Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Code: MNDCT

Introduction

The tenant seeks compensation against their former landlord pursuant to section 67 of the Residential Tenancy Act ("Act").

This matter was heard over a course of three hearings (not including two, brief hearings that resulted in adjournments with no evidence being considered). Various parties attended the hearings, and that attendance is recorded on this decision and previous interim decisions.

Issue

Is the tenant entitled to compensation?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the specific issue of this dispute, and to explain the decision, is reproduced below.

It should be noted that the following background and evidence encompasses the testimony, argument, and submissions made in almost four hours of hearing time (excluding the first two adjourned hearings).

The tenancy in this dispute began on September 1, 2018 (though the tenant moved in at the end of August) and has since ended. The rental unit itself has since been torn down. The monthly rent was $2,000.00. According to the tenant's application there was a $1,000.00 security deposit (though the landlord stated that he only received $700.00). There is no written tenancy agreement in evidence.

In this application, the tenant seeks compensation in the amount of $9,600.00. This is for the loss of quiet enjoyment that he suffered due to a non-functioning furnace and the resulting loss of heat.

According to the tenant's testimony and reiterated by his advocate, the thermostat stopped working sometime in October 2018. The tenant told the landlord, or someone purportedly representing the landlord, about the issue. There was, however, no email or contact information for the landlord. The tenant's advocate also wrote a letter to the landlord, but there were no responses forthcoming. At some point, the tenant was eventually given contact information for the landlord.

The tenant testified that the issue was first discovered when he observed wires sticking out of the wall. There was "no switch" and thus no heat or working furnace. The first thing he did was contact the landlord (in person) and the landlord said, "it's OK, I'll come fix it." The landlord apparently did not come to fix it, and the tenant asked the landlord a number of times – "every time I saw him" – though he only saw him a couple of times. Later, the tenant testified that he asked the landlord "a dozen times" to fix the furnace.

In response to the advocate's question during direct examination as to why the tenant had not noticed the wires sticking out of the wall earlier, the tenant explained that he had not noticed it earlier because he did not need the furnace until October 2018. At the start of the tenancy, the tenant did a walk-around of the rental unit but "didn't notice any wires sticking out." He then explained that one would have had to be looking for them to notice it.

On cross-examination, the tenant testified that he first met the landlord about two years before the tenancy. The tenant "knew where the landlord lived," or, at least where a member of his family lived. He also testified that he had the landlord's son's phone number, though it was not the son who collected the rent. However, landlord's counsel then asked the tenant a series of questions (lightly edited for concision and brevity):

> D.M.: You had the ability to contact the landlord's son?
> N.K.: No, two years before that.
>
> [. . .]
>
> D.M.: When you first hired [the advocate], did you tell her about the heat?
> N.K.: No, I didn't raise the heat issue.
> D.M.: It wasn't until November of 2020 did you raise the issue with the heat?

N.K.: [answered in the affirmative]
D.M.: You didn't raise the issue regarding the heat until almost a year later?
N.K.: [answered in the affirmative]

Landlord's counsel then asked a series of questions about the tenant's interactions and communication with one of the landlord's agents (S.M.). And counsel asked the tenant why no electricity bills were submitted or available for the period in which the furnace was not working. The tenant did not provide an answer.

Tenant's advocate briefly conducted a redirect examination, asking why the tenant had not used an address for service of the landlord from 2019. "Why not continue to use this address?" she asked. The tenant responded, "I was told not to use it."

The tenant's advocate argued that the tenant believed he mitigated his loss by purchasing various items to keep him warm (e.g., heaters, clothing).

It should be noted that there was a separate dispute resolution hearing on November 9, 2020, in which the tenant sought an emergency repair order for the furnace. The landlord did not attend this hearing, but an emergency repair order was made by the arbitrator. It is the advocate's position that the landlord made no effort to comply with this order. Later in that month, the landlord's lawyer let the tenant know that he, the lawyer, was the landlord's contact person.

On November 28, 2020, the furnace was looked at by a furnace repair company and it was determined that a part was needed. By December 1, 2020, the repairs were underway. There were, however, some delays in getting the part due to the pandemic.

Tenant's advocate argued that the landlord breached various subsections of sections 32 and 33 of the Act (specifically, subsections 32(1)(a), 33(1), 33(1)(c), and 33(2) of the Act). In addition, the tenant seeks compensatory relief for the landlord's purported breach of section 28 of the Act for loss of quiet enjoyment.

The global amount sought is broken down into three amounts as follows (copied from the tenant's Monetary Order Worksheet):

1. Loss of heat (30% x 7 months' rent) for October 1, 2018 to April 30, 2019 for a subtotal of $4,200.00;
2. Loss of heat (30% x 7 months' rent) for October 1, 2019 to April 30, 2020 for a subtotal of $4,200.00; and,

3. Loss of heat (30% x 2 months' rent) for October 1, 2020 to November 30, 2020 for a subtotal of $1,200.00.

Landlord's counsel's direct examination of the landlord's representative S.M. focussed on S.M.'s interactions with the tenant. "Yes, I met [him] a few times," S.M. testified. He was a self-described point person for the landlord, and he testified that the tenant was provided with the landlord's contact information. He also testified that he delivered a letter on April 22, 2020 to the tenant requesting monies due. He delivered this to the tenant. On July 20, 2020, S.M. delivered a letter to the tenant regarding bylaw issues.

S.M. had apparently advised the landlord not to visit the rental unit because of the acrimonious relationship between the parties. And, if there was any communication from the tenant, to redirect this to S.M.

Under cross-examination by the tenant's advocate, S.M. testified that eleven days before the move out he saw a marijuana grow operation while doing an inspection. The remainder of the cross-examination dealt with various letters and authorizations to act. However, he mentioned about half-way through cross-examination that the first time the tenant raised the issue of the furnace was when he was getting ready to move. Various letters and their contents were then read into evidence by the advocate. S.M. denied, or had no knowledge of, ever receiving certain earlier letters from the advocate.

A witness for the landlord, R.S. (name of witness appears on the cover page of the Interim Decision dated October 19, 2021) testified that he operates a business of repairing and installing appliances. One of his technicians attended to the rental unit and diagnosed that the thermostat was "shorted." The thermostat was not working when the technician visited, and that "somebody had done something to short it," he stated.

The furnace filters were dirty, which meant that the furnace had worked at some point. However, the technician was unable to say when or for how long it had stopped working. Repairs were eventually made on December 21, 2020.

Under cross-examination, the witness testified that the dust collection would have settled if the furnace had not been working for a long time. The witness was unable to say when the furnace stopped working, however. As for the thermostat, the witness repeated his previous testimony that the thermostat had shorted. "The wires shorted clearly showed a spark," he said. The advocate then asked the witness who might have shorted the thermostat. "Whoever is living there," he responded. "Someone living there previously?" the advocate asked. "Can't say," the witness replied.

The landlord testified, under direct examination from counsel, that the tenant knew where the landlord lived and had his phone number. Counsel referenced evidence of a text message in which there was a message sent on December 6, 2019 from the tenant to the landlord. Counsel then submitted, “the tenant had contact information for the landlord.” And, a 10 Day Notice to End Tenancy for Unpaid Rent later issued also had the landlord’s contact information.

The landlord also testified that he attended to the rental unit at some point before December 2019 but that there was no mention by the tenant of any furnace issues. “I didn’t know anything about the furnace [problems],” the landlord added. It was not until November of 2020 when the landlord received an evidence package for the emergency repairs hearing (but purportedly received after the hearing) that he became aware of any furnace issue. However, once he became aware of the problem, he “got in the furnace repair company in there a.s.a.p.”

In terms of the landlord’s previous relationship and interactions, he explained that the tenant worked for him doing lawn care; from 2016 to 2019 the tenant worked at different construction sites for the landlord.

The tenant briefly, directly cross-examined the landlord in the last hearing. He asked the landlord who it was that collected the rent. “Wasn’t it you?” the tenant asked. Responding, the landlord said that “the only rent [I collected] was the $700 deposit in October 2019. After that I never received rent.” He then asked the landlord a question about caretaking responsibilities, which the landlord did not answer. The tenant then began asking the landlord questions about bylaw issues, at which point I ordered the cross-examination to end.

In closing, the tenant’s advocate submitted that the tenant had verbally asked for repairs from October 2018 until December 2019. The landlord had said, “yes, yes, I’ll fix it.” Every winter month the tenant asked the landlord to please fix the furnace. There was no contact information for the landlord, however. It was not until the tenant received a 10 Day Notice to End Tenancy for Unpaid Rent that the contact information for emergency repairs had been made. The advocate argued that the landlord attempted to avoid the Act by not providing contact information. And it was not until the tenant went to an emergency repair-related arbitration hearing in November 2020 that the landlord finally made the repairs. It was argued that the landlord simply ignored the arbitrator’s order for emergency repairs, hoping not to have to do them.

To reiterate, the advocate argued that landlord failed to take any steps to repair the furnace and in doing so deprived the tenant of the right to quiet enjoyment of the rental unit. Conversely, the tenant "did everything he could under the circumstances" to address the issue.

In his closing submissions, landlord's counsel argued that the landlord was unaware of the furnace issue until a letter dated October 2020 was received in November. There was, he stressed, no malice or bad intent involving the furnace issue. Once the tenant's advocate contacted the landlord and the landlord's lawyer the furnace was dealt with. In respect of the furnace, counsel reviewed the appliance company's witness's testimony, who testified that the previously working furnace had its thermostat shorted out. And, that the furnace could not have been out of service for sixteen months based on the lack of dust settling.

Further, counsel argued (by posing a rhetorical question) whether it was reasonable for the tenant to wait sixteen months before advancing a claim related to the furnace. Indeed, counsel suggested that the furnace issue only arose after the landlord began demanding that rent be paid. To this point, counsel argued that this entire claim was constructed to set off portions of unpaid rent.

On this point, counsel argued that if the tenant had been paying rent, "one would think that the tenant would've made deductions." Counsel also noted that there is no evidence of any receipts for the supposed electrical heaters, and no other evidence of higher electrical usage.

Moreover, the tenant's advocate had "ample opportunity" to contact the landlord. He further notes that in each of the many Residential Tenancy Branch files involving the parties there is landlord contact information.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria before compensation may be awarded (the "four-part test"):

1. has the respondent party to a tenancy agreement failed to comply with the Act, regulations, or the tenancy agreement?
2. if yes, did the loss or damage result from that non-compliance?
3. has the applicant proven the amount, or value, of their damage or loss?
4. has the applicant done whatever is reasonable to minimize the damage or loss?

The above-noted criteria are based on sections 7 and 67 of the Act, which state that

> 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.
>
> . . .
>
> 67 Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

1. Has respondent failed to comply with Act, regulation, or tenancy agreement?

Section 32(1) of the Act states the following:

> A landlord must provide and maintain residential property in a state of decoration and repair that
>
> (a) complies with the health, safety and housing standards required by law, and
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Section 33(2) of the Act states that

> 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.

In respect of the first section of the Act cited, it is clear from the evidence that the furnace had, at some unknown point, stopped working. A fully functioning furnace is undisputedly a necessity in making a rental unit suitable for occupation by a tenant.

What is missing from the tenant's claim, however, is persuasive evidence of when the furnace in fact stopped working. The tenant testified that he told the landlord about it early into the tenancy. The landlord denied ever hearing about any furnace issues until much later. And it is important to note that when two parties to a dispute provide equally reasonable accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. In this case, I find that the tenant has failed to provide any evidence that the landlord was made aware of the furnace issue until two years later.

In any event, that the landlord eventually repaired the furnace is sufficient evidence to prove that it was not working. However, as stated above, there is insufficient evidence for me to find that the furnace was not working as early as October 2018 (or, for that matter, even earlier). The appliance repair witness' evidence speaks to the furnace being inoperable, but that it could not – based on the physical evidence of the dust accumulation and settling – have been out of commission for sixteen months or longer.

As an aside, while there is evidence that the thermostat had been shorted out, I do not find that this necessarily or persuasively points to an intent by the tenant to destroy or otherwise tamper with the thermostat. Equally plausible is that the tenant may have shorted out the thermostat in an attempt to get the furnace working.

Therefore, I find that, prima facie, the landlord breached section 32(1) of the Act. (And, as a result, a prima facie breach of section 28 of the Act for loss of quiet enjoyment.) However, what is missing is any persuasive evidence of when the breaches occurred.

Turning now to the second alleged breach, while it does not appear that the landlord posted and maintained in a conspicuous place contact information, I am satisfied based on the evidence before me that the tenant had, in writing (that is, through phone or text contact information) the landlord's contact information.

I am not persuaded that the tenant, who knew and worked for the landlord as far back as 2016, on construction sites between 2016-2019, and then who entered into a tenancy with the landlord in 2018, did not have the landlord's contact information. There is, for this reason, no finding that the landlord breached section 33(2) of the Act.

2. Did loss or damage result from non-compliance?

Having found that the landlord breached the Act, I must next determine whether the tenant's loss resulted from that breach. This is known as *cause-in-fact,* and which focusses on the factual issue of the sufficiency of the connection between the respondent's wrongful act and the applicant's loss. It is this connection that justifies the imposition of responsibility on the negligent respondent.

The conventional test to determine cause-in-fact is the *but for* test: would the applicant's loss or damage have occurred *but for* the respondent's negligence or breach? If the answer is "no," the respondent's breach of the Act is a cause-in-fact of the loss or damage. If the answer is "yes," indicating that the loss or damage would have occurred whether or not the respondent was negligent, their negligence is not a cause-in-fact.

In this case, the tenant would not have suffered the loss of heat (and thus loss of quiet enjoyment of the rental unit) but for the landlord's breach of section 32(1) of the Act.

3. Has applicant proven amount/value of damage/loss?

On this matter, what is particularly troubling about the tenant's claim is that, despite specific testimony about contacting the landlord to fix the furnace, there is no specificity to the actual days on which the tenant actually suffered a loss of heat. The claim for compensation comprises three blanket stages of two seven-month-long periods followed by one two-month-long time period. What is more, the two seven-month-long stretches begin exactly on October 1. I find it difficult to accept that the tenant would have needed the furnace (if it was in fact inoperable, though we do not know when, as explained above) starting exactly on October 1 and not at all after April 30.

Certainly, while there will often be a best guess and approximation required when assessing damages, the periods claimed are simply too broad – and unsupported by any documentary evidence – for me to be persuaded that the tenant has proven or established the amount or value of the loss. For this reason, I do not find that the tenant has met the third criterion, namely that he has proven the dollar amount of the loss.

Given that the third criterion of the four-part test has not been proven I need not address the fourth criterion, as it is rendered moot.

Taking into consideration all of the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the tenant has not met the onus of proving his claim for compensation.

Conclusion

The application is dismissed, without leave to reapply.

This decision is made on delegated authority under section 9.1(1) of the Act.

Dated: December 15, 2021
Corrected Decision dated December 20, 2021

Residential Tenancy Branch