Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL MNDCL-S MNRL-S MNDCT FFT

Introduction

This hearing was reconvened from the last adjourned hearing on June 28, 2018 for the continuation of the landlord's application, which was scheduled to be heard at the same time as the tenants' on May 2, 2018. The tenants' application was heard on May 2, 2018, but the landlord's application was adjourned due to lack of scheduled time to hear the application on that date. The hearing was adjourned again on June 28, 2018 on the request of the landlord due to a medical emergency.

This hearing proceeded on August 23, 2018 in order to deal with the landlord's application. I had deferred my decision on the tenants' application until the landlord's application was heard on August 23, 2018.

The original scheduled matter dealt with cross-applications by the parties pursuant to the *Residential Tenancy Act* (the "Act") for Orders as follows:

The landlord requested:

- a monetary order for damage to the unit, site, or property, or for money owed or compensation for damage or loss pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The tenants requested:

- a monetary order for compensation for loss or money owed, and for the cost of emergency repairs already made under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

XY attended this hearing as an interpreter for the landlord. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Preliminary Issue: Adjournment of Hearing

The landlord made an application requesting an adjournment during the hearing in order to make further submissions and provide more witness testimony that could not be heard in the allotted time for this hearing. The tenants were opposed to the application for an adjournment stating that the matter had been outstanding since January 2018, and that they had taken time off to attend the hearings, and were ready to proceed.

The tenants were opposed to a further adjournment of this matter given the delay and history of adjournments of both applications. The tenants testified that yet another adjournment would be prejudicial to them the as the landlord has been given ample opportunity to prepare for the hearings, and submit evidence in accordance with the Rules of Procedure.

Rule 6 of the Residential Tenancy Branch Rules of Procedure state that the "Residential Tenancy Branch will reschedule a dispute resolution proceeding if written consent from both the applicant and the respondent is received by the Residential Tenancy Branch before noon at least 3 business days before the scheduled date for the dispute resolution hearing".

The criteria provided for granting an adjournment, under Rule 6.4 are;

- whether the purpose for the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1…
- whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether the party had sufficient notice of the dispute resolution hearing…
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and
- the possible prejudice to each party.

This matter has been adjourned on more than one occasion for different reasons. Previously adjournments were granted in order to provide a fair opportunity for both parties to be heard. The tenants are opposed to yet another adjournment of the hearing as they were ready to proceed, and this matter has been outstanding since January 2018. In consideration of the landlord's adjournment request, I was not satisfied that an adjournment was necessary or justified. During this scheduled hearing for 9:30 a.m, the

landlord was given ample time and multiple opportunities to present her evidence, including witness testimony.

Despite the presence of an interpreter, the landlord's testimony in this hearing was not clear. I made repeated attempts to clarify the landlord's testimony during the hearing, which was also made by the landlord's own witness SA. In response to the landlord's questions during the hearing she stated "I don't understand".

Furthermore, despite several reminders to the landlord that she could not reargue the issue of admitting her late evidence and amended monetary claim, the landlord continued to do so. The landlord was reminded at 10:14 a.m. to make efficient use of the scheduled time to complete her submissions, to call witnesses, and cross-examine the parties in the hearing. Despite my repeated reminders the landlord continued to interrupt the tenants in their testimony and reargue issues that had already been decided.

At 10:24 a.m. the landlord was reminded once again that she must use the scheduled hearing time efficiently, and that she could not argue the issues that had already been decided. An additional 10 minutes per party was given at this time to allow both parties to finish their cross examination, and complete their submissions. At 10:31 a.m. and 10:39 a.m. the landlord was given the same reminders. At 10:41 a.m., the landlord interrupted the tenants again despite previous warnings not to do so.

The hearing concluded at 10:48 a.m., and I advised both parties that I was not granting a further adjournment of this matter.

I found that the explanation and argument provided by the landlord for a further adjournment did not meet the requirements of Rule 6.4, namely that an adjournment would be prejudicial to other party who was prepared to proceed with the hearing, and namely that I was not satisfied that an adjournment would contribute to a resolution of the matter. I note, as summarized above, that the landlord was given ample opportunity to present her testimony and call her witnesses. I note the landlord's repeated attempts to reargue the same points despite being warned several times not to do so.

I find that the request for an adjournment arises out of the landlord's intentional actions, and the request for an adjournment was not granted. The hearing proceeded, and concluded after an extra 18 minutes was given to allow both parties to present their evidence.

Preliminary Issue – Landlord's Late Evidence and Amended Application

During this hearing the landlord wanted to reargue her case about the admission of her late evidence and amended monetary application. As stated in my interim decision dated May 4, 2018, I find that the landlord failed to serve the tenants with her amendment and late evidence within the prescribed timelines of rules 4.6 and 3.14, and I am excluding her late evidence, and am not considering her amendment to her application. This decision stands. As I found that the tenants were served with landlord's original application package in accordance with section 89 of the *Act,* this landlord's original application was considered for this hearing.

Preliminary Issue –Service of Amendment of Tenants' Application

At the May 2, 2018 hearing the landlord testified that although she did receive the tenants' original hearing package and evidence, she did not receive the package that the tenants sent to her on April 12, 2018.

In my interim decision dated May 4, 2018, I made the following finding:

"Although the landlord disputes the fact that she had received this package, the address confirmed in the hearing matches the address the tenants sent the package to.

On a balance of probabilities, I find that the landlord was served with the tenants' amendment to their application at the address at which she carries on business as a landlord, as required by section 89 (2)(c) of the *Act*. In accordance with section 90 of the *Act*, the landlord is deemed served on April 17, 2018, five days after mailing. As this date meets the requirements of Rule 4.6, which requires that the amendment be served 14 days before the hearing, the tenants' amendment is admitted and will be considered."

As stated above, the hearing proceeded on May 2, 2018 in relation to the tenants' amended application.

Issues(s) to be Decided

Are both parties entitled to the monetary compensation that they applied for?

Are both parties entitled to recover the filing fee for their applications?

Background and Evidence

This fixed-term tenancy began in August 2016, with monthly rent set at $2,000.00. The landlord had collected a security and pet damage deposit in the amount of $1,000.00 for each deposit from the tenants. The tenants testified that they had moved out on January 19, 2018, while the landlord testified that this tenancy ended on January 23, 2018.

The tenants testified at the May 2, 2018 hearing that their forwarding address was provided to the landlord on January 27, 2018, and also confirmed at the hearing on March 6, 2018, but they have not received any portion of their deposit back. In my interim decision dated May 4, 2018, I dismissed the tenants' application for the return of their security deposit with leave to reapply.

The tenants provided undisputed testimony that on January 6, 2018 the home was damaged during the ice storm, and as a result the power to the home was disconnected by the utilities provider for safety reasons. The tenants testified that they had contacted the landlord immediately as they were without power and heat during freezing temperatures. The tenants testified that they had emailed and called the landlord, with no response. They had also contacted the landlord's agent SA, who had previously served them with a 10 Day and 1 Month Notice to End Tenancy. On January 8, 2018 the tenants moved to a hotel as they had not heard from the landlord, and they were still without heat and electricity.

The landlord disputes having received any communication from the tenants, and she testified that she had already served the tenants a 10 Day Notice to End Tenancy on January 1, 2018. She testified that the tenants had failed to pay her rent, and that they also had refused access to her general contractor. The tenants disputed this, stating that they landlord had repeatedly attended their home to harass and threaten them to the extent that the police were called. The landlord testified that she had attended on January 5, 2018 with her contractor, but the tenants testified that the purpose of this visit was to harass them, and the police were called.
".
The tenants are seeking a monetary order for the following losses associated with this tenancy. The tenants are also seeking the return of their security and pet damage deposits:

Item	**Amount**
Hotel Costs	$898.14
Cost of Food	640.00
Cost of Emergency Repairs	51.45

Moving Costs	1,032.00
Lost Wages ($466/day *3)	1,398.00
Return of their deposits	2,000.00
Aggravated Damages	21,000.00
Total Monetary Order Requested	**$27,019.59**

The tenants testified that they had paid their own electrician, which the landlord refused to reimburse them for. The tenants submitted an estimate in the amount of $51.45, but were did not provide proof of payment for the electrician.

The tenants testified that they were displaced due to the lack of power to the home, and had to stay in a hotel and pay for food as the hotel had no kitchen. The tenants are also seeking reimbursement of the cost of moving to their new residence as the home was uninhabitable due to the extreme cold. The tenants are also seeking $21,000.00 in aggravated damages for the harassment that has taken place during this tenancy, which the tenants testify is still ongoing. The tenants admitted in the hearing that this amount was an “arbitrary figure”, but they felt that the amount was justified considering the harassment they had suffered. The tenants, in their application stated that the landlord had stolen their cat and kittens, and made repeated unannounced visits to the home.

The landlord disputed the tenants’ claims, stating that the tenants were not truthful, and that they had failed to pay rent as required by the *Act.* The landlord testified that she had attempted to enter the home on several occasions with her general contractor, but was always denied access.

The landlord filed her own monetary claim against the tenants for failing to pay $2,000.00 in outstanding rent for the month of January 2018. The landlord testified in the hearing that she had received an e-transfer from the tenants, but that she did not receive the password, and was unable to receive the January 2018 rent payment. The tenants testified that they sent the password to the landlord.

In addition to the unpaid rent, the landlord made an additional monetary claim in the amount of $21,218.80. The landlord stated that this monetary claim was for items stolen by the tenants, the cleaning of the property and home, including the “dog shit” left by the tenants, for unpaid utilities, and repairs to the home.

The tenants disputed the landlord’s monetary claim stating that the yard contained items that were already there. The tenants testified that without power to the home, they had

difficulty cleaning the home. The tenants testified that the home required serious maintenance which the landlord failed to do.

Analysis

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter the tenant must satisfy each component of the following test for loss established by **Section 7** of the Act, which states;

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.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the landlord)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (tenant) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Both parties bear the burden of establishing their claim on the balance of probabilities. They must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party. Once established, the claimant must then provide evidence that can verify the actual monetary amount of the loss. Finally, they must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

Section 33 of the Act outlines the obligations of the tenant and landlord for emergency repairs.

Emergency repairs

33 (1) In this section, **"emergency repairs"** means repairs that are

(a) urgent,

(b) necessary for the health or safety of anyone or for the preservation or use of residential property, and

(c) made for the purpose of repairing

(i) major leaks in pipes or the roof,

(ii) damaged or blocked water or sewer pipes or plumbing fixtures,

(iii) the primary heating system,

(iv) damaged or defective locks that give access to a rental unit,

(v) the electrical systems, or

(vi) in prescribed circumstances, a rental unit or residential property.

(2) The landlord must post and maintain in a conspicuous place on residential property, or give to a tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs.

(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.

(7) If a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount

Section 44 (1) of the *Residential Tenancy Act* states that a tenancy may end only if one or more of the following applies;

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i) section 45 *[tenant's notice]*;

(i.1) section 45.1 *[tenant's notice: family violence or long-term care]*;

(ii) section 46 *[landlord's notice: non-payment of rent]*;

(iii) section 47 *[landlord's notice: cause]*;

(iv) section 48 *[landlord's notice: end of employment]*;

(v) section 49 *[landlord's notice: landlord's use of property]*;

(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;

(vii) section 50 *[tenant may end tenancy early]*;

(b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1),

requires the tenant to vacate the rental unit at the end of the term;

(c) the landlord and tenant agree in writing to end the tenancy;

(d) the tenant vacates or abandons the rental unit;

(e) the tenancy agreement is frustrated;

(f) the director orders that the tenancy is ended;

(g) the tenancy agreement is a sublease agreement.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

> ***45*** *(2) A tenant may end a fixed term tenancy by giving the landlords notice to end the tenancy effective on a date that*
>
> *(a) is not earlier than one month after the date the landlords receives the notice,*
>
> *(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and*
>
> *(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*

In consideration of the evidence and testimony before me, I find that that there is conflicting testimony as to whether the tenants had made two attempts to contact the landlord by telephone as required by section 33(3) of the *Act,* as stated above.

The tenants submitted in evidence their correspondence to the landlord regarding the loss of power. The tenants also submitted evidence to support that the power would not be restored until repairs were completed by an electrician. The landlord provided in evidence the written testimony of her contractor that they had attempted to perform repairs on previous occasions, but was denied access.

I find that the statement of the contractor submitted by the landlord demonstrates the landlord's knowledge that there was damage to the home by the tree. The contractor, in his statement, wrote that that the tree had caused serious damage to the roof and gutter, but made a determination that the "somebody made the tree fell down on purpose to damage the roof and gutter" and that the "tenants never report anybody entered the property to pull down the tree". I am not satisfied, however, that the tenants had demonstrated that they had complied with their obligations under section 33(3) and 33(6) of the *Act,* as stated above.

The tenants submitted a monetary claim for the costs associated their temporary displacement due to the loss of power, as well as for reimbursement for emergency repairs performed. As stated above the onus falls on the claimant to prove "the existence of the damage or 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". The tenants made a monetary claim for food, lost wages, and hotel costs. I find the tenants failed to provide sufficient evidence to support how these losses was due to the deliberate or negligent act or omission of the landlord. Furthermore, I find that they had failed to demonstrate that they had met their obligations under section 33(3) and 33(6) of the *Act.* Although the tenants submitted evidence to support that there was damage to the property, and that an electrician was required, they did not provide sufficient evidence to support that they had fulfilled the criteria for reimbursement of the costs of the emergency repair, including two attempted phone calls for emergency repairs to the landlord or her designated emergency contact, that they had given the landlord reasonable time to perform these repairs, and that they had obtained and submitted the receipt for the repair. The tenants did not submit any receipts in their evidence, but only an estimate, to support the cost of the electrician. Accordingly, the tenants' monetary application for the costs associated with their temporary displacement and emergency repairs is dismissed without leave to reapply.

Furthermore, I find that this fixed-term tenancy ended in a manner contrary to sections 44 and 45 of the *Act*. The tenants had moved out in January before the end of this fixed-term tenancy, which was to end on May 2018. I find that the tenants failed in their obligations to end this tenancy in accordance with the *Act*. Accordingly, I find that they are not entitled to the cost of their move. This portion of their monetary claim is dismissed without leave to reapply.

In addition to other damages an arbitrator may award aggravated damages. These damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. (Intangible losses for physical inconvenience and

discomfort, pain and suffering, loss of amenities, mental distress, etc.). Aggravated damages are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer's behaviour. They are measured by the wronged person's suffering.

The damage must be caused by the deliberate or negligent act or omission of the wrongdoer. However, unlike punitive damages, the conduct of the wrongdoer need not contain an element of wilfulness or recklessness in order for an award of aggravated damages to be made. All that is necessary is that the wrongdoer's conduct was highhanded. The damage must also be reasonably foreseeable that the breach or negligence would cause the distress claimed.

They must also be sufficiently significant in depth, or duration, or both, that they represent a significant influence on the wronged person's life. They are awarded where the person wronged cannot be fully compensated by an award for pecuniary losses. Aggravated damages are rarely awarded and must specifically be sought. The damage award is for aggravation of the injury by the wrongdoer's highhanded conduct.

The tenants requested $21,000.00 for aggravated damages as part of their monetary claim. Although I sympathize with the tenants and the fact that they suffered from a difficult relationship with the landlord during this tenancy, I find that they did not establish how this estimate was obtained, either referenced and supported by similar claims of this nature, or by providing pay stubs, receipts, statements, or written or oral testimony to support the damages the tenants are seeking in this application. The tenants testified that this figure was arbitrary. Although the tenants referenced acts by the landlord such as the theft of their cat and kittens, the tenants did not provide sufficient evidence to support that these deliberate acts had taken place. On this basis I find that the tenants are not entitled to any award for aggravated damages, and this portion of their monetary claim is dismissed without leave to reapply.

Section 26 of the Act, in part, states as follows:

Rules about payment and non-payment of rent

> ***26*** *(1) 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.*

Although I find that the tenants did attempt to pay the January 2018 to the landlord, due to reasons that cannot be determined based on the evidence before me, I find that the landlord did not successfully receive the $2,000.00 for January 2018 rent. Despite the tenants' efforts, I am satisfied that this amount remains outstanding, and accordingly I find that the landlord is entitled to $2,000.00 in unpaid rent for this tenancy.

I have considered the $21,218.80 monetary claim by the landlord. As stated earlier, the landlord had attempted to file an amendment to her original application in the form of an updated monetary worksheet, as well as additional evidence on April 30, 2018, and on the date of the May 2, 2018 hearing. This evidence and attempted amendment was excluded for the purposes of this hearing as the landlord failed to submit the amendment and evidence in accordance with the *Act* and RTB Rules.

As stated above, the onus falls on the applicant to support that they suffered a loss due to the other party's failure to comply with the tenancy agreement or *Act*, and the amount of that loss. Furthermore, the claimant must demonstrate how they mitigated the other party's exposure to their losses.

In this hearing, and in her application, I find that the landlord was extremely unclear in her submissions as to what she was claiming, and how the other party's failure to comply with the *Act* and tenancy agreement contributed to the amount she is claiming. As summarized above in my decision about the landlord's adjournment request, several attempts were made to clarify and obtain more evidence from the landlord in order to make a decision about her application. Despite these repeated attempts, the landlord used the allotted time in the hearing to reargue her points about admitting her late evidence and amendment to her monetary claim.

The hearing was adjourned on May 2, 2018 specifically to give the landlord ample opportunity to make her submissions, call witnesses, and cross examine the other party. The purpose of the adjournment was made clear in the hearing, as well as in my interim decision dated May 4, 2018. Despite my efforts to allow all parties to make their submissions, call witnesses, and cross examine each other, I found the landlord to be extremely unprepared, disorganized, and difficult to understand despite the presence of her interpreter in this hearing. I find that none of the landlord's evidence and testimony submitted for this hearing sufficiently supports any portion of her monetary claim, other than the unpaid rent for January 2018. Accordingly, the remaining portion of the landlord's monetary claim is dismissed without leave to reapply.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the tenants were not successful with their application to recover their application to recover the filing fee is dismissed without leave to reapply.

As the landlord was unsuccessful with the majority of their claim, I also dismiss her application to recover the filing fee without leave to reapply.

Conclusion

The tenants' entire application is dismissed without leave to reapply.

I issue a $2,000.00 Monetary Order in favour of the landlord, which allows the landlord to recover the unpaid rent for January 2018. The remaining portion of the landlord's application is dismissed without leave to reapply.

The tenant(s) must be served with this Order as soon as possible. Should the tenant(s) 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: October 1, 2018

Residential Tenancy Branch