Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, AS, RR, O, FF

Introduction

These two hearings dealt with the Tenant's Application for Dispute Resolution, seeking a monetary order for money owed or compensation under the Act or tenancy agreement, for an order to allow the Tenant to assign or sublet the rental unit, to allow the Tenant to reduce rent for repairs agreed upon but not provided, and to recover the filing fee for the Application.

The Tenant appeared, gave affirmed testimony and was provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me.

Legal Counsel C.D., appeared on behalf of the Respondents B.E. and the Estate of G.E.

Legal Counsel J.V. appeared on behalf of the Landlord T.S. aka T.E., and her spouse E.E.

Both Legal Counsel were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions to me.

No other Respondents appeared. The Tenant testified she served each of the Respondents personally or on their counsel, on October 6, 2011. I find that the Respondents have been duly served in accordance with the Act.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

Is the Tenant entitled to the monetary relief sought?
Who is the Landlord of the rental unit?

Background and Evidence

The Tenant testified that she rented the subject rental unit on August 1, 1996, from the Respondent J.E., and for much of the tenancy the Tenant believed that J.E. was the

Landlord. The monthly rent was $1,500.00 throughout the tenancy. The Tenant testified she vacated the rental unit on November 30, 2011.

The Tenant testified that she repaired, maintained and renovated the rental unit over the years of the tenancy, with the permission of J.E. The Tenant testified she would supply the labour and then deduct this, as well as the cost of materials, from the rent due to the Landlord. The Tenant states that she had discussed the possibility of purchasing the property with J.E. several times over the tenancy, and this is one of the reasons why she continued to live in the property despite its many deficiencies and the problems she encountered.

The Tenant testified that in August of 2009, the roof began to leak heavily. She spoke with J.E., who had a roofing company come out and do temporary repairs. The Tenant testified that the leaks stopped for a while, then returned and multiplied. She again spoke to J.E. The Tenant purchased tarps and placed these over the roof. Eventually, water found its way through the tarps and into the rental unit.

The Tenant submits that it was around the end of 2010 when she was informed by J.E. that the issue of ownership of the rental unit was in litigation before the Supreme Court of British Columbia.

Based on the evidence submitted, T.E., B.E. and the Estate of G.E. (the "Plaintiffs"), had claimed against J.E., E.E. and T.S. aka T.E., (The "Defendants"), that they were entitled to an interest in the subject property, as well as three other properties. These parties were all involved in the Supreme Court of British Columbia lawsuit, which then went to the Court of Appeal for British Columbia.

The Tenant testified and submitted evidence that when J.E. informed her there was litigation over the ownership of the property she agreed to wait until the litigation was over for the repairs. For example, in evidence both the Tenant and the Respondents submitted a copy of an affidavit the Tenant swore in January of 2011, for use in the Court of Appeal. The relevant extracts include:

> "I rent the entire [subject rental unit]. The monthly rent is $1500.00 per month, which I think is the market value for a house this age and state of disrepair with all its challenges and inconveniences."
>
> and,
>
> "Living here these past 15 years has been a challenge at times and with [J.E.'s] understanding and cooperation, I have accepted the deficiencies of this old house."
>
> [Reproduced as written.]

The Tenant explains in written submissions that,

> "More than two years ago, the roof began to leak heavily and roofing repairmen came and made a temporary patch and later tarps were applied. Over the last 2 years, [J.E.] asked if I could wait till the litigation that the property was involved in was decided. I agreed and then earlier this year [2011] he told me that it was in receivership and that I could expect the roof to be repaired."

The Tenant was also given a payment direction on where to provide the rent payments from an accountant appointed by the Legal Counsel involved in the Supreme Court action. The Tenant testified she did not know the accountant and thought the letter sent to her may have been some sort of fraud.

The Tenant testified she called the accountant and he explained to her his duties were to simply collect the rent for the Plaintiffs and Defendants. The Tenant testified that despite this she continued to make some of the rent payments in cash directly to J.E., even after speaking with the accountant. The Tenant further testified she did not pay rents for September or October, due to the fact she deducted repairs from the rents due.

The Tenant alleges that the accountant should have ensured the property was repaired or forced the Legal Counsel of the parties to ensure repairs.

In or about December of 2010, the Honourable Supreme Court Justice found in favour of the Plaintiffs, and found that the Plaintiffs had a 50% beneficial ownership interest in the subject rental unit and the three other properties. There was a Court of Appeal matter brought by the Defendants in which the Tenant provided the above mentioned affidavit. Eventually the Plaintiffs were successful.

The documents submitted in evidence indicate that in August of 2011, the Plaintiffs in the Supreme Court action were seeking conduct of sale of the subject rental unit property because it had been found that the Defendants had breached their fiduciary duties to the plaintiffs and it was alleged they could not be trusted with sole conduct of sale of the properties.

The Tenant testified she was served with documents for the sale of the rental unit property on or about August 20, 2011. In her written submissions, the Tenant characterizes these documents as an intentional eviction threat against her. She alleged that the Plaintiffs neglected their responsibilities towards the subject rental unit and are attempting to frustrate the renters in these properties and force them to abandon or move out of the properties.

The Tenant testified she was frustrated throughout the litigation as the Plaintiffs and the Defendants did not communicate with her, or keep her informed as to what was going on.

Following service of the court ordered sale petition documents on her, in August of 2011, the Tenant testified she contacted the Residential Tenancy Branch to learn about

her rights. Following this, she wrote a letter to the Respondents on or about August 25, 2011, requesting that the roof be fixed and other repairs be made. She requested that the Respondents provide her with a written plan to have the roof repaired by August 31, 2011, with the roof repairs to be completed by September 31, 2011 [Reproduced as written] and the other work to be completed by October 30, 2011.

The Tenant filed this Application on October 4, 2011. It was her testimony and evidence that she gave the Respondents a one month Notice to End Tenancy on October 31, 2011, by email. She testified she vacated the rental unit by November 30, 2011.

The Tenant claims that the problems with the rental unit caused her marriage to break up. She submits her former husband never liked the rental unit and was upset with her because she did not take steps to have the Landlord repair the rental unit. She testified that some water leaked from the roof down into her ex husbands television and shorted it out. She submits he blamed her for this problem.

The Tenant also claims that the deficiencies in the rental unit caused her to lose income from renting out rooms to four different students over two years. In evidence to support this, she has included one receipt that indicates she has one student allotted to living with her for eight weeks.

The Tenant has also claimed that the problems with the house and her ongoing attempts to deal with it aggravated her mental health condition. The Tenant has submitted a clinical report from her psychiatrist, apparently prepared for a disability claim she made when she was unable to work at her regular employment. The report indicates the Tenant has a mental health issue which prevents her from working, however, there is no mention in the report of the subject rental unit or that stresses from the rental unit have aggravated or affected her mental health.

The Tenant is requesting a monetary order of $24,999.60, comprised of the following:

1. $16,200.00 for loss of use of 45% of the house for 24 months;
2. $1,239.60 for loss of 43% income for four homestay students for 24 months;
3. $1,080.00 for loss of quiet enjoyment for 24 months;
4. $5,400.00 for health and safety issues for 24 months; and
5. $1,080.00 for aggravation of depression and anxiety.

In reply, Legal Counsel C.D., on behalf of the Respondents B.E. and the Estate of G.E., submitted that T.S. aka T.E. was the legal owner on title for the property, and J.E. acted as the Landlord and as Agent for the Landlord. Legal Counsel C.D. submits that the Plaintiffs in the Supreme Court Action did not have a beneficial ownership in the property until October of 2011, and therefore, it was not until this time they could have acted as the “landlord” as defined under the Act.

Legal Counsel C.D. further submits that the Tenant's evidence is, "... wholly inconsistent with the sworn evidence she provided to the Court of Appeal" and her current evidence is "... directly contradicted by that evidence."

Legal Counsel C.D. submits that the Tenant's claims are unreasonable, as she has provided sworn testimony and evidence that the Tenant accepted the deficiencies of the rental unit and that she believed that the rent paid was market value for the rental unit.

Legal Counsel J.V. on behalf of the Respondents T.S. aka T.E., and her spouse E.E., submits that the since the Tenant established a practice of making repairs to the rental unit and then deducting these from rent, she acquiesced to the condition of the rental unit throughout the tenancy. Legal Counsel argues that since the Tenant derived a benefit by having reduced rent for performing this work it would be inequitable to permit her to now claim for compensation.

Legal Counsel J.V. further submits that if liability against the Respondents is found, that the Act does not have authority to apportion liability amongst them and this should be resolved as part of the Supreme Court proceedings.

Analysis

Based on the above, the evidence and testimony and on a balance of probabilities, I find that the claims of the Tenant for the period up to September 1, 2011, must be dismissed without leave to reapply, for the reasons outlined below. I do allow the Tenant a portion of her claims, for the period from September 1, to November 30, 2011, as described below.

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, based on a balance of probabilities.

To prove a loss and have the other party pay for the loss requires the claiming party to prove four different elements:

1. proof that the damage or loss exists;
2. that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or tenancy agreement;
3. establish the actual amount required to compensate for the claimed loss or to repair the damage; and
4. proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Regardless of whether or not she proved her alleged losses during the time up to late August of 2011, I find the Tenant failed to mitigate her alleged losses from the time the leaks in the property started until approximately the end of August of 2011, when she finally put her complaints in writing to the Respondents.

The Tenant submitted in her own evidence here, and in an Affidavit for the Court of Appeal, that she agreed to live in the property as it was and that the rent she paid was reflective of the market value even considering its various deficiencies. In effect, the Tenant either waived her rights or chose not to enforce them, until late August of 2011.

The Tenant allowed her alleged losses to accrue and did nothing to mitigate or minimize the alleged damages or losses she claims for, even though she was aware that these alleged damages and losses were occurring. Therefore, I dismiss these portions of her claims for failing to mitigate or minimize her alleged losses.

Once the Tenant wrote to the Respondents at the end of August 2011, they were put on notice that the Tenant was no longer waiving or not enforcing her rights.

Section 32 of the Act sets out the following:

> **32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
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> (a) complies with the health, safety and housing standards required by law, and
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> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Based on the evidence of the Tenant and the appraisal report submitted in evidence, I find that the Tenant has proven that the rental unit had significant deficiencies, such as a leaking roof, that affected her use of the rental unit.

I find that the Landlord had no evidence that they responded to the written request of the Tenant in a timely manner, nor is there evidence they made any repairs to the rental unit from late August to the end of November 2011. I find that the Landlord violated the Act and tenancy agreement by failing to make the repairs.

Nevertheless, I find that the Tenant had insufficient evidence to prove how much of the rental unit she lost use of during the period of the end of August to the end of November 2011. I also find that the Tenant failed to prove she lost income from four homestay students or that the Landlord violated health and safety laws. For example, the Tenant provided no copy of municipal laws the Landlord breached. I also find the Tenant failed to prove the condition of the property aggravated her mental health issues.

I do find that the Tenant has established a loss of quiet enjoyment of the rental unit from late August until the end of November. I find the Landlord allowed the property to fall into disrepair and neglected the requests of the Tenant for repairs. I find the Landlord breached sections 28 and 32 of the Act.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Taking into account the seriousness of the situation, the varying degrees to which the Tenant has been unable to use some portions of the rental unit, the length of time over which the situation existed (during the time the Tenant began mitigating her losses), I find that the value of the tenancy was reduced by 50% for September, October and November of 2011.

Therefore, I find that the Tenant has established a total monetary claim of **$2,275.00**, comprised of $750.00 for each of the months of September, October and November of 2011, totalling $2,250.00, as well as a portion of her filing fee for the Application, $25.00, which reflects the limited success of the Tenant in this matter.

As to the issue of who the Landlord is in this matter, I find that from the outset of the tenancy and at all relevant times during the tenancy the Respondents J.E. and T.S. aka T.E. were the Landlords of the Tenant. Between these two Respondents, one of whom has always been and continues to be on title of the property as an owner, they permitted occupation of the rental unit by the Tenant and exercised the powers and duties of a "landlord", as defined in the Act, under the Act and tenancy agreement.

Therefore, I award the Tenant a monetary order in the amount of **$2,275.00**, against the Landlords J.E. and T.S. aka T.E., payable forthwith. This order may be enforced in the Provincial Court.

I note it is up to J.E. and T.S. aka T.E. to pay the Tenant her award in accordance with the Act and this must be done immediately.

Following payment, it is up to J.E., T.S. aka T.E. and the other Respondents as to how they apportion this liability amongst themselves, or if they need to have the Supreme Court ascertain this for them.
This decision is final and binding on the parties, except as provided under the Act, and 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 20, 2012.

Residential Tenancy Branch