Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Top Vision Realty Inc.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, FFT

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; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act.*

CFC and WSL appeared for the landlord in this hearing. 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.

As the parties were in attendance, I confirmed that there were no issues with service of the tenant's application for dispute resolution ('application') and evidence. In accordance with sections 88 and 89 of the *Act*, I find that the landlord duly served with the tenant's application and evidence. The tenant testified that they were not served with the landlord's evidence, which consisted of only a copy of the tenancy agreement. The tenant confirmed that they were okay with proceeding with the scheduled hearing as they have previously reviewed a copy of the same tenancy agreement. Accordingly, the hearing proceeded with the admittance of this document.

Issues(s) to be Decided

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

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

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 March 15, 2021, and was to end on March 31, 2022. Monthly rent was set at $1,800.00 per moth with a $150.00 rent reduction for maintenance of the lawn and garden. The landlord had collected a security and pet damage deposit in the amounts of $900.00 each for this tenancy, which was still in the landlord's possession at the time of the hearing. This tenancy ended by way of Mutual Agreement on August 31, 2021, which was confirmed at a previous hearing held on August 13, 2021.

The tenant filed this application on September 14, 2021 for compensation as set out in the table below. The tenant confirmed the monetary claim amounts during the hearing as the tenant was informed of Section 58(2) of the *Act* that states the director can decline to resolve disputes for monetary claims that exceed the limit set out in the Small Claims Act which is $35,000.

Remediation	$205.20
Air Quality Testing	414.75
Asbestos Testing	294.00
New Beds	1,787.71
Hydro	319.00
Loss of enjoyment, food, injuries	31,879.34
Filing Fee	100.00
Total Monetary Award Requested	$35,000.00

The tenant testified that they had wanted to remodel the bathroom at their own expense, which the landlord had approved. The tenant approached the landlord about

this in May 2021. Before beginning the work in June 2021, the tenant had inquired with the landlord about whether there had been asbestos testing due to the age of the home, which was built in 1970. The tenant testified that the landlord had responded that the home was tested twice, and both results were negative.

The tenant testified that the demolition of the bathroom started on June 7, 2021, and the tenant noticed during the work that the walls were “spongy”. The tenant soon noticed the presence of mould, which the tenant submitted photos of. The tenant notified the landlord, and requested repairs, as well as testing for asbestos. The tenant testified that they were certain that remediation was required at this point based on their observations, and the knowledge that they had gained from watching the home improvement channel as this issue was frequently discussed.

The tenant testified that the landlord did have some test performed, which came back negative. The tenant testified that the landlord had offered the tenant compensation to perform the repairs, which the tenant was not comfortable doing, and the landlord subsequently dispatched a couple contractors, which did not work out. Eventually, after the tenants had discovered evidence that led the tenants to believe that the landlord was aware of a previous mould problem, the landlord dispatched another contractor who determined that there was a leak involving the skylight, and suggested that proper testing and abatement be performed, and that the tenant seek alternative housing until the problem was fixed.

The tenant testified that the entire family started exhibiting symptoms such as headaches and feelings of malaise, including burning throats, and rashes. The tenant testified that due to the farm animals, they were unable to find alternative housing, and decided to remain on the site. In mid June 2021, the tenant sealed off the bathroom, and used the alternative bathroom in the basement suite which the landlord provided access to.

The tenant testified that they spent the majority of the time outside, and on July 4, 2021 they finally received a response from the landlord that they were not proceeding with the contractor’s suggestions, and hired a new contractor instead. The landlord also suggested to the tenant to find new housing. The tenant attended the office of the property management company the next day to speak to the owner of the property management company, CFC, and testified that they were laughed at and antagonized by CFC. The tenant decided to pay for their own testing, which took place on July 12, 2021. The tenant testified that the asbestos testing results showed 1-3% in the walls, and 35-40% in the flooring. The tenant testified that they had informed the landlord of

the results on July 13, 2021. The tenant also arranged for air quality testing, which the tenant paid for. The tenant testified that they were concerned that they were living there for a significant amount of time without any abatement, and as of July 13, 2021 the tenant started to sleep outside, while their daughter slept elsewhere. The tenant texted the landlord on July 14, 2021 to inform the landlord that the air quality test was complete, and presented the landlord with the amounts paid by the tenant, which also included the hydro bill.

The tenant testified that they filed an application for emergency repairs on July 23, 2021, and a hearing was set for August 13, 2021. The tenant paid for further testing, which was performed on July 29, 2021, resulting in findings of moisture in the home.

The tenants found new housing on August 5, 2021, and subsequently agreed to move out by way of Mutual Agreement on August 15, 2021. The tenant testified that they had to purchase new beds as their beds were contaminated, and they did not want to bring the old beds to their new home. The tenants testified that they also lost a significant amount of food due to exposure to mould spores.

The tenant testified that they had to disinfect and decontaminate their belongings, and suffered not only financially, but health wise. The tenant testified that they are feeling long term effects which included dizziness, muscle pain, slurred words, and unsteadiness. The tenant was offered a settlement by the landlord, which was included in the evidentiary materials. The tenant testified that they were informed that if they did not accept this settlement option, the landlord would file their own application for damages and losses against the tenant. The tenant rejected this settlement offer.

The landlord responded that they had attempted to resolve the matter for the tenant, but their expectations were not met despite their efforts. The landlord testified that they did offer the tenant the use of the other suite, as well as reimbursement of the cost of testing and the August 2021 rent and hydro bill. The landlord testified that they were not given sufficient time to address all the issues once they were discovered, and which the landlord did not believe to be a problem until the tenant had wanted to perform renovations in the home. The landlord testified that the tenant was already provided some compensation which included waiver of the July 2021 rent, an alternative bathroom facility, and the mutual agreement to end the tenancy before the end of the fixed term. The landlord had also presented the tenant with a proposed settlement offer, which the tenant did not accept.

The landlord disputes the tenant's claims for the replacement mattresses as these losses were not associated with any contravention of the *Act* by the landlord, and the tenant had a duty to mitigate by purchasing renter's insurance.

Analysis

Under the *Act*, a party claiming a loss bears the burden of proof. They 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.

I have considered the testimony and evidentiary materials submitted by both parties. I accept the evidence of the tenant that they and their family have suffered much distress during this tenancy. The onus is on the tenant, however, to support how the actions of the landlord and their agents constitute a contravention of the *Act*, and furthermore, how this contravention has caused the tenant to suffer a loss in the amounts claimed.

The tenant provided detailed evidence documenting the events that took place during this tenancy. Although the landlord did not dispute the findings of the testing companies dispatched and paid for by the tenant, the landlord is disputing the monetary claims as they believe that they have fulfilled their obligations by attempting to address the issues, and have attempted to compensate the tenant, and settle the issues outside of arbitration.

In consideration of the evidence and testimony before me, I find that regardless of how the tenant had discovered the mould and asbestos in the home, the final conclusion was that the tests performed did result in positive findings confirming the tenant's suspicions. I must, however, determine whether the landlord had fulfilled their obligations, and whether the tenant had suffered a loss due to the landlord's failure to do so.

Section 32 of the *Act* outlines the following obligations of the landlord and the tenant to repair and maintain a rental property:

Landlord and tenant obligations to repair and maintain

> **32** (1) 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.
>
> (2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.
>
> (3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.
>
> (4) A tenant is not required to make repairs for reasonable wear and tear.

> (5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

In this case, I find that the landlord had an obligation to investigate the matter and perform required repairs. In this case, I find that the landlord did attempt to address the matter, but not in the fashion the tenant had expected for an issue the tenant considered urgent as the issue pertained to the health and safety of the tenant and their family. It is undisputed that the tenant eventually dispatched and paid for their own testing. I find that they had only done so after attempting to communicate with the landlord, and after attempting to address the matter. I also find that the tenant did file an application for emergency repairs, but had entered with a mutual agreement to end the tenancy instead, mitigating further losses. I find that the tenant supported these losses with invoices, and accordingly, I find that the tenant is entitled to reimbursement of the three invoices for testing. I also find the tenant's claim for the reimbursement of hydro costs to be reasonable, and I allow this portion of their claim as well.

Although I accept the testimony of the landlord that they did attempt to accommodate the tenant by reimbursing the July 2021 rent, and providing alternative bathroom facilities, I find that the tenant and their family did suffer a reduction in the value of the tenancy agreement for the months of July and August 2021. As the tenant was already offered a waiver of the July 2021 rent, I will consider whether the tenant should be compensated for the month of August 2021.

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.

I find that the findings presented in the reports would have caused the tenant significant alarm, as demonstrated by their decision to sleep outdoors, and seek alternative housing for the family. I have considered whether the parties are at fault, and although it appears that the issue started upon the tenant-initiated renovation project, I find that the mould and asbestos were already underlying issues that only came to the parties' attention during the process of the renovations. I do not find the tenants at fault. Similarly, I do not find that evidence supports that the landlord was aware of the asbestos or mould prior to the issues being reported, and accordingly, I cannot place fault on the landlord for deciding the rent out the home or allowing the initial renovation either.

In consideration of the evidence and testimony before me, I find that this tenancy became frustrated in July 2021. I find that the condition of the home prevented the landlord from fulfilling their obligations under this contract for the months of July and August, even though the tenancy formally ended on August 31, 2021. On this basis I find that the tenant is entitled to the return of their rent for July and August 2021. As the July 2021 rent was already waived, I find that no further monetary orders are required for that month. The tenant is granted a monetary order in the amount of $1,800 in satisfaction of this monetary award.

I have considered the tenant's monetary claims for the new beds, and although I am sympathetic towards the fact that the tenant and their family have lost personal belongings due to the contamination, I do not find that the tenant has provided sufficient evidence to support that the contamination was due to the landlord's negligent or deliberate actions. As stated above, I do not find either party at fault for the asbestos or mould contamination. Furthermore, the tenant claimant has a duty to mitigate the losses claimed.

Residential Tenancy Policy Guideline #5 addresses the duty of the claimant to mitigate loss:

"Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss[1]. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation[2]. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."

The duty to mitigate losses is only one of the criteria that needs to be met when making a claim. As stated earlier in this decision, the claimant must not only prove the value of the loss, the claimant must also prove that the losses were solely due to the other party's contravention of the *Act* or tenancy agreement. Only after these requirements are met, can the applicant be successful in their claim. In consideration of the claims for the new beds, I am not satisfied that the tenant had met the criteria to support this loss, which also included their duty to mitigate this loss by having adequate tenant insurance to cover the cost of replacing personal belongings.

In consideration of the other claims, as noted above, the burden is on the tenant to support their losses. In this case, although the tenant described ongoing health problems and general feelings of unwellness, I am not satisfied that the evidence

supports that these issues were caused by the landlord's actions or contravention of the *Act.* Furthermore, although the tenant requested compensation of up to $35,000.00 for the loss of enjoyment and food, I find that that the tenant failed to establish the amount of loss claimed, either referenced and supported by similar claims of this nature, or by providing pay stubs, receipts, statements, or written or oral testimony to support these losses the tenant is seeking in this application. I also find that the tenant failed to establish how their suffering and loss was due to the deliberate or negligent act or omission of the landlord. On this basis I dismiss the remainder of the tenant's monetary claims without leave to reapply.

As the tenant's application had some merit, I allow the tenant to recover the filing fee for this application.

Conclusion

I issue a monetary order in the amount of $3,130.25 in the tenant's favour as set out in the table below.

Remediation	$205.20
Air Quality Testing	414.75
Asbestos Testing	294.00
Hydro	319.00
Reimbursement of August 2021 rent	1,800.00
Filing Fee	100.00
Total Monetary Award	$ 3,130.25

The landlord(s) must be served with this Order as soon as possible. Should the landlord(s) 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 claims 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: March 21, 2022

Residential Tenancy Branch