Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNC, MNDC, OLC, MNSD

Introduction:

The Application for Dispute Resolution filed by the Tenant seeks the following:

a. An order to cancel the one month Notice to End Tenancy dated January 28, 2018
b. An order for a monetary order in the sum of $33,425
c. An order that the landlord make emergency repairs
d. An order that the landlord reduce the rent for repairs, services or facilities agreed upon but not provided.
e. A repair order
f. An order suspending or setting conditions on the landlord's right to enter the rental unit.
g. An order to recover the cost of the filing fee.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the one month Notice to End Tenancy was personally served on the Tenant on January 28, 2018. Further I find that the Application for Dispute Resolution/Notice of Hearing was personally served on February 1, 2018. With respect to each of the applicant's claims I find as follows:

Issues to be Decided:

The issues to be decided are as follows:

a. Whether the tenant(s) are entitled to an order cancelling the one may Notice to End Tenancy dated January 28, 2018?
b. Whether the tenant(s) are entitled to a monetary order and if so how much?

c. Whether the tenant(s) are entitled to an order that the landlord make emergency repairs.
d. Whether the tenant(s) are entitled to an order that the landlord reduce the rent for repairs, services or facilities agreed upon but not provided?
e. Whether the tenant(s) are entitled to a repair order?
f. Whether the tenant(s) are entitled to an order suspending or setting conditions on the landlord's right to enter the rental unit?
g. Whether the tenant is entitled to an order to recover the cost of the filing fee?

Background and Evidence:

The parties entered into a one year fixed term commencing December 1, 2014 and becoming month to month after that. The rent was $800 per month payable in advance. In addition the tenants were to pay 2/3 of ½ of the utilities. The tenants paid a security deposit of $400 at the start of the tenancy.

The tenant AC testified she vacated the rental unit in the summer of 2017. She confirmed at the hearing that she does not consider herself as a tenant.

On December 4, 2017 the tenant CB texted the landlord requesting that the Tenant AC be taken off the lease. The landlord responded saying he could not take her off the tenancy agreement unless she gave notice in writing that she was ending the tenancy. ON January 13, 2018 the tenant AC gave the landlord notice in writing that stated "Please be advised that as of last summer 2017 I will not longer be residing at ….thank you AC." She signed this Notice.

The landlords advised the Tenant CB they were not interested in renting the rental unit to him alone. The landlords served a one month Notice to End Tenancy dated January 28, 2018 on the Tenant CB. That Notice does not identify any grounds to end the tenancy. However, the Notice included the following notation: "We have received notice from AC, the co tenant that she moved out from the property in the summer of 2017. Please see the attached. We are under no obligation to enter into another tenancy agreement with you. We instead are issuing notice for you to move out."

On February 1, 2018 the tenant CB gave the landlord a notice requesting that the landlord have the rental unit inspected for mold by February 9, 2018 including air quality and that the landlord have the rental unit repaired professionally afterwards.

The landlord arranged to have a professional contractor inspect the rental unit and do a mold analysis. They visited on February 8, 2018. The report indicates there are 5

different molds present in the rental unit and that remedial work should be done. One of the moulds does not exist in Canada and must have been brought in. The landlord testified the tenants are longshoremen working at the docks and submits they must have brought it in through their work.

The landlord and the contractor returned on March 8, 2018 to conduct further testing for mold and remediation purposes. A heated exchange between the tenant and the landlord resulted. The technician felt unsafe and further testing was postponed because of the volatility of the situation.

The tenant seeks a repair order and compensation in the sum of $33,425 based on the following evidence:

- He produced many photographs taken January 31, 2018 that show extensive mold on the walls, window sills, bathrooms etc.
- He testified he asked the landlord on many occasions to have the rental unit tested from mold but the landlord failed to do. Rather, the landlord showed him a report from a previous report completed in 2014 that shows mold was not a problem.
- He testified AC left in the summer of 2017 because of the mold problem and stress it was creating. AC testified she has suffered significant health problems including loss of hair etc. because of the mold. AC did not produced medical evidence to support the claim that her medical problems were caused by the mold.
- The tenant CB testified he now suffers from asthma because of the mold. He testified he has a report from his doctor but did not receive it until after the time he could submit it. He has not given it to the landlord.
- CB and AC testified the mold began to be a major problem about a year ago. Prior that time they cleaned the mold on a regular basis. However, the mold in the bathroom was hard to clean and they gave up on trying to clean the rental unit of the mold.
- The tenants testified there is a moisture problem in the rental unit that is giving rise to the mold.

The landlords gave the following evidence relating to the mold problem:

- They had the rental unit tested for mold with 8 days of getting the tenant's request for testing by HPM&P Ltd, a professional contractor. .

- The report HPM&P Ltd. was included in their materials. There is an email from the technician stating that most of the mold is due to uncleanliness. The technician did not attend the hearing.
- The landlord included an inspection report from ASS Inc. dated June 26, 2014 .that was testing for mold and included the following: "Advised owner/tenants that there was no evidence of mold based on the ingress of moisture, and that the main cause for the mold in my opinion was the lack of air flow in the home. Advised that the best prevention for further grey mold would be to ensure air flow by leaving the window open approximately ½", at least while they were home, and to ensure the bathroom fan was set to run a least twice a day for a 4 hour period."
- The landlord produced a copy of the pre tenancy Inspection report dated December 1, 2014 which does not show that the parties saw any evidence of mold at that time.
- The landlord produced a letter from the technician as to the problems that occurred on March 8, 2018 when the landlord and technician attempted to do some re-testing.
- The landlord denied going to the rental unit without first giving notice except on one occasion he had to deal with an emergency.
- The rental unit was fully renovated about 5 ½ years ago.

Analysis:

Tenant's Application to Cancel the one month Notice to End Tenancy:

An arbitrator can only consider the matters that have been set out in the Application for Dispute Resolution filed by the parties. I determined the tenants are entitled to an Order to cancel the one month Notice to End Tenancy as the landlord(s) failed to identify a ground to end the tenancy. Section 47 of the Residential Tenancy Act (the section that deals with the grounds to end a tenancy on the basis of a one month Notice to End Tenancy) does not identify the tenant giving notice as a ground to end the tenancy. As a result I ordered that the Notice to End Tenancy be cancelled. An Order of Possession cannot be issued where the Notice to End Tenancy has been cancelled. The tenancy shall continue with the rights and obligation of the parties remaining unchanged.

Section 55 of the Act permits a landlord to apply for an Order of Possession where a Tenant has given a notice to end the tenancy. However, landlord must make such an application claiming an Order of Possession where the Tenant has given the notice.

The Tenant AC has given the landlord notice in writing that she was not living in the rental unit as of the summer of 2017. I determined that this notice ends the tenancy effective on the date the Notice was received by the landlord.

As a courtesy to the parties I have attached relevant provisions of Policy Guideline #13 and #11 with the hopes they may be able to resolve their difficulties on their own.

Policy Guideline #13 includes the following:

> This Guideline clarifies the rights and responsibilities relating to multiple tenants renting premises under one tenancy agreement.
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> A tenant is the person who has signed a tenancy agreement to rent residential premises. If there is no written agreement, the person who made an oral agreement to rent the premises and pay the rent is the tenant. Co-tenants are two or more tenants who rent the same property under the same tenancy agreement. Co-tenants are jointly responsible for meeting the terms of the tenancy agreement. Co-tenants also have equal rights under the tenancy agreement.
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> Co-tenants are jointly and severally liable for any debts or damages relating to the tenancy. This means that the landlord can recover the full amount of rent, utilities or any damages from all or any one of the tenants. The responsibility falls to the tenants to apportion among themselves the amount owing to the landlord.
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> Where co-tenants have entered into a fixed term lease agreement, and one tenant moves out before the end of the term, that tenant remains responsible for the lease until the end of the term. If the landlord and tenant sign a written agreement to end the lease agreement, or if a new tenant moves in and a new tenancy agreement is signed, the first lease agreement is no longer in effect.
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> Where co-tenants have entered into a periodic tenancy, and one tenant moves out, that tenant may be held responsible for any debt or damages relating to the tenancy until the tenancy agreement has been legally ended**. If the tenant who moves out gives proper notice to end the tenancy the tenancy agreement will end on the effective date of that notice, and all tenants must move out, even where the notice has not been signed by all tenants.** If any of the tenants remain in the premises and continue to pay rent after the date the notice took effect, the parties may be found to have entered into a new tenancy

agreement. The tenant who moved out is not responsible for carrying out this new agreement.

Policy Guideline #11 includes the following:

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- whether the receipt shows the money was received for use and occupation only.
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
- the conduct of the parties.

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

Also, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional. A Notice to End Tenancy given by the landlord must also be in the form approved by the Director of the Residential Tenancy Office.

Tenant Application for A Repair Order and/or an Order for Emergency Repairs::
Section 32 of the Residential Tenancy Act provides as follows:

Landlord and tenant obligations to repair and maintain

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(4) A tenant is not required to make repairs for reasonable wear and tear.

(5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

I determined there is a mold problem in the rental unit which exceeds what might be expected from uncleanliness. I ordered that the landlord complete the testing for mold and remedy the problem by April 30, 2018 provided the Tenant gives the landlord access and does not interfere with the testing and remedial process.

Tenant Application for a Monetary order and an Order for the Reduction of Rent:
Section 7 of the Act states as follows:

Liability for not complying with this Act or a tenancy agreement

7 (1) if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline #16 includes the following;

C. COMPENSATION

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

…

An arbitrator may award monetary compensation only as permitted by the Act or the common law. In situations where there has been damage or loss with respect to property, money or services, the value of the damage or loss is established by the evidence provided.

I determined the Tenant has proven that as of January 31, 2018 there was an extensive mold problem in he rental unit. However, the proof provided by both parties about the cause of the mold problem was not satisfactory. The landlord alleged it is caused by the tenant's failure to properly clean. However, the technician who gave the landlord an e-mail to this effect did not attend the hearing. The tenants testified the major problems began to occur about a year ago. Prior to that time they kept most of the mold problems under control by regular cleaning.

I determined the problems are more substantial that the failure to clean. The requested a report in 2014 which indicates that someone was experiencing mold problems at that time. The report from HPM&P Ltd. indicates there are 5 different molds in the rental unit. The landlord testified the problems that occurred on March 8, 2018 occurred when the landlord and the contractor returned to the rental unit for further testing and to identify a remediation plan. Again this suggests the problem is greater than just a cleanliness problem. I determined both the landlord and tenant have contributed to the mold problem.

The tenant seeks compensation going back over 2 years. I determined the Tenant failed to properly advise the landlord that a problem existed prior to the letter of February 1, 2018. The tenant made this demand after receiving the notice from the landlord that he must vacate the rental unit. A landlord cannot be expected to make repairs if the tenant fails to give him sufficient notice that a problem exists. The tenant testified he asked the landlord to do a mold test on many occasions. However, he failed to provide specifics as to when those demands were made, what was said and in what context. The tenant relies on a video recording he had with the landlord which shows an edited antagonistic exchange between the parties where the landlord allegedly acknowledged the tenant made the requests. After viewing the video I determined little weight can be given to it given the hostile nature of the conversation, the fact it was edited and the lack of specifics. However, I determined the tenant made 2 to 3 requests that the landlord conduct a mold test in the couple of years prior to the formal request on February 1, 2018.

With regard to each of the Tenants' claim I find as follows:

a. The tenant seeks reimbursement of $20,800 for rent paid for the last 2 years and 2 months. I determined the tenant is entitled to compensation of $150 per month commencing February 1, 2018 to April 30, 2018 for the following reasons:

    - The rent is $800 per month. I determined the tenant receives some value for the tenancy even given the mold in the rental unit. Further AC testified she was no longer living in the rental unit since the summer of 2017.
    - The tenant has provided sufficient proof in the form of photographs there was a significant mold problem as of January 31, 2018. He has failed to establish whether there was a problem and if so the extent of the problem prior to that date.

- I determined the Tenant failed to give the landlord sufficient notice of the problem prior to February 1, 2018. A request that the landlord conduct mold test is not sufficient notice to the landlord that repairs are necessary.
- The applicant has a duty to mitigate his/her loss. This includes an obligation to seek a repair order from the Residential Tenancy Branch if a landlord is not doing what is required under the Act. At all times during the tenancy it was open for the tenant to file an Application for Dispute Resolution to seek a repair order and the matter could have been dealt at an earlier time if there was a breach of the Act.
- I have also considered the parties' antagonistic encounter in March 2018 when the conversation got heated and out of hand. However, in my view a landlord cannot just ignore the situation. The landlord should have made greater efforts to work with the tenant to have the tests and remediation efforts completed.

b. I dismissed the tenant's claim of $2625 for 3 years and 2 months of utility bills. The tenant agreed to pay the utility bills in the tenancy agreement. There is no reason why this obligation should fall on the other tenants in the rental property. The tenant failed to establish a causal connection between the presence of mold and his obligations to pay utilities as he has agreed.

c. I dismissed the tenants' claim of $10,000 for stress, anxiety and pain and suffering as the tenant failed to present sufficient proof to establish this claim. The tenants failed to produce medical evidence of their medical issues. There is insufficient proof to establish their medical problem was caused by the mold. I do not accept the submission that the domestic problems between them was caused by the mold.

In summary I determined the tenant has established a claim in the sum of $450 for the period February 1, 2018 to April 30, 2018. I decline to make an order for a reduction of rent after that time as much will depend on whether the tenant provides the landlord with access to have the problems remediated. If the tenant provides access but the landlord fails to remediate the problem the tenant has the right to make a new application.

<u>Application for an Order to set conditions or suspend the landlord's right to enter the rental unit:</u>

I dismissed the tenants' claim for an order to set conditions or suspend the landlord's right to enter the rental unit as the tenant failed to prove he is entitled to such an order.

Conclusion

I ordered that the landlord complete the testing for mold and remedy the problem by April 30, 2018 provided the Tenant gives the landlord access and does not interfere with the testing and remedial process.

I further ordered the landlord(s) to pay to the tenant the sum of $450 plus $100 for the cost of the filing fee for a total of $550..

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

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: March 29, 2018

Residential Tenancy Branch