Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding IMH Pool XIV LP C/O MetCap Living
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **CNR, MNDCT, RR, RP, FFT**

Introduction
The words tenant and landlord in this decision have the same meaning as in the *Residential Tenancy Act, (the "Act")* and the singular of these words includes the plural.

This hearing dealt with an application filed by the tenant pursuant the *Residential Tenancy Act* (the "*Act*") for:

- An order to cancel a 10 Day Notice to End Tenancy for Unpaid Rent/Utilities pursuant to sections 46 and 55;
- A monetary order for damages or compensation pursuant section 67;
- An order for a reduction of rent for repairs, services or facilities agreed upon but not provided pursuant to sections 27 and 65;
- An order for repairs to be made to the unit, site or property pursuant to section 32; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

Both parties attended the hearing. As both parties were present, service was confirmed. The parties each confirmed receipt of the application and evidence. Based on the testimonies I find that each party was served with these materials as required under RTA sections 88 and 89.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules") and that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation and potential fine under the Act.

Each party was administered an affirmation to tell the truth and they both confirmed that they were not recording the hearing.

Preliminary Issue 01

The tenants named their son as an applicant on the application for dispute resolution, although he was not named on the tenancy agreement. As the son is not a tenant as defined by the Residential Tenancy Act, the son's name was removed as a party in this decision. Likewise, the tenants named the property manager JD as a landlord in their application for dispute resolution, although the tenancy agreement is between the tenants and the property management company. JD's name has been removed from the decision as a named party pursuant to section 64(3)(c).

Preliminary Issue 02

Both parties agreed that the tenant paid the outstanding arrears within 5 days of being served with a 10 Day Notice to End Tenancy for Unpaid Rent/Utilities. Pursuant to section 46(4), the notice has no effect and the tenant's application seeking to cancel the notice is dismissed.

Issue(s) to be Decided

Should the landlord be ordered to perform repairs to the rental unit?
Should the tenant's rent be reduced for repairs, services or facilities agreed upon but not provided?
Is the tenant entitled to compensation?
Can the tenant recover the filing fee?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The tenancy began on September 1, 2020 with rent set at $2,198.00 per month. The tenant testified that since moving in, the unit has been cold in the winter months. The old windows leak and moisture is coming in, even when the windows are closed. The curtains have water marks and the plaster around and above the window is breaking loose and falling down from the water ingress.

The tenant had to move their bed into the living room to keep warm, as the bedrooms were too cold to sleep in. The heaters are located directly under the windows and are ineffective at warming the room. The tenant testified that her family is always sick with colds from the constant cold, and she had to purchase medication to keep her family healthy. The tenant wants the landlord to replace the single pane windows to make the space liveable in the winter.

The tenant also complains of delays in getting a microwave in their unit and when it arrived, it did not fit. Further, there were multiple power outages and elevator failures in 2022 and a lack of hot water between November 1 and December 31, 2022.

The property manager SP testified that the building was built in 1971 and the windows are original, single paned windows. Too many people in the unit will cause condensation to build up around the windows if fans are not used. The request about window deterioration came to the attention of the landlord on April 17, 2023 and repairs were postponed by the tenant to June 16, 2023. She testified that the repairs would not include replacement of the window but scraping the peeling stucco, then re-surfacing it.

The landlord argues that the tenant only made a couple of requests to the landlord regarding lack of heat in the unit. Once in 2021 and another in 2023. The tenant has not complained about it, even though she knew how to submit a complaint. To the landlord, there was no urgency to the requests.

There were 5 documented power outages between November 13 and December 27, 2022. The first was due to a fire, the second was attributed to water ingress into the vault room located in the P1 parking level. A breaker had to be replaced the same day. The third and fourth incidents also involved leaks in the vault room and on each occasion, the power was restored the same day.

When the power goes out, the elevators stop working and the heat to the building is affected because the pumps go down. There should be residual heat but it would only last an hour. The landlord testified that the outages were short in duration but the tenant disputes that.

Analysis

Pursuant to section 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. Pursuant to section 32(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.

I have reviewed the photographs supplied by the tenant and considered the testimony of the parties. I find the condition of the unit does not comply with health, safety and housing standards required by law, suitable for occupation by a tenant. I find the landlord's argument that the window moisture can be resolved by circulating air with a fan to be unreasonable. I accept the tenant's argument that the water ingress coming from outside is causing the ceiling around the windows to deteriorate and cause further health issues for her and her family due to the presence of mold. I find the landlord in breach of section 32(1) of the Act.

The landlord testified that the windows are original to the building, built in 1971, making them over 50 years old. The useful life of an aluminum framed window is 20 years, according to Residential Tenancy Branch Policy Guideline 40 - [Useful life of building elements]. As such, I find the windows in the tenant's unit have outlived their useful life and require replacement to comply with section 32(1) of the Act. **I order that the landlord replace the windows in each of the tenant's bedrooms by July 31, 2023**. The cosmetic repair to the window casings and ceiling above may need to be rescheduled if the window replacement cannot take place before the scheduled date of June 16, 2023.

The tenant seeks a $1,000.00 reduction in rent for the 5 months between November 1, 2022 and March 31, 2023 when the unit was cold due to the deficient windows and the building's faulty heating system; intermittent power outages; frequent loss of hot water; and the inconvenience of having no elevator.

Under section 27 of the Act, a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or providing the service or facility is a material term of the tenancy agreement.

Policy guideline 22 – termination or restriction of a service or facility states:

An “essential” service or facility is one which is necessary, indispensable, or fundamental. In considering whether a service or facility is essential to the tenant's use of the rental unit as living accommodation or use of the manufactured home site as a site for a manufactured home, the arbitrator will hear evidence as to the importance of the service or facility and will determine whether a reasonable person in similar circumstances would find that the loss of the service or facility has made it impossible or impractical for the tenant to use the rental unit as living accommodation. For example, an elevator in a multi-storey apartment building would be considered an essential service.

…

Where it is found there has been a substantial reduction of a service or facility, without an equivalent reduction in rent, an arbitrator may make an order that past or future rent be reduced to compensate the tenant.

…

Where the tenant claims that the landlord has restricted or terminated a service or facility without reducing the rent by an appropriate amount, the burden of proof is on the tenant. There are six issues which must be addressed by the landlord and tenant.

- whether it is a service or facility as set out in Section 1 of the Legislation;
- whether the service or facility has been terminated or restricted;
- whether the provision of the service or facility is a material term of the tenancy agreement;
- whether the service or facility is essential to the use of the rental unit as living accommodation or the use of the manufactured home site as a site for a manufactured home;
- whether the landlord gave notice in the approved form; and
- whether the rent reduction reflects the reduction in the value of the tenancy.

With respect to the issues to be addressed, I find as follows:

1. The hydro, the elevator, hot water, and heating facilities are all services or facilities as defined under section 1 of the Act.
2. These services were all restricted during the months of November and December, 2022.
3. These services are essential to being able to comfortably live in the rental unit and are therefore form a material term of the tenancy agreement.
4. They are all essential to the use of the rental unit as a living accommodation.
5. The landlord did not provide any notice that these services would be terminated or limited due to the intermittent nature of the outages.
6. The reduction in rent sought by the tenant was not substantiated by any particular set of values or scale of costs.

While the tenant seeks 5 months compensation at $1,000.00 per month for the loss of the services or facilities, I find the justification for that amount to be unsupported. The justification was simply the tenant's remark that the bedrooms were cold and she had to sleep in the living room to keep warm. I find that a closer approximation of the loss to be a 25% loss of the value of the tenancy for the two months when the majority of the power outages occurred and led to the loss of the consistent elevator service and heating in the unit. (November and December 2022). Though the tenant may have been inconvenienced all the way until March, 2023, I find the tenant has provided insufficient evidence to support a rent reduction for those months. I award the tenant compensation in the amount of $1,099.00. [$2,198.00 / 25% x 2 = $1,099.00].

The final portion of the tenant's application seeks a $34,000.00 monetary order for:

Cold apartment, deteriorating windows which allow a draft in and moisture affecting health (temperature not meeting requirements, waiting 2 weeks for microwave-restricts cupboard usage, it does not fit, continuous elevator failures in 2022, power outages localised to building, lack of hot water, emotional distress due to health and safety of occupants especially pregnant mother and while post partum with her 8 month baby. occupants mother and 9 year old and guest baby purchase increase medicine

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim and that the standard of proof is on a balance of probabilities.

Residential Tenancy Policy Guideline PG-16 [Compensation for Damage or Loss] states at Part C:

In order to determine whether compensation is due, the arbitrator may determine whether:

1. a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
2. loss or damage has resulted from this non-compliance;
3. the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

[the 4-point test]

While I have already found that the landlord was not complying with section 32 of the Act and failed to provide a sufficiently warm living unit due to the deteriorating windows; I do not find the tenant has provided sufficient evidence to support their claim for $34,000.00 in compensation. The tenants were already granted a rent reduction for November and December 2022 for the window issue and the intermittent power outages. I also took into consideration the reduced comfort in the unit due to the heat escaping through the window and the inconvenience of needing to walk up stairs while the elevator was out.

Further, my attention was not drawn to any documentary evidence regarding the emotional or medical distress the tenant and her family allegedly suffered. I have no independent reports from medical or psychological practitioners to corroborate the claim for emotional distress or claims of health and safety risks. The tenant has provided neither case law where similar facts led to an award similar to that which the tenant claims and the tenant did not provide any scale for me to determine how she arrived at this figure to assess damages (point 3 of the 4-point test). I find the tenant has not met the evidentiary onus to prove this portion of her claim and I dismiss the tenant's claim for monetary compensation.

As the tenant was only partially successful in her application, I exercise my discretion to award 50% of the filing fee, $50.00.

Conclusion

I order that the landlord replace the windows in each of the tenant's bedrooms by July 31, 2023. If the landlord does not comply with the above order, the tenant may apply to the Residential Tenancy Branch for further compensation.

Pursuant to section 27, I award the tenant a monetary order in the form of a rent reduction for the months of November and December 2022 in the amount of $1,099.00. The tenant is awarded $50.00 in filing fee pursuant to section 72(1). In accordance with the offsetting provisions of section 72(2)(b), the tenant may reduce a single payment of rent owing to the landlord by $1,149.00.

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: June 20, 2023

Residential Tenancy Branch