Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, RR, FFT

Introduction

The tenant filed an Application for Dispute Resolution (the "Application") on September 11, 2020. They seek a monetary order for compensation for monetary loss or other money owed. Additionally, they seek a reduction in rent for repairs, services or facilities agreed upon but not provided by the landlord. Additionally, they seek reimbursement of the application filing fee.

The matter proceeded to a hearing pursuant to section 74(2) of the *Act* on November 3, 2020. Both parties attended the conference call hearing. I explained the process and offered both parties the opportunity to ask questions. Both parties presented oral testimony and evidence during the hearing.

The tenant confirmed they provided notice of this hearing and their prepared documentary evidence to the landlord by registered mail. They provided proof of this in the form of a receipt showing the tracking number, along with information showing the package sent on September 18, and delivered on September 22. This is their "primary evidence".

In the preliminary stage of the hearing, the tenant confirmed receipt of the landlord's prepared evidence for this hearing.

Preliminary Matter

At the outset, the landlord identified specific pieces of the tenant's evidence they felt they did not receive. They placed the responsibility on the tenant – the claimant here – to provide evidence they wish to have considered in their claim.

In the landlord's response submission, dated October 26, 2020, they state: ". . .the tenant has filed to provide the Landlord with the evidence to substantiate [their] claim including specifically evidence demonstrating the value of [their] monetary claims and the evidence alluded to in the Tenant's dispute application (items H-N) of [their] secondary evidence." They submit, as per Residential Tenancy Branch Rule of Procedure 3.14 that this evidence not be permitted. The provided a prior arbitrator decision of this office to highlight the principle employed.

After the landlord's initial statements with this in the hearing, I advised the parties that the hearing would proceed given that the landlord submitted a fulsome response package to all issues raised by the tenant. I informed the parties that any gaps in the evidence disclosed that were identified in the hearing would, if need be, be addressed in this decision.

On my review of the tenant's list of "secondary evidence", I find deficiencies. The tenant listed "affidavits, depositions" from the restoration and sub-contractors, the strata, and the landlord's insurance company. Materials fitting this description were not provided in the materials the tenant provided to the Residential Tenancy Branch in advance of the hearing, in support of their claim. There is no separate record of communication that enclosed this information to the landlord prior to the hearing.

Also, the tenant listed "witness subpoenas" on their timeline of evidence, indicated as "evidence to be provided." As above, there is similarly no such evidence labelled thus in the tenant's evidence package. Items listed as "emails with STRATA" and "sms's" (a standard acronym for text messages) with the renovation company receive close scrutiny and cross-referencing in the decision below if necessary.

I address gaps I have identified in the tenant's list of evidence they presented to assure the landlord no materials not disclosed to the landlord are receiving consideration herein. The landlord identified items listed and on my review I have found the same material not present in the tenant's submission. By this measure, I have ensured no late submissions receive any consideration as a surety against undue prejudice to the landlord with respect to submitted materials.

Issue(s) to be Decided

Is the tenant entitled to an order for loss or compensation pursuant to section 67 of the *Act*?

Is the tenant entitled to a reduction in rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65 of the *Act*?

Is the tenant entitled to recover the filing fee for their application pursuant to section 72 of the *Act*?

Background and Evidence

In their response submissions, the landlord provided a copy of the tenancy agreement. The tenancy initially began in 2014; the parties renewed each year. The current iteration is that signed by the tenant on May 27, 2020, and the landlord on June 27, 2020. It sets out that the current rent amount is $1,750.

The agreement sets out that the landlord and tenant obligations with respect to repairs in a separate clause.

In their Application, the tenant set out the fact of a flood in the rental unit due to a burst sewer pipe on July 23, 2019. They set out that the landlord used this event to "constructively evict" the tenant. This was through making renovations that were protracted, changing scope with renewed timelines and poor communication from the landlord.

In their documentary evidence, the tenant set out the background:

a) from the time of the flood to "pre-renovation"
b) during renovation, when they vacated the unit
c) finalizing renovation

The tenant also provided a detailed timeline from July 23, 2019, the date of flooding, through to February 15, 2020, when they moved their belongings back to the unit and "final repairs [were] deemed finished." By the tenant's count, this was a total of 207 days.

Throughout this timeline, the tenant refers to the “constructive eviction strategy” undertaken by the landlord.

The timeline, cross-reference with the email record, is as follows:

- By August 9, the tenant requested a rent reduction because of the first two weeks which saw “emergency crew” plumbers visit to the unit to examine the issue and set dehumidifiers. The tenant states the core of the issue thus: “Landlord suggests that tenant move out because this will take ‘months’ to fix and not willing to offer any rent abatement due to the fact that his rent was already less than what he can get on the market.”

- By week 3, a restoration company began their work which involved “demolition work of bathroom, kitchen, store room.” Later the restoration company informed the tenant that the there would be “vacancy possession”.

- On September 22 the tenant requested a timeline for project completion from the landlord – on September 24 the tenant mentioned to the landlord the possibility of a lawsuit.

- On September 25 the landlord responded to say there would be “full rent abatement” during a temporary vacancy and offered a per diem rate.

- The tenant’s account lists that on day 73 (October 4, 2019) they reached an agreement with the landlord for an end of October temporary vacancy date, based on “5 weeks repairs as per contractor repair schedule.” As agreed, the tenant moved out on October 29, 2019.

- by mid-December, the landlord advised of a 7-day turnaround for the tenant to return to the unit; two days before that date, the landlord advised it would not occur as planned, “with no move-back day mentioned”.

- When they returned to the unit on December 17, the state of the unit was nowhere near completion; in their submission this is “deemed part of the constructive eviction attempt”.

- Based on information they received from the contractors, the tenant returned to the unit on January 5 – when notified, the landlord stated this was

"unauthorized". The tenant's return was limited to the bedroom, with "building materials all over the apartment".

- By mid-February, the "Tenant's contents [were] all moved back and final repairs [were] deemed finished." The tenant incurred some incidental costs for cleaning before the final date.

The tenant provided three separate "Contractor's Repairs Timelines" with overlapping dates. These show timelines of 42 days, 31 days, and 39 days for the project duration. As shown in emails to/from the landlord and the tenant to the contractor, this timeline for completion was revised due to another minor waterline break. Throughout, the tenant asked for specifics on building materials used, and re-established timelines when the unit would be "habitable" again.

Toward the end of the project work mid-January, the tenant was emailing the contractor directly to specify items that still needed to be painted and other incidental incomplete work.

The tenant provided a two-part claim; together these total $10,972:

- For "rent abatement" the tenant claimed $6,714 total, with a breakdown of amounts for background categories a) through c) listed above. The largest portion of this claim is for the period they state was "post-flood, pre-renovation – waiting for repairs, notice to tenant to vacate", at $4,210.

- For monetary compensation, the tenant claimed $4,258. This breaks down to:
  - utility fees November – December: $50.80
  - cleaning of bedroom post-repairs: $750
  - outside housing cost Dec 17 to Jan 5: $1,607
  - move-out/storage during temporary vacancy (1 mo. rent): $1,750
  - Application filing fee: $100

The landlord submitted a 12-page submission with 12 separate reference documents. They also included two BC Supreme Court decisions which they submit "may assist in resolving this dispute."

The salient points of the landlord's submission are as follows:

- After the initial flood emergency repairs, the restoration company identified the need for further repairs that required demolition – in late July, the "tenant became fixated on the idea that completing [this] . . .would take only 5 to 7 days" and

"became belligerent with. . .all parties involved for not living up to this alleged standard."

- The tenant had outlined health concerns both to the landlord and the contracting company – to the landlord this made it "impractical and potentially catastrophic" for the tenant to remain in the unit for the restoration process. The landlord made the proposal on August 9, 2019 that the tenant temporarily vacate the unit, thereby protecting the tenant's health and ensuring faster completion. The landlord offered to not collect rent for the time in which the tenant did not occupy the rental unit.

- To this offer the tenant responded by alleging that it was a "renoviction" whereby the landlord could collect higher rent – the landlord confirmed that the tenancy was not ending, with no intention to do so.

- The tenant "insisted on staying in the premises". An email from the landlord to the tenant dated September 25, 2019 shows the tenant "made the choice to stay". The landlord re-stated their offer of rent-free time away for the tenant, adding: "Once the repairs and final clean have been completed, the move in date will be determined by [the restoration company]. On that date, the rent forgiveness will terminate."

- The following day, the restoration company provided a revised timeline and "strongly recommended" that the tenant vacate the rental unit for the entire duration of the project, and stated it was necessary for the tenant's belongings to be removed from the unit.

- On October 10, 2019 the landlord and tenant reached an agreement that the tenant would temporarily vacate on October 29, and the landlord "will forgive 100% of . . . rent and such forgiveness will terminate upon the day the tenant moves back into the Rental Unit."

- In the interim, mid-December, the restoration company advised the landlord of further revisions, pushing back the restoration date. The landlord also advised the company would provide full clean-up at completion, and "would not be responsible for the tenant's belongings."

- The tenant moved back into the unit on January 5 – the landlord was "surprised the tenant had elected to move back in to the rental unit."

In their response to the tenant's remedies claimed, the landlord submits the following:

- The tenant did not provide evidence to show the value of their monetary claims. The landlord is also of the understanding that the tenant had "tenant's insurance". Effectively, an award for monetary compensation here would be an "unreasonable windfall."

- The landlord did not attempt to "renovict" the tenant. No end of tenancy was involved, and it was never considered by the landlord. The *Act* section 49(6)(b) does not apply, and the tenancy was not ending.

- The repairs could have been completed before February 2020; however, the tenant delayed initial repairs, then delayed subsequent repairs, and then moved back in "prematurely without notice." This amounts to the tenant impeding the landlord's ability to complete their statutory obligations as per sections 32 and 33 of the *Act* as well as provisions of the tenancy agreement.

The landlord also provided two BC Supreme Court cases to illustrate the principles at play in a situation of vacant possession necessitated by renovations. They distinguish those cases presented to state that the situation here is different in that there is no end of tenancy in this current situation. In sum: "where the restoration work required vacancy of the unit, [the landlord] did not use that as an opportunity to "renovict" the tenant."

The tenant provided a document entitled "comments on Landlord Response." They raise further points as part of their submission, clarifying dates with further details. This includes further points on their 'renoviction' claim, including the submission that they saw the unit advertised online. They added the detail that on January 5 they "ask[ed] someone to clean bedroom ~ $350".

Also appearing in the evidence is an email the tenant sent to the landlord upon receipt of their submission package, dated October 29, 2020. The tenant communicated directly with the landlord days prior to the hearing. They state: "Any false evidence or misleading statements submitted, could have serious repercussions; especially with [the landlord] as a CEO & director of a Public listed company." They also mention a "700 pages" submission pack" and make cursory responses to what they term "[the landlord's] request for additional information." Specific points herein include that they flew back from London in mid-December, this on the information that the unit was ready. Their claim is for "not for 100% of the costs – only the delta".

Analysis

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

1. That a damage or loss exists;
2. That a 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.

Under section 7 of the *Act*, a landlord or tenant who does not comply with the legislation or the tenancy agreement must compensate the other for damage or loss. Additionally, the party who claims compensation must do whatever is reasonable to minimize the damage or loss. Pursuant to section 67 of the *act*, I shall determine the amount of compensation that is due, and order that the responsible party pay compensation to the other party.

On their Application, the tenant made a twofold request for monetary compensation. These are: a reduction in rent for repairs, services or facilities agreed upon but not provided; and compensation for monetary loss or other money owed.

The *Act* section 65 grants authority to make an order granting a rent reduction:

(1)Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:

(f)that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement;

Overall in their application for what they term ‘rent abrogation’, the tenant has not established that the landlord committed a breach of the *Act*, or the tenancy agreement. The *Act* sections 32 (a landlord’s obligation to repair and maintain) and 33 (emergency repairs) govern any tenancy agreement. I accept that emergency repairs arose immediately upon the discovery of a burst sewage line; this in turn necessitated further renovations at the behest of the restoration company involved. The landlord undertook completion of the duties in a diligent and responsible fashion. I find there was no breach of the *Act* in that regard. The tenant did not establish, through there evidence,

that the landlord neglected to undertake repairs – even though they dispute all aspects of the repairs undertaken.

I follow and accept the landlord's submission that section 49(6)(b) of the *Act* does not apply to this situation. There was no attempt by the landlord to end the tenancy and this was never presented – even remotely – by the landlord to the tenant. Throughout, the communication between the landlord and the tenant discussed an imminent return to the unit by the tenant, their belongings remained, and the landlord waived monthly rent amounts. The tenant has phrased this as "constructive eviction"; however, the evidence does not bear this out.

Aside from this, the tenant did not fashion any of their other submissions in terms that state plainly how the landlord otherwise breached the *Act* or the tenancy agreement. In some messages with the landlord the tenant made reference to the loss of quiet enjoyment; however, they did not present submissions on this issue in relation to their monetary claim in this hearing and did not present this in their written submissions. Stated thus, the tenant has failed to establish that a damage or loss resulted from the action or inaction of the landlord, in violation of the *Act* or the agreement.

The tenant chose to present a square-footage interruption to their daily living within the unit, in terms of three stages to work completion. I find the damage or loss is not established in this approach. The tenant stated on their "claim break-down" page their "Abatement seeked [*sic*]" over the timeframe of 194 days. I am not able to interpret the equations used, or how for instance the tenant arrived at an amount of $4,210 (down from the rent paid amount). In this fashion, the tenant has not established the value of their loss. Further, the amount shown for the period 'post flood, pre-renovation' goes from $5,015 claimed, to $4,833, to the amount claimed of $4,210. They listed 'Tenant paid: $5,638'; however, there is no clarification of what this amount represents. Aside from this being a discrepancy in their submission, the entirety of their claim for rent reduction is not accurately presented or justified with evidence for the time period pre- and post-renovation when the tenant occupied the rental unit.

With respect to a rent reduction, the evidence referenced by the landlord in their submissions shows clearly that the landlord – within a short timeframe of the finalized project scope on day 18 – offered to waive the tenant's rent commitment during the estimated project timeframe. Essentially this meant free rent when the tenant was not occupying the unit. The tenant here attempts to recoup extra costs they incurred during this absence; however, I accept the landlord's submission on this point that in no way should the landlord be responsible for any extra costs the tenant incurred along the

way. This includes time at an accommodation in another township at considerable expense, as well as a term overseas which the tenant did not present in their submission, only to say their travel plans were pre-emptively cancelled. Their early return to the unit was their own error; I find it was self-induced via the one-sided communication the tenant chose to carry on with throughout.

In sum, for the tenant's claim of rent reduction, I am not satisfied that a loss exists where the evidence presented is insufficient.

Further, I accept the submissions of the landlord that show the tenant's delay in accepting and finalizing the terms of the temporary vacancy, as well as their early return, counteract a duty to whatever is reasonable to minimize the damage or loss. The landlord's initial offer of rent reduction for the temporary vacancy was on August 9; the tenant moved out from the unit on October 29. This is 81 days in duration from when the discussion first opened.

This carries over into the tenant's claim for compensation for monetary loss. I find the tenant has not presented steps taken to minimize loss. The need for carpet cleaning is not established in the evidence and very late in their response to the landlord's submissions the tenant alludes to cleaning of their bedroom at ~$350 with no receipt. I dismiss this portion of the tenant's claim for reimbursement.

Additionally, I find the "outside housing cost" at $1,607 is not the responsibility of the landlord where rent was free during that time period. I similarly dismiss this portion of the tenant's claim for reimbursement.

Further, in what I find to be the extreme opposite of an effort at minimization, the tenant claimed a one-month rent amount as "move-out storage costs due to deemed renovation" at $1,750. Presumably this is the tenant's interpretation of the *Act* section 49 where they state: "capped to One Month Notice to End Tenancy rent as per section 49(6)(b)". There is no statutory basis for this amount. I find it is a selective interpretation of the *Act* by the tenant.

The landlord agreed to the reimbursement of $50.80 for utility fees in November and December. This involves a timeframe where the tenant was not occupying the unit. I so order reimbursement of this amount to the tenant. By application of the *Act* section 72(2)(a), the tenant may deduct this amount from one future rent payment to the landlord.

As the tenant was not successful in this Application, I find they are not entitled to recover the $100 filing fee paid.

In sum, the tenant throughout described protracted renovations that presented a challenge to them. I find, rather, that the tenant presented the challenge to the parties involved proving to be a barrier to the completion of work in an expedited fashion. On my review the communication from the tenant throughout is demanding. This culminates in the final email to the landlord dated October 29, 2020 which contains threats of ramifications because of the landlord's submissions for this hearing.

The tenant did not present sufficient evidence to establish each of the four points listed above; they did not meet the burden of proof. As a result, I am not satisfied that a loss exists where the evidence presented is insufficient.

Conclusion

The tenant is authorized to withhold the amount of $50.80 as set out above from one future rent payment. All other portions of their claim are dismissed without leave to reapply.

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: December 3, 2020

Residential Tenancy Branch