Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPB
MNDC, FF

Introduction

This hearing was convened by way of conference call concerning applications made by the landlord and by the tenants. The landlord has applied for an Order of Possession for breach of an agreement. The tenants have applied for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement, and to recover the filing fee from the landlord for the cost of the application.

The landlord and both tenants attended the hearing and each gave affirmed testimony. A translator for the landlord also attended who was affirmed to well and truly interpret the hearing from the English language to the landlord's native language and from the landlord's native language to the English language to the best of his skill and ability.

The parties were given the opportunity to question each other and give closing submissions.

During the course of the hearing the tenants withdrew the application for recovery of the filing fee.

Issue(s) to be Decided

- Is the landlord entitled under the *Residential Tenancy Act* to an Order of Possession for the tenants breaching the tenancy agreement fixed term?
- 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 reimbursement of supplies and loss of quiet enjoyment of the rental unit?

Background and Evidence

The landlord testified that this fixed term tenancy began on May 1, 2016 and expired on May 1, 2017, and the tenants still reside in the rental unit. Rent in the amount of

$1,100.00 per month is payable on the 1st day of each month. At the outset of the tenancy the landlord collected a security deposit from the tenants in the amount of $1,100.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a manufactured home on 5 acres, but the tenants only rent the home, not the acreage.

The landlord further testified that the contract has expired, and the landlord needs the house. The tenancy agreement, a copy of which has been provided for this hearing, specifies that at the end of the fixed term, the tenants must move out of the rental unit, but they don't want to leave. The tenants paid rent for May, 2017, but have not paid any for June or July, and are currently in arrears of rent $2,200.00. The tenants have locked the gate, and have made things very unpleasant, and the landlord can't get access to collect rent. The tenants won't allow it, and make different stories about why. The tenants wanted a month-to-month tenancy to continue, but the landlord didn't agree. Rent for May was collected because the tenants wanted more time to move out, and then said they weren't going to move out.

In January, 2017 the tenants started making excuses for being late with rent, then said that they would pay rent once the furnace was fixed. The landlord sent a technician who said it was working nicely, but changed a breaker.

In response to the tenants' application, the landlord testified that a small garden was used by the tenants, but not part of the tenancy agreement. The tenants used the garden after the landlord told them they couldn't and then they locked the gate to the garden. The tenants also changed a door without permission from the landlord and then asked for money for completing the job. Also, the landlord fixed the driveway before the tenants moved in and after that wasn't allowed on the property.

The landlord agrees there are gophers on the property, but the landlord wasn't permitted to attend even to collect rent and had to meet the tenant at a coffee shop to collect rent.

The first tenant (ANH) testified that there has been a constant rodent issue inside and outside, which was brought up to the landlord and he didn't care, saying it was to be expected. The tenant's husband went under the house and replaced insulation that rodents had torn out, and has made it a better place to live in, and has been vermin free for some time now. The landlord wouldn't attend to look at any of the work completed by the tenants.

The landlord has not given the tenants any notice to vacate the rental unit, so the tenants oppose an Order of Possession in favour of the landlord.

The tenants have provided a Monetary Order Worksheet setting out the following claims as against the landlord:

- $27.48 – Gophers - April 28, 2016 to June 6, 2017 – sling shot/Ammo;
- 98.54 – pellet gun/ammo;
- 180.00 – 2 days lost time;
- 3,300.00 – loss of driveway – June, 2016 to February, 2017;
- 1,100.00 – loss of use of lawnmower June to July, 2016;
- 1,357.00 – hydro bills;
- 3,300.00 – loss of use of the furnace from April 28, 2016 to February, 2017;
- 1,200.00 – outstanding repairs – May, 2016 to May 3, 2017.
- 13,200.00 – Frustration of #RTO – 1 – April 28, 106 to May 3, 2017;
- For a total of $23,763.02.

The tenant testified that they used space heaters due to the furnace not functioning, and the tenants have provided copies of hydro bills. The tenants had to get traps, set them, acquire a pellet gun and sling shot. Receipts have been provided.

The tenants' claim of $1,200.00 for outstanding repairs is made because the landlord won't complete the repairs. The tenants had to buy calking, cement, insulation, plastic, and lumber as part of the extermination process to prevent rodents from entering, and fill the holes with concrete to drive them out. Water was leaking into the canning room creating mold on the floor, the bathroom need to be re-done due to black mold in the tub. The landlord said the parties could talk about compensation.

The tenants claim "frustration" and have provided a document setting out "Details regarding Family being left without heat," and due to the tenants' inability to have proper communication with the landlord.

With respect to loss of the driveway, the tenants were told that during the winter the driveway was suitable, and after the second big snowfall, even with winter tires, the tenants slid down the hill. There was another entrance but the neighbours told the tenant that they would block it off and the tenants were no longer able to use it. The grade on the existing driveway is ridiculous, and the tenants told the landlord about it.

The lawn mower was included in the rent by a verbal agreement. There is a yard on the side that is connected and the tenants were to maintain it with that lawn mower. The tenant explained to the landlord that it wasn't working, and the tenants were compensated by way of a rent reduction $50.00 to purchase a used one. However,

weeks had gone by, and the tenants seek compensation for not being able to use that portion of the yard due to no lawn mower.

The tenant also explained that the $13,200.00 claim is under the “Frustration Act,” for which the tenants claim 12 months at $1,100.00 per month. The tenant testified that the law says the tenants have a right to enjoyment and safety in their home, and for the last year it has not been attended to.

The second tenant (DLH) testified that the landlord was to take possession of the rental unit on May 1, 2017 but didn’t do so and collected rent. The tenancy is now on a month-to-month basis as a result.

The tenant also mentioned “frustration” of the tenancy due to the lack of safety, quiet enjoyment, and that the rental unit did not conform with the Act. The parties had a verbal agreement for maintenance and repairs, and that the tenant wouldn’t do more than $100.00 per month.

The landlord failed to provide an emergency phone number.

The landlord withdrew the garden area; a facility provided with the tenancy and removed without notice to the tenants.

The landlord also told the tenants he was going to keep the security deposit.

Digital evidence and transcripts have also been provided by the tenants, which the landlord objected to, stating that he didn’t believe they were authentic and may have been altered. At the conclusion of the hearing the tenant advised that he had recorded the entire hearing. The tenant was advised that recording of hearings is not permitted by the legislation. The tenant said he didn’t know that, and that he immediately deleted the recording.

Analysis

Not only is it against the legislation, I find it to be invasive to record conversations without the consent or knowledge of the person(s) being recorded, and serve no other purpose than to be confrontational. The tenant did not consent to being recorded, and may not even have had knowledge of it at the time. Further, verbal agreements are not necessarily enforceable because other verbal agreements may have followed that are not contained in such recordings. As a result, I decline to consider any of the tenants’ digital evidence or transcripts.

With respect to the landlord's application for an Order of Possession, it is clear in the evidence before me that the parties entered into an agreement for a fixed term to expire on May 1, 2017, at which time the tenants were required to vacate the rental unit. The tenants rely on the fact that the landlord collected rent for the month of May thereby reinstating the tenancy on a month-to-month basis. The landlord disagrees that was the intent and the tenants wanted more time to move out, so he agreed to one month. The tenants' written material also suggests that Section 44(3) applies:

> **44** (3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

I find that the subsection does not apply to this dispute because the date specified as the end of the fixed term does require the tenants to vacate the rental unit on that date. I also refer to Residential Tenancy Policy Guideline #30 – Fixed Term Tenancies, which states, in part (underlining added):

> **Orders of Possession and Fixed Term Tenancies**
>
> In addition to the procedures under the Legislation for terminating a tenancy for cause or for non-payment of rent, a landlord may apply for an Order of Possession in respect of a fixed term tenancy when any of the following occur:
>
> - the tenant has given proper notice to the landlord as a result of a material breach by the landlord;
> - the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
> - the landlord and tenant enter into a written agreement specifying that the tenancy agreement shall end on a specified date.

Therefore, the landlord is not required to give the tenants notice to vacate the rental unit. That "notice" is the agreement entered into at the commencement of the tenancy. I also find that the intention of the parties at the time the agreement was entered into, and at the end of the fixed term, are important factors to consider. I do not accept that the landlord agreed or had any intention of agreeing to a month-to-month tenancy. The tenants paid rent for an additional month in the hopes of coercing a month-to-month tenancy, which was never the intention of the landlord, and I find that the tenants were well aware of that. Therefore, I find that the landlord is entitled to an Order of Possession. Since the effective date of vacancy contained in the tenancy agreement has passed, I grant the Order of Possession on 2 days notice to the tenants.

With respect to the tenants' monetary claim, a tenant is not permitted to make repairs and claim them from the landlord unless they are emergency repairs, defined as follows:

33 (1) In this section, **"emergency repairs"** means repairs that are

(a) urgent,

(b) necessary for the health or safety of anyone or for the preservation or use of residential property, and

(c) made for the purpose of repairing

(i) major leaks in pipes or the roof,

(ii) damaged or blocked water or sewer pipes or plumbing fixtures,

(iii) the primary heating system,

(iv) damaged or defective locks that give access to a rental unit,

(v) the electrical systems, or

(vi) in prescribed circumstances, a rental unit or residential property.

In such circumstances, the tenants may only make such repairs and claim the costs from the landlord when all of the following conditions are met: the tenant has made at lest 2 attempts to contact the landlord, following those attempts the tenant gives the landlord a reasonable time to make the repairs, provide receipts, and a landlord may take over such emergency repairs at any time. The tenant testified that the landlord didn't post an emergency phone number, however, the tenants clearly knew how to reach the landlord, and neither tenant disputed the landlord's testimony that the tenants would not allow the landlord on the property. I find that the tenants have not established claims for:

- $27.48 – Gophers - April 28, 2016 to June 6, 2017 – sling shot/Ammo;
- 98.54 – pellet gun/ammo;
- 180.00 – 2 days lost time.

None of those items qualify as emergency repairs.

With respect to "Frustration," I find that the tenants' use of the word is confused with the tenants' actual claim of aggravated damages. The *Residential Tenancy Act* states:

Order of possession: tenancy frustrated

56.1 (1) A landlord may make an application for dispute resolution requesting an order

(a) ending a tenancy because

(i) the rental unit is uninhabitable, or

(ii) the tenancy agreement is otherwise frustrated, and

(b) granting the landlord an order of possession of the rental unit.

(2) If the director is satisfied that a rental unit is uninhabitable or the tenancy agreement is otherwise frustrated, the director may make an order

(a) deeming the tenancy agreement ended on the date the director considers that performance of the tenancy agreement became impossible, and

(b) specifying the effective date of the order of possession.

In this case, I find that the tenants' claims amount to a claim of aggravated damages for the landlord's failure to make repairs to the rental unit. In order to be successful, the onus is on the tenants to establish the 4-part test:

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

Again, I reiterate that the landlord testified more than once that the tenants denied the landlord entry onto the property, which was not explained or denied by either tenant. Therefore, I find that any loss suffered as a result of repairs being required on the rental unit, was not mitigated by the tenants and I dismiss the tenants' claims for:

- 3,300.00 – loss of driveway – June, 2016 to February, 2017;
- 3,300.00 – loss of use of the furnace from April 28, 2016 to February, 2017;
- 1,200.00 – outstanding repairs – May, 2016 to May 3, 2017.
- 13,200.00 – Frustration.

With respect to the tenants' claim for loss of use of the lawnmower, I find the claim to be atrociously high, and not contained in the tenancy agreement. The landlord has reimbursed the tenants $50.00 for purchasing one, and I find that the landlord has done more than required under the tenancy agreement and the legislation.

With respect to compensation for hydro bills, I have reviewed the bills provided by the tenants and absent any comparisons to previous or future months, I cannot determine how much excess hydro was consumed due to space heaters. Certainly the tenants would have had bills for hydro, and winter months are typically higher. Therefore, I dismiss the tenants' claims for payment of the hydro bills.

Since the landlord has been successful with the application the landlord is also entitled to recovery of the $100.00 filing fee, and I order that the landlord retain that amount from the security deposit held in trust, and to deal with the balance of the deposit in accordance with Section 38 of the *Residential Tenancy Act.*

Conclusion

For the reasons set out above, the tenants' application is hereby dismissed in its entirety.

I hereby grant an Order of Possession in favour of the landlord effective on 2 days notice to the tenants.

I further order that the landlord retain $100.00 from the $1,100.00 security deposit currently held in trust as recovery of the filing fee, and that the balance of the security deposit be dealt with in accordance with Section 38 of the *Residential Tenancy Act.*

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: July 11, 2017

Residential Tenancy Branch