Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Prompton
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes RR, FFT, RP, MNDCT

Introduction

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

- a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order to the landlord to make repairs to the rental unit pursuant to section 33;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act.*

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. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

The landlord confirmed receipt of the tenant's dispute resolution application ('Application') and amendment. In accordance with section 89 of the *Act*, I find that the landlord duly served with the Application and amendment. As all parties confirmed receipt of each other's evidentiary materials, I find that these were received in accordance with section 88 of the *Act*.

At the outset of the hearing, both parties confirmed that the repairs have been completed, and no further orders were required in relation to the repairs. Accordingly, this portion of the tenant's application was cancelled.

Preliminary Issue- Additional Claims For Compensation

The tenant testified that they wanted a $1,000.00 deductible to be considered as part of this application. The tenant did not include this monetary claim in their original application, or in the amendment filed on July 9, 2021.

Rule 4.6 states the following:

As soon as possible*, copies of the Amendment to an Application for Dispute Resolution and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by the applicable Act and these Rules of Procedure.*

The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the Act and these Rules of Procedure.

In any event, a copy of the amended application and supporting evidence must be received by the **by the respondent(s) not less than 14 days before the hearing.**

No amendments were received in accordance with RTB Rule 4.6 pertaining to the deductible. Rule 4.6 exists to ensure that a respondent is aware of the scope of the hearing and is prepared to respond, if they chose to do so. Given the importance, as a matter of natural justice and fairness, that the respondent must know the case against them, this issue will not be considered as part of this application as no proper application or amendment was filed to request this additional claim.

Issues

Is the tenant entitled to an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided?

Is the tenant entitled to a monetary compensation for money owed under the *Act,* regulation, or tenancy agreement?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This fixed-term tenancy began on January 1, 2021, with monthly rent currently set at $2,000.00, payable on the first of the month. The landlord had collected a security deposit in the amount of $1,000.00, which the landlord still holds.

It is undisputed by both parties that a flood took place in the building on May 9, 2021, which affected the tenant's rental unit. The damage required emergency repairs and restoration services, and repairs to the tenant's rental unit. Both parties confirmed that the tenant was provided with alternative accommodation between August 1, 2021 and August 21, 2021, while the flooring was being installed, but the tenant remained in the rental unit before this period. Both parties confirmed that the tenant was not required to pay rent for this period. The bathroom sink was installed on July 29, 2021.

The tenant is requesting compensation and a 100% rent reduction in the amount of $12,000.00 to reflect the reduction in her ability to use and enjoy their rental unit. The tenant testified that the landlord did give the tenant the ability to end the fixed-term tenancy early, but the tenant could not afford to move out. The tenant testified that they had further discovered bed bugs, and combined with the pressure to move out, caused the tenant an anxiety attack which necessitated a visit to the emergency at the hospital.

The tenant testified that the repairs took a significant amount of time to complete, and was informed that the adjuster considered the rental unit not suitable for living in. The tenant included an email from SD, the property manager for the landlord, which quoted a reply from the owner's insurance as follows: "I would consider this unlivable and would be presenting as such to the insurers. But the tenant should ensure she gets the coverage form her insurer before moving out as they are covering her costs". The tenant testified that ultimately she was not provided alternative accommodation until August1, 2021. The tenant also testified that the landlord did not fully reimburse the tenant for the additional use of electricity due to the repairs.

The landlord submits that the main damage caused by the flood was to the bathroom sink and vanity, and to the laminate flooring. The landlord testified that the landlord did offer the tenant an opportunity to end the tenancy and a rent reduction, which were not accepted by the tenant. The landlord testified that the delay was due to the fact that this

was a strata claim, and the landlord had to wait for the restoration company to undertake repairs. The landlord testified that they had attempted to do as much as possible to reduce the impact of the incident on the tenant, including offering the tenant the option to end the tenancy early, and trying to find the tenant alternative accommodation. The landlord testified that they reimbursed the tenant money to cover the additional electricity usage, and worked with the insurance company to make the unit functional and livable since the tenant could not move out, and in the end the rental unit was liveable, and the tenant was not required to vacate until the flooring needed to be redone. The landlord testified that the sink was installed on July 23, 2021, and the flooring repairs commenced on August 1, 2021. The landlord testified that the 100% rent reduction is not justified nor supported in evidence. The landlord feels that they had fulfilled their obligations to the best of their ability.

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*.

Therefore, in this matter, the tenant bears the burden of establishing their claim on the balance of probabilities. The tenant 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 tenant must then provide evidence that can verify the actual monetary amount of the loss. Finally, the tenant must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

Additionally, section 65(1)(c) and (f) of the *Act* allows me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement."

A tenant may be entitled to compensation for loss of use of a portion of the property even if the landlord has made reasonable efforts to minimize disruption to the tenant. In assessing the tenant's application for a rent reduction under section 65 of the *Act,* the tenant has the right to claim for loss of enjoyment of the space that they had paid rent for. In this case, I am satisfied that the tenant did suffer a reduction in the value of the tenancy agreement.

The tenant applied for a one hundred percent rent reduction effective May 9, 2020 to when the repairs were completed. In this case, although there is evidence to show that the tenant believed the unit to be unlivable, as described in initial correspondence from the landlord's adjuster, the landlord disputes this finding. The landlord testified that as the tenant did not accept offers to end the fixed-term tenancy early, the landlord had worked with their insurer to lessen the impact of the repairs on the tenant so that the tenant could remain in the rental unit. In this case, I find it undisputed that the tenant did not end up moving out with the exception of the period of August 1, 2021 through to August 21, 2021, when the flooring repair were completed. In assessing the tenant's request for a one hundred rent reduction, a complete reimbursement of rent would only be justified in the case that the tenant had to completely and permanently vacate the rental unit, such as in the case of a frustrated tenancy.

Residential Tenancy Policy Guideline 34 states the following about a Frustrated Tenancy:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.

A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

The Frustrated Contract Act deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

In consideration of the evidence and testimony before me, I am not satisfied that this tenancy could be considered Frustrated. However, I find that the tenant did demonstrate a loss in the value of this tenancy for a period of May 9, 2021 through to July 31, 2021. Although the landlord may have done their best to mitigate the issues and loss of enjoyment for the tenant, the undisputed fact is that the tenant paid monthly rent in the amount of $2,000.00 for the above period, and was not able to enjoy the rental unit to the extent that the tenant is entitled to under the tenancy agreement and the *Act*.

Despite the fact that the landlord was affected by delays and issues beyond their control, this fact does not relieve the landlord of their obligations to compensate the tenant if the tenant had suffered a loss in the value of the tenancy agreement. In calculating the value of the loss, I find that the majority of the loss took place between May 9, 2021 and July 23, 2021. I find that the tenant was compensated for the period in August 2021 when the tenant had to vacate the rental unit. Although the tenant was able to continue to live in the rental unit, I find that the tenant was without a bathroom sink and vanity for some time. As stated above, I do not find the tenancy was frustrated in contemplation of the definition under the *Act* and legislation, but I do find that the tenant is entitled to some compensation for the loss of use of a portion of their home.

The tenant was not able to use the entire rental unit in a manner the tenant would under normal circumstances. I find that 10% rent reduction is fair, and justified, and accordingly, I order that the landlord provide the tenant with a monetary order equivalent to 10% of the rent from May 9, 2021 through to July 23, 2021 (*10% x 76 days * $2,000.00/30 days), for a total monetary order of $506.67.

In consideration of the other losses the tenant has suffered, as stated above, the burden falls on the tenant to support of the value of these losses. Although I am sympathetic to the fact that the tenant did suffer considerably due to the situation, I do not find these losses can be attributed to the landlord's actions. Accordingly, I dismiss the remainder of the tenant's monetary claim without leave to reapply.

I allow the tenant to recover the filing fee for this application.

Conclusion

I issue a monetary order in the amount of $606.67 in the tenant's favour which allows the tenant a 10% rent reduction for the period of May 9, 2021 through to July 23, 2021, plus recovery of the filing fee.

I allow the tenant to implement the above monetary awards by reducing a future monthly rent payment by $606.67. In the event that this is not a feasible way to implement this award, the tenant is provided with a Monetary Order in the amount of $606.67, 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.

I dismiss the remainder of the tenant's application 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: October 29, 2021

Residential Tenancy Branch