Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: MNDC, ERP, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for a monetary order for money owed or compensation for damage or loss under the Residential Tenancy Act, (the Act), and an order to compel the landlord to make emergency repairs for health or safety reasons. Both the tenant and landlord were represented and each gave affirmed testimony in turn.

Preliminary Issue(s)

At the commencement of the hearing an agent of the landlord, (advised that he would be representing the landlord, (owner/landlord), at the hearing because the owner/landlord was incapacitated for medical reasons. The owner/landlord's wife also appeared and stated that she would be present as an observer. All of the parties were then affirmed and hearing proceeded with testimony from both parties.

However, at one point later on during the proceedings, the agent, (hereafter referred to as "the landlord") initiated a request for adjournment on the basis that the there were some documents that the landlord should have submitted into evidence. The landlord stated that he needed the chance to send in and serve this evidence to defend against the tenant's claim. The landlord also pointed out that the fact that the owner/landlord was ill prevented him from attending or submitting evidence and felt that should warrant an adjournment.

Analysis – Respondent's Request for Adjournment

Rule 6.1 of the Rules of Procedure states that the Residential Tenancy Branch will reschedule a dispute resolution proceeding if "*written consent from both the applicant and the respondent is received by the Residential Tenancy Branch before noon at least three (3) business days before the scheduled date for the dispute resolution proceeding*."

In some circumstances proceedings can be adjourned after the hearing has commenced. However, the Rules of Procedure contain a mandatory requirement that the Dispute Resolution Officer must look at the oral or written submissions of the parties; consider whether the purpose for which the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1 [objective and purpose]; consider whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether a party had sufficient notice of the dispute resolution proceeding; weigh the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and assess the possible prejudice to each party.

In this instance, the tenant's application was made on August 29, 2008. I determined that the landlord, or agents of the landlord, had been provided with a fair opportunity to make evidentiary submissions or to contact the other party requesting an adjournment based on medical reasons prior to the hearing, having had over 3 weeks to do so. I note that the landlord had never approached the applicant in regards to the need for an adjournment.

In any case the owner/landlord was represented by a party having, by his own testimony, knowledge of the facts and also in attendance was a second party who had some connection to the tenancy. I found that delaying the hearing further, particularly for the purpose of allowing the respondent a second opportunity to submit evidence that

could have been served on the other party and placed into evidence in advance of the hearing, would be prejudicial to the applicant.

Moreover, I found that the particular evidence in question, as described, by the landlord related to affiliated damages being alleged by the landlord against the tenant. I found that, while this data may be pertinent in an application by the landlord for a monetary claim against the tenant, it would not be particularly relevant as a defence against the tenant's claim, even if the evidence was verified and accepted as true. This hearing was on the tenant's application. That being said, the landlord is at liberty to pursue a monetary claim against the tenant for damages that he alleges the tenant caused. But this must be done in a separate application for dispute resolution initiated by the landlord at which time the missing evidence could be seen as relevant and presented in support of the landlord's application.

Accordingly, I found that there was not sufficient justification under the Act and Rules of Procedure to support imposing an adjournment on the other party and the landlord's request for an adjournmentwas denied.

Issue(s) to be Decided for the Tenant's Application

The tenant was originally seeking compensation in the form of a retro-active rent abatement to compensate for devaluation of the tenancy due to a leaking roof, a future rent reduction for the same reason and an order to compel the landlord to complete emergency repairs to the roof. However, at the commencement of the hearing, the parties advised that the roof has recently been completely repaired. Therefore the portion of the application relating to an order for a future rent reduction and for emergency repairs was dismissed. In regards to the tenant's remaining claim for a rent refund, the issues to be determined based on the testimony and the evidence are:

- Whether the tenant is entitled to monetary compensation under section 67 of the *Act* for damages or loss. This determination is dependant upon answers to the following questions:

    - Has the tenant submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing on a balance of probabilities that the tenant suffered a loss due to the landlord's neglect or failure to comply with the Act?

    - Has the tenant submitted proof that the specific amount being claimed in compensation, $450.00, is validly justified?

The burden of proof is on the Tenant.

Background and Evidence

The tenant submitted into evidence, a statement on the application that "*The landlord has been notified repeatedly of leaky roof and damage it has caused."* The tenant also submitted a written statement and 53 photographs showing damage to walls, window frames and ceilings of various rooms in the unit. The tenant testified that the tenants moved in to the unit in July 2006 and that by October 2006 it was evident that the roof was leaking by the fact that the glass shade on the overhead light in his son's bedroom had filled with water and that the re-painting of the daughter's room was ruined by water running down the wall and bubbling the paint. The tenant testified that leaks were evident in several areas of the unit every time it rained The tenant testified that he and the landlord had numerous discussions on this matter and the tenant even had the landlord come over to observe the situation on rainy days. However, the landlord took the position that the issue was due to "condensation" and suggested that the tenant could install some vents in the gables of the house. The tenant testified that he told the landlord that he was not willing to do this. The tenant testified that the leaking continued and he decided to put a tarp over the roof shingles to stop the water from getting in.

The tenant testified that he took this action because the landlord did not address the problem and the tenant felt it necessary to protect the comfort and safety of his family being that possessions were ruined and because mold was also an issue. The tenant testified that he presented the invoice for the tarp to the landlord and the landlord paid for the supplies. The tenant testified that this measure was somewhat successful, but that the effectiveness waned over time and the tarp had to be replaced. The tenant finally decided to make an application for dispute resolution to get the issue resolved. The tenant testified that the amount being claimed, $450.00, represents the equivalent of one-half a month's rent which the tenant feels is very fair compensation in light of what has been endured over the past two years. The tenant pointed out that there was no claim of compensation for property losses, although this did occur.

The landlord testified that the tenant had created condensation in the unit by placing a hot-tub backed up against the wall directly under the eaves of the house. The landlord testified that the owner/landlord was of the opinion that the water was not being caused by a a leaky roof, but internal condensation, and as a professional tradesperson, he would be in a position to assess this. When asked what actions the landlord took to address the condensation issue, the landlord stated that this type of water problem is common and can be addressed by merely opening windows to allow the moisture out.

The landlord testified that the tenant's own actions caused the roof to leak because of the manner in which the tenant fastened the tarp to the roof with screws driven into the functional shingles. The landlord testified that inspection reports from the roofing contractors confirm this to be the case. In fact, according to the landlord, the photographs submitted into evidence by the tenant actually show leakage that was directly caused by the tenant himself. The landlord testified that even if there was originally a leak in the roof, it was very minor and should have been properly addressed by patching it rather than ruining the roof by putting a tarp over it with boards and screws, as the tenant chose to do. In answer to why the landlord did not take the responsibility to pursue this course of action and properly patch the roof at the time, the

explanation offered by the landlord was that this was because the tenant had not let the landlord know in writing that the problem was due to a leak in the roof. The landlord testified that no written notice was given to inform the landlord about the continuing roof leaks until very recently and stated that when this occurred, the roof was repaired immediately.

The landlord testified the fact that the landlord had reimbursed the tenant for the tarp and supplies did not necessarily indicate that the owner/landlord was aware of a roof leak nor that he was in agreement with this method of addressing the moisture problem. The landlord testified that the owner/landlord was always very amenable to the tenant's requests.

The landlord's wife gave testimony stating that the landlord/owner had specifically told the tenant not to put a tarp on the roof. However, she was unable to testify what alternative measure was proposed by the owner/landlord to stem the moisture problems.

The landlord testified that the tenant should be held fully responsible for the roof damage that the tenant caused in fastening the tarp in the manner done. I must point out, however, that a monetary claim by the landlord for damages against the tenant can not be heard during these proceedings. As mentioned earlier in the decision, this hearing was convened to deal with the tenant's application and there is no authority under the Act during these proceedings to hear the respondent's claims.

Analysis

Section 32(1) of the Act states that a landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and that renders it suitable for occupation by a tenant and section 32(5) provides that these obligations are in effect whether or not a

tenant knew of a breach by the landlord at the time of entering into the tenancy agreement.

Section 33(1) defines "emergency repairs" as repairs that are urgent and necessary for the health or safety of anyone or for the preservation or use of residential property. The act specifically identifies “those made for the purpose of repairing major leaks in the roof” as an emergency repair.

Under the Act, a tenant has the right to have emergency repairs made when all of the following conditions are met:

> (a) emergency repairs are needed;
>
> (b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;
>
> (c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

The Act also states that a landlord may take over completion of an emergency repair at any time and that a landlord must reimburse a tenant for amounts paid for emergency repairs.

In this situation, I find that the verbal notification early in the tenancy was sufficient notification to the landlord and the landlord should have taken some action pursuant to the landlord’s obligation under section 33 of the Act. Both participant’s testimony indicates that this was not done.

Even if the landlord was in doubt about the emergency nature of the tenant’s complaint, the landlord still had an obligation under section 32 of the Act. This is applicable whether or not the matter related to a small roof leak or condensation from any source

or cause, I find that a tenant is not required to live in a damp environment whatever the reason may be. In this regard I find that, although the landlord suggested the installation of vents, the landlord simply failed to act or take any responsibility that has been assigned to the landlord by law. I also make a finding of fact in regards to the roof that, regardless of whether or not the tenant's actions in covering the roof with the tarp added more damage to the roof, this roof was already in a state of significant and long-standing disrepair, the extent of which remains open to speculation.

The landlord seems to be attempting to excuse the landlord's serious contravention of the Act by pointing out that when the tenant took matters into his own hands, it was an inadequate job, a botched effort, that only succeeded in causing more damage. I find that, whether or not this is true, this fact does not serve to nullify the landlord's clear failure to comply with the Act. Whatever the quality of the tenant's temporary repair job, the landlord was still accountable and had an obligation under the Act not to subject a tenant to conditions that are simply not permitted by legislation to exist in a tenancy relationship. Moreover, I find that the tenant's actions were a direct result of the landlord's inaction. The tenant's testimony that his only aim in tarping the roof was be able to allow his family to live in a dry house, is credible. I reject the landlord's allegation that the applicant's motive in pursuing this matter to dispute resolution is to profit from the situation. Whatever else is under debate, it is an undisputed fact that water problems had adversely affected the tenant and his family for almost the entire duration of this tenancy.

In regards to an Applicant's right to claim damages from the another party, Section 7 of the Act states that if a landlord or tenant fails to 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. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the Applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the tenant, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred

Based on the testimony of the parties, I find that the tenant has fully proven that there was a loss of the value of the tenancy and that this stemmed directly from the respondent's failure to comply with the Act. In terms of the amount being claimed, I find

this claim of $450.00 to be modest compensation. It breaks down to $18.75 per month, which represents a more than reasonable rent reduction of approximately two percent. In terms of the tenant meeting the requirement to try and mitigate the losses, I find that, whether particularly effective or not, the tenant made every effort to work around the leaky roof problem by putting up a tarp in an attempt to make his home livable and avoid further water damage and loss to the tenant. Given the above, I accept tenant's claim for compensation. .

Conclusion

Based on the testimony and evidence presented by both parties during these proceedings I find that the tenant is entitled to monetary compensation in the amount of $500.00, comprised of $450.00 for the loss of peaceful enjoyment and devaluation of the tenancy due to the chronic leaky roof problems and the $50.00 paid by the tenant for this application. I hereby issue a monetary order, in favour of the tenant, for $500.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

September 25, 2008 _____