Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL DRI ERP FF MNDC MNSD

Introduction

This hearing was convened in response to applications by the tenants pursuant to the *Residential Tenancy Act* (the "Act") for Orders as follows:

The application from the tenants requested:

- a cancellation of a Mutual Agreement to End Tenancy;
- a Monetary Order pursuant to section 67 of the *Act* for damages suffered;
- authorization to recover their security deposit pursuant to section 72 of the *Act;*
- an order compelling the landlord to perform emergency repairs pursuant to section 33 of the *Act*;
- an order directing the landlord to comply with the *Act* pursuant to section 62;
- more time to file an application for dispute resolution pursuant to section 66 of the *Act*;
- a dispute of the rent increase pursuant to section 43 of the *Act*; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72 of the *Act*.

Both the tenants and the landlord attended the hearing. The landlord was represented at the hearing by his lawyer, J.A. (the "landlord"), while tenant, B.D., presented submissions for the tenants. Both parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The tenants testified that the landlord was personally handed a copy of the Application for Dispute Resolution hearing package ("dispute resolution hearing package") on April 29, 2017. The landlord confirmed receipt of the package. In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenants' application for dispute resolution hearing.

Following introductory remarks, the tenants explained that they mistakenly requested more time to complete their application under section 66 of the *Act* and they were prepared to conduct the hearing. This portion of the tenants' application was withdrawn at the hearing.

Issue(s) to be Decided

- Can the tenants cancel a mutual agreement to end tenancy?
- Can the tenants dispute a rental increase that does not comply with the Regulations?
- Should the landlord be directed to make emergency repairs to the rental unit?
- Are the tenants entitled to a Monetary Order?
- Are the tenants entitled to a return of their security deposit?
- Should the landlord be directed to comply with the *Act*?
- Should the rent be reduced for repairs, services or facilities agreed upon but not provided?
- Are the tenants entitled to a return of the filing fee?

Background and Evidence

The tenants testified that this tenancy began on March 1, 2004. Rent was $2,650.00 and a security deposit of $1,325.00 was collected at the outset of the tenancy and continues to be held by the landlord.

Evidence provided to the hearing from the landlord demonstrates that the rent was raised on the following occasions.

- On September 23, 2007 a Notice of Rent Increase raised the rent starting January 1, 2008 to $2,740.00.

- On September 30, 2014 a Notice of Rent Increase raised the rent starting January 1, 2015 to $2,800.00.

- On September 25, 2015 a Notice of Rent Increase raised the rent starting January 1, 2016 to $2,880.00.

- On June 27, 2016 the tenants agreed in writing to a rental increase starting January 1, 2017, raising the rent to $4,450.00

The tenants are seeking a monetary award of $18, 612.85. This money reflects:

Item	**Amount**
Rent Overpayment	$17,240.96
Security Deposit and Interest	1,371.89
Total =	$18,612.85

The tenants testified that they were looking for compensation because they had paid rent beyond what was allowable under the *Regulations.* They explained that this amount was $17,240.96. Specifically, they were seeking a 25% return in the rent of $4,450.00 they paid from January 1, 2017 to June 2017, and were looking to recover 25%, in the form of a rental reduction, for rent from April 2016 to June 2017 due to ongoing construction and repairs in the rental unit.

The tenants explained that repair works for a water leak were undertaken in April 2016. During the course of these repairs, some asbestos was discovered in the linoleum flooring. The tenants argued that as a result of the construction work to repair this water leak, they had been exposed to asbestos fibres and construction dust. They contended that they should be compensated in the form of a rental reduction of 25%.

Following the discovery of asbestos in the flooring, a qualified contractor was hired to remove the asbestos. On May 12 & 13, 2016 this qualified contractor performed asbestos cleanup. As a result of this work, the tenants were left with three holes in their floor. These holes remain in the rental unit up to the present time.

On May 13, 2016 an environmental assessment company performed air quality tests on the rental unit. Following these tests, a report was provided to the landlord that stated, “The air samples 1, 2, 3 and 4 collected from within the residence are well below twenty percent of the worker 8-hour permissible concentration for asbestos fibres in air. The criterion for air clearance has been met. AIR CLEARANCE IS GRANTED.”

The tenants have applied to cancel a 2 Month Notice to End Tenancy (“2 Month Notice”) despite no 2 Month Notice having been served on them. Testimony from both the landlord and the tenants revealed that the tenants were, in fact, attempting to cancel the Mutual Agreement to End Tenancy (“Mutual Agreement”) signed between the parties on

June 27, 2016, which created a tenancy ending on June 30, 2017. During the course of the hearing the tenants sought to argue that they signed this agreement under duress and that it was entered into under false pretenses. The tenants testified that they felt great pressure to sign the agreement, fearing they would face immediate eviction if they did not. Furthermore, the tenants stated that they had been informed by the landlord that he would be taking possession of the home.

The landlord disputed this account of events. He explained that this Mutual Agreement was entered into between the parties after lengthy negotiations, and signed two weeks after it had initially been offered to them.

Counsel for the landlord provided the hearing with a statutory declaration. This outlined the landlord's position on all matters raised by the tenants during the hearing. Specifically, the landlord's statutory declaration explained at the following indicated points:

> #22 thru #27 - The landlord's original intention was to serve the tenants with a 2 Month Notice to End Tenancy. After he spoke with them, the parties began negotiating terms of a continued tenancy.
>
> #28 - Discussions concerning a drastic increase in rent began on June 7, 2016.
>
> #69 - A qualified asbestos contractor performed asbestos cleanup at the Rental Property on May 12 and 13, 2016.
>
> #72 - On March 12, 2017 the tenants requested that the holes in the ground floor be repaired and that the length of the rerouted waterline attached to the drywall be covered.
>
> #75 - On March 25, 2017 the landlord provided the tenants with the contact information of a contractor whom the landlord recommended and had spoken to about performing the necessary repairs
>
> #79 thru 83 - On April 2, 2017 the contractor attended the Rental Property. Following this, a series of phone calls took place between the contractor and the tenants as they attempted to arrange a time for him to attend the Rental Property.

<u>Analysis – Cancel a Mutual Agreement to End Tenancy</u>

There is no recourse available under the *Act* for the tenants to dispute the Mutual Agreement, unless it is "unconscionable" under section 6 of the *Act*. It is a Mutual Agreement that was entered into by both parties which is allowable under section 44(1)(c) of the *Act*. The tenants raised the issue of duress during the hearing, testifying

that they felt pressured to sign the contract and they argued that they had been led to sign this agreement under false pretenses.

While the tenants may have felt pressured to sign this Mutual Agreement and may have believed that they had been lied to by the landlord regarding the true nature of his intentions for the rental unit, little evidence was presented to support this notion. The landlord provided a reasonable explanation as to how the parties arrived at this Mutual Agreement and no evidence was presented that the landlord threatened the tenants with any physical harm or explicitly threatened them in any manner – key elements of duress. There is no indication that the landlord took advantage of the tenants' age, infirmity or inability to understand the nature of the agreement or its consequences. As unfair as the tenants may contend this agreement to be, I find that the parties entered into it under their own free mind and will.

Residential Tenancy Policy Guideline #8 explores the issue of 'Unconscionable Terms' and it notes, "Under the *Residential Tenancy Act*…a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party…a test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party…exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when on party took advantage of the ignorance, need or distress of a weaker party." This provision however, only applies to terms of a residential tenancy agreement. There was no evidence presented at the hearing that the landlord sought to impose any unconscionable terms to the tenancy agreement itself.

The tenants may have misunderstood the true intent of the landlord; however, that is not a sufficient ground to invalidate this Mutual Agreement. The elements of contract law require the provision of an offer, the acceptance of that offer and an exchange of consideration by the parties. All of these elements are present in this Mutual Agreement. It is not for the *Residential Tenancy Branch* to explore the equities of the agreement reached by the parties, unless it is unconscionable under section 6 of the *Act*. As stated previously, I do not find this to be the case in this instance. As such, the Mutual Agreement is valid, and I find that this tenancy shall end when scheduled at 1:00 P.M. on June 30, 2017.

Analysis – Monetary Order & Rent Increase

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. When a party makes a claim for damage or loss, the burden of proof lays with the applicant, in this case the tenant to establish the claim on a balance of probabilities. To prove a loss, the applicant 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 other party 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 applicant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

The tenants are seeking compensation for overpaid rent. The tenants explained that they wanted compensation for having overpaid rent based on a rental increase that was beyond the amount prescribed under the *Regulations*. The tenants acknowledge paying this rent based on a June 27, 2016 rental increase that they signed.

Section 43(1)(c) permits a landlord to increase rent above the legislated amount if the tenant agrees so in writing. *Residential Policy Guideline #37* notes that, “a landlord who desires to increase a tenant’s rent by more than the amount of the allowed rent increase can ask the tenant to agree to an increase that is great than the allowed amount…If the tenant agrees in writing to the proposed increase…the landlord must still follow requirements regarding the timing and notice of rent increases.”

I am satisfied that the landlord has increased the rent in accordance with the *Act* and *Regulations* in excess of what is permitted pursuant to *Regulations.* All documentary evidence presented to the hearing demonstrates, however, that the tenants signed a document allowing for this rental increase to take effect on January 1, 2017. This rental increase was signed on June 27, 2016, giving the tenants 5 months before the increase took effect. The statutory provisions in *Policy Guideline #37* require a landlord to provide only 3 months advance notice of any rental increase. For the above reasons, the increase in this case was made in compliance with the *Policy Guideline* and the tenants cannot recover the funds sought related to a rental increase.

During the course of the hearing the tenants explained that they felt “pressured” to sign this increase in rent. While, I agree with the parties that this is a very large rental increase, there was no evidence that the tenants were lacking in intelligence or

experience, or faced with any immediate eviction had they not agreed to the terms of this new rental agreement. No evidence of any notices to end tenancy was produced to the hearing.

The tenants stated that in addition to an illegal rental increase, they should be compensated for losses suffered as a result of having lived with holes in their floors, and because the landlord did not intend to use the rental unit as he advertised to them.

Starting with the tenants' request for compensation requesting compensation for not having used the rental unit as they were informed; I turn to section 51 of the *Act*. This section provides that a tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

It continues by explaining that if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice, the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement. This compensation structure only applies to instances where a landlord has issued a 2 Month Notice to End Tenancy to a tenant.

Testimony was provided by both parties that the landlord did not serve the tenants with a 2 Month Notice to End Tenancy and that this tenancy is ending on the basis of a Mutual Agreement to End Tenancy. There is no basis for any compensation under the *Act* when the parties have entered a Mutual Agreement to End Tenancy. The tenants were not presented with any Notice to end their tenancy and the tenants agreed to the terms of the Mutual Agreement. In addition, the landlord supplied evidence that the parties had entered into negotiations to extend the tenancy, and following these discussions the tenants expressly wanted to stay. The tenants' application for compensation based on the landlord not having used the rental property as communicated is therefore dismissed.

The final matter requested by the tenants was a monetary award in the form of a 25% reduction in rent from April 2016 to June 2017. This is in reflection of having lived with holes in their floors since May 2016. Evidence was presented at the hearing by the landlord that he made efforts to rectify this matter within two weeks of having received a complaint in March 2017. In his statutory declaration, the landlord presented a reasonable explanation as to why this matter was not dealt with sooner, due to

difficulties he encountered getting the tenants to meet with the contractor during the month of April 2017. Furthermore, the landlord explained that the tenants did not raise the issue of the unfinished construction until recently. The tenants did not specifically explain how they suffered as a result of the rental property having the holes in the floor, or how they arrived at the figure of 25%. The landlord supplied detailed environmental reports in which he outlined that adequate steps were taken to ensure that no asbestos was present in the rental unit despite these holes in the floor. As I can find no loss on the tenants' part, this portion of their application is dismissed.

The entirety of the tenants' application for a Monetary Order is dismissed.

Analysis – Order to Comply

The tenants presented no testimony at the hearing specifying how they would like the landlord to comply with the *Act*. During the course of the hearing the tenants presented some testimony concerning their feelings towards the landlord and the manner in which he conducted his business. While the tenants felt that the landlord was unscrupulous in the way that he interacted with them, there is no basis in the *Act* for granting relief to someone who applies for an Order solely on this ground.

Based on the evidence and testimony presented at the hearing, it is evident that the landlord has closely followed the *Act* in all of his interactions with the tenants. The tenants' application for an order requiring the landlords to comply with the *Act* is dismissed.

As the tenancy will continue until June 30, 2017, the tenants' application for a return of their security deposit with interest is premature. This portion of their application is dismissed with leave to reapply.

Since the tenants were unsuccessful in their application, they must bear the cost of their own filing fee.

Conclusion

The tenants' application to cancel a 2 Month Notice is dismissed, as no such Notice was issued to the tenants. This tenancy is scheduled to end on June 30, 2017 in accordance with the Mutual Agreement to End Tenancy.

The tenants' application for a monetary award is dismissed.

The tenants' application for an Order directing the landlord to comply with the *Act* is dismissed.

The tenants' application to recover their filing fee is dismissed.

The tenants' application to recover their security deposit is dismissed with leave to reapply following the conclusion of this tenancy.

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: June 2, 2017

Residential Tenancy Branch