Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67; and
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that the landlord was served the notice of dispute resolution package by registered mail sometime in January 2018, but could not recall the specific date. The landlord confirmed receipt of the dispute resolution on February 5, 2018. I find that the landlord was served with this package on February 5, 2018, in accordance with section 89 of the *Act.*

Preliminary Issue- Res Judicata

In this application the tenant applied for the return of her security deposit.

The tenant's evidence package referred to two previous Residential Tenancy Branch (RTB) decisions dated February 14, 2017 and November 24, 2017 between the tenant and the landlord at the same residential address as this application. A finding was made in the decision dated November 24, 2017 that the landlord was entitled to retain the tenant's security deposit.

Res judicata prevents a plaintiff from pursuing a claim that already has been decided and also prevents a defendant from raising any new defense to defeat the enforcement of an earlier judgment. It also precludes re-litigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action. Former adjudication is analogous to the criminal law concept of double jeopardy.

The Arbitrator in the November 24, 2017 decision made a finding that the landlord was entitled to retain the tenant's security deposit. I therefore find that this current application for the tenant to recover her security deposit is *res judicata*, meaning the matter has already been conclusively decided and cannot be decided again.

The tenant's application to recover her security deposit is dismissed without leave to reapply.

Issue(s) to be Decided

1. Is the tenant entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. In this decision, I will only address the facts and evidence which underpin my findings and will only summarize and speak to the points which are essential in order to determine if the tenant is entitled to a Monetary Order for damage or compensation. Not all documentary evidence and testimony will be summarized and addressed in full, unless it is pertinent to my findings.

Both parties agreed to the following facts. This tenancy began on December 1, 2014 and ended on June 6, 2018, pursuant to the RTB decision dated November 24, 2017. Monthly rent in the amount of $550.00 was payable on the first day of each month pursuant to the RTB decision dated November 24, 2017. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that in January 2017 the tenant reported the landlord to the city regarding her concerns of mold in her unit. In the latter half of February 2017, the city invoked a 'safe-premises' by-law requiring the landlord to hire a mold remediation company to remediate the unit. In March 2017, the landlord hired a mold remediation company to inspect and remediate the tenant's unit in accordance with the safe-premises by-law.

The landlord testified that a representative of the mold remediation company (the "representative") inspected the tenant's unit for mold on March 21, 2017. The landlord testified that after the inspection the representative recommended that some drywall be replaced and an ozone treatment be completed at rental property to ensure that any mold present was treated. The landlord testified that he relied upon the expertise of the representative and followed all of the representative's instructions in order to be in compliance with the city by-laws and to provide a safe residence for the tenant.

Both parties agree that the tenant was given written notice on March 30, 2017 that the remediation company would be entering the tenant's unit on April 4th and 5th 2017 and that they required vacant possession of the tenant's unit for three days to complete the required remediation work. On April 4, 2017 the tenant and her parents were at the rental unit and were informed by the representative that the treatment might kill the tenant's plants and recommended that the tenant remove them. The tenant and her parents removed the plants from the unit.

The tenant testified that she wanted to remove more items but the landlord physically pushed her out of the unit saying that "time was money" and that the tenant needed to leave. The tenant described the contact as an assault but testified that she did not report it to the police because she did not see the contact as an assault at that time.

The landlord testified that he did not push the tenant, but was encouraging her to leave as the remediation to the unit needed to start as per the notice provided to the tenant on March 30, 2017.

The tenant's mother testified that the landlord put his hand on the tenant's shoulder and guided her out of the rental unit because "time was money".

The tenant testified that she returned to her apartment when she was advised that it was safe to do so on the evening of April 6, 2017. The tenant testified that the smell in her unit was horrible and that it was unlivable. The tenant testified that it was so toxic that she never again spent a night in the apartment. The tenant is claiming $2,801.00 in

expenses related to being unable to reside in her unit for the month of April such as clothes, food, lottery tickets, pet supplies, toiletries, and dishes. The tenant is also claiming for compensation for her hydro and internet bills for the month of April as she was not in her unit and so could not use those services. The tenant entered numerous receipts but did not provide a breakdown as to what each receipt was for or how she reached the claimed sum of $2,801.00.

The tenant testified that the ozone treatment destroyed most of her property and possessions. The tenant testified that she had content insurance and made a successful insurance claim as a result of the ozone treatment. The tenant testified that she had to pay her insurance company a $1,000.00 deductible. The tenant entered into evidence a letter from her insurance company which stated:

> "[a mold remediation company] was hired by [the landlord] to complete mold remediation and in doing so, they used ozone within the Condominium unit rented by our insured which resulted in damage to a number of her contents. The first party portion of her claim as [sic] been settled for $20,000.00 after application of [the tenant's] $1,000.00 deductible ($21,000 total loss)."

The tenant is claiming the $1,000.00 deductible from the landlord.

The landlord testified that he is not at fault for any damage to the tenant's belongings because he acted responsibly and reasonably in hiring the mold remediation company in response to the tenant's concerns and was diligent in following the recommendations of that company. The landlord entered into evidence a letter from the mold remediation company which outlined the actions the company took to remediate the unit.

The landlord testified that on April 19, 2017 the mold restoration company completed a standard air quality test and found that the property was safe and that the post-remediation cleanup was complete. The mold restoration company's air test interpretation report was entered into evidence.

The tenant testified that the smell from the ozone treatment was still very potent and that this smell continued to prevent the tenant from moving back into the unit.

The landlord testified that upon submission of documents from the mold remediation company to the city, the city e-mailed the landlord and declared the tenant's suite "compliant". The e-mail from the city was entered into evidence.

The tenant testified that the landlord's action, in spraying her unit and her belongings with ozone caused her to suffer a loss of quiet enjoyment of her unit because her home became unlivable as a result of the treatment.

The tenant testified that she is seeking aggravated damages because the ozone treatment destroyed all of her personal memorabilia, gifts from deceased loved ones, and resulted in the loss of her home. In addition, the tenant testified that she feels she is entitled to aggravated damages for being pushed by the landlord and that ever since she filed her first notice of dispute resolution against the landlord, he has treated her dis-respectfully. The tenant testified that the above have caused her both physical and mental distress.

The tenant is seeking a Monetary Order for the following:

Item	**Amount**
Loss of quiet enjoyment for April and May 2017	$1,425.00
Aggravated Damages	$10,000.00
Cost of living expenses while tenant unable to reside in home	$2,801.00
Content insurance deductible	$1,000.00
Total	$15,226.00

Analysis

Loss of Quiet Enjoyment

Section 28 of the *Act* states that 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.

Residential Policy Guideline 6 states that a landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

Section 10(a) of the tenancy agreement and section 32 of the *Act* states that the landlord must provide and maintain the residential property in a reasonable state of decoration and repair, suitable for occupation by a tenant.

I find that the ozone treatment and its effects on the tenant's possessions and rental unit was an unreasonable disturbance which prevented the tenant from exclusive possession of the rental unit. I find that the ozone treatment resulted in a loss in the value of the tenancy for the tenant from April 4, 2017 until June 6, 2017 because the tenant was unable to reside in the unit during that time. I find that the landlord did not fulfill his obligation under the tenancy agreement and section 32 of the *Act* to provide a property suitable for human occupation.

Section 67 of the *Act* allows me to issue a monetary award for damage or loss. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. Residential Policy Guideline 16 states that 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.

I find that the tenant is entitled to be compensated by the landlord for the days she paid to reside in the rental unit but was unable to do so due to the ozone treatment. I find that the tenant is entitled to a Monetary Order as follows:

Item	**Amount**
Pro-rated rent for April 4 - 30, 2017	$494.91
Rent for May, 2017	$550.00
Pro-rated rent for June 1-6, 2017	$109.98
Total	$1154.89

The pro-rated rate is based on the following calculation:

$550.00 (rent) / 30 (days per month in April and June 2017) = $18.33 per day

Monetary Claim for Living Expenses

The tenant is claiming for the cost of her living expenses when she was unable to live in her apartment due to the ozone treatment. In support of her claim, the tenant entered into evidence numerous receipts for items such as clothes, food, lottery tickets, pet supplies, toiletries, and dishes. The tenant did not provide a breakdown of her claims explaining how the sum of $2,801.00 was reached. The tenant did not provide any separate explanation as to what the receipts were for, except what is written on the receipts themselves.

There is a general legal principle that places the burden of proving a loss on the person who is claiming compensation for the loss. I find that the tenant has not proven that the $2,801.00 she is claiming for cost of living expenses arose as result of the landlord's breach of the *Act* or tenancy agreement and I find that the tenant has not proven the quantification of that loss. I dismiss the tenant's claim for the cost of living expenses without leave to reapply.

Aggravated Damages

Policy Guideline 16 states that aggravated damages are for intangible damage or loss. Aggravated damages may be awarded in situations where the wronged party cannot be fully compensated by an award for damage or loss with respect to property, money or services. Aggravated damages may be awarded in situations where significant damage

or loss has been caused either deliberately or through negligence. Aggravated damages are rarely awarded and must specifically be asked for in the application.

The tenant, landlord and the tenant's mother all testified to different versions of the events which took place on April 4, 2017. The landlord testified that he did not touch the tenant, the tenant testified that the landlord pushed her and the tenant's mother testified that the landlord put his hand on the tenant's shoulder and guided the tenant out. Of the testimony provided by all three persons, I found the tenant's mother's testimony to be the most credible and reliable as it came across as an honest recollection and was provided without hearing the parties' versions of events.

I find that the landlord guided the tenant out of the rental suite in an effort to have the remediation work started. I find that the conduct of the landlord was not so egregious as to justify aggravated damages.

The landlord testified that he hired a mold remediation company as recommended by the city and that he relied on that company's expertise to safely complete the remediation. I find that the landlord was not negligent in hiring the mold remediation company and acted reasonably in relying on the mold remediation company's expertise. I find that the landlord did not deliberately cause damage to the tenant's property. I find that the landlord acted reasonably and that the tenant is therefore not entitled to aggravated damages. I dismiss the tenant' s application for aggravated damages, without leave to reapply.

Monetary Claim for Insurance Deductible

Policy Guideline 16 states that it is up to the party who is claiming compensation to provide evidence to establish that compensation is due.

In order to determine whether compensation is due, the arbitrator may determine whether:

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

I find that the landlord failed to comply with section 10 of the tenancy agreement and section 32 of the *Act* by not providing a safe and habitable place to live. I find that the

landlords inaction, not remediating the ozone to provide a safe and habitable place to live, did not cause the damage to the tenant's property which subsequently led to the $1,000.00 insurance deductible. I find that it was the actions of the mold remediation company which caused damage to the tenant's property. Therefore, I find that the landlord is not required to reimburse the tenant for the $1,000.00 insurance deductible.

Conclusion

I issue a Monetary Order to the tenant under the following terms:

Item	**Amount**
Pro-rated rent for April 4 - 30, 2017	$494.91
Rent for May, 2017	$550.00
Pro-rated rent for June 1-6, 2017	$109.98
Total	$1,154.89

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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: September 13, 2018

Residential Tenancy Branch