Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding KENSINGTON COURT and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, RR, ERP, RP, OLC, OT, FFT

Introduction

This hearing was convened on May 28, 2024 by way of conference call concerning an application made by the tenant seeking the following relief:

- a monetary order for money owed or compensation for damage or loss under the *Residential Tenancy Act*, regulation or tenancy agreement;
- an order reducing rent for repairs, services or facilities agreed upon but not provided;
- an order that the landlord make emergency repairs for health or safety reasons;
- an order that the landlord make repairs to the rental unit or property;
- an order that the landlord comply with the *Act*, regulation or tenancy agreement; and
- to recover the filing fee from the landlord for the cost of the application.

The tenant and an agent for the landlord attended the hearing and the tenant was accompanied by an assistant. The tenant and the tenant's assistant and the landlord's agent each gave affirmed testimony and the parties were given the opportunity to question each other.

The hearing was originally scheduled for May 13, 2024, joined to be heard with the landlord's application, however the landlord did not complete the application and on May 13, 2024 I dismissed it without leave to reapply. I also ordered that the hearing be adjourned to May 28, 2024 and that the tenant to submit all evidence to the landlord with the exception of an Asbestos Report, Decision of a previous Arbitration and the tenant's Monetary Order Worksheet, by email, with the consent of the landlord's agent, and that no new evidence except emails referred to at the May 13, 2024 hearing will be accepted. My Interim Decision was provided to the parties after the first scheduled date.

The landlord has not provided any evidence, and no new evidence has been provided by the tenant. No other issues with respect to service or delivery of documents or evidence were raised, and all evidence of the tenant has been reviewed and the evidence I find relevant to the application is considered in this Decision.

Issue(s) to be Decided

- Has the tenant established a monetary claim as against the landlord for money owed or compensation for damage or loss under the *Residential Tenancy Act,* regulation or tenancy agreement, and more specifically for loss of use of the rental unit?
- Has the tenant established that rent should be reduced for repairs, services or facilities agreed upon but not provided?
- Has the tenant established that the landlord should be ordered to make emergency repairs for health or safety reasons?
- Has the tenant established that the landlord should be ordered to make repairs to the rental unit or property, specifically full repair to the damaged rental unit?
- Should the landlord be ordered to comply with the *Act*, regulation or tenancy agreement?
- Should the tenant recover the filing fee from the landlord?

Background and Evidence

The tenant's assistant testified first in order to provide affirmed testimony independently. This month-to-month tenancy began on April 1, 2010 and the tenant still resides in the rental unit. Rent was originally $795.00 payable on the 1st day of each month, which has been increased over time and is currently $924.25 per month, and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenant in the amount of $397.50 as well as a pet damage deposit in the amount of $200.00, both of which are still held in trust by the landlord. The rental unit is an apartment on the 2nd floor of a 3-story apartment building. The landlord does not reside on the rental property. A copy of the tenancy agreement has been provided for this hearing.

The tenant's assistant further testified that a flood occurred by an upper level tenant, and the landlord gave this tenant a Notice of Frustrated Tenancy. There was an expedited hearing on April 15, 2024 and a resulting Decision was made on April 17, 2024, and the landlord's application was dismissed without leave to reapply. Since

then, no notice of any kind was issued by the landlord, and the tenant continues to live out of suitcases waiting for something to happen.

The landlord treats the tenancy as frustrated and has refused to deal with repairs. The tenant has moved all belongings to a storage unit, except for personal items.

The flooding has damaged the tenant's rental unit, which is being treated as identical to the damage in the unit that flooded. The landlord wants to strip out all flooring, ceilings, cupboards and walls. The Decision dated April 17, 2024 states that is not necessary. The tenant has tried to negotiate but the landlord insists that the tenant has abandoned. That is not true. Nothing has happened from the landlord to move the process forward.

Four units suffered damage; 2 moved out, one of which was a previous eviction, and the third did not move out, and the church offices below did not receive an eviction notice.

The tenant is a 71 year old lady, or older, and has no bedroom, which is not acceptable. The tenant just wants some progress. The tenant has moved everything out to facilitate the repairs and has written numerous letters, but the landlord wants to renovate all apartments at once. However it is not a frustrated tenancy, only a frustrated "renoviction."

The tenant has provided a Monetary Order Worksheet setting out the following claims totalling $11,569.49:

- $845.00 for packing contents;
- $551.97 for transportation and storage for March, 2024;
- $172.52 for storage for April, 2024; and
- $10,000.00 for loss of quiet enjoyment

The tenant's assistant also testified that a community effort was made, and the tenant paid $600.00 for packing and moving the tenant's items at a cost of $10.00 per hour. The tenant also claims the cost of accommodation during renovations, which have not yet started, but is a "place-holder" until repairs are completed.

With respect to the claim for loss of quiet enjoyment the landlord's assistant testified that the tenant has not been able to use her rental unit, and continues to pay rent, but nothing has happened. The tenant wants the rent back that was paid to the landlord from January 13, 2024 to May 31, 202, being 4 ½ months at $924.25, which equals $4,159.12.

The tenant's assistant has tried to negotiate with the landlord, however at one point the property manager told the tenant's assistant that he would "have her out in 24 hours," which frightened the tenant's assistant. The same thing was said to the tenant.

The tenant testified that she is 77 years old and has lived in the rental unit for 14 years. The tenant has heart issues, crippling arthritis and many ailments that the tenant sees a physician for.

The tenant further testified that there are currently 4 breaches in the drywall, 2 of which existed prior to the flooding from a previous flood caused by a previous tenant in the upper level. This flooding which occurred in January, 2024 is the same or more.

The landlord testified that from the beginning of the flood, and complying with the insurance company and a contractor the landlord is trying to control the situation due to potential mold under the carpet, flooring and drywall. The landlord gave a letter to all tenants affected. Three residential and 2 commercial units were affected.

The rental unit has not tested positive for asbestos, but the unit needs to be contained completely and the tenant can't stay there and the landlord has told the tenant that; it's not safe.

Drywall was flooded, and contractors were hoping to do all units at once. The other 2 had to be stripped completely, not just patching; they have to see the extent of the damage in there. During that time, the rental unit was packed with floor to ceiling contents from the past, and the landlord told the tenant that the landlord needs access, and an agent was helping the tenant to get the unit clear. The landlord couldn't get the contractor to give an update with respect to the work after the previous hearing because the landlord's insurance company decided to work with another contractor, and the landlord is now waiting.

All remediation was to be done together, which is not easy and the previous Arbitrator was understanding. The landlord understands that the tenant can leave and come back. The landlord is not asking for the tenant to pay rent while she pays for her own alternative accommodation. The work was pushed to March, 2024 because the tenant said she needed more time with the tenant's assistant, and the landlord thought the tenant was going to go.

The landlord is trying to accommodate the tenant, but can only do so much as a landlord with the guidance from the Residential Tenancy Branch. The landlord is not trying to push the tenant out to the street.

The landlord is now trying to obey the ruling from the previous hearing and come up with a strategy about when the rental unit could be entered so that the tenant can move back in. Since it's a joint insurance claim, all has to be approved by the insurance company. The hold-up was explained, the rental unit needs to be contained for asbestos because it will

be airborne and needs to be controlled, and the landlord won't know the extent until the walls are opened. The presence of asbestos has been confirmed. The previous facilitator didn't understand that extent. The landlord couldn't get an air blower in, due to the confirmed presence of asbestos. The landlord can't disprove the tenant's monetary claim.

The rental unit was fully packed, and since the landlord was not able to do what is planned due to this tenant, the insurance probably won't pay the landlord for damages. The landlord wants to get in there and get things done, but can't.

When asked if the building manager passed on information that the contractor said he could do the entire renovation in 2 months, the landlord testified that he heard it during mediation, and that's coming from the contractor's point of view, but the work needs to get done. The presence of asbestos is enough for the landlord to know that it needs to be air-tight; opening the drywall completely to see the extent of damage. The entire unit needs to be contained, but does not know the timeline. There is no problem with the un-breached drywall. The landlord wants to do a complete renovation, and there is no evidence of flooring needing to be replaced. It is not necessary to do the entire unit.

At the end of the hearing, the landlord testified that the lower level of the building is commercial and a different situation. Renovation was done after 1990 and the drywall was tested and no asbestos was found. The tenant's agent yelled, "No, it was not!"

Analysis

A landlord is required to provide and maintain rental property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location, makes it suitable for occupation by a tenant.

The *Residential Tenancy Act* also specifies how a tenancy ends. In this case, the tenancy has not ended, the tenant still occupies the rental unit, and continues to pay the rent.

I accept the undisputed testimony that the landlord continues to treat this as a frustrated tenancy, rather than starting on the repairs.

I have also reviewed the Asbestos Report, which shows that, "Building materials or products suspected of containing hazardous materials were identified, logged and, where necessary, sampled and analyzed to confirm the presence or absence of hazardous materials." Visually investigations were for silica, mercury, hantavirus, arsenic, radioactive materials, PCB's, mold, ODS, Formaldehyde, oil tanks and

collection of samples for building materials that may contain asbestos, as well as paint samples for lead content. It also states that the building was built pre 1990, and the parameters of the assessment area are Units 1A, 1B, 201, 202 and 302, with no limitations in the assessment area. Samples 1 – 11 are asbestos containing, but no silica or mercury, and all samples for lead are within the allowable limit. No other hazardous materials show in the report.

The report also states that: "Please Note – Due to results on all hazardous materials and their condition, the home is considered to be safe and free of contaminants and/or risk of immediate exposure," but is assumed to contain asbestos with 2% Chrysotile in the ceiling and drywall, and 30% in the linoleum, and that the WorkSafeBC limit is 0.5% and any future renovations must adhere to the regulations. It also states: "The asbestos containing materials are in good condition and only pose a risk if disturbed by renovation or demolition where fibers can be released and airborne."

The evidence also indicates that the tenant, or assistant, notified the landlord that the tenant is willing to vacate for the purpose of remediating breaches, but requests that the landlord be required to remedy those as opposed to renovating the entire unit.

The Decision of the Residential Tenancy Branch dated April 17, 2024 states that: "The Tenant is reminded that if they want to preserve their tenancy, they must find other temporary accommodation at their own cost, during the demo/renovation period."

In this case, the tenant has applied for monetary compensation for the landlord's failure to maintain the rental unit, and related expenses.

As a result of the evidence and testimony, I find as follows:

- **$845.00** for packing contents of the rental unit: The tenant has provided a signed written statement from a person to establish that amount, and I allow the claim.
- $551.97 for storage for March: The invoice provided by the tenant includes a fuel charge of $36.75, a lock costing $19.61, a security deposit of $125.00, $35.69 for rent for February 24 to February 29, 2024, a delivery charge of $162.40 and $172.52 rent for March 1 to March 31, 2024. The security deposit will presumably be returned to the tenant, and therefore cannot expect the landlord to pay for that. I find that the tenant has established the claim with the exception of the security deposit for a total of **$426.97.**
- **$172.52** for storage for April: The tenant has provided an invoice in that amount, and I find that the tenant has established that claim;
- $10,000.00 loss of quiet enjoyment and bad faith: The landlord attempted to obtain an order of possession for a frustrated tenancy, which was not successful.

> I find this to be more of a “reno-viction” rather than a “frustrated tenancy.” It has already been determined that a full renovation is not necessary. A tenant cannot sue a landlord for the attempt, however telling the tenant that the landlord would have the tenant removed within 24 hours no doubt caused the tenant to suffer damages. I am also satisfied that the tenant has not had full use of the rental unit since the flooding occurred on January 13, 2024, but has continued to pay rent in the amount of $924.25 per month. I find that the tenant should be entitled to recover that from the landlord, being $536.66 ($924.25 / 31 days in January = $29.81 per day x 18 days = $536.66), plus $924.25 for each of the months February, March, April, May and June, 2024, which amounts to $4,621.25, for a total rent reimbursement of $5,157.91. I also find that the tenant has suffered damages equivalent of one month’s rent for the threat of having the tenant removed within 24 hours, or $924.25, bringing the total for loss of quiet enjoyment and bad faith to **$6,082.16.**

Having found that the tenant has established a claim of $7,526.65, the tenant is also entitled to recover the $100.00 filing fee from the landlord. I grant a monetary order in favour of the tenant in the amount of $7,626.65. The landlord must be served with the order, which may be filed in the Provincial Court of British Columbia, Small Claims division and enforced as an order of that Court.

There is no question in my mind that it is not safe for the tenant to remain in the rental unit during the remedial period for asbestos. The tenant has done nothing wrong, but has in fact mitigated any damage or loss suffered by removing all items from the rental unit. I order the landlord to complete the necessary repairs as soon as possible, and that the tenant be permitted to move back into the rental unit once repairs are completed. I further order that the tenant will not be required to pay any rent to the landlord until the month following the month that the tenant is able to move back in.

I further order that the landlord reimburse the tenant for any storage fees beyond April, 2024 in the amount of $172.50 for each month.

Conclusion

For the reasons set out above, I hereby grant a monetary order in favour of the tenant as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of $7,626.65.

I further order the landlord to make the necessary repairs to the rental unit, and that the tenant be permitted to move back in once completed.

I further order that the tenant will not be required to pay rent until the month following the month that the tenant is able to move back in.

I further order that the landlord pay for all storage fees charged to the tenant from May, 2024 until the tenant is able to move back in.

This order is final and binding and may be enforced.

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 04, 2024

Residential Tenancy Branch