



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, MT, ERP, RP, MNDC, RR

Introduction

This hearing dealt with the tenant's application to cancel a Notice to End Tenancy for unpaid rent and more time to make the application; for Orders for repairs and emergency repairs; for a Monetary Order for damage or loss under the Act, regulations or tenancy agreement; for authorization to reduce rent payable for repairs not provided.

At the commencement of the hearing I determined that the landlord has made the necessary repairs and the tenant no longer requests Orders for repairs. Accordingly, the remainder of this decision deals with the Notice to End Tenancy and the tenant's request for compensation for the period of time repairs were not made.

Issue(s) to be Decided

1. Should the Notice to End Tenancy be upheld or cancelled?
2. Has the tenant established an entitlement to compensation for repairs not made?

Background and Evidence

The tenancy commenced June 1, 2010 and the tenant is required to pay rent of \$1,350.00 on the 1st day of every month.

Notice to End Tenancy for Unpaid Rent

On July 14, 2011 the landlord issued a 10 Day notice to End Tenancy for Unpaid Rent (the Notice) indicating the tenant failed to pay rent of \$1,350.00 on July 1, 2011. The tenant applied to dispute the Notice within the time limit required under the Act.

During the hearing the tenant acknowledged he did not pay the rent when it was due. The tenant submitted that he was served with only the 1st page of the Notice. The landlord stated the tenant would have been served with both pages of the Notice but acknowledged she was not the one who served the Notice. The person who served the Notice was not at the hearing. Nor did the landlord provide any other proof of service of

the Notice. I also noted in the landlord's evidence package that only the 1st page of the Notice was provided as evidence.

Repairs and request for compensation

The tenant submitted that he had three repair issues in his unit that the landlord did not address quickly or sufficiently and the tenant is seeking compensation of \$4,200.00 plus medication costs. The repair issues are:

1. Leaking pipe in wall

A pipe that carries rain water had been leaking behind the drywall in his bedroom closet. On May 29, 2011 the tenant moved a laundry hamper and noticed mould on the drywall. He notified the landlord via email who in turn sent someone to clean the carpet. The tenant insisted that the wall had to be cut open to determine the cause of the mould. The landlord's maintenance person did cut open the wall, and removed the carpet and baseboard.

The tenant was suffering from a sinus infection which he attributed to the mould in the bedroom closet. The tenant had to spend \$131.62 on prescription antibiotics that he is seeking to recover from the landlord.

The landlord did not repair the pipe or wall until mid-July 2011.

2. Broken toilet

The tenant's toilet stopped working near the end of June 2011 and he notified the maintenance man directly. The maintenance man advised the tenant a new toilet would need to be installed. The tenant left town for the July 1 long weekend as he could not use the toilet and was of the understanding the toilet would be working after the long weekend. Upon his return he discovered the toilet was still not working. The toilet was not fixed until July 11, 2011. During this time the tenant had to use a neighbour's bathroom.

3. Broken fridge

Starting on May 13, 2011 the tenant reported to the landlord that water was leaking in the fridge. The maintenance man and then a fridge technician attended the unit on a few occasions, adjusting the dial and defrosting the freezer with a hairdryer. The issue with the fridge was not resolved until late June.

The landlord provided the following responses to the tenant's claims:

1. Upon notification there was an issue with moisture in the bedroom closet the landlord's staff reacted immediately by removing drywall and carpet. The area had to dry out and the source of the water had to be determined. During the month of June the source of the leak was being investigated and assessed. No other units had issues with water leaking from the pipe. On June 13, 2011 the tenant was notified that they needed to access his unit to inspect the problem area. The tenant made accessing the unit more difficult by insisting he be present when the landlord accessed his unit. The repair was completed July 12, 2011.
2. The tenant waited 8 days to report the broken toilet to the landlord in writing as evidence by the tenant's email dated July 4, 2011. On July 11, 2011 a plumber attended the unit and removed an SOS pad from the toilet.
3. Upon notification of an issue with the fridge the maintenance staff attended the unit. Adjustments were made and the tenant was told to remove the clutter from on top of his fridge. The landlord was of the belief the fridge was working until another complaint was received. Every time the tenant complained of an issue the landlord took sufficient action.

In response to the landlord's submissions, the tenant denied refusing access to the landlord. The tenant acknowledged he wanted to be present when the landlord entered his unit but explained that he was easily reachable by phone and usually not far from home if the landlord called.

The tenant vehemently denied putting SOS pads or hair down the toilet. Rather, the tenant pointed to a previous drainage issue in the bathroom sink where a wad of grey hair was removed. The tenant suspects the grey hair was from the previous tenant.

The tenant also denied having excessive clutter on the fridge. The tenant submitted that the issue with the fridge appears to be that the freezer requires periodic defrosting as there has not been an issue since the freezer was defrosted.

Analysis

Upon consideration of the evidence before me, I provide the following reasons and findings.

Notice to End Tenancy

In order to end a tenancy for unpaid rent, the landlord must serve the tenant with a 10 Day Notice to End Tenancy in the approved form. The approved form is two pages and the second page contains important information for tenants who receive such a Notice. Failure to serve both pages is insufficient Notice to End Tenancy.

In this case it was in dispute as to whether both pages of the Notice to End Tenancy were served upon the tenant. Where service of a document comes into question, the party who served the document has the burden to prove what was served.

In the absence of testimony from the person who served the Notice or a sworn statement from that person, I find the landlord has not met the burden to prove both pages were served upon the tenant. Therefore, I am not satisfied that both pages of the Notice to End Tenancy were served upon the tenant and I find the Notice is invalid and of no effect.

In light of the above, the tenant's request to cancel the Notice is granted and the tenancy continues. The landlord is at liberty to issue another 10 Day Notice to the tenant and obtain the necessary proof of service for that Notice.

Repairs and request for compensation

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.

Negligence is the failure to exercise the degree of care considered reasonable under the circumstances, resulting in an unintended injury to another party.

Leaking pipe

I find insufficient evidence to conclude the landlord knew or ought to have known the drain pipe was leaking behind the wall of the rental unit or that mould was forming. I am satisfied that the landlord acted reasonably quickly in removing the mouldy drywall and baseboard. Thus, I am not satisfied that the leak or mould growth occurred due to negligence on part of the landlord.

Further, I find it reasonable that the landlord waited for rainfall to assess the origin of the problem and determine the repair required. I also find it reasonable that the wall cavity needed to be left open for a period of time in order to dry out. Thus, I do not find the landlord acted negligently in leaving the wall open while the investigation and drying process took place in June 2011. Nor do I find sufficient evidence that the tenant's medication costs are the result of negligence on part of the landlord.

In light of the above, the tenant is not entitled to recover damages related to damage to his personal property or medication costs. However, Residential Tenancy Policy Guideline 16 does provide that where a tenant suffers a loss of use of the rental unit, even if there has not been negligence on part of the landlord, the tenant may be entitled to damages. Upon review of the pictures, I am satisfied the tenant suffered a loss of use of closet space for approximately six weeks. I award the tenant compensation of \$150.00 for loss of use of closet space during this time.

Broken Toilet

Having heard there is only one toilet in the rental unit I find its function would be of significant importance to the tenant. The tenant also testified as to conversations he had with the maintenance man about the toilet before leaving town for the July 1 long weekend. Accordingly, I accept the tenant's testimony that he verbally informed the maintenance man about the plugged toilet before he left town for the Canada Day long weekend.

I find it reasonable that the tenant had an expectation that the landlord would take sufficient action to repair the toilet upon verbal notification to the maintenance man given the significance of a working toilet in a one-bathroom unit.

I find the tenant's expectation that the toilet would be repaired upon his return on July 4, 2011 to be reasonable. Therefore, I find the loss of use of the toilet between July 4, 2011 and July 11, 2011 to be unreasonably long. I provide the tenant an award of \$140.00 (\$20.00 x 7 days) for the unreasonable delay in having the toilet repaired.

I have rejected the landlord's position that the tenant may have been responsible for plugging the toilet. Given the previous issue with the bathroom sink being clogged with grey hair and the tenant's denial of flushing an SOS pad down the toilet, I find the landlord's position unsubstantiated. In any event, the cause of the plug does not exempt the landlord from making the repair in a timely manner.

Broken fridge

As evidence by the email dated May 14, 2011 I find the tenant complained of the fridge not working properly and I find the email dated June 4, 2011 shows that the tenant reports that it is working after a fridge technician was called to repair it. I make no award for compensation for this time period. However, on June 10, 2011 another email was sent to the landlord to advise that the fridge was not working again. The landlord responds June 13, 2011 via email but only speaks of the issue in the closet. On June 16, 2011 and June 21, 2011 the tenant complains of the fridge again and informs the landlord this is causing his groceries to be ruined.

I find there is a lack of documentary evidence showing the landlord's response to the tenant's written complaints about his fridge dated June 10, 2011; June 16, 2011 and June 21, 2011. It is unclear to me whether the landlord took any action to address the issue of the fridge upon receiving the June 10, 2011 complaint until it was finally repaired in late June 2011. Even if the landlord did take action I find that it was likely insufficient given there was a recent problem with the fridge. Therefore, I conclude that the tenant endured an improperly working fridge for an unreasonable length of time.

I award the tenant compensation for lack of a properly working fridge for one-half of the month of June 2011 in the amount of \$75.00.

Filing fee

I find the tenant's application has merit and I award the tenant the \$50.00 filing fee paid for this application.

By way of this decision, the tenant has been awarded compensation in the total amount of \$415.00. I hereby authorize the tenant to withhold \$415.00 from a subsequent month's rent in satisfaction of the total award granted to him with this decision.

Conclusion

The tenant has been awarded compensation in the amount of \$415.00 and the tenant is authorized to deduct that amount from a subsequent month's rent.

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: September 13, 2011.

Residential Tenancy Branch