Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL MNRL OPU
CNR ERP RP MNDCT MNRT OLC PSF RR FFT

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 and a monetary order for unpaid rent and utilities and to recover the filing fee from the tenants for the cost of the application.

The tenants have applied for:

- an order cancelling a notice to end the tenancy for unpaid rent or utilities;
- an order that the landlord make emergency repairs for health or safety reasons;
- an order that the landlord make repairs to the unit, site or property;
- a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement;
- a monetary order for the cost of emergency repairs;
- an order that the landlord comply with the *Act,* regulation or tenancy agreement;
- an order that the landlord provide services or facilities required by the tenancy agreement or the law;
- an order reducing rent for repairs, services or facilities agreed upon but not provided; and
- to recover the filing fee from the landlord.

The landlord attended the hearing accompanied by an agent, both of whom gave affirmed testimony. Both tenants also attended and each gave affirmed testimony. The parties were given the opportunity to question each other.

During the course of the hearing the tenants advised that they have vacated the rental unit and consent to an Order of Possession in favour of the landlord effective immediately. As a result, the tenants have withdrawn the applications for:

- an order cancelling a notice to end the tenancy for unpaid rent or utilities;
- an order that the landlord make emergency repairs for health or safety reasons;
- an order that the landlord make repairs to the unit, site or property;
- an order that the landlord comply with the *Act,* regulation or tenancy agreement;
- an order that the landlord provide services or facilities required by the tenancy agreement or the law; and
- an order reducing rent for repairs, services or facilities agreed upon but not provided.

The parties did not agree that evidence had been exchanged in accordance with the Rules of Procedure.

Landlord's Evidence: The tenants advised that on January 12, 2018 the tenants found an envelope at the rental unit which contained photographs, text messages and a certificate of a fuel tank removal, but no other evidence from the landlord.

The landlord has provided a Canada Post tracking print-out showing that registered mail was sent to the tenants on December 28, 2017 but was not collected by the tenants. The landlord's agent advised that all evidence and the landlord's Hearing Package were served on the tenants in that envelope.

The tenants seek an adjournment to allow the tenants to obtain and consider the landlord's evidence, however the landlord opposes any adjournment.

Tenants' Evidence: The landlord's agent advised that some of the tenants' evidentiary material was provided to the landlord 3 days prior to the hearing, which ought to have been served 14 days in advance of the hearing. On January 6, 2018 the landlord received express-mail from the tenants with the original package which was sent on January 4, 2018. The evidence of the tenant respecting their monetary claim was supposed to be served 14 days before the hearing. The landlord has received 2 invoices of technicians, receipts for air purifiers which were purchased December 8, 2017, the day the landlord served the notice to end the tenancy, and messages that have been altered. The landlord has not received any photographs or other evidence from the tenants, and the landlord opposes inclusion of it.

The tenant advised that he tried to up-load the evidence into the Residential Tenancy Branch computer system but was not successful. On January 1, 2018 it wouldn't accept the tenant's log-in information, and on both January 2 and January 3, 2018 the tenant received a "server error" message. On January 4, 2018 the tenant took the material to the Residential Tenancy Branch who uploaded it to the system, and all evidence was served to the landlord on January 4, 2018 by Express Post and by dropping another copy in the landlord's mail slot.

The landlord's agent responded that nothing was dropped in the mailbox on the landlord's video surveillance system.

The landlord has provided evidence of serving the landlord's evidentiary material to the tenants by registered mail on December 28, 2017 which is the same day that the landlord received the hearing package to serve on the tenants from the Residential Tenancy Branch. The record shows that all evidence of the landlord was provided to the Residential Tenancy Branch on December 27, 2017. I find that the landlord has established that the evidence has been served within the time required under the Rules of Procedure, and therefore I consider it.

The tenants' Application for Dispute Resolution was filed on December 14, 2017, and as an applicant, must provide the evidence 14 days prior to the hearing to the respondent and to the Residential Tenancy Branch. The tenant advised that he tried to upload it on January 1, 2018, which was not successful, and on the 4th took it to the Residential Tenancy Branch who uploaded it. The record shows that some of it was received on January 8, 2018 and more on January 14, 2018. The hearing was scheduled for January 18, 2018, and notice of that sent to the tenants on December 14, 2017. I do not accept that the tenants attempted to provide the evidence earlier, and have no other compelling reason the tenants had to have missed the

deadline, and had plenty of opportunity to do so from December 14, 2017 to that first alleged attempt on January 1.. The landlord has opposed inclusion of the evidence, and I decline to consider any of it.

Issue(s) to be Decided

The issues remaining to be decided are:

- Has the landlord established a monetary claim as against the tenants for unpaid rent or utilities?
- 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 damages caused by the landlord's failure to make repairs to the rental unit?
- Have the tenants established a monetary claim as against the landlord for the cost of emergency repairs?

Background and Evidence

The landlord's agent is the landlord's adult son and testified that this fixed term tenancy began on April 14, 2017 and expires on April 14, 2018 at which time the tenants are required to vacate the rental unit. A copy of the tenancy agreement has been provided as evidence for this hearing. Rent in the amount of $3,600.00 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 $1,800.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a house with a basement suite, and the rental amount is for the entire house including the basement suite. The landlord's agent believes that one of the suites is currently occupied by the tenants' adult son, however the landlord does not have a tenancy agreement with him.

The tenants failed to pay rent in December, 2017 and on December 7, 2017 the landlord served the tenants with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities by posting both pages of the completed form to the door of the rental unit. A photograph and a copy of the first page only of the notice has been provided for this hearing, which is dated December 7, 2017 and contains an effective date of vacancy of December 17, 2017 for unpaid rent in the amount of $3,600.00 that was due on December 1, 2017 and unpaid utilities in the amount of $1,202.87 following a written demand on September 30, 2017.

The tenants paid the rent in full on December 14, 2017 but have not paid the utilities and have not paid any rent for January, 2018. A copy of an overdue utility bill has been provided for this hearing, and the landlord's agent testified that for the first 3 months, the amount of $513.77 was not paid. For the following 3 months, the amount had not been paid and was added to the next bill which then amounted to $1,279.44. If paid by the due date of November 30, 2017 there would be a discount, and it was the discounted amount of $1,202.87 that was written onto the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, however the discount did not apply because the tenants didn't pay it and the landlord claims $1,279.44 to the end of the billing period of September, 2017.

The landlord's agent also calculated the next bill by taking an average of past usage and estimates it to be $639.72, which the landlord expects to receive at the end of January, 2018. The District sends a copy of the bill to the rental unit and to the owner.

Rental arrears now are $3,600.00 for January, 2018 in addition to the utilities.

With respect to the tenants' monetary application, the landlord's agent testified that the landlord responded to all of the tenants' concerns about air quality or leaks in the roof in a timely manner, and text messages provided for this hearing confirm response. The *Residential Tenancy Act* requires tenants to contact the landlord twice for emergency repairs, but the tenants did not and took on repairs, and if there was any cost, none were authorized by the landlord. The landlord does not know what repairs were done or if they were emergency repairs.

The only invoice provided by the tenants was for the environmental inspection, which is dated October 27, 2017 in the amount of $150.00. On October 27, 2017 the tenants hired an environmental consulting firm to inspect the furnace. The tenants sent the report to the landlords on November 26, which states that the furnace was not the source of any odor and recommends a ground penetrating metal scan to see if any metal tank exists underground, which the landlord did on October 28, 2017. The scan was actually performed on November 29, 2017. It is signed by the President of the environmental consultant firm.

However, a spreadsheet entitled "Timeline of Significant Events" has also been provided by the landlord for this hearing. The landlord's agent testified that the tenants waited 5 weeks to respond to the landlord's emails requesting to meet and discuss concerns, thereby deliberately creating the situation. The oil tank was removed prior to the landlord purchasing the rental home, and the landlord had an inspection completed to confirm there is no tank on the property. The landlord's agent further testified that the move-in condition inspection report was initialed by the tenants and shows that everything was okay including the air conditioning and heat working properly.

The tenants' claim includes recovery of costs to purchase Air Quality Monitors that they purchased on December 8, 2017, however that was after the notice to end the tenancy was issued.

The tenants' claim also includes recovery of costs for an environmental study dated July 7, 2017 but there was never any mention of the resulting memo prior. It appears that the tenants sought services of a friend or co-worker who back-dated the memo. The landlord had never seen it and didn't hear a complaint about fumes or odor until October 26, 2017. The tenant does hazardous asbestos waste removal for a living, and the landlord's agent is also an engineer. The memo is signed by the President of the company, which is unusual and the amount of the invoice of $4,650.00 is absurd. The tenant has not provided proof of payment of the invoice and did not give the landlord an opportunity to do so if it was even needed, and it was a visible inspection only.

The tenants didn't file the Application for Dispute Resolution until December 14, 2014.

The landlord was affirmed, and simply testified that he agrees that the testimony of his son and agent is the truth.

The first tenant (TF) testified that the landlord made the house uninhabitable and the other tenant moved out at the end of October, 2017 due to fumes. The tenant also testified that the landlord would not make repairs and although excavation was recommended, the landlord stopped dealing with it.

The tenant also testified that neither of the tenants signed a tenancy agreement and any provided by the landlord is fraudulent. Further, the move-in condition inspection report was done in the absence of the tenants, and none of the tenants signed it.

The tenants claim rent paid for October, November and December for the unliveable conditions.

The tenants also made improvements to the rental unit, such as repairs to holes in the walls screens and soffits, and the landlord verbally authorized it and agreed to reimburse the tenants for materials purchased. The tenant gave the receipts to the landlord on the premise of reimbursement, so no receipts are available by the tenants for this hearing.

The tenant called the landlord in June about illness and mold and the landlord didn't act on it.

The tenants **claim $24,290.00** including 3 months of rent.

Despite the testimony of the landlord's agent the tenant testified that the tenants have not been residing in the rental unit. Only cleaners and repair people have been in the home. The keys were not returned to the landlord because the tenants were awaiting this hearing. One tenant has not resided there since October and all tenants had moved out by the end of December, 2017. When asked about the tenant's truck being seen in the drive-way all night and into January, 2018 the tenant testified that he gave the cleaners usage of his truck, and has no control over the hours that cleaners work. He also testified that leaving the truck in the driveway in January was a protective measure to ensure people think someone is home.

The second tenant (AH) testified that it was warm when the tenants moved in, but the rental home had an old house smell noticed in May. In September or October it got cold enough to close windows and doors and when there was no air flow through the home things took a turn. It was like a toxic build-up. As it got colder, and with the furnace on, the tenant got headaches, which became worse. One day it was so bad the tenant could taste it to the point where her organs couldn't discharge it. It was so bad, and because the tenants needed the heat on and windows closed, the tenant called an Air Quality Professional Environmental technician to inspect as soon as possible. The tenant spoke with the technician in person who said it could be very hazardous depending on what kind of chemical it was. Within an hour or 2 he went through the house and said there was definitely a problem and inspected inside and outside and made recommendations to narrow down the source. He thought it might be an oil tank which could have leaked into the ground causing water to drive up to the foundation when it rains, and up into the house, which can affect air quality. He suggested a ground penetrating metal scan and if no tank is found, to excavate.

The technician also spoke to the other tenant who later asked for written findings so the tenants had proof to give to the landlord about the $150.00 bill and the findings.
A scan was done on November 29 confirming no oil tank. However, the landlord failed to conduct exploratory tests for removal of soil contamination and upgrade drainage. The tenant contacted the company who advised that they hadn't heard back from the landlord and said to not turn off air purification system, and that he was concerned for everyone's health. The tenant has the report from the landlord showing no contaminants, but the tank removal company used at the time doesn't have the best reputation. They may have only moved one tank and perhaps there is another, as suggested.

By October 25 or 26, 2017 the tenant was so afraid about their health that the tenant went to the Holiday Inn due to nausea and dry throat.

The landlord and his spouse attended the rental unit, but the tenant had to stand outside in the back yard. The tenant explained that during a down-pour oil was brought back to the surface and the tenant suggested that it might be from construction next door. By November, the tenant had to move and rent another place for $75.00 per night.

The tenants had an air purification system in the basement and it wasn't doing enough for the rest of the house so they bought another one; the newest on the market, and put it in the bedroom. It got so bad that the tenants purchased another for another bedroom and they all ran 24/7. The tenant went to a doctor and a neurologist, and BOCs recorded on monitors that the tenants purchased were very high. The landlord was given the business card of the environmental technician and the tenant later learned that the technician hadn't heard from the landlord.

The tenants didn't want to move, but wanted to stay in the rental unit long-term. The tenant went back for a time after staying at the Holiday Inn, and testified that the downstairs portion of the house seems to be affected most and when the furnace is on. It's okay in the summer when windows are open, but not in winter.

Analysis

Firstly, the tenants claim that they moved out of the rental unit before this hearing commenced, which is disputed by the landlord. However, the tenants have agreed to an Order of Possession in favour of the landlord effective immediately, and I so order. That does not negate the necessity of paying rent. The tenants gave no notice to the landlord to vacate the rental unit, and I find that the landlord has established the claim of **$3,600.00** for unpaid rent for the month of January, 2018. The tenancy agreement is fixed until April 14, 2018, however I make no findings of fact or law with respect to rent payable beyond January, 2018.

I have also reviewed the utility bills and I am satisfied that the tenants failed to pay the utilities and the tenancy agreement requires that the tenants pay the utilities. Therefore, I am satisfied that the landlord has established the **$1,279.44** to the end of the billing period of September, 2017. I also accept the calculation for the next billing cycle of **$639.72.**

The tenants claim monetary compensation for the cost of emergency repairs and for compensation for damage or loss due to the landlord's failure to provide and maintain the rental unit. With respect to emergency repairs, the *Residential Tenancy Act* specifies what emergency repairs are:

> **33** (1) In this section, **"emergency repairs"** means repairs that are
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> (a) urgent,
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> (b) necessary for the health or safety of anyone or for the preservation or use of residential property, and
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> (c) made for the purpose of repairing
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> (i) major leaks in pipes or the roof,
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> (ii) damaged or blocked water or sewer pipes or plumbing fixtures,
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> (iii) the primary heating system,
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> (iv) damaged or defective locks that give access to a rental unit,
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> (v) the electrical systems, or
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> (vi) in prescribed circumstances, a rental unit or residential property.

The *Act* also states that:

(3) A tenant may have emergency repairs made only when all of the following conditions are met:

(a) emergency repairs are needed;
(b) 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;

(c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

(4) A landlord may take over completion of an emergency repair at any time.

(5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant

(a) claims reimbursement for those amounts from the landlord, and

(b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

(6) Subsection (5) does not apply to amounts claimed by a tenant for repairs about which the director, on application, finds that one or more of the following applies:

(a) the tenant made the repairs before one or more of the conditions in subsection (3) were met;

(b) the tenant has not provided the account and receipts for the repairs as required under subsection (5) (b);

(c) the amounts represent more than a reasonable cost for the repairs;

(d) the emergency repairs are for damage caused primarily by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

In this case, the tenants' application seeks $4,890.00 for the cost of emergency repairs, $7,600 for emergency accommodation for noxious fumes and mitigation factors, reimbursement of 3 months rent for October, November and December, 2017 in the amount of $10,800.00 for loss of comfortable use of the rental unit, and recovery of the $100.00 filing fee, for a total of $24,290.00. In order to be successful, the onus is on the tenants to satisfy the 4-part test:

1. that the damage or loss exists;
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.

I find that if the tenants actually did incur the costs for repairs the tenants did not comply with the *Act* by giving the landlord any opportunity to do so. The landlord has provided evidence of having ensured tank removal from the property prior to purchasing the property. The landlord's agent testified that the Invoice the landlord received showed that no source of contamination was detected, but recommends a scan or excavation, and the scan was completed.

The tenant also testified that illness was obviously caused by contaminants in the rental home, and that she has been seeking medical attention, but other than that testimony, there is no supporting evidence to

satisfy me that the tenant has suffered as a result of the landlord's failure to do the excavation or make other repairs.

The landlord's agent testified that the tenants waited 5 weeks to respond to the landlord's suggestions of meeting to discuss complaints, and has provided evidence of that.

In the evidence before me, including the affirmed testimony of the parties, I find that the tenants have failed to establish any of the elements in the test for damages, and I dismiss the tenant's application without leave to reapply.

Since the landlord has been successful with the application the landlord is also entitled to recovery of the $100.00 filing fee.

Conclusion

For the reasons set out above, and by consent, I hereby grant an Order of Possession in favour of the landlord effective at 1:00 p.m. on January 18, 2018.

The tenants' application for monetary compensation is hereby dismissed.

I hereby grant a monetary order in favour of the landlord as against the tenants pursuant to Section 67 of the *Residential Tenancy Act* in the amount of $5,619.16.

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: January 25, 2018

Residential Tenancy Branch