



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, MNDCT, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenant applied for:

- an order for the landlord to comply with the Act, the Residential Tenancy Regulation (the Regulation) and/or tenancy agreement, pursuant to section 62;
- a monetary order for compensation for damage or loss under the Act, the Regulation or tenancy agreement, pursuant to section 67; and
- an authorization to recover the filing fee for this application, under section 72.

The hearing on June 29, 2021 was adjourned and reconvened on January 17, 2022 due to time constraints. Both parties attended both hearings and were each given an opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. Witnesses for the landlord DF attended the hearing on June 29, 2021 and AK attended on January 17, 2021.

At the outset of the hearings the attending parties affirmed they understand it is prohibited to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials) and that they had enough time to review the materials. Based on the testimonies I find that each party was served with the respective materials in accordance with sections 88 and 89 of the Act.

Preliminary Issue – Vacant Rental Unit

Both parties agreed the tenancy ended on May 31, 2021.

The application for an order for the landlord to comply with the Act is moot since the tenancy has ended.

Section 62(4)(b) of the Act states an application should be dismissed if the application or part of an application for dispute resolution does not disclose a dispute that may be determined under the Act. I exercise my authority under section 62(4)(b) of the Act to dismiss the application for an order for the landlord to comply with the Act.

Issues to be Decided

Is the tenant entitled to:

1. a monetary order for compensation?
2. an authorization to recover the filing fee?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the tenant's obligation to present the evidence to substantiate the application.

I note that the hearings lasted 173 minutes, the tenant submitted 220 pages of evidence and the landlord submitted 33 pages of evidence and two video files.

Both parties agreed the tenancy started on June 01, 2017 and ended on May 31, 2021. Monthly rent was \$2,600.00 and there was a flat payment of \$250.00 for utilities. Rent and utilities were due on the first day of the month. The landlord collected a security deposit of \$1,300.00 and a pet damage deposit of \$300.00 and returned both deposits. The tenancy agreement dated May 16, 2017 was submitted into evidence. It indicates monthly rent of \$2,850.00 was due on the first day of the month and it included water, sewer, electricity and heat. The addendum states:

1. The rent is \$2,600.00.

2. The [electricity bill] + [gas bill] will be paid by the landlord and the tenant will pay \$250.00 per month on top of the rent (\$125.00 for gas) (\$125.00 for electricity) for utilities.

A second tenancy agreement dated November 25, 2018 indicates monthly rent is \$2,850.00 and it includes electricity and heat.

Both parties agreed the rental unit is a single family, 5-bedroom, 2,122 square feet house built in 2003 located in a 3,218 square feet lot.

The tenant is claiming \$1,174.50 for loss of use of the deck from December 2020 to March 2021. The tenant affirmed the deck was disintegrating and the landlord removed it in the last week of November 2020. The tenant stated she was not able to use the deck until the end of the tenancy.

The tenant testified she stored a table, a swing, a barbecue, a gas fire pit and chairs on the 290 square feet deck. The tenant said one of the main reasons why she rented the unit was the deck and that she enjoyed using it during the winter months. The tenant divided the amount of rent by the total square footage of the lot and multiplied by the square footage of the deck, thus reaching the amount of \$234.90 per month.

The landlord affirmed the parties previously agreed the landlord would pay \$2,400.00 for compensation due to several tenancy issues. The emails dated November 17, 2020 state:

Landlord:

I have given this a lot of thought and I am prepared to give you 600.00 per month for the 4 months you had partial use of the kitchen. I have spent thousand of dollars above what insurance covered in fixing things that you would have had to fix. But in order to move forward on a positive note I feel this would be fair. I do expect you to keep the house in good order and cleanliness. Regular inspections will occur under the perimeters of the tenancy rules.

So moving forward this is a one time offer to resolve this issue and reduce stress for both of us.

Any repairs that occur after this point would have to cleared by me if you are expecting a payment back. **The 2400.00 would be to cover everything in your dispute and no other monies would be owed to you.**

If you agree to these terms you can deduct 2400.00 from December's rent. Thank you
Tenant:

I've been running around and finally got home to look over my extra expenses. Some of the bills I have taken off so we can share the extra expenses.

July 24th, 2020 – stove removal

August 7th, 2020 – cleaning

August 18th, 2020 – cleaning

August 27th, 2020 – dishwasher inspection

September 7th, 2020-cleaning

October 8th, 2020 – cleaning

October 16th, 2020 -RTB filing fee

October 20th, 2020 -fixing dryer

October 22nd, 2020 – cleaning post renovation

I know with the deck needing attention your financial burden isn't over and I don't want to cause any more stress/frustration. Moving forward Cleaning will be my sole responsibility, however you did say you would be paying half and through the renovation it was definitely needed. She will be here on Friday to conduct a "move in clean" because there is still construction dust/wood shavings in the drawers etc. This will be a heavy expense which I'm willing to take on.

I will be willing to have December's rent waived, and start a new slate into the New Year.

I would like the dryer fixed properly however, and [redacted for privacy] has all the info and his number is [redacted for privacy]. I no longer feel comfortable with [redacted for privacy] coming in to fix anything, as the dryer has been attended to 3 times now, and he's never actually looked at why it's not closing.

The hinge is \$145 I believe and he would need to install it which would make the bill a bit greater. You can call him to confirm or I can give him your phone number.

I would be willing to undertake this repair, however I would like confirmation that it will be deducted in January's rent.

Please let me know.

Landlord: My offer stands at 2,400.00. I will however get the dryer fixed by an appliance specialist [...]

Tenant: Fine

(emphasis added)

The landlord stated the November 17, 2020 emails implied that the tenant accepted the compensation of \$2,400.00 for the loss of use of the deck.

The tenant testified the \$2,400.00 payment did not include compensation for the loss of use of the deck.

The tenant texted the landlord on November 29, 2020:

I see you worked really hard... However you've taken away my outdoor living space which is something I really really really really enjoying the summer time. The stairs encroach on any sort of opportunity to replace anything and rocks mean that I can't put my barbeque back and I can't have a stable area to put any sort of outdoor furniture... This is a loss of use for us in the summertime I'm really going to miss having a place to go out and sit because it gets super hot in this house. I'm really disappointed with the fact that you chose to put rocks into the backyard and not grass or concrete or something else where we could have a stable solid area to put all the furniture that we have now taken out and put on the other side of the yard

The tenant submitted photographs taken in November 2020 showing the outdoor furniture on the deck and the fire pit being used.

The landlord said the tenant could store the outdoor furniture after the deck was removed, as the landlord put paving stones on the deck area. The deck could not have been rebuilt during the winter months.

The tenant affirmed the landlord did not want to rebuild the deck, the landlord could have rebuilt the deck during the winter months and that the stones that the landlord put on the deck area were not stable.

The landlord submitted photographs showing the deck area after the structure was removed.

The tenant submitted this application on March 17, 2021 and asked for an order for the landlord to comply with the Act related to the deck removal.

The tenant is claiming \$650.00 because the dryer did not function properly from February 2020 to March 2021. The tenant stated she informed the landlord in February 2020 that the dryer's door constantly opened during the cycle and the landlord repaired the dryer twice in 2020. The tenant could use the dryer, but she needed to push the door so it did not open when the dryer was running.

The landlord testified the dryer was repaired three times in 2020 because the tenant overloaded it and did not clean the lint. The landlord submitted a letter issued by WD:

During the past 2 years I was called to service the following: repair cloth dryer door.[...]
Cloth dryer door not closing tight caused by buildup of lint and small objects in the filter.

The tenant said she cleaned the lint filter constantly. Later the tenant affirmed the lint filter accumulated so much lint that she cleaned it for an entire day. The tenant stated she did not overload the dryer and that the lint did not damage the door.

The tenant testified WD is an 80-year-old handyman and that he is not an appliance technician. The landlord affirmed WD is a licensed plumber and an appliance specialist.

The landlord said the dryer has been functioning properly since the tenant moved out. The landlord's witness AK affirmed that she has been living in the rental unit, the dryer has been functioning properly and she never had it repaired.

When I inquired the tenant why she did not submit an application for dispute resolution earlier she answered: "I don't know why I did not apply, I'm a single mom, I'm busy, I was trying to get this done, as our relationship declined I did not want to deal with her anymore."

The tenant is claiming \$2,000.00 because the landlord increased rent by \$250.00 from August 01, 2020 to March 01, 2021. The tenant stated the landlord verbally agreed to reduce the total payment of rent and utilities to \$2,600.00 in March 2018 and in August 2020 the landlord increased the total payment of rent and utilities to \$2,850.00.

The landlord testified that the rent reduction was temporary because the tenant faced financial difficulties.

The tenant said the parties did not discuss if the rent reduction was temporary or permanent. The parties texted each other about the rent reduction on August 02, 2020:

Tenant: Not even once did you say the rent decrease was temporarily. I would like to see that correspondence in writing please

Landlord: It was told to you and you should be grateful I helped you out for so long. It was temporary and you know that. Furthermore you have taken advantage of my generosity by abusing the house beyond wear and tear. I find your tone with me very hostile especially because even with the temporary lowering of rent you have delayed partial rent most times and I have not penalized you and actually worked with you.

Tenant: Not even once did you say the rent decrease was temporary. I would like to see that correspondence in writing please

Landlord: Where is it in writing that it is not temporary? If it was permanent it would have been changed on the lease agreement and signed.

The tenant is claiming \$270.00 for cleaning expenses. The tenant affirmed the landlord agreed to pay half of the cleaning service hired by the tenant every other week. The landlord stated she did not agree to pay the cleaning expenses incurred by the tenant.

The tenant submitted a written statement indicating the total amount of the monetary claims is \$4,094.50.

Analysis

Section 7 of the Act states:

Liability for not complying with this Act or a tenancy agreement

(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.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. 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.

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 the case is on the person making the claim.

Deck

Based on the emails dated November 17, 2020, I find the payment of \$2,400.00 is not related to the loss of use of the deck. The landlord removed the deck in the last week of November 2020 and the emails do not indicate the payment of \$2,400.00 is for the loss of use of the deck.

Based on the testimony offered by both parties and the photographs, I find the tenant suffered a loss because the landlord removed the deck and did not rebuild it. I find the tenant could not use the deck area after the structure was removed as she could use it when there was a deck structure. The landlord's testimony about not rebuilding the deck during the winter months was not convincing.

Section 32(1) of the Act states:

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.

I find the landlord breached section 32(1) of the Act by removing the deck in the last week of November and not replacing it and the tenant suffered a loss.

Residential Tenancy Branch Policy Guideline 05 explains the duty of the party claiming compensation to mitigate their loss:

B. REASONABLE EFFORTS TO MINIMIZE LOSSES

A person who suffers damage or loss because their landlord or tenant did not comply with the Act, regulations or tenancy agreement must make reasonable efforts to minimize the damage or loss. Usually this duty starts when the person knows that damage or loss is occurring. The purpose is to ensure the wrongdoer is not held liable for damage or loss that could have reasonably been avoided.

In general, a reasonable effort to minimize loss means taking practical and common-sense steps to prevent or minimize avoidable damage or loss. For example, if a tenant discovers their possessions are being damaged due to a leaking roof, some reasonable steps may be to:

- remove and dry the possessions as soon as possible;
- promptly report the damage and leak to the landlord and request repairs to avoid further damage;
- file an application for dispute resolution if the landlord fails to carry out the repairs and further damage or loss occurs or is likely to occur.

Compensation will not be awarded for damage or loss that could have been reasonably avoided.

Partial mitigation

Partial mitigation may occur when a person takes some, but not all reasonable steps to minimize the damage or loss. If in the above example the tenant reported the leak, the landlord failed to make the repairs and the tenant did not apply for dispute resolution soon after and more damage occurred, this could constitute partial mitigation. In such a case, an arbitrator may award a claim for some, but not all damage or loss that occurred.

(emphasis added)

I find the tenant notified the landlord on November 29, 2020 that she suffered a loss because of the removal of the deck. The tenant did not explain why she did not submit an application for dispute resolution asking for an order for the landlord to rebuild the deck earlier. The tenant partially mitigated her losses by notifying the landlord of her losses on November 29, 2020 and only applying for dispute resolution on March 17, 2021.

Considering the tenant's testimony and the tenant's partial mitigation of her losses, I find it reasonable to award the tenant compensation in the amount of 33% of the amount claimed.

The tenant asked for compensation of \$234.90 per month from December 01, 2020 to March 31, 2021. Thus, I award the tenant compensation in the amount of \$310.07 ($\$234.9 \times 4 \times 0.33$).

Dryer

I find the tenant's testimony about the dryer was not convincing. The tenant testified that she cleaned the lint filter constantly. Later the tenant said that she cleaned the lint filter for an entire day because of the amount of lint accumulated.

The testimony provided by the landlord and her witness about the dryer was convincing.

The tenant's testimony about WD's qualification was vague.

Based on the above, I find the tenant failed to prove, on a balance of probabilities, that she suffered a loss or damage because the landlord failed to comply with the Act.

Thus, I dismiss the tenant's claim without leave to reapply.

Rent increase

Based on the tenancy agreements dated May 16, 2017 and November 26, 2018 and the addendum, I find that monthly rent was \$2,600.00 and utilities were \$250.00 per month.

Based on the August 02, 2020 text messages and the landlord's convincing testimony, I find the landlord accepted a lower amount of rent from March 2018 to August 2020 because the tenant faced financial difficulties.

I note that both parties agreed at the outset of the hearing that monthly rent was \$2,600.00 and utilities were \$250.00. Furthermore, the November 26, 2018 tenancy agreement indicating that monthly rent is \$2,850.00 was signed after the verbal agreement for a temporary rent reduction.

Thus, I find the tenant failed to prove, on a balance of probabilities, that there was an illegal rent increase.

I dismiss the tenant's claim without leave to reapply.

Cleaning expenses

The parties offered conflicting testimony about the payment of cleaning expenses. In cases where two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making a claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

The applicant did not provide any documentary evidence to support her claim that the landlord agreed to pay for half of the cleaning expenses. The applicant did not call any witnesses.

I find the tenant failed to prove, on a balance of probabilities, that she suffered a loss or damage because the landlord failed to comply with the Act.

Thus, I dismiss the tenant's claim without leave to reapply.

Filing fee and summary

Per section 72(1) of the Act, the tenant is entitled to recover the \$100.00 filing fee.

In summary, the tenant is entitled to \$410.07.

Conclusion

Pursuant to sections 67 and 72 of the Act, I grant the tenant a monetary order in the amount of \$410.07. This order must be served on the landlord by the tenant. If the landlord fails to comply with this order, the tenant may file the order in the Provincial Court (Small Claims) to be 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: January 19, 2022

Residential Tenancy Branch