



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes CNC, MNR, MNDC, ERP, RR, FF, O

Introduction

This hearing dealt with the tenant's application to cancel a Notice to End Tenancy; for a Monetary Order for emergency repairs and damage or loss under the Act, regulations or tenancy agreement; for Orders for emergency repairs; authorization to reduce rent; recovery of the filing fee and other issues. Both parties appeared at the hearing and were provided the opportunity to make submissions, in writing and orally, and to respond to the submissions of the other party.

At the commencement of the hearing the tenant testified that she has vacated the rental unit and has found new living accommodation. I determined that it was no longer necessary to consider the request to cancel a Notice to End Tenancy, make orders for repairs, or a rent reduction. Rather, the remainder of this hearing dealt with the tenant's monetary claims only.

On a procedural note, the tenant had initially requested compensation of \$5,949.90 from the landlord; however, in a subsequent written submission the tenant reduced the claim to \$2,469.46. This hearing dealt with the tenant's reduced monetary claim of \$2,469.46.

Issue(s) to be Decided

Has the tenant established an entitlement to compensation from the landlord for damage or loss under the Act, regulations or tenancy agreement?

Background and Evidence

The tenancy commenced approximately five years ago and the tenant was required to pay rent of \$825.00 on the 1st day of every month, plus a portion of utilities. The rental unit is a basement suite and the tenant lived in the unit with her two dogs.

On November 29, 2010 storm water infiltrated the two bedrooms in the rental unit (herein referred to as the first flood). Shortly before this storm the landlord had roof work done on the residential property including work on the rain litres. The landlord

responded by attending the property with the roofing contractor and digging trenches in an attempt to divert rain water away from the structure. The tenant moved her possessions out of the bedrooms and into the living area of the rental unit. The tenant started sleeping in the living room.

On December 12, 2010 more storm water seeped into the unit and this time the living area was also affected (herein referred to as the second flood). The landlord called in his insurance company. Restoration work commenced on the rental unit and a contractor was called in to deal with drainage problems on the exterior of the house. The tenant stored some of her belongings in the carport and the landlord \$691.94 to the tenant for December's rent.

The tenant housed her dogs in a kennel starting December 15, 2010 to facilitate the restoration work. The tenant ceased residing in the rental unit December 17, 2010 and the tenant removed her possessions at the end of December 2010. The tenant did not carry tenant's insurance.

The tenant is seeking compensation from the landlord on the basis the landlord was negligent in dealing with obvious flooding problems. The tenant described how flooding in the backyard worsened over the years yet the landlord did not take action to improve drainage. The tenant submitted that at the time of the first flood the cause of the excess water was obviously the lack of drainage for the storm water yet the landlord did not take sufficient action to deal with drainage issues until after the second flood. The tenant acknowledged that the landlord did dig some trenches after the first flood and had the roofer attend the property but this response was inadequate to prevent the second flood.

The tenant is seeking compensation for the following items:

Description	Reason	Amount
Damaged mattress	Mattress damaged by second flood	725.48
Kennel fees	Dogs in kennel December 15 – 31, 2010	856.82
Packing	Professional packers hired to pack tenant's possessions December 29, 2010	504.00
Filing fee		100.00
Photos for dispute		50.10
Rubbish removal	Disposal of damaged property	<u>100.00</u>
TOTAL CLAIM		\$ 2,469.46

Upon review of the tenant's monetary claims, the tenant provided the following explanations, in brief. The landlord only refunded to her the portion of rent covered by the landlord's insurance; however, the tenant experienced loss of use of the rental unit since the first flood. The dogs were put in a kennel with the understanding the landlord would pay for the kennel costs for three days. The mattress was damaged when it was stored in the living room after the first flood and would not have been damaged if the landlord took sufficient steps to remedy the flooding problem after the first flood. The mattress was approximately six years old. Packers were hired because the tenant's possessions were being moved around by the restoration crew and the tenant wanted to protect her possessions from damage.

The landlord made the following submissions. The landlord has owned the property for approximately 15 years and had not had a prior issue with water infiltration. The landlord received a letter from the tenant December 4, 2010 confirming a conversation the parties had that day about the first flood. In the letter the tenant acknowledges that the flooding was thought, at that time, to be caused by work performed by the roofing contractors. The landlord had the roofing contractor attend the property and trenches were dug in an effort to divert storm water away from the house. After the first flood the landlord determined the rental unit was drying out and the water was no longer infiltrating the rental unit. The landlord proceeded to make arrangements to have the bedroom carpets replaced without making an insurance claim. Then the second flood occurred on December 12, 2010 and the landlord determined a larger problem existed, made an insurance claim, a restoration crew and a drainage contractor were brought in.

Upon enquiry, the landlord testified as follows. The property has flat land and over the years neighbouring properties and the road have changed so that the property is lower than those adjacent properties. The rainfall on November 29 and December 12 was extraordinary. The drainage contractors began upgrading the drainage system on December 18 or 19 and now water that accumulates in the back yard is diverted to the street. The landlord acknowledged that there was discussion about putting the tenant's dogs in a kennel for three days but denies there was an agreement for the landlord to pay that cost. The tenant was offered use of the carport to store her items and could have placed her mattress in the carport instead of the living room.

The landlord submitted that the packers were hired by the tenant as she found a new place to live and was packing to move. The tenant was of the position she was evicted. I did hear evidence that a 1 Month Notice to End Tenancy for Cause had been issued to the tenant December 17, 2010; however, that Notice was initially disputed by the tenant in making this application.

The tenant provided a written submission of events, photographs and receipts as evidence for this hearing.

Analysis

Section 32 of the Act provides that a landlord has a statutory duty to provide and maintain a residential property so that it complies with health, safety and housing standards required by law.

Residential Tenancy Policy Guideline 16 provides for claims in damages. The guideline provides, in part,

Claims in Tort

A tort is a personal wrong caused either intentionally or unintentionally. An arbitrator may hear a claim in tort as long as it arises from a failure or obligation under the Legislation or the tenancy agreement. Failure to comply with the Legislation does not automatically give rise to a claim in tort. The Supreme Court of Canada decided that where there is a breach of a statutory duty, claims must be made under the law of negligence. In all cases the applicant must show that the respondent breached the care owed to him or her and that the loss claimed was a foreseeable result of the wrong.

[my emphasis added]

Where a rental unit is damaged by an unforeseen event, such as fire or flooding, it is upon the landlord to repair the rental unit and residential property. Tenant's insurance generally covers damages or loss a tenant may incur as a result of an unforeseen event such as fire or flood. Damage to a tenant's property or other losses, other than the loss of use of the rental unit, are not the responsibility of the landlord unless the landlord has been negligent in the duty owed to the tenant.

In light of the above, it is upon the tenant to show that the water infiltration in the rental unit was a result of the landlord's negligence. Negligence is the failure to exercise the degree of care considered reasonable under the circumstances, resulting in an unintended injury to another party. Accordingly, I have considered all of the evidence before me to determine whether the tenant has shown that the landlord acted unreasonably in addressing the water infiltration problem or the likelihood that water would infiltrate the residential property.

The majority of the tenant's monetary claims relate to damages or loss she suffered after the second flood. The tenant was of the position the landlord took insufficient and unreasonable action in dealing with the water infiltration problem after the first flood.

I have considered the submissions of both parties and I find as follows. Upon learning of the first flood the landlord and the landlord's roofer attended the property and began digging trenches in the backyard in an effort to divert water from the roof away from the house. Given there was recent roof work done to the house and no previous issues with water infiltration I do not find the landlord's actions to be unreasonable given the circumstances. I am satisfied the landlord made efforts to determine that the rental unit was drying and was not continuing to leak, including ordering or putting a deposit on new carpeting for the bedrooms. Given the diversion of roof water and the appearance that the rental unit was drying, I find the landlord had a reasonable expectation that the landlord's efforts to divert the roof water away from the house to be reasonable at that time. Only after the second flood was it evident that the landlord's efforts were not addressing the underlying problem.

Given my findings above, I do not find the tenant has proven negligence on part of the landlord and the tenant is not entitled to compensation for damaged possessions, packing and rubbish removal.

Policy guideline 16 also provides, in part,

Claim for Breach of Contract

Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. A landlord is expected to provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. If, on the other hand, the tenant is deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of an abatement of rent or a monetary award for the portion of the premises or property affected.

[my emphasis added]

It is undisputed that the tenant had lost use of the two bedrooms up until the second flood and this created diminished enjoyment of the remainder of the unit since items from the bedroom were stored in the living area. I am also satisfied that the tenant had greater loss of use of the rental unit after the second flood. The tenant has been

provided a partial rent abatement of \$691.94 for the month of December 2010. I calculate the partial refund to equal 26 days of rent meaning the tenant paid for five days of rent for the month of December 2010. Given the tenant was able to use a portion of the rental unit until she ceased residing in the unit December 17, 2010 I find the rent abatement already given to the tenant to be sufficient. Therefore, I make no further award for an abatement of rent for the month of December 2010.

I do not find the tenant entitled to recover kennel fees from the landlord as the tenant did not establish negligence on part of the landlord and because the tenant has already received a rent abatement for the period of time for which the dogs were in a kennel. However, I am reasonably satisfied that the tenant put the dogs in a kennel at the request or urging of the landlord or the landlord's insurance agent starting December 15, 2010 with the understanding a period of three days would be paid for by the landlord or his insurance. Without this assurance the tenant may have made alternative arrangements for boarding of the dogs and I award the tenant compensation for three days of boarding which I calculate to be \$151.20 based upon the kennel invoice.

I do not find sufficient evidence that there was an agreement for landlord to compensate the tenant for dog boarding in excess of three days. Therefore, I deny the remainder of the tenant's request for kennel fees.

The costs of providing photographs for this dispute resolution proceeding are not recoverable under the Act and I do not award the tenant any compensation for these costs.

As the tenant was marginally successful in this application I provide a proportionate award of the filing fee. The tenant's total award for kennel fees and a portion of the filing fee is \$155.00.

The tenant is provided a Monetary Order in the amount of \$155.00 to serve upon the landlord and enforce in Provincial Court (Small Claims) if necessary.

Conclusion

The tenant has been awarded \$155.00 and the tenant is provided a Monetary Order for this amount to serve upon the landlord.

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: February 9, 2011.

Residential Tenancy Branch