landlord's Legal Counsel:

The landlord was not served with the application and notice of the first hearing and had no knowledge of the December, 2016 hearing. The Affidavits of the landlord specify that the landlord named in the tenants' application (VT) is a person who has a beneficial interest in the rental property and is not the proper party to be served. That person hired a property manager (AKD) who is the landlord named in the tenancy agreement.

Within a month and a half, the house was dried out, new flooring installed, and pieces of drywall that needed to be replaced were replaced with decorative baseboards. There was no disruption to the tenants with respect to replacing the faulty hot water heater, and the landlord's conduct entirely has been to get work done or he wouldn't have had the restoration company attend within 24 hours. The tenants were disruptive to getting the last work done and their interference has caused further damage because water would not have sat as long and drywall would not have had to be cut up 2 feed above the floor to prevent mold. A shop vac is not sufficient.

The tenants' photographs show an incredible amount of belongings The *Residential Tenancy Act* requires that the tenants mitigate and put belongings back to make the rental unit functional for them. Some missing drywall and baseboards don't prevent the tenants from doing so, and inconvenience is not evidence of damage or loss. Further, the letter of the restoration company shows interference and delay caused by the tenants. Given that the rental home is listed for sale, it doesn't follow that the landlords would not finish the last portions of the repairs.

The landlord's Legal Counsel also submits that the tenants cannot refuse to pay rent under Section 26 of the *Residential Tenancy Act,* and there is no order of the

Residential Tenancy Branch permitting the tenant to withhold it. The receipt provided by the tenant is not signed by a landlord.

Submissions of the tenants:

Drywall has been missing for almost 9 months and repairs started in August, 2016. The rental home is a 2500 square foot house and the tenants wanted to use it the way they wanted and have been deprived of that, not by the tenants' cause.

The tenants seek an order that the landlord complete the repairs to the drywall, baseboards and painting. The tenants also seek a monetary order for the period of December 1, 2016 to March 31, 2017 and for traps.

Analysis

Firstly, with respect to the proper party to be served and named as the landlord, the *Residential Tenancy Act* defines a landlord:

> **"landlord"**, in relation to a rental unit, includes any of the following:
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> (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
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> (i) permits occupation of the rental unit under a tenancy agreement, or
>
> (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
>
> (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
>
> (c) a person, other than a tenant occupying the rental unit, who
>
> (i) is entitled to possession of the rental unit, and
>
> (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;
>
> (d) a former landlord, when the context requires this;

The Affidavit of AKD provided in the landlord's evidentiary material sets out very clearly that he is a beneficial owner of the rental property, the person who signed the tenancy agreement is the property manager (RC), and the person named in the Tenant's Application for Dispute Resolution (VT) is the registered owner of the rental property. A landlord is described in the *Act* as the owner, the owner has cashed the rent cheques, and I find that he is a proper party to be named and served.

Where a party makes a monetary claim as against another party, the onus is on the claiming party to satisfy the 4-part test:

1. that the damage or loss exits;
2. that the damage or loss exists as a result of the other party's failure to comply with the *Act* or the tenancy agreement;
3. the amount of such damage or loss; and
4. what efforts the claiming party made to mitigate any damage or loss suffered.

In this case, there is no doubt that the hot water system malfunctioned and caused a flood in the lower level of the rental home. There is also no doubt that a hearing was held in December, 2016 and the resulting Decision was a monetary order in favour of the tenants for loss of use of a portion of the rental unit. No one attended the hearing on behalf of a landlord, and no one has provided a copy of the Decision for this hearing, however I am not bound by it.

The parties also agree that the tenants have withheld rent until the entire sum has been realized and this application is for loss of use of a portion of the rental unit for the period since that hearing. Legal Counsel for the landlord submits that according to Section 26 of the *Act,* the tenants cannot withhold rent, and that the Decision does not specify that rent can be withheld, but I have no application before me from the landlord.

I have read all of the evidentiary material provided by the parties, including the Affidavits provided by the landlord. I also accept the letter of the restoration personnel stating that the tenants were uncooperative, given that the tenants have never provided any written requests or notifications to the landlord or the landlord's agents about what work has not yet been completed by tradespeople. However, the email from the restoration company described incidents that allegedly took place before the first hearing, and that matter has already been adjudicated upon.

I also find that the tenants have had no reason to keep all of their belongings stacked up in different rooms of the house because baseboards are missing for several months. It was not and is not necessary, and I agree with Legal Counsel for the landlords that the tenants have an exceptional amount of belongings piled up.

In the circumstances, I am not satisfied that the tenants have established mitigation for a claim for loss of use of the rental unit, but have established that the tenants have suffered damages as a result of not having a rental unit in a similar state as it was when the tenancy agreement was entered into and for several years after that up until the malfunctioning hot water system. I find that the tenants have established a claim for a nominal amount of $100.00.

I also order the landlord to ensure that the drywall and baseboards be finished and installed by the end of May, 2017, and if not, the tenants will be at liberty to apply for further compensation for the landlord's failure to comply with this order.

The *Act* also permits me to order either party to comply with the *Act* or the tenancy agreement, and states that a landlord may not enter a rental unit subject to a tenancy without providing at least 24 hours and not more than 30 days notice and specifies what must be contained in the notice, unless the tenant agrees to entry at the time of entry. A tenant may not interfere with a landlord's right to enter the rental unit if that notice is properly given. I further order the tenants to cooperate with the landlord and tradespeople with respect to getting the repairs finished.

Although I am satisfied that a squirrel got into the rental home, I am not satisfied that the tenants have established that it got in because of the landlord's failure to comply with the *Act* or the tenancy agreement, given that the work left unfinished is interior drywall and baseboards. The tenants have provided a photograph of the squirrel in a trap and testified that it was taken in January or February, 2017. I find it just as likely or possible that the squirrel got in by leaving a door or window open, and the tenants' application for recovery of trap costs is dismissed.

The *Residential Tenancy Act* does not provide for recovery of the costs to prepare for a hearing or for service of documents, and therefore, the tenants' claims for those expenses is dismissed.

However, the *Act* does provide for recovery of the filing fee. Since the tenants have been partially successful with the application, the tenants are also entitled to recovery of the $100.0 filing fee, and I order that the tenants be permitted to reduce rent for a future month by $200.00 or may otherwise recover it.

Conclusion

For the reasons set out above, I hereby grant a monetary order in favour of the tenants as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of $200.00 and I order that the tenants be permitted to reduce rent for a future month by that amount or may otherwise recover it.

I further order the landlord to complete the drywall and baseboard repairs by the end of May, 2017 and if the landlord fails to do so, the tenants will be at liberty to make an application for further relief for the landlord's failure to comply with this order.

I further order the tenants to cooperate with the landlord and tradespeople with respect to getting the repairs finished.

This order is final and binding and may be enforced.

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: April 28, 2017

Residential Tenancy Branch