



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION/ORDER AMENDED
PURSUANT TO SECTION
78(1)(A) OF THE RESIDENTIAL
TENANCY ACT ON June 19, 2018
AT THE PLACES INDICATED.

Residential Tenancy Branch

DECISION

Dispute Codes MNR MND MNDC MNSD OLC FF

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* ("the Act"). The landlord applied for: a monetary order for unpaid rent, damage to the unit and loss as a result of the actions of the tenant pursuant to section 67; authorization to retain the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and authorization to recover the filing fee for this application pursuant to section 72.

The tenant applied under the Act for: a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67; authorization to obtain a return of all or a portion of her security deposit pursuant to section 38; an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62; and authorization to recover the filing fee for this application from the landlord pursuant to section 72. The tenant withdrew the application to have the landlord comply with the Act.

Both parties attended the original hearing date (January 31, 2018). On the original date, after 90 minutes of hearing, this matter was adjourned to ensure each party had an opportunity to respond to the other party's evidence and submissions. In the interim decision, granting an adjournment of this matter, I wrote,

... prior to the conclusion of this hearing I adjourned the hearing to a second date to reconvene. At that time, the landlord requested permission to re-serve the tenant with his materials that I excluded at the outset of the hearing. I refused this request by the landlord.

An adjournment is not an opportunity for the parties to provide further evidence unless required by the Arbitrator: an adjournment is made in circumstances where ... there is evidence that has been submitted that the other party has not had a full opportunity to respond to. In this case, the adjournment was initiated by this arbitrator to ensure that both parties had a full opportunity to make oral submissions - submissions which are considered central to the decision making in a Residential Tenancy Branch dispute resolution hearing process.

[In] consideration of the importance of procedural fairness to the dispute resolution process and the landlord's obligations under the Act regarding service of documents, as well as the fact that the landlord can make submissions for unpaid rent without substantial documentary evidence... I find that I cannot allow the landlord to serve the evidence that I have determined should be excluded prior to the reconvened hearing date.

Both parties attended this reconvened hearing date. Both parties were given an opportunity to be heard, to present their sworn testimony, and to make submissions. As a result of my decision at the previous hearing date, I will not consider the documentary evidence submitted by the landlord in making my final decision. The landlord confirmed receipt of the tenant's evidence submitted for this hearing and had a very full opportunity to speak with respect to his own application and the tenant's application.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent and any other loss under the Act?

Is the tenant entitled to a monetary order for loss under the Act, particularly with respect to the landlord's failure to address repairs during the course of the tenancy?

Is either party entitled to recover the filing fee for their application from the other party?

Background and Evidence

This tenancy began on November 13, 2015 with a rental amount of \$4900.00 each month. A copy of the residential tenancy agreement was submitted as evidence for this hearing. The landlord ~~confirmed that he continues to hold~~ **no longer holds** a \$1225.00 security deposit and a \$2450.00 pet damage deposit paid by the tenants at the outset of this tenancy: **these deposits were used to offset a previous monetary award issued to the landlord against the tenants.** The landlord sought to retain the tenant's deposit towards a \$14,700.00 monetary order. The tenant sought the return of the security deposit as well as an additional amount for a total of \$9000.00. The tenant vacated the rental unit on August 28, 2017.

The landlord testified that, although the tenant resided in the unit until the end of August 2017, the tenant did not pay rent for June, July or August 2017. He sought to recover the unpaid rent totaling \$14,700.00. The landlord also sought to recover rental loss for the months of September, October, November and December 2017 from the tenants totaling \$19,600.00 (7 months' rent total). He testified that he was unable to re-rent the unit until extensive damages, caused by the tenants (and other people at the rental premises with the permission of the tenants) were repaired.

The landlord testified that the residence is 28 years old and that he has owned it since 2015. He testified that, after making an application to the Residential Tenancy Branch, he was issued a 2 Day Order of Possession dated June 13, 2017 against the tenants. The tenant was in attendance at that hearing where an Order of Possession was granted. The landlord testified that the tenant remained in the rental unit August 28, 2017 (2.5 months after the Order of Possession was served by the landlord). He testified that he required the services of a bailiff to remove the tenant and the tenant's belongings from the rental unit. He sought to recover \$4525.71 for bailiff services. He also sought to recover \$2500.00 in legal fees to bring a small claims action against the tenant.

The landlord testified that he sought a portion of the \$3942.00 he spent for carpet replacement. He also sought to recover a portion of the additional renovations totaling \$4158.00. He also testified that he has receipts to support his claim. However, the landlord's documentary materials were excluded for lack of timely service. The landlord testified that he incurred approximately \$350.00 in "other damages" and that the rental unit required \$860.00 in cleaning at the end of this tenancy.

The tenants testified that they did not pay rent because the landlord never completed repairs requested. The tenant confirmed that the landlord has not received payment for the final 2.5 months that she resided in the rental unit. The tenant and her witnesses stated that the rental unit was “unlivable”: they both testified to the following issues at the rental unit;

- There was a problem with the hot water tank at the start of the tenancy. It was 9 days fixed after 9 days.
- The dishwasher leaked under the sink onto the kitchen floor. The dishwasher was unusable and was repaired after 14 months.
- Both showers in the rental unit leaked from the upstairs to the main floor. 1 leak was fixed after 5 months – 1 leak was never fixed.
- The refrigerator had broken shelves and required careful placement and arrangement of all the items going into the refrigerator.
- The heating ducts blew cold air and sometimes very hot air. Despite notifying the landlord several times, one of the tenant’s roommates did the fixes and it was still very cold in the unit most of the time.
- There was mold inside the ceiling, roof discovered by the tenants. When the landlord was advised, he simply covered it with plastic.
- The windows upstairs had moisture and mildew.
- The tenant had health effects including eczema and asthma.
- The eavestroughs were leaking.
- The sidewalk was dangerous because it was uneven and slippery when wet or icy.

The tenant and her lawyer argued that all of the items described made the rental unit uncomfortable, unsafe and ultimately unlivable. Her lawyer submitted that the tenant has evidence of requests to the landlord for repair. However, within the tenant’s materials, there was affidavits completed by the tenant and her roommates as well as written submissions by the tenant and her lawyer. The landlord countered that he generally responded to requests within hours, that he was motivated to take care of his rental unit, and that it was preposterous to think he would not make repairs to his own property. He testified that it was also preposterous that he would refuse to accept rent from the tenants (as suggested by the tenant’s son in his testimony).

Three witnesses testified on behalf of the tenant(s). Witness CE was the tenant’s son who also resided in the rental unit. He testified that the hot water did not work for the first week of the tenancy. He testified that he had to do many dishes by hand because the dishwasher was not functional for most of the tenancy. He testified that his

bathroom shower was unusable for about 5 months and so he had to use the shower in his mother's room. He testified that items placed in the refrigerator had to be carefully arranged because the shelves inside were broken. He testified that his bedroom was like an icebox: there was no heat going in and lots of build-up of ice on the window. He also testified that there was a leak in the roof, that the furnace blew up during their tenancy and that eaves troughs were always overflowing. As well, he commented on the dangerous sidewalk – he testified that the sidewalk was their main access to the rental unit and it was slippery when wet.

Witness KP was a roommate of the tenant who also lived in the rental unit. He testified that the hot water did not work at the outset of the tenancy and that it took 9 days to be repaired. He testified that the landlord ignored requests to have the dishwasher repaired. He testified that the upstairs showers leaked and the residents had to use ensuite showers in other's rooms. He testified that the refrigerator had cracked shelves and that it was about a year before it was fixed. He testified that there was no heat upstairs in the residence and that, when he investigated himself, he saw that the heat was not properly connected. He testified that the eavestroughs were damaged from always being overfilled. He testified that the sidewalk "sloped really bad" and was dangerous in poor weather. He testified that an inspector came to the property on behalf of the landlord and was very disturbed by the lack of repair.

Witness H resided at the rental unit from February to June 2017. He testified that he lived in the unit part-time when he was in the province. He testified that, when he moved in, there were already problems with the rental unit related to the heat, the dishwasher and the showers. He testified that the plumbing was generally in bad condition. He testified that there was a hole in the roof that the landlord simply put a plastic bag over. He testified that he moved out in June because of the condition of the rental unit and the landlord's failure to make any lasting repairs.

The tenant's lawyer submitted on behalf of the tenant that the tenant did not move out when she received a copy of the landlord's Order of Possession because the decision was under appeal for approximately 2.5 months.

The tenant to show the condition of the residential property however, the photographs were black and white and generally unclear, submitted photographs.

Analysis

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. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In this case, the landlord provided testimony that the tenant left extensive damage and that the rental unit required cleaning when they moved out. However, I was unable to consider the landlord's evidence and therefore, I find that he provided insufficient proof of the damage to the rental unit, particularly with respect to his exact costs. I dismiss the landlord's application for damage to the rental unit as well as the landlord's application for loss as a result of this tenancy.

The landlord provided undisputed evidence that the tenant did not pay rent for the month of June, July or August 2017 even though she continued to reside in the rental unit for all of June 2017, all of July 2017 and during the month of August 2017. The tenant, her witnesses and her lawyer did not dispute that rent went unpaid. At some points in her testimony, the tenant testified that she tried to pay the rent and the landlord refused. At some points in her testimony, the tenant stated that she did not pay rent because of the landlord's failure to make repairs. I accept the evidence of the landlord that rent remains unpaid and that he would not refuse to accept rent payments in the circumstances.

Section 26(1) of the *Act* establishes that "a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent." As the tenant resided in the unit with her co-tenants and roommates until the end of August 2017 and as the tenant has not paid the rent for June, July and August 2017, I find that the landlord is entitled to 3 months' rent totaling \$14, 700.00.

The tenant and her roommates testified that the landlord failed to make repairs. All of the tenant's witnesses (as well as the tenant herself) testified that;

- There was a lack of hot water for the first 9 days of the tenancy;
- The dishwasher leaked and did not fully function for approximately 14 months;
- The refrigerator had broken shelves;
- The heating did not work properly and affected the windows;
- The eavestroughs were not sufficiently cared for; and
- The sidewalk was precarious and slippery when wet.

Neither the tenant nor her roommates suffered any injury as a result of the precarious sidewalk and it is unclear from the evidence what the tenant's expectation was for the broken sidewalk. Further, based on all of the evidence I have heard, I am not convinced by the tenant's argument that this was something that the landlord should be required to repair as part of a residential tenancy agreement – that this was either a health or safety issue that failed to meet housing standards. It was the condition of the property at move-in and the tenants were able to get to the residence without injury or destruction of property. Similarly, I find that the eavestroughs' back up was likely annoying and caused issues in the rental unit yard but that the tenant/roommates did not suffer unduly as a result of the landlord's failure to clear the eavestroughs. I find that the broken shelves in the refrigerator were an irritant for the tenant and other occupants but that they were able to use the refrigerator: it was functional as a unit to keep items cold: its primary purpose.

The landlord explained that the showers in the unit had poorly designed doors and therefore water did get out of the showers onto the floor. I accept the landlord's evidence that the residential premises was approximately 28 years old and the showers had a faulty design. However, I find that the tenant did provide sufficient evidence, with the corroboration of her witnesses to show that they were inconvenienced by the unpredictable showers. Again, I find that they generally served their purpose and the tenants are not entitled to compensation for a minor inconvenience.

With respect to the heating in the unit, the mildew conditions in the unit and the lack of hot water for the first 9 days of the tenancy, I find that the tenant's witnesses, testifying independently, all gave evidence of an impact on the overall tenancy because of the lack of hot water initially and the lack of heat combined with mildew conditions throughout the majority of the tenancy. Furthermore, I find that hot water, heat and dry conditions are essential elements in the provision of a rental unit. With respect to the landlord's failure to fix the water for 9 days, I find that this amounted to an unreasonable amount of time for the tenants to go without hot water. With respect to the 9 days without hot water, I find that the tenant is entitled to \$81.00 per day (1/2 of a day's rental amount) for 9 days totaling \$729.00.

The ongoing issue with respect to the provision (or lack thereof) of heat described by all of the occupants and acknowledged partially by the landlord, I find that the provision of heat is an essential element of a residential tenancy rental. I find that the lack of provision of heat to the rental unit exacerbated by the amount of time that it went unaddressed by the landlord. I note that the tenant provided evidence to show that she regularly raised this issue with the landlord but that it was not resolved during the course of her tenancy. Therefore, I find that the tenant is entitled to a 5% rent (\$245.00 per month) reduction for 21 months (1 year and 9 months) of this tenancy; \$5, 145.00.

Pursuant to section 72 of the Act, the landlord is entitled to retain the tenant's \$1225.00 security and \$2450.00 pet damage deposit to offset the unpaid rent from the tenancy.

However, those deposits were previously used to offset an amount owed by the tenants to the landlord.

The landlord is entitled to a monetary award as follows,

Item	Amount
Unpaid Rent – June July & August 2017 (3 x \$4900.00)	\$14, 700.00
Heat (\$5145.00) & Hot water (\$729.00)	-5874.00
Less Security Deposit	-1225.00
Less Pet damage Deposit	-2450.00
Total Monetary Order	\$5,150.00
	\$8826.00

As both parties were only partially successful in their applications, I find that the parties are not entitled to recover their filing fees: Each party will bear the cost of their own filing fee.

Conclusion

The tenant withdrew her application to have the landlord comply with the Act.

I dismiss the landlord's application for damage to the unit or other loss as a result of the tenancy.

I dismiss the tenant's application for the return of her deposits and find that the landlord is entitled to retain the deposits **as previously awarded** pursuant to section 72 of the Act.

I issue a monetary order in the amount of ~~\$5150.00~~ **\$8826.00** to the landlord.

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this 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: May 17, 2018

DECISION/ORDER AMENDED PURSUANT TO
SECTION 78(1)(A) OF THE RESIDENTIAL
TENANCY ACT ON June 19, 2018 AT THE
PLACES INDICATED.

Residential Tenancy Branch

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