



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes PFR

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for an order of possession to make renovations and repairs pursuant to section 49.2.

This matter was reconvened from a prior hearing on November 30, 2023. I issued an interim decision setting out the reasons for the adjournment that same day (the Interim Decision). This decision should be read in conjunction with the Interim Decision.

The tenant attended the hearing and was assisted by counsel (JL). The landlord was represented at the hearing by its owner (MO).

Issues to be Decided

Is the landlord entitled to an order of possession?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The tenant and the former owner of the rental unit entered into a tenancy agreement starting November 1, 2009. Monthly rent is \$1,055.66. The tenant paid the prior owner a security deposit of \$450, which the landlord continues to hold in trust for the tenant.

MO testified that the rental unit is located in a 65-year-old wood frame walk-up building that is in very poor condition. She does not believe the rental unit has undergone significant renovations since it was built.

She testified that she first attended the rental unit in July 2022 because the tenants in the rental unit below had complained of a leak. When she entered the rental unit, she testified that the smell “knocked her over” and was damp and moldy. She stated that there was a small leak from the water line leading into the rental unit, which she fixed. She testified that she had to open up the ceiling of the unit below to dry it out and to avoid mold from growing. The landlord submitted a photo of damaged ceiling in the unit below into evidence. It does not show the presence of any mold.

MO discussed the issue of the mold to the tenant, and he indicated that he would be moving out of the rental unit shortly, so MO testified that the landlord intended to remediate the mold then.

Additionally, in 2021, the landlord undertook renovations of the suite next door to the rental unit, and removed the tiles and greenboard drywall from that unit's bathroom. MO stated that upon doing so, she discovered that an “extreme” amount of mold was on the shared wall between the unit being renovated and the rental unit. The landlord provided a photo of this.

MO testified that when she went into the rental unit in 2022, she touched the shower wall between the rental unit and the neighboring unit and found that it was “soft”. The landlord provided a photo of the bathtub which shows staining on the grout between the tub and the tiles and around the soap dish located in an indentation in the wall. I cannot say if this staining is the result of surface mold or mold behind the tiling. Additionally, the interior of the tub and the surface of some of the tiles appears stained. These are not places where mold typically accumulates, so I cannot be certain that staining in the grout could not also be the result of the accumulation of something other than mold.

She also testified that there was mold underneath the kitchen sink in the drywall which can be seen through the cut out in the cabinets made for the drainpipe. She testified it is “black with mold”. The landlord provided a black and white photograph of the cabinet beneath the sink, but it is difficult to tell the cabinet's condition from it, as I cannot say what are shadows, what is surface staining, and what is mold damage to the cabinet. The photo does not appear to show the drywall behind the cabinet.

She testified that the entire rental unit needs to be taken down to the studs (or “gutted” as she sometimes described it), in order to determine the extent of the mold and to address the mold issue.

In addition to the presence of mold, the materials used throughout the rental unit contain asbestos. MO testified that there is no evidence that the asbestos is airborne or posing a health risk to the tenant, but such a risk would manifest should the proposed renovations be completed. The landlord provided a “pre-renovation hazardous materials inspection report” (the Report) which indicated that asbestos was presumed to be in the grout, mortar, joint compound, ceiling, flooring, and acoustic undercoating of the sink.

This report briefly addressed whether or not mold was located in the rental unit. It states:

Signs of moisture and water leaks are observed causing mold growth in some areas of the unit. Areas in the bathroom and kitchen were observed to have detreating materials and potential mold growth period suspect mold growth must be presumed throughout the building and may be hidden behind walls, floors, and ceilings.

The landlord did not conduct an air quality test to determine if there is any airborne mold.

The landlord called a contractor (JS) who would be renovating the rental unit if the landlord’s application is successful as a witness. He testified that once the rental unit was vacated by the tenant, and the asbestos remediation was completed, he would enter the rental unit and start removing the drywall throughout to “see if mold” was present. On cross-examination, he testified that he was in the rental unit a year prior, and saw “lots of decay” and saw that the “shower as falling apart”. He testified that he did not know if there was any mold behind the drywall, but did know that there was mold “in the shower”. He did not comment whether this was surface mold or mold in the drywall. He did not touch the walls of the shower and could not say whether the walls were spongy, as MO had testified. He testified that he did not do any air quality testing for mold.

The landlord also called the asbestos remediator (RM) as a witness. He testified that there is asbestos in the flooring and drywall but was unable to say whether or how deep the mold goes in the walls. He testified that the rental unit looks “pretty bad” however he testified that he had never been inside the rental unit. He stated that his opinions about the asbestos were based on the Report and his opinion on the presence of mold was based on photographs shown to him by the landlord.

The focus of the landlord's submissions related to the presence of mold and asbestos in the rental unit as the reason the renovation was required. However, MO briefly mentioned that the wiring in the rental unit was original to the building and needed to be replaced. The landlord provided a single photo of a portion of the electrical system, which MO says show that the electrical system is "knob and tube wiring". The landlord did not provide any evidence as to the suitability of such wiring or the need to replace it.

The tenant denied that there was any issue with mold in the rental unit. He denied that the bathroom walls were soft or spongy, or that there is any smell of mold in the rental unit. He did concede that there could be "a little bit" of surface mold in the bathroom resulting from inadequate ventilation. He testified that the stains on the bathtub were the result of a leaky faucet and were not mold.

The tenant denied that there was any mold under the kitchen sink. He testified that there was a small leak under the sink, which he has requested to be repaired, but that it does not cause any mold, as he places a bucket under it, which he drains frequently.

The tenant testified that he does not have any concerns about living in the rental unit and feels that it is habitable and safe. He stated that it is old and out of date, but argued that this is not sufficient basis to evict him so it can be renovated.

The tenant submitted a number of photographs of the rental unit into evidence, none of which show any mold. However, these photographs do not include the portions of the bathtub or the area underneath the kitchen sink shown in the landlord's photos, so I cannot conclude that these photos demonstrate that the landlord's photos are inaccurate.

The parties made lengthy submissions on several other topics (what permits are required, the method and length of the proposed renovations, and the tenant's connection to the community). However, for the purposes of this application it is not necessary for me to recount these submissions.

Analysis

Residential Tenancy Branch (RTB) Policy Guideline 2B states that section 49.2 of the Act allows a landlord to apply for an order to end the tenancy and an order of possession if they can prove that all of the following apply:

- a) the landlord has all the necessary permits and approvals required by law and intends in good faith to renovate or repair the rental unit(s)

- b) the renovations or repairs require the unit(s) to be vacant
- c) the renovations or repairs are necessary to prolong or sustain the use of the rental unit(s) or the building in which the rental unit(s) are located
- d) the only reasonable way to achieve the necessary vacancy is to end the tenancy agreement

Per RTB Rule of Procedure 6.6 The landlord bears the onus to prove all four of these factors apply. If even one does not, then the application must be dismissed. Rule 6.6 states that the landlord must prove its claims on a balance of probabilities, or more likely than not true.

For the following reasons, I find that the landlord has failed to establish that the proposed renovation is necessary to prolong or sustain the use of the rental unit.

The reasons for the proposed renovations put forth by the landlord are the presence of mold and asbestos in the rental unit as well as the inadequate electrical system. Based on the evidence provided by the landlord, I do not find that that the landlord has established that any of these individually, or all three taken together, are necessary to prolong the use of the rental unit or residential property.

While I accept that the rental unit uses outdated wiring, there is nothing in evidence (such as a report from an electrician) to show that it needs to be replaced or that is necessary to replace the wiring to prolong or sustain the use of the rental unit.

Additionally, based on the Report and RM's testimony, I accept that there is a significant amount of asbestos throughout the rental unit and that the rental unit would need to be vacant to remove the asbestos. However, there is nothing to suggest that the asbestos is airborne or by itself poses any danger to the tenant or other occupants of the residential property. Rather, I understand that if it is left undisturbed, there is no need to remediate it. The only reason the rental unit would need to be remediated for asbestos is if it is "gutted" to address the alleged mold problem.

As such, I find that the asbestos remediation is a precondition of addressing the mold issue, as opposed to an end in and of itself. Accordingly, I do not find it is more likely than not that the removal of the asbestos is required to prolong or sustain the use of the rental unit.

Based on the testimony of MO, I find that the ultimate reason for for the landlord wanting vacant possession of the rental unit is so that it can "gut" the rental unit down to

the studs in order to remove all material damaged by mold. I accept, should the rental unit be inundated with mold as alleged by MO, that vacant possession of the rental unit would be required to full remove it (as per page 10 of Policy Guideline 2B).

However, the landlord has not produced sufficient evidence to satisfy me that the rental unit is so infested with mold as to warrant the proposed renovation. There is little in the way of documentary evidence to support MO's testimony as to amount of mold in the rental unit. Such evidence should have been relatively simple to obtain (an air quality test for mold, a written report from a contractor or inspector as to the extent of mold damage in the rental unit setting out the precise locations and the methodology used, video of the "spongey" bathroom wall, for example).

The documentary evidence does not show that mold is throughout the rental unit. Rather, the photographs show that there is mold on the backside of the drywall in the bathroom. The photos of the bathtub and under the sink do not persuade me it is more likely than not that the nearby drywall is saturated with mold. JS's testimony was not sufficiently specific for me to conclude that the entire rental unit needs to be gutted to address the mold issue. There is no documentary evidence to suggest that mold is present in the rental unit outside of the bathroom or kitchen.

The Report briefly discusses the presence of mold in the rental unit, but only states that areas of the bathroom and kitchen were observed to have potential mold growth, and that the presence of mold was presumed and may be hidden behind walls, floors, and ceilings. It does not set out how the author came to this conclusion. This lack of specificity coupled with the uncertain nature of the language causes me to assign little evidentiary weight to the Report as it relates to the presence of mold in the rental unit.

Based on the insufficiency of the evidence provided by the landlord, I cannot find that it is more likely than not the proposed renovations are necessary to prolong or sustain the use of the rental unit. As such, I find that the landlord has failed to satisfy one of the required criteria set out at section 49.2 of the Act.

Accordingly, I dismiss the landlord's application without leave to reapply.

Conclusion

The landlord's application is dismissed 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: January 3, 2024

Residential Tenancy Branch