



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

MNDL-S, MNDCL-S, FFL

Introduction

This is an Application for Dispute Resolution (the “Application”) brought by the Landlords requesting a Monetary Order for Damages and to have the security deposit applied to the award in partial satisfaction. The Landlords also request an order for payment of the filing fee. In particular, the Landlords applied for \$3,200.00 in damages. The Landlords submitted an amendment to their claim and increased the total to \$11,314.20.

I find that the notice of hearing was properly served. The Landlords and the Tenant, LK, appeared for the scheduled hearing; the Landlords also provided a witness, SM, to speak to findings from a mold inspection performed by him. It should be noted that the Landlords waited about five months to file their submissions, although most of the documentation is dated and was available to them in 2017 when the claim was filed on December 12, 2017; the initial evidence package was received by RTB on May 17th, 2018. It was marked by the Landlords as the “complete evidence submission” and the Landlord explained it was late because she had suffered from illness and other personal issues as a result of the problems stemming from the end of the tenancy.

The Tenant then filed documentation in response, which resulted in both parties continuing to file materials after that. Rule 3.11 of the Rules of Procedure state that an arbitrator may refuse to consider evidence where there was an unreasonable delay in submitting evidence; Rule 3.14 requires an applicant to file evidence at least 14 days prior to a hearing; this allows a respondent time to review the claims against him as he must file any evidence in response at least 7 days prior to the hearing. As a result of the abundance of evidence and the lateness of much of the subsequent evidence, I only considered relevant evidence that was filed in the Landlord’s evidence package received May 17, 2018 and the Tenant’s evidence provided May 23, 2018, as well as all testimony heard during the hearing. In addition, the Landlord had only provided excerpts from an expert report into evidence; the full Mold Inspection Report from the November 13, 2017 inspection was submitted by fax following the hearing and was then considered by me.

The hearing process was explained and parties were given an opportunity to ask any questions about the process. The parties were given a full opportunity to present affirmed evidence, make submissions, and to cross-examine the other party on the relevant evidence provided in this hearing. Although all evidence filed by May 23rd was taken into consideration at the hearing, only that which was relevant to the issues is considered and discussed in this decision. I note that this hearing took approximately 2.5 hours, with the Tenant only speaking and presenting evidence for about 30 minutes of that time. The Landlord was cautioned on four occasions to stop interrupting the proceedings, as she spoke out-of-turn and frequently interjected by calling the Tenant a liar on several occasions.

It is noted that there was a previous hearing held on November 23, 2017 between the parties in relation to many of the concerns referenced in this Application. In the decision that followed, the Tenants were awarded \$50.00 for two instances of infractions of their legal rights, as well as half their filing fee.

Issues to be Decided

Are the Landlords entitled to a Monetary Order for Damages pursuant to section 67 of the *Residential Tenancy Act* ("Act")?

Are the Landlords entitled to retain the security deposit in partial satisfaction of any award, pursuant to section 38 of the Act?

Is the Landlords entitled to reimbursement of their \$100.00 filing fee, pursuant to section 72 of the Act?

Background and Evidence

The tenancy began July 15, 2015 with monthly rent at \$875.00 and a security deposit of \$437.50. The rent was eventually increased to \$1,000.00 over the course of the tenancy. The Landlords and their family reside upstairs, while the Tenants rented the basement suite.

The testimony suggested that there were no real issues that arose for the first two years of the tenancy, but that the relationship between the parties broke down the summer of 2017, when there was a small flood in the Landlords' upstairs bathroom that caused damage in the Tenants' bathroom directly below. The damage was repaired, although the Tenant argued that he raised some concerns with the Landlords about caulking that needed to be refinished around the bathtub as water was pooling.

The issues between the parties broke down considerably after that, with the Landlords issuing a One Month Notice to End Tenancy for Cause and the police becoming involved to deal with the disputes that then arose between them.

The Tenants also provided a 30 Day Notice to End the Tenancy themselves on October 27, 2017. Apparently, a move-out inspection was done on October 29th, the Tenants claiming that about three hours later, they notice mold in an unlit mechanical room where they had vacuumed; he described this as the “final straw”.

The Tenants vacated the end of November and the tenancy terminated on November 30, 2017. The police advised the Tenants to stay away from the Landlords during the final walk-through inspection, and the Tenants did not agree to the report due to some discrepancies such as the lack of mention of any mold which they had reported seeing a month earlier.

The Tenants submitted photographs and video to document some of the exchanges when inspections were taking place and the condition of the premises after they had cleaned it and shampooed the carpets. As the Tenant is employed as a property manager, he states they are very aware of their obligation to leave the premises clean and they had access to commercial carpet cleaning equipment to clean the carpets; the appliances were not on wheels and he states could not be easily moved to clean behind them.

The Landlords state that the Tenants are responsible for the following damages:

- (a) Mold Remediation Work/Lost Rent – The majority of the Landlords’ claim for damages relates to the finding of moisture in the mechanical room in the basement that caused rust to develop in the ductwork and mold to grow.

The Landlords hired three companies in total to investigate the mold and none were able to locate or confirm the source of the water problem. A water stain at about eye level was noted in the mechanical room, but there were no pipes in that wall, nor visible leaks anywhere which would determine the source of the moisture. The Mold Inspection Report stated that the ductwork was rusted out “*to what appears to be prolonged moisture exposure.*” It was noted that no rust was seen during the purchase home inspection, which the Landlords indicated was in 2008.

The Report goes on to state that “*The pipes above the water heater did not reveal any evidence of leakage. The stains on the wall were random. The cascading water staining and mold was consistent with constant moisture exposure over a period of 24-48 hours or longer... In this scenario, there were no obvious signs that I could find so my conclusion is that water was added to the wall and heat duct from some other unidentifiable source.*”

The mold found was of a serious type and the Landlords took measures after the tenancy had ended to investigate and hire professionals to remove it. The first company hired did not correct the problem. Others were hired and partial reports submitted into evidence, the Landlords claiming that the balance of the reports were “irrelevant”. As

stated earlier, the Mold Inspection Report in its entirety was later submitted for my consideration, as I was not prepared to consider a partial or redacted report.

The Landlords incurred expenses getting the hot water tank removed, the affected drywall removed, and work on rusted ductwork in the furnace room. The Landlords claim that the suite could not be rented out and that they are entitled to lost rent as the Tenants are liable for the damage.

There was no suggestion that the Tenants were negligent and somehow caused a leak or water damage which resulted in mold and rusty ductwork, but rather, the implication was that the Tenant had somehow deliberately come and gone from the unlit mechanical room repeatedly to cause a water stain to remain wet on a wall for at least 7 days, the period of time required for this type of mold to develop. Total claimed for this particular issue is listed in an amended monetary worksheet submitted by the Landlords at \$7,860, which includes four months' lost rent at \$1,000.00 per month.

The Tenant responded by pointing out that none of the mold reports or the expert who testified, SM, could confirm any source of the water stain which likely caused the mold to grow inside the drywall in the mechanical room.

He confirmed that he had advised the Landlords of the mold as soon as it was discovered, contrary to their assertion that it was never reported, and he further provided letters dated October 30th and November 3rd, 2017 to the Landlords which confirms this.

The Tenant also submitted several photographs from the mechanical room showing rusty pipes and possible mold growth taken October 30th, 2017. He stated that the Landlords likely heard him using the folding door to enter the bathroom, while the Landlords submit he was coming and going from the mechanical room to cause harm.

He points out the fact that the Landlords caused a leak which drained downstairs to the adjacent bathroom that August and caulking around the tub which required repair as possible sources of water which could lead to mold growth under the right conditions. The Mold Report appears to confirm this suggestion after noting that the area around the tub was defective, *"High moisture/density readings have been noted along the lower shower wall(s). As noted, there is a possibility of moisture and/or mold behind the wall."*

Photographs of the missing caulking as well as photographs showing the extent of the water damage in the basement from the upstairs leak were submitted into evidence. He stated that he ran the bathroom fan almost continuously to cut down on humidity but that the Landlords' report shows that the bathroom fan ran at a low volume; he kept windows open a crack to promote air circulation in the suite; the open window and running fan are noted in a video taken with the Landlord present, which was submitted into evidence. In

that video, the inspector stated that the fan was running low, meaning it was not drawing out as much humidity as a newer and more powerful bathroom fan would.

The Tenant admits he entered the mechanical room when the Landlords asked him in writing to check on the hot water heater dial, which he reported back that it was still set at level "A", and that he was in the room again on October 29th to vacuum the floor and discovered the mold which he then reported.

Finally, the Tenant argued that he and his partner sleep in the next room and would never do anything to promote the growth of dangerous mold in their living quarters.

Drawings of the suite were submitted by both parties, the Tenant noting on his copy the close proximity of the August leak from the suite above, to the mold and rusted heat duct found in the adjacent mechanical room, and the vent then directly leading to the bedroom where they slept. The door to the mechanical room had vents and was unsealed, as evidenced by a photograph submitted. One video showing a plumber onsite states that an ice maker line may have been disrupted, which was not noted in the report by SM.

- (b) Loss of Quiet Enjoyment – the Landlords claim that the Tenants deliberately tried to make things difficult for their family, and blame them for using all the hot water in the tank so that only cold water was left at times, then claiming that the water was scalding hot at other times, having been measured upstairs at 147 degrees. The Landlords claim for the hot water tampering is \$1,500.00; another \$175.00 is claimed for hydro influx, \$950.00 for emotional distress and \$60.00 for improper waste disposal, for a total of \$2,685.00.

The Tenant responded by stating that it is a 40 gallon 9 year old gas water heater and likely near the end of its lifespan which is why it is causing problems and temperature fluctuations. He states that the issues with the hot and cold water are not unusual with a tank such as this, operating in a home with four adults and two children.

The Landlords countered by stating that they had the heater checked prior to the tenancy and that it is in good condition; the same unit was replaced back in the mechanical room after the mold was removed from that room. They argue that the Tenants deliberately adjusted the water and the temperature in the basement to cause problems for them upstairs; the Tenant denied this, stating that he was only asked to check the lever and it was still on level "A" which is appropriate. The Mold Inspection Report stated that *"typically water heaters last between 10-12 years. The water heater is showing signs of leakage, nearing the end of it's useful service life. Fellow inspector, DF was able to detect a leaking anode."*

The Tenants also submitted several video clips wherein he purports to hear a plumber stating that there may be a crack in the water heater and that it should be replaced at some point.

- (c) Cleaning/Repairs – the Landlords filed the Condition Inspection Reports dated October 29th and November 30th into evidence. The only relevant report for the purpose of judging the cleanliness is the November 30th report which took place at the actual end of the tenancy.

It notes that there was no cleaning behind or under the fridge. A clogged sink is noted. Broken boards and hinges were noted for the driveway gate. There was a question mark beside carpet and a notation as to whether the carpet was clean and whether there was a receipt. The amount claimed to unclog a sink, clean the carpets and other general cleaning total \$468.00.

The Tenants replied by not agreeing with the report and stated in reasons *“incorrect reasoning – past unresolved issues from Landlords”*. The Tenants provided photographs/videos showing the condition they left the premises.

The invoices submitted by the Landlord for \$147 for cleaning and \$200 for carpet cleaning, the Tenant pointed out, are for several months after the tenancy ended, presumably after the remediation work was done in the basement to remove the mold. He argues that he left the premises clean and that the additional cleaning months later was only necessary to re-rent the suite which was advertised for rent online.

The Tenants submitted 10 videos and 20 photographs into evidence in support of his arguments. A signed statement from JB states that *“I helped LK... clean the carpets, as this would be the last day they would be residing there...I stayed back to assist with cleaning the floors and bathroom as well. Upon leaving the suite everything was clean...”* With respect to the clogged sink, the Tenant provided a copy of messages between the parties which show that it had been an ongoing issue reported in the past and to which the Landlord's father had to address before, in 2016; another blocked pipe was again reported February of 2017.

- (d) Other Costs – the Landlords claim \$150.00 for photocopying, \$50.00 for postage and \$100.00 for the cost of filing this Application.

Analysis

A party in a tenancy has the ability to bring an action claiming damages under section 67 of the Act; the burden of proof is on the party alleging the damage, on a balance of probabilities.

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

(a) Mold Remediation/Lost Rent:

The Landlords suggest that the Tenants were deliberately, and with malice intent, causing moisture issues that resulted in the mold growth and rusty ductwork. I find that there is no evidence, either from the experts who prepared reports and the one who testified, nor from the Landlords themselves, which points to the Tenants as having directly caused these issues.

There are many plausible sources of water in an older home with older ductwork and fixtures. The Tenant suggests many such sources, all of which seem reasonable. The argument that the Tenants deliberately caused water and mold issues defies common sense, considering it is the Tenants who were residing in the basement and sleeping in the adjoining room.

There is no logical reason why they would create a situation where dangerous mold would develop in their living quarters and there is no evidence to show they were negligent and caused mold to develop.

Furthermore, it was the Tenants themselves who pointed out the mold on October 29th, when the Landlords missed it during their inspection only hours earlier; if the Tenants had created this to cause harm to the family living above, logic would dictate that they would not have reported it, but rather, they could have simply vacated the premises and let it be discovered by the Landlords at some future point.

I find that the Tenants are not liable for the mold and water damage issues in the residence and I dismiss the claim for damages which relate to this issue.

(b) Loss of Quiet Enjoyment:

With respect to the claims under loss of quiet enjoyment of the property, section 28 of the *Act* states:

28 *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*

(a) reasonable privacy;

- (b) freedom from unreasonable disturbance;*
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
- (d) use of common areas for reasonable and lawful purposes, free from significant interference. (bolding added)*

It is the Tenants who have this right under the legislation. I do note that a landlord may evict a tenant if the tenant interferes with their quiet enjoyment of the property, but that is not the issue before me. The issue is whether the Landlords are entitled under the law to make a claim of damages for loss of quiet enjoyment; I find that they are not specifically granted this right under the Act.

However, the Landlords are entitled to make a claim for monetary compensation and other losses which could include what they have claimed under their heading of quiet enjoyment.

Having said that, the Landlords have failed to demonstrate that these Tenants deliberately manipulated the hot water heater to create problems for the occupants or that they were not compliant with the Act. The issue is not whether the temperature of the water was actually very hot or cold, but rather, the cause of that issue. I do not find that there is any evidence that these Tenants caused this problem.

Furthermore, under the Act, it is the Landlords who are responsible for taking care of the furnace and hot water heater, including inspecting and maintaining these items, which they also make use of.

There is no evidence that the Landlords had the water heater inspected until a plumber was on site at the end of the tenancy, when the Tenant recorded it. There was, however, evidence given of the Landlord screaming and becoming irate about the water issue and police becoming involved to try to control the mounting tension between the parties.

The parties all share the same hot water tank – so if the water that is coming from that heater is either too hot or too cold for use by occupants, then it impacts all of the residents equally, and not only the Landlord's family. Although I must acknowledge that the Landlords have suffered emotional distress from the difficulties they have described herein, I cannot hold the Tenants liable as I find there is no causal connection between them and the issues that arose in the house.

(c) Cleaning and Repairs:

The requirement to leave the premises in a clean and undamaged state is outlined in section 37 of the Act:

37 (1) *Unless a landlord and tenant otherwise agree, the tenant must vacate the rental unit by 1 p.m. on the day the tenancy ends.*

(2) *When a tenant vacates a rental unit, the tenant must*

(a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and

(b) give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

I have reviewed the photographic evidence and find that the rental unit was left in a state of general cleanliness as is required under the Act, at the end of the tenancy. Any cost for subsequent cleaning that was done several months after the tenancy ended and after remedial work, to prepare for new renters, is not the responsibility of these Tenants.

With respect to the specific claims of the Landlords, under Policy Guideline 1, a tenant is responsible to steam clean or shampoo the carpets, but there is no requirement that it be done by a professional outside service. I am satisfied from the pictures and testimony that the Tenants did the carpet cleaning as required under the Act, using proper equipment.

As for the cleaning behind the kitchen appliances, there is a dispute as to whether or not there were rollers underneath. In the absence of rollers, Policy Guideline 1 states that a tenant is not expected to move the appliances and clean behind unless a landlord gives express directions on how to do that without damaging the floors. I find that the Landlords have failed to prove that there were rollers or that they gave the Tenants instructions on moving the appliances.

With respect to the claim for the fence repairs, under Policy Guideline 1 a landlord is responsible for maintaining fences; I find no evidence to prove these Tenants damaged the fencing and should be held liable.

A landlord is responsible for clearing a clogged sink unless it can be shown that a tenant did something to cause the sink to become blocked. I find that the Tenants complained about issues with the bathroom sink in 2016 and 2017 and that it was an ongoing issue. The Landlords are responsible for addressing this problem and the Tenants are not liable for this small repair.

The Landlords' Application is dismissed as they have not met the burden of proof. As the Landlords were not successful in their claim, I do not award the filing fee or other costs claimed. As such, they are required to pay back the security deposit in the amount of \$437.50 to the Tenants forthwith.

The monetary order requiring the payment of the security deposit must be served on the Landlords and may then be filed in the Small Claims Division of the Provincial Court and enforced as an order of that court if the Landlords fail to make payment. Copies of this order are attached to the Tenants' copy of this Decision.

Conclusion

The Landlords' Application is hereby dismissed and the security deposit of \$437.50 held by the Landlords shall be paid to the Tenants forthwith.

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 08, 2018

Residential Tenancy Branch