Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PINE GLEN APARTMENTS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

The tenant applies to recover a security deposit and for a monetary award for damage and loss claimed to result from the landlord's failure to repair the rental unit or to provided services and facilities: heat and garbage pickup.

Both parties attended the hearing, the landlord by its agent an its legal counsel, and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Is the tenant entitled to recover any deposit money paid during this tenancy? Has the landlord breached its obligations to the tenant under the law or the tenancy agreement and has the tenant suffered damage or loss as a result?

Background and Evidence

The rental unit is a two bedroom apartment in a 132 unit apartment building. There is a written tenancy agreement. The tenancy started June 1, 2012. It ended February 11, 2017 as the result of the landlord issuing a one month Notice to End Tenancy for repeated late payment of rent.

The tenancy agreement discloses that a Mr. C.K. was a co-tenant. He is not a party to this proceeding.

At the end of the tenancy the monthly rent was $638.00 per month and the landlord held a $312.50 security deposit. The deposit has not been returned.

This application was made April 6, 2018, approximately fifteen months after the tenancy ended.

The tenant did not testify. Ms. D.R. indicates that the tenant, her son, has difficulty expressing himself. She indicates that the applicant tenant's co-tenant Mr. C.K. did not testify because he is mentally disabled and has difficulty dealing with confrontational situations.

Ms. D.R. testifies that during the tenancy her son experienced problems with: the shower, heating, a leaky fridge, defective lights, a defective stove, a defective front door, problems with windows and the patio door, a lack of blinds, a leaky faucet, locks, disruptive people in the halls of the building, an overflowing garbage dumpster as well as old and worn out carpeting, appliances and bathroom.

She says the tenant made many complaints to the landlord about these things but nothing was done. The building entrance door was replaced in 2016 but it would not lock either. She indicates that anyone could simply open the building's main door and enter. She refers to a video clip showing the door to be opening from the inside, apparently without locking.

She refers to a video clip showing the suite door to be sticking a bit in its frame. She asserts that complaints about it were made but nothing was done.

Ms. D.R. testifies that to her personal knowledge there was insufficient heat in the rental unit in the winter and that the thermostat in the rental unit did not work. She refers to a video clip showing someone turning the rheostat knob and then removing the knob. She says that the rental unit was too hot in the summertime because the landlord left the furnace on and the tenant could not turn the heat off in his rental unit.

Ms. D.R. says that it could be very cold in the rental unit in winter. Her son used a portable heater but would often stay with her due to the cold in the rental unit.

She says a plumber has told her the heating system needs a new "actuator."

To compound the heating problem, Ms. D.R. says the balcony door did not close completely, thus letting out heat.

In the summer of 2016 the landlord conducted renovations to the rental unit but never did install the new blinds for the unit. The blinds were delivered and remained rolled up on the floor in front of the window.

She says the bathroom fan was noisy. She refers to videos and photos showing the bathroom faucet continuing to run a small stream of water after being turned off.

She says the tenants did not take action about this problem because they were unaware of their rights “until 2016”.

Ms. D.R. also referred to various photographic and video evidence relating to the claims above, as well as to complaints about a noisy bathroom fan, old fuses, a dumpster full of garbage, a shower with low water pressure, debris around the building, a hole in a bedroom wall, old carpet, a light switch claimed to be defective and a stove element said to only work on its highest setting when turned on.

She was unable to show any documented instance of the tenant reporting to the landlord about any of these items since 2012. She says her son’s complaints were verbal to the building manager.

Ms. D.R. attempted to adduce two recordings of conversations between her son and Mr. M.B., the building manager. It was admitted the conversations were recorded without Mr. M.B.’s knowledge or consent. This evidence was refused on that basis and Ms. D.R. was informed that she could challenge Mr. M.B. with their contents if he testified and contradicted their content.

Ms. D.R. stated that her son the tenant did not pursue his complaints about the state of the premises and building because he was often late with his rent and there was an agreement with the landlord (or the manager.) that if he did not complain he would be given leeway about paying rent late. As it turned out, she says, her son finally did complain and was given the Notice to End Tenancy that caused him to move out.

On being questioned by Mr. M.T. for the landlord, Ms. D.R. indicates she did not know exactly when her son took the video or photos adduced in support of his claim. She indicates that he was aware of the problems since 2012. The tenant never made a written complaint about any of the items referred to. This application was not made earlier, she says, because neither she nor her son was aware of his right to apply for help through the Residential Tenancy Branch.

In response Mr. M.B. testifies that on taking over as resident manager in 2015 he assumed care of the files kept on each rental unit in the building. He says that the file for this rental unit had no written maintenance requests. He describes the system for dealing with maintenance issues. Generally a tenant comes to the office and is directed to a maintenance request form. The maintenance staff are informed, the request is investigated and addressed by the maintenance staff.

He says there have been no maintenance requests from the tenants in this rental unit since he has been there. He says no other tenants have complained about problems with the front door to the building.

He says the boiler in the building is turned off in summer and so there could not have been heat coming to this rental unit in the summer. Each fall the landlord's staff turn the boiler on and attend at each unit to confirm the heat is on and to bleed the pipe valve if necessary. They also bleed the system a couple of times per year and when the boiler is shut down.

Mr. M.B. denies being informed about any problems with this rental unit but for the blinds. New blinds were provided as part of the renovation work in 2016 but, he says, the installer refused to install them unless and until the tenants cleaned the rental unit and its strong smell from the animals the tenants kept. The tenants were informed but did not contact him that the rental unit had been cleaned up.

Mr. M.B. indicates that the garbage dumpsters are emptied twice a week and that even if they are full, tenants could leave their bagged garbage beside the bins and it would be removed.

He says the rental unit was entirely renovated after the tenants left and that the present tenants have not complained about anything.

Ms. D.P. testified that she has been an inside maintenance worker at this apartment building for nearly two years. During that time she has not had any maintenance requests from the tenants in this rental unit. She has bled the hot water lines in the unit with these tenants there and there was no mention of repairs from either of them.. If there had been, she says, she would have referred them to the office to fill out a request form.

She says that the staff go through all the request forms from tenants every Monday and they are dealt with.

Analysis

The Security Deposit

It is apparent that since the ending of this tenancy and until this claim was made in April 2018, the tenant did not provide the landlord with a forwarding address in writing.

Section 39 of the *Residential Tenancy Act* (the "*Act*") states that if a tenant fails to provide a landlord with a forwarding address within one year after the end of the tenancy the landlord may keep the deposit money and the right of the tenant to return of it is extinguished.

The tenant's right to return of the deposit money has been extinguished in this case because his forwarding address, given by the making of this application, was provided more than a year after the end of the tenancy.

The Tenant's Damages Claim

Laches

Before addressing the evidence given in this matter it is appropriate to discuss a central argument raised by counsel for the landlord, who argues that the tenant has been tardy in enforcing his rights by making his claim and that the landlord has suffered prejudice as a result. He says the landlord has not been able to investigate the complaints or to secure evidence related to any of the complaints. The rental unit is now renovated and many of the allegations made here cannot now be investigated.

Counsel argues that the doctrine of laches should be applied to refuse the tenant's claim. He refers to a number of other Residential Tenancy arbitration decisions in which the doctrine has been invoked.

Laches was described by Mr. Justice La Forest in ***M.(K.) v. M.(H.)***, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 at p. 76 quoting from Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies*, 2d ed. (Winnipeg: Butterworths & Company (Canada) Limited, 1984) at 755:

> It is a defence which requires that a defendant can successfully resist an equitable (**although not a legal) claim** made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either … acquiesced in the defendant's conduct or … caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.
>
> (*emphasis added*)

The ***M.(K.)*** decision continues:

> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

The tenant's claim is clearly a "legal" claim not an "equitable" claim. It arises from s. 58(1) of the *Act*, which provides:

> (1) Except as restricted under this Act, a person may make an application to the director for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of any of the following:

(a) rights, obligations and prohibitions under this Act;
(b) rights and obligations under the terms of a tenancy agreement that
(i) are required or prohibited under this Act, or
(ii) relate to
(A) the tenant's use, occupation or maintenance of the rental unit, or
(B) the use of common areas or services or facilities.

The powers granted the Director (and thus her designated arbitrators) when adjudicating a dispute are set out in s. 62, and 64 of the *Act*. Those sections state:

Director's authority respecting dispute resolution proceedings
62 (1) The director has authority to determine
(a) disputes in relation to which the director has accepted an application for dispute resolution, and
(b) any matters related to that dispute that arise under this Act or a tenancy agreement.

(2) The director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act.

(3) The director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.

(4) The director may dismiss all or part of an application for dispute resolution if
(a) there are no reasonable grounds for the application or part,
(b) the application or part does not disclose a dispute that may be determined under this Part, or
(c) the application or part is frivolous or an abuse of the dispute resolution process.

(5) [Repealed 2006-35-86.]

Dispute resolution proceedings generally
64 (1) [Repealed 2006-35-88.]

(2) The director must make each decision or order on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions under this Part.

(3) Subject to the rules of procedure established under section 9 (3) *[director's powers and duties]*, the director may

(a) deal with any procedural issue that arises,

(b) make interim or temporary orders, and

(c) amend an application for dispute resolution or permit an application for dispute resolution to be amended.

(4) If, in the director's opinion, another tenant of a landlord who is a party to a dispute resolution proceeding will be or is likely to be materially affected by the determination of the dispute, the director may

(a) order that the other tenant be given notice of the proceeding, and

(b) provide that other tenant with an opportunity to be heard in the proceedings.

(5) The director may order that a landlord be given notice of a dispute resolution proceeding and an opportunity to be heard in the dispute resolution proceeding if, in the director's opinion, the landlord

(a) is a landlord of a tenant who is a party to that dispute resolution proceeding,

(b) did not receive under section 59 (3) notice of that dispute resolution proceeding, and

(c) will be or is likely to be materially affected by the resolution of the dispute.

There is no provision granting the Director any equitable powers; that is: to consider what is fair in the absence of the law. She is directed to decide cases “on the merits” meaning; after all the evidence in the case and the arguments of the parties have been heard.

Section 91 of the *Act* states that except as modified or varied under the Act, the common law respecting landlords and tenants applies in British Columbia. The “common law” is judge made law as opposed to law created by statute. I can infer no intent to grant the Director any equitable powers by these words.

The power of a court to consider equitable doctrines like laches arises, if not from a superior court’s inherent jurisdiction, then from ss. 4 and 5 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. Those provisions direct “the court” to deal with all equitable claims and grant all equitable relief (for example, imposing the doctrine of laches) to dismiss a claim. Those provisions do not apply to dispute resolution under the *Act*, because the dispute resolution process is not a court (*accord*, *Heilman* v *Upper Room Mission and Unger*, 2014 BCHRT 66 (BC Human Rights Tribunal)). Indeed, “the court” does not include the Provincial Court of BC (*William Murray Law Corp.* v. *Christ*, 2013 BCPC 188).

I conclude that the doctrine of laches is an equitable doctrine only available in the defence against an equitable claim. The claim brought in this proceeding is a claim created by statute and is a legal claim, not an equitable one. I conclude that neither the Director nor her

designate, the arbitrator, has power to invoke equitable doctrines like laches as a defence against claims by landlords or tenants.

Time Limitations

Were this a civil claim brought in a court in BC, the basic limitation period set out in the *Limitation Act*, S.B.C. 2012, c. 13, would serve to prevent any application being made after two years from the date the claim was discovered. In this case that might have a significant effect on the tenant's claim or any award for damage or loss as he is claiming recovery for a period starting in 2012. As well, the *Limitation Act,* s. 21, contains an "ultimate limitation period" giving a period of 15 years to bring a claim after the day on which the act or omission on which the claim is based took place.

The *Limitation Act*, s. 3(2) states that it does not apply to a claim or court proceeding for which a limitation period has been established under another enactment, except to the extent provided for in the other enactment.

The *Residential Tenancy Act* establishes its own limitation period. Section 60(1) provides,

> (1) If this Act does not state a time by which an application for dispute resolution must be made, it must be made within 2 years of the date that the tenancy to which the matter relates ends or is assigned.

This provision might have the flavour of an "ultimate limitation period" as it contemplates the survival of very old claims associated with tenancies of long duration, but my view the wording of the section is clear enough to reasonably exclude any suggestion of ambiguity. It is a limitation period that effectively disengages the basic, two year limitation period in the *Limitation Act*. The tenant's claim is not barred by any applicable limitation period.

I now proceed to deal with the tenant's claim. In order to establish a claim for damage or loss resulting from a landlord's failure to repair it is, in most cases, essential to show that the landlord was aware of the need for repairs. Though landlords may conduct occasional inspections or otherwise see inside a rental unit, it is the tenant who has exclusive possession of the rental unit. A landlord's right of entry is a very limited one. A tenant seeking the replacement or repair of something in the rental unit must inform his landlord of it.

It appears that at the time the parties conducted the move-in inspection, the premises were in reasonably good condition and repair. After that, it was incumbent on the tenant to inform the landlord about anything gone wrong, like: the leaky fridge, the thermostat, the stove, the lights and switches, the sink, the tub, the water pressure, the rental unit door, the locks and any other item of concern in the rental unit.

The tenant's mother Ms. D.R. says the tenant did complain but only verbally. The landlord's manager says that to his knowledge he did not, at least since 2015, and the manager and Ms. D.P. the maintenance worker say that if a verbal complaint was made the tenant would have been directed to put it in writing and it would have been investigated and dealt with.

In considering this conflicting evidence I take into account the fact that the tenant has delayed his application for a considerable period. Some of the items of his complaint appear to have arisen as long ago as 2012. I also consider and find that the landlord has been prejudiced by that delay. Its former manager, who might have given relevant testimony about verbal complaints, is long gone. The rental unit itself is no longer as it was. It has been renovated and re-let.

To explain the delay the tenant's mother claims that she and the tenant were ignorant of his rights, but I do not accept that excuse. In this day and age the existence of the Residential Tenancy Branch and its dispute process is common knowledge among landlords and tenants. Should a landlord or a tenant have an inkling of concern about a tenancy, it requires only a very small effort to find and connect with an authoritative voice like a Residential Tenancy Information Officer at a toll free telephone number, or through the Branch's thorough website.

In my view, as a result of the tenant's delay in bringing this application and the resultant evidentiary difficulties imposed on the landlord, the evidence presented by the tenant should be direct, cogent evidence and should be corroborated in its chief aspects by independent evidence where reasonably possible. It should be scrutinized with care.

In this case, on the essential point of whether or not the landlord was notified of any problems in the suite, there is only the tenant's mother's assertion that the tenant did so. Her assertion is not corroborated. Indeed, she states that the tenant had a bargain with the manager that if he did not complain about problems in his rental unit, the landlord would be flexible about his late payment of rent. That statement is inconsistent with the assertion that the tenant made verbal complaints to the landlord's manager.

In these circumstances I find that the tenant has not established that he informed the landlord about any alleged problems with his rental unit or the common property at any time during this tenancy.

It follows that the tenant's claim for money for damage or loss resulting from the landlord's alleged breach of the law or the tenancy agreement must be dismissed.

Conclusion

The tenant's application is dismissed.

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: August 20, 2018

Residential Tenancy Branch