Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

The tenants seek compensation from their former landlord pursuant to sections 38, 67, and 72 of the *Residential Tenancy Act* ("Act"). It should be noted that the tenants' claim for the return of their security deposit is no longer part of this application.

Both parties, including the landlord's daughter providing assistance to the landlord, attended the hearing on February 7, 2021. No service issues were raised, the parties were affirmed, and Rule 6.11 of the *Rules of Procedure* was explained.

Issue

Whether the tenants are 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.

The tenancy began on July 1, 2011 and ended on March 15, 2021. Rent was $3,465.00. A copy of the written tenancy agreement was in evidence.

Between 2017 and 2020 the tenants experienced a significant water leak in the rental unit. The water leak was not properly addressed by the landlord. The tenants asked the landlord many times to check the leak, to repair it, and to check for mold that had started to grow where the leak was. A few repair attempts were made by a plumber, but they were often not able to reproduce the issue.

The leak was coming from somewhere in the upstairs bathroom and was in the wall and down into the downstairs shower. A written chronology was submitted into evidence and the tenant testified that between 2017 and 2018 they asked the landlord a total of eight times for repairs to be done on the leak and for the mold to be addressed. They asked "many times" for help. Photographs of the mold were submitted into evidence.

On June 28, 2019, the tenants made another request for the landlord to address the issue. Eventually, in November 2020, a plumber was able to fix the leak. However, the hole in the ceiling and the mold were not addressed or fixed.

As a result of the leak, mold started growing in the room adjacent to the leak. One of the tenants (M.S.) started developing health issues at the same time that the mold began growing. Those health problems became more problematic, but eventually started decreasing after extensive treatment and after leaving the property. The primary health issue was poisoning from mold producing Ochratoxin.

The tenant described the health symptoms as "long and brutal." Symptoms included chronic headaches, gastrointestinal issues, random nausea, lymph node issues, anxiety, sleeplessness, brain fog, bladder pains, dizziness, depression, and "more and more headaches."

The tenant saw various health practitioners over the course of a year, including naturopaths and acupuncturists. In December of 2020 a new naturopath advised the tenant that if there was mold, and Ochratoxin present, that the tenants would have to throw away a lot of their property and belongings. On December 21, 2020, the tenants conducted a mold testing sample and sent the kit away for testing. The result of the test came back on February 12, 2021, and it was confirmed that there was indeed mold.

Noted above, the tenant underwent a prolonged course of treatment (a "very long treatment" they explained), but slowly, day by day, the tenant healed. However, the mold was still present, and the tenants decided to end the tenancy due to the landlord not taking care of the issues. On March 7, 2021, the tenants had a telephone conversation with the landlord and let him know that they wanted to leave. They wanted to end the tenancy amicably but did not feel safe continuing to live in the rental unit. The landlord, they added, did not want to test for the presence of mold; he purportedly brushed off the tenants' concerns and thought mold was simply "green furry stuff."

In respect of the compensation sought, the tenants are seeking to recover expenses and costs related to the tenant M.S.'s medical and health treatment. The various expenses are listed on pages 2 and 3 of the tenants' Monetary Worksheet and total $1,902.19.

They also seek $211.91 for a mold cleaner and a mold fogger machine rental.

As a result of having to move, on account of the mold issue and resulting health problems, the tenants seek $86.45 for having to rent a moving truck.

The tenants seek $518.56 for the loss of various personal belongings (mattress recycling fee, cost of the mattress being disposed, and numerous pillows) that, because of the porous nature of the property, had to be discarded.

In addition, the tenants seek $45.00 for an NSF fee that was incurred when the landlord attempted to cash both of the tenants' cheques when only one cheque ought to have been cashed. The $100.00 application filing fee is also being claimed.

There is also a claim for $2,670.00 which is what the difference in rent was between the rental unit and the tenants' new accommodation (for a period of two months) into which the tenants moved. They also seek $3,465.00 in a rent refund for the period of February 15 to March 15, 20221, which is what they were entitled to, but were not paid. Last, the tenants seek $2,350.00 as compensation for the loss of the downstairs shower over a period of 47 months calculated at $50.00 a month (this amount, they noted, represents a mere 1.44% of the monthly rent, and is, in their opinion, a reasonable amount to be claimed).

According to the tenants, the rental unit's five occupants were forced to all share one bathroom on the upstairs floor. The drywall near the downstairs shower was so damaged that it was falling, or crumbling, off the wall.

The tenants submitted various documentary evidence in support of their application, including multiple receipts for the health professional visits, a health professional's opinion, receipts for various medicines, tinctures, charcoals, for truck rental, fogger rental, and receipts for the various personal belongings disposed of, copies of bank statements showing the NSF fee, and numerous copies of transcriptions of conversations had with the landlord. There were also various audio files submitted into evidence. It is noted that the landlord did not submit any documentary evidence in respect of the tenants' application.

The landlord gave evidence that when he checked all the faucets and pipes that they were all one hundred percent okay. He testified that he could not any issues; he saw no leak, though he acknowledged that there was a hole in the downstairs shower.

He argued and submitted that the only time there would have been any water leak is when the tenants or other occupants were standing in, or otherwise using, the upstairs bathtub. There would, he surmised, have had to be leak near the drain. The leak clearly came from upstairs, he added. Moreover, when there are five people taking a bath, and when the bathtub is never cleaned, then mold is going to happen. Continuing, he noted that there was no mold on the bedroom walls.

According to the landlord, the mold was caused by an earlier issue having to do with rain from outside that was somehow entering the rental unit. The landlord spoke of having to put towels down to sop up the water.

Returning to the alleged leak, the landlord testified that he was unable to fix the hole in the shower until after the tenants moved out. Moreover, in respect of the mold test, the landlord testified that he was unaware of any test from a laboratory or that the tenant had any health problems. He “never heard anything from them.” And, despite what the tenants complaint about, they are “never going to find a better landlord” than him.

The landlord’s English was proficient, but at times his testimony was somewhat difficult to understand, possibly due to a breathing or a lung issue. I mean no disrespect in saying this, but only to note that at times I found the landlord’s words a bit difficult to discern. With the support of his daughter, however, a few portions of his testimony were repeated. For example, his daughter explained that the leak was “extremely difficult to find” but that once it was found the landlord fixed it. She also reiterated that the mold came from a moisture issue unrelated to the shower.

In their brief rebuttal, the tenants stated that it was “news to us” that there was some other source for the water damage. Further, they did, in fact, see mold inside the rental unit. They concluded their submissions by saying that a total of three years is an unreasonable period of time to fix the issue.

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.

Section 7 of the Act states that if a party does not comply with the Act, the regulations or a tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Further, a party claiming compensation for damage or loss that results from the other's non-compliance must do whatever is reasonable to minimize the damage or loss.

Section 32(1) of the Act states that

> 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
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> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

The evidence before me, which includes both oral evidence and supporting documentary evidence, persuades me to find, on a balance of probabilities, that the landlord did not provide and maintain the rental unit in a state of repair that made it suitable for occupation by the tenants. Despite the tenants asking the landlord on several different occasions between May 2017 and June 2019, the landlord failed to make any concerted or diligent effort to repair the leak. The problem simply got worse.

That a plumber eventually repaired the leak in November 2020 supports the fact that there was a leak present. Clearly the plumbing was not one hundred percent okay. This fact does not support any an alternative finding (for which there was also no evidence) that the source of the water leak was from outside the property, as suggested. It is also my finding that, based on the evidence, the water leak directly caused the mold, which led to the tenant’s many health problems.

In summary, taking into consideration all the oral and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the tenants have met the onus of proving that the landlord breached the Act.

Having found that the landlord breached the Act, I must next determine whether the tenants’ losses 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, both the tenant's testimony regarding their health issues (and subsequent losses) and the supporting medical evidence, including an assessment from their naturopath (a naturopath doctor) dated April 8, 2021, in which the doctor's assessment is that the tenant was found to have Ochratoxin A in their urine sample, along with the positive mold test results, lead me to conclude that the tenants' losses would not have occurred but for the landlord's negligence and breach of the Act. There is, I find, a direct causal link between the mold – which did not appear before the water leak – and the tenant's health issues.

As a result, the tenants suffered losses and expenses related to health treatments and related expenses totalling $1,902.19. The tenants would not have to expend $211.91 for a mold cleaner and a mold fogger machine rental had the leak been dealt with promptly. Moreover, it is my finding that had the leak been fixed, there would not have been the mold which caused the tenants' various property to be contaminated, leading to their necessary disposal. As such, the tenants' claim for $518.56 related to the disposal of those items is granted. It should be noted that the amounts claimed are reasonable, and at the conservative end of what could be expected to be recovered, taking into consideration the reasonable depreciation amounts applied to those items.

In summary, taking into consideration all 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 tenants have met the onus of proving their claim for the above-noted claims in the amount of $2,632.66.

In respect of the claim for the NSF charge, while the landlord ought not have cashed both tenants' cheques at the same time, resulting in the charge, I can find no breach of the Act or the regulations from which compensation may flow. As such, this particular claim to recover the NSF charge of $45.00 must be dismissed, without leave to reapply.

Regarding the claim for $2,670.00 for the difference in rent, while it is not lost on me that the tenants had to vacate the rental unit as soon as feasible, as recommended by the naturopath doctor, there is no evidence before me to establish what section of the Act the landlord breached that might lead to this compensation being awarded.

Moreover, even if there was a breach (for which, as I have said, I cannot find), the tenants have not provided persuasive evidence demonstrating what alternative rental options were available at the time that they looked. That is, what more affordable options might have been available to choose from. In any event, this aspect of the tenants' application must be dismissed for the reasons stated.

Regarding the rent refund, I do not find that the tenants have proven why they are entitled to receive a refund. They gave their notice to end the tenancy at the end of February 2021 for a vacate date of mid-March 2021. This notice to end tenancy does not comply with the notice requirements under section 45(1) of the Act. Thus, in considering the evidence relating to this claim, and applying the law to the facts, I find on a balance of probabilities that the tenants have not met the onus of proving this aspect of their claim. This part of their claim for compensation must be dismissed.

Concerning the claim for the cost of the moving truck rental, it is my finding that this is an expense that the tenants would, at some point in the future, have had to incur, regardless of the reason for the tenancy ending. It is not, therefore, a claim that would have been avoidable regardless of whatever section of the Act the landlord may have breached. For this reason, the tenants' claim for the $45.00 moving truck rental expense is dismissed without leave.

Last, it is my finding, however, that the tenants' claim for $2,350.00 in compensation for the loss of the downstairs shower over a period of 47 months has been proven on a balance of probabilities. Under the tenancy agreement, the monthly rent was for the exclusive use of the entire rental unit, including the downstairs shower. However, due to the leak and mold issues, and the crumbling drywall, it is unreasonable to expect a tenant to use the shower in the state that it was in. Moreover, the 1.44% amount claimed, while rather arbitrary, is a more-than-reasonable percentage to be claimed for the loss of a shower. Given the above, then, this aspect of the tenants' application for compensation is granted.

The tenants' claim for recovery of the $100.00 application filing fee, pursuant to section 72 of the Act, is granted.

In total, the tenants are awarded a total of $5,082.66 in compensation. A monetary order in this amount is issued in conjunction with this decision, to the tenants. The tenants must serve a copy of the monetary order on the landlord. Should the landlord not pay this amount then the monetary order may be enforced in court.

Conclusion

The application is granted, in part.

This decision is final and binding on the parties, and it is made on delegated authority under section 9.1(1) of the Act. A party's right to appeal the decision is limited to grounds provided under section 79 of the Act or by way of an application for judicial review under the *Judicial Review Procedure Act,* RSBC 1996, c. 241.

Dated: February 10, 2022

Residential Tenancy Branch