Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

The Tenant filed an Application for Dispute Resolution (the "Application") on January 12, 2022 seeking compensation for monetary loss/other money owed, and reimbursement of the Application filing fee.

The matter proceeded by way of a hearing on August 22, 2022, pursuant to s. 74(2) of the Residential Tenancy Act (the "*Act*"). The Tenant, the Landlord, and representatives for the Landlord (hereinafter the "Landlord") attended the hearing, and I provided each with the opportunity to present oral testimony. In the conference call hearing, I explained the process and provided each party the opportunity to ask questions.

At the outset of the hearing, the Landlord confirmed they received the prepared documentary evidence of the Tenant. This was via flash drive, including the Tenant's digital file evidence.

In the hearing the Landlord stated they provided evidence, including a written response, to the Tenant. The Tenant confirmed they received this material. On this confirmation, I proceeded with the hearing as scheduled.

Preliminary Issue -- Jurisdiction

The Landlord set out that though named as the Respondent in this matter, they sold their rights and interests to the property on August 25, 2021. A notice advising all residents – including the Tenant here – was dated August 3, 2021 as shown in the Landlord's evidence.

The Landlord submits they have no obligations under the tenancy agreement because of that purchase, and “Any obligations under the Lease (i.e., the tenancy agreement) are assigned to the Purchaser. . .”

The *Act* s. 1 defines ”landlord” as including “a former landlord, when the context requires this.” Given that the Tenant’s Application is based on events that arose while the Landlord here had obligations for that time of the tenancy, I find the Landlord is properly so named as the Respondent for the purpose of this hearing.

Preliminary Matter – laundry hot water

The Tenant made an application for compensation on the basis that “that washing machines were altered in such a way that they would not provide a hot water wash.” Their claim is two-fold: past rent reimbursement, and refund of money they paid “for hot water washes not received”, totalling $8,094. This refers to the pay-per-use on-site laundry facilities, from June 2009 to January 2021.

The Tenant referred to their earlier application from December 2020 wherein that Arbitrator dismissed their claim for compensation with leave to reapply. In that decision of March 12, 2021 (corrected March 17, 2021) the Arbitrator on page 6 made the finding:

> On a balance, I find the Tenant has failed to prove the Landlord breached his obligations under the *Act*, the *regulations*, or the residential tenancy agreement. The Tenant was promised access to a shared laundry facility and she has had continuous access to this facility since the tenancy began. I am not persuaded the Tenant was guaranteed a certain temperature for washing. While the tenancy agreement provides that she is entitled to hot water, I find this means she was not expected to pay more for hot water in her rental unit and that this was included in her rent payment; I am not persuaded that this means she was entitled to hot water of a certain temperature in the washing machines in the shared laundry area.

In any claim for compensation, under s. 7 of the *Act*, a landlord or tenant who does not comply with the legislation or their tenancy agreement must compensate the other for damage or loss. Additionally, the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;

2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

From the March 17, 2021 decision, the Arbitrator found the Landlord did not breach their obligations. For the Tenant to successfully prove their claim here, they must show the Landlord violated the legislation and/or the tenancy agreement. The Tenant's claim on the Landlord's breach was identical to that from which the previous Arbitrator made a finding of fact on that key issue.

The *Act* s. 77(3) provides that a decision is final and binding. As well, I am bound by the principle of *res judicata* ("the matter is judged"). This principle prevents a party from pursuing a claim that has already been decided. This is an equitable principle that, when its criteria are met, preclude re-litigation of a matter. The preconditions are:

- the same question has been decided in earlier proceedings;
- the earlier judicial decision was final; and
- the parties to that decision are the same in both the proceedings.

All of these preconditions apply in this case here with respect to the issue of the alleged Landlord's breach. The Tenant here is rearguing that the Landlord breached the *Act*; however, the previous Arbitrator decided on the matter of the Landlord's violation of the legislation or the tenancy agreement, and their March 17, 2021 decision was final. The particular issue on laundry hot water is precluded from my consideration by the principle of *res judicata*. That prior decision is final and binding and there is no jurisdiction under the *Act* that allows my reconsideration of this issue.

For this reason, I dismiss the portion of the Tenant's Application for compensation for a lack of laundry hot water, without leave to reapply.

Preliminary Matter – evidence volume and decision timeline

There were three previous hearings concerning this tenancy, the substance of which entered into the Tenant's submissions for this present hearing. This required my review of those prior decisions in relation to the Tenant's claim for compensation. As well, the Tenant provided evidence coming to approximately 300 pages. This included the Tenant's own journal, numerous articles cited as sources of information, a number of the Tenant's photos of the

interior of the rental unit, and even detailed logs of the Tenant's medical condition. As well, the Tenant submitted video. All of this material required by review to assess either its relevance, or weight as evidence where I determined it was relevant to this present claim for compensation.

The hearing process is designed to be an expedient measure to determine parties' rights and obligations under the *Act* and/or a tenancy agreement between the parties.

While the *Act* s. 77(1)(d) does set a 30-day limit for a decision of the delegated decision-maker, s. 77(2) assures a decision is not invalid when given past the 30-day period. I reached this decision through review and evaluation of all of the Tenant's documentary evidence that amounted to hundreds of pages. The parties' right to due process, for a thorough consideration of all evidence, and my deliberation of the applicability of the law, outweighs the need for a 30-day time limit. Also, this was a matter of monetary compensation between the parties and did not concern an eviction or end of tenancy that are matters of more immediate human consequence.

Issues to be Decided

Is the Tenant entitled to compensation for monetary loss or other money owed, pursuant to s. 67 of the *Act*?

Is the Tenant entitled to recover the filing fee for this Application pursuant to s. 72 of the *Act*?

Background and Evidence

The Landlord and Tenant each provided a copy of the tenancy agreement. Both parties signed the agreement on May 1, 2009 for the tenancy starting on June 1. The rent amount and payment of deposits was not at issue in this hearing.

The agreement itself in both parties' evidence consists of the first page and the final page. At the top of the final page the agreement contains the following clause:

> If a landlord enters or is likely to enter the rental unit illegally, the tenant may apply for an arbitrator's order under the Act, to change the locks, keys or other means of access to the rental unit and prohibit the landlord from obtaining entry into the rental unit.

For their Application, the Tenant provided a set of comprehensive written statements that describe the issue of the Landlord's continual entry into the rental unit without proper notice.

In a summary statement, the Tenant described the Landlord's "history of entering my apartment without notice multiple times each year, over more than 12 years, despite my complaints, and this has caused me considerable long-term stress and anxiety." This was for two primary purposes since the start of the tenancy in 2009: annual testing for fire safety systems, and miscellaneous work needed in the rental unit.

On fire safety testing, the Tenant applied for a restriction or set conditions on the Landlord's right to enter, and this was a separate hearing in April 2021. The Tenant submits the Landlord admitted to entry, providing an excuse as to their comprehension of what a notice to the Tenant entails. The Tenant also submitted the Landlord from this had a two-part "test" in place to identify if they had provided notice, though this is nowhere set out in the Arbitrator's decision dated April 20, 2021. The Tenant noted after this hearing they "dropped [their] request for damages in order to move forward."

Subsequent to that hearing, testing for smoke alarms occurred on August 3, 2021, and staff enlisted by the Landlord to perform that task entered the Tenant's rental unit, this due to the urgency of complying with the fire code, with alarms untested since 2019. The Landlord acknowledged that was a mistake, due to miscommunication and an error in that staff's posted notice.

The Tenant submits this August 2021 incident was the same pattern the Landlord engaged in throughout the tenancy, on a yearly basis, for alarm testing. The Tenant alleges they "had no clue that the Landlord was also going into my apartment for the smoke detector to be serviced." They submit their neighbours similarly never received any notice from the Landlord about their entry for this purpose. One neighbour in 2019 mentioned to the Tenant that posted notice about alarm testing "included going into everyone's apartments." As well, the Tenant communicated with the maintenance firm who advised of a two-page notice that contains a separate notice to a tenant that the Landlord should have posted. The Tenant submitted this should be posted on or under the Tenant's door "at least 3 days prior (as required by the RTA)".

In their written submission for this present hearing, the Tenant referred to the Landlord's other submissions in another December 23, 2021 hearing and provided rebuttal responses to each of the Landlord's submissions from that hearing. The Tenant referred to the "spirit of the law", *i.e.*, the two-part "test".

Secondly, with reference to other miscellaneous work needed within the rental unit throughout the tenancy, they referred to the most recent event of December 18, 2019. They submitted that in the past since the start of the tenancy the Landlord had the habit of attending to the rental unit unannounced and knocking on the door. The Landlord would then typically email the Tenant just as they were entering when the Tenant was not home. Other times the Landlord would provide a date, but not attend on that date. The Tenant described their "uncomfortable conversations" with the Landlord in which they disclosed the distress the Landlord's entries were causing.

On these maintenance entries as well, the Tenant submits they had discussions with neighbours who disclosed they had similar issues with the Landlord.

This single entry of December 18, 2019 spurred the Tenant to action, and they responded to the Landlord by sharing the *Act* s. 29 which restricts a landlord's right to enter. This seemingly went unacknowledged by the Landlord, as had the Tenant's previous complaints within the previous 12 years.

Attesting to the damage the Landlord's alleged repeated breaches caused, the Tenant describes "feelings of paranoia, anger, and despair", making them "suspicious and untrusting". The Landlord's lack of response made them "feel disrespected and dismissed." They described the Landlord's entries as "triggering" based on their mental health struggles that they openly disclosed in their written submissions. They described buying a security camera, to add a measure of stability to their home that serves as a source of "comfort, solace, peace, calm, stability, and order." Their numerous photos show in detail the level of care and value they place on their living arrangement. In sum, their home is a "safe place", yet this is "de-stabilized" each time the Landlord enters without notice; adding to this is the Landlord's dismissive attitude to the Tenant's complaints. Their reaction to the Landlord's entry on August 3, 2021 reflected their anger and frustration that had "built up over twelve years of violations and disrespect by the landlord."

The Tenant submitted a copy of psychiatrist's reports from 2019 in which the doctor described "borderline and obsessive-compulsive personality disorders." This includes "being preoccupied with details, rules, lists and organization, being perfectionistic . . ." The doctor also described the Tenant wanting to remain in "[their] bubble and safe space." The Tenant presented this to show the Landlord's violations caused immeasurable damage to their distress, manifesting as "panic and nausea" with a racing heart. The Tenant also gave statements at their anxiety on the status of the security camera they installed and its tendency to go offline. In a summary chart, the Tenant listed "emotional effects" leading to "physical effects" with marked "behavioural effects".

As compensation for these intrusions, and the ill effects this gives ongoing to their health and psychological makeup, the Tenant proposed three options for compensation:

- $17,346, comprised of 147 months $100 for “loss of quiet enjoyment, loss of exclusive use, and loss of privacy” and mental suffering; a lump sum of $2,500 for “future mental suffering” for “the ongoing nature of the conduct”; and $146 reimbursement of out-of-pocket expenses (receipts for registered mail and security cameras)
- $12,248.82, comprised of 147 months $50 for “loss of quiet enjoyment, loss of exclusive use, and loss of privacy”; total $2,230, $100 each for August 3, 2021 and December 18, 2019 incidents, and annual fire inspections at $10 each and “$10/per incident related to miscellaneous work – annually”; $2,500 for “future mental suffering”; and out-of-pocket expenses at $168.84 (discrepancy noted)
- $27,668.84 for $1000 per offence (12 incidents of annual fire testing plus 13 incidents of maintenance); $2,500 future mental suffering; out of pocket expenses at $168.84 (discrepancy noted) – this is based on awards on a per-offence basis that are in place in other jurisdictions.

The Tenant noted they feel “Option A (*i.e.*, $17.346) compensates me most fairly.” The Tenant also stated: “The amount requested in each option reflect twelve years of accumulated damages – these costs could have been mitigated by the landlord had he chosen to address these complaints in the beginning, or at any time over the past twelve years.”

In the hearing, the Tenant reiterated that the Landlord should distribute a 24-hour notice to any tenant needing an entry. The Landlord showed no evidence of an emergency on August 3. Over the years, there has been no way to resolve this with the Landlord.

In their written response dated June 8, 2022 the Landlord acknowledged their mistake of August 3, 2021. The firm involved with the entry apologized to the Tenant. The Landlord submitted they thought that posting notices in the common area of the building served to notify individual tenants of the Landlord’s entry into their units; this was done so in good faith.

Further, the Landlord only learned of this improper manner of giving notice fairly recently. They rely on the principle of estoppel where the Tenant had “accepted this practice for over a decade previously without bringing [their] grievance to [the Landlord’s] attention.” They were not aware that 24-hour notice to a tenant also applied to hired workers, and not only the Landlord.

The Landlord applied the phrase “crumbling skull” to describe the Tenant’s response to the circumstances, referring to the Tenant’s “significant, chronic pre-existing mental illness.”

Overall, the Landlord submits it is inappropriate to award the Tenant compensation based on their submissions and the lack of material evidence supporting those submissions.

The Landlord brought a witness to the hearing who described the need to enter all rental units in summer 2021 to complete fire code requirements. They described a timeframe of 1, 2, or 3 minutes at most for an individual rental unit entry to check the fire detectors. This was the individual who wrote to the Tenant to apologize for the entry, and in the hearing acknowledged there was inadequate notice to individual tenants.

In the hearing the Landlord specifically noted the Tenant’s drawing upon statements of other residents in the rental unit building. They submit there was no evidence from any other residents, and it is fundamentally “very unfair of the Tenant to do that”. They also stated no other resident brought residential tenancy actions for any matter in the past, reflective of the Landlord’s attention to duty throughout their long-term tenure managing this rental unit property.

Analysis

Under s. 7 of the *Act*, a Landlord or Tenant who does not comply with the legislation or their tenancy agreement must compensate the other for damage or loss.

While the party who does not comply with the tenancy agreement/legislation must compensate the other, by s. 7(2) the party who claims compensation must do whatever is reasonable to minimize the damage or loss. Pursuant to s. 67 of the *Act*, I shall determine the amount of compensation that is due, and order that the responsible party pay compensation to the other party, only if I identify palpable damage or loss, and a definitive breach.

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

As above, I noted the specific clause present in the tenancy agreement regarding illegal entry by a landlord. Of the two pages of the incomplete tenancy agreement that do appear in the evidence, this clause was present, and remarkably on point, especially for the Tenant's claims present in this tenancy. The remedies briefly described in the tenancy agreement are either changing the locks or setting restrictions on the Landlord's right to enter. The Tenant presented no evidence that they pursued either of these avenues for legal remedy, even though that is explicit in the agreement.

I find the Tenant expressed they were burdened by the Landlord's entry over quite a long timeframe. The Tenant presented no rationale on why they did not assert their rights via the Residential Tenancy Branch over the sustained period of 10 years. I find the Tenant was aware that something was not right, and I even grant that they made their discomfort known to the Landlord, even though there is no record of this in their evidence. Given the nature of the breach, and the rather serious impact this was having on the Tenant's own health, I cannot understand why they did not pursue the legal avenue to put a stop to that practice of the Landlord. I find the Tenant thus took no steps toward legally barring the Landlord from that action thereby mitigating a loss. Instead, the practice continued unchecked for 10 years. With no evidence of their effort at mitigating the damage, I dismiss any award for "loss of quiet enjoyment, loss of exclusive use, and loss of privacy", as well as "mental suffering", and for each of the alternative options for compensation, that eliminates the bulk of the Tenant's estimated value.

I do not agree with the Landlord's own notion that the Tenant was accepting of the practice, thereby creating a situation of estoppel. That would seem to automatically preclude the Tenant from pursuing the issue in any way though a finding that the Tenant accepted the practice. That is not the case here. Whatever the Tenant's psychological makeup, they chose not to pursue the matter for clarity on the Landlord's obligations, and I find this lack of action to assert their rights in the past equates to no steps taken to mitigate the damage.

Had the Tenant pursued a legal means of rectifying the situation, the two incidents of Landlord entry that are definitively on the record would either have not occurred, or they would be properly subject to some form of recompense to the Tenant, though likely nominal. Having said that, I am not convinced of the severity of the impact the Landlord's entry had in terms of actual damage or loss. The evidence shows the Tenant faces considerable mental health issues and my conclusion is that the Tenant's allowance of the pattern to continue had a reverse-impact psychological effect on them. This is entirely attributable to the Tenant's own way of identifying stressful situations, facing those challenges, and the support system available to them for doing so. This is more likely the cause of the negative impact this

situation had on the Tenant for quite some time, rather than the Landlord not giving proper notices where the evidence does not establish that was a common practice over a 10-year timeframe. In plain terms, I find the Tenant focused more on the impact the situation was having on their own psyche, rather than confronting the issue with the help of the Residential Tenancy Branch. This is unfortunate; however, it is not a situation for which the Landlord is liable for compensation to the Tenant where the Tenant did not proactively confront the issue for quite some time.

In summary, for the long-term practice that remained unchallenged by the Tenant, I find the Tenant did not mitigate the damage by formally challenging that practice through dispute resolution. For the Landlord's two documented entries of December 2019 and August 2021, I am not satisfied that a damage or loss exists; therefore, I grant no singular lump-sum award for either of these incidents that on a balance of probabilities would not have occurred had the Tenant previously asserted their own rights in this situation.

In their final piece, the Tenant listed alternate amounts of $146 and $168.84 for costs of registered mail and security cameras. There is no allowance under the *Act* for reimbursement of preparation of materials and evidence for a hearing, and at least one instance listed by the Tenant shows they chose to communicate with the Landlord via registered mail. This mode of service was entirely of the Tenant's own choosing, and not recoverable for that reason. Secondly, the necessity of lower-priced security cameras was also of the Tenant's own choosing; they pursued this method rather than utilizing the legal means available to them, that of dispute resolution. I grant no recovery of these expenses borne by the Tenant entirely of their own choosing.

In conclusion, I dismiss the Tenant's Application for compensation in its entirety, without leave to reapply. This judgement forms part of the record concerning this tenancy and will be reviewed in any future action initiated by the Tenant through the Residential Tenancy Branch.

Because the Tenant was not successful in this Application, I grant no reimbursement of the Application filing fee.

Conclusion

For the reasons set out above, I dismiss the Tenant's Application for compensation in its entirety, without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: September 21, 2022

Residential Tenancy Branch