Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with an application by the landlord for a monetary order and an order to retain the security deposit in partial satisfaction of the claim and a cross-application by the tenant for a monetary order. Both parties participated in the conference call hearing.

This hearing was originally set to take place on June 7 and the parties convened at that time before a different Dispute Resolution Officer. The hearing was adjourned to give the tenant additional time to respond to the landlord's evidence and as that Dispute Resolution Officer was not seized of the matter, it was scheduled to be heard by me on July 4.

Although the landlord had submitted a written request for an adjournment, at the hearing that request was withdrawn and the landlord confirmed they were prepared to proceed.

Issue to be Decided

Is the landlord entitled to a monetary order as claimed?
Is the tenant entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began on November 21, 2011 and ended on April 1, 2012. The tenancy was set to run for a fixed term ending on May 31, 2012. The tenancy agreement provided that rental payments were not to be paid monthly, but in lump sums which averaged out to $2,500.00 per month. The parties agreed that the tenants paid the landlord a total of $11,200.00, which represents a $1,200.00 security deposit and $10,000.00 in rent payments. The rental unit is located in an alpine ski resort community.

The issues between the parties arose when on January 29, 2012, the tenant discovered that the carpet in the loft of the unit was wet, the dampness resulting from ingress of water. The tenant immediately reported the issue to the landlord and on January 30, the landlord's agent attended at the unit. The agent confirmed that an ice dam had formed on the roof, which had caused water to leak into the unit. The landlord explained that an ice dam is created when

water on the roof melts and runs to the edge of the roof where it freezes and dams water, creating a pool on the roof.

The landlord testified that after receiving the agent's assessment, he contacted a restoration company and made arrangements for that company to attend on January 30 or 31. On February 1, the landlord met with insurance adjusters and learned at that time that the restoration company had not attended as promised. Another company was contacted which worked with the landlord for the next 5 days. After February 5, the insurance company assumed responsibility for remediation.

The landlord testified that there was significant damage to both the inside and outside of the building and that in addition to the affected areas being completely dried out, the landlord had to replace drywall and carpets.

The tenant testified that he suffered an extreme disruption as a result of the flooding and that he was unable to use part of the space in the rental unit. He claimed that he could not use the loft for guests as intended because the carpet was removed and the tackboard exposed around the flooring and there was a tripping hazard at the top of the stairwell. He testified that the master bathroom and closet were affected and flooring and drywall were removed. The tenant also complained of the noise and inconvenience of the fans and dehumidifiers used to dry the affected area.

The tenant claimed that a number of rooms in the unit were affected by the flood and subsequent repairs as he was unable to use the pantry due to extreme dust and therefore had to move to the kitchen the items which had normally been stored in the pantry. He lost use of the closet in the master bedroom and moved his belongings to the closet in the spare bedroom, causing him to lose use of that space as well. The futon which had been located in the loft was moved to the master bedroom and the closet in the bathroom had no flooring and had rodent traps set in it because during remediation, the area was exposed to an area to which rodents had access.

The tenant argued that the overall value of the unit was devalued and that his quiet enjoyment was disrupted as a result of the noise, odour, dirt and tradespeople. He testified that he and his wife performed property management duties, primarily granting access to tradespeople and claimed that he lost productivity in his work. The tenant testified that he worked from the rental unit and was unable to do some of his work during the day due to the tradespeople being at work at that time, and therefore had to perform some of his work on evenings and weekends.

The tenant made a claim for aggravated damages.

The parties each accused the other of being responsible for the damage. The landlord testified that the ice dam occurred because heat tape which ran along the edge of the roof had not been turned on. The landlord stated that there are a number of heat tapes on the roof, the controls for some being in the rental unit and the controls for others in a separate unit. The affected area of the roof was related to a heat tape whose controls were in the rental unit. The landlord R.C. testified that at the beginning of the tenancy, she showed the tenant's wife the location of the switch for the heat tape and told her to turn it on when temperatures were consistently below -7 or when there was 6" of snow on the roof.

The tenant's wife was not in attendance at the hearing, but the tenant denied having been told by the landlord that the tenants were responsible to turn on the heat tape.

The tenant questioned why the heat tape had not been turned on when the tenancy began in November as the weather was already cold at that point and suggested that a thermostatically controlled system would be more reliable. The landlord replied that a thermostatically controlled system had not been required in the past and that there was a concern that leaving the heat tape plugged in all the time could pose a fire hazard.

The tenant claimed that the landlord broke the terms of the lease by not preventing the leak, not attending to repairs and not negotiating in good faith for the tenant's losses. The tenant claimed that the lease, which was signed in counterpart, contains a forged signature. The landlord testified that R.C. has been authorized by R.M. to sign his name.

The tenant further alleged that the lease has illegal terms, claiming that the payment terms which divided rental payment into 3 parts over the course of 6 months and required the first and last months' rent to be paid at the outset of the tenancy, were illegal and therefore rendered the agreement unenforceable.

Analysis

I find that the parties were bound by an effective tenancy agreement, the term of which was 6 months. I can find no provision in the legislation which prevents a rental scheme requiring lump sum payments rather than monthly payments and I find that this provision does not invalidate the agreement. Although generally speaking a landlord cannot require the first and last months' rent at the outset of the tenancy, because the parties had agreed to 3 lump sum payments rather than monthly payments, characterizing the first payment as first and last months' rent is meaningless. Even if the provision were illegal, I find that this would not invalidate the agreement or change the total amount of rent due, but would merely have required a different payment scheme to be implemented had the tenancy continued.

I find the fact that R.C. signed R.M.'s name on the lease to be irrelevant.

The tenancy agreement consists of the standard form agreement available through the Residential Tenancy Branch together with a one page addendum which lists additional tenant responsibilities, including snow removal, hot tub maintenance and taking steps to ensure that bears could not access the home or garbage. I find that given the severity of the consequences of not activating the heat tape, the landlord had an obligation to include direction in the tenancy agreement about the tenants' responsibility for activating the heat tape together with specific instructions. While the landlord may have mentioned the heat tape to the tenant's wife, I find that this was insufficient to discharge the landlord's responsibility to ensure that the tenants were fully aware of the process and the conditions under which activation of the heat tape was required. For this reason, I find that the landlord must bear the responsibility for the formation of the ice dam and the resulting damage. Accordingly, I dismiss the landlord's claim for costs associated with remediation (identified in the landlord's claim as Monetary Order Request 2).

I find that the tenant suffered a loss as a result of the flooding and the time taken for repairs. The tenant framed his claim in a number of different ways, including loss of space, loss of overall value and loss of quiet enjoyment, each calculated separately and added together which resulted in a claim amounting to more than what the tenant paid in rent during the tenancy. Rather than addressing each of the tenant's calculations, I find it appropriate to arrive at a global award under the head of loss of quiet enjoyment which takes into account the tenant's various losses but reflects the fact that he was able to continue living in the unit throughout the flood and remediation.

The flood occurred in the last days of January and much of the repair work was completed within one month of the event. I accept that the carpet was not replaced in the loft and stairs until March 19, but I find that the issues with other areas were primarily cosmetic and did not affect the tenant's use of those areas.

I find that the bulk of the tenant's loss of his quiet enjoyment occurred from the date of the event until February 13th when the fans and dehumidifiers were removed, a period of approximately 2 weeks. I find that during this period, he was unable to fully use the rental unit and that the immediate measures taken to dry the rental unit were significantly intrusive. I find that he experienced a minor inconvenience from February 13 – the end of the tenancy in having to tolerate an uncarpeted area and interaction with tradespeople who had briefly stored drywall in an inconvenient area and attended at the rental unit to install carpet. I find that some additional cleaning was required of the tenant during this period as well.

I find that the tenancy had a value of approximately $83.00 per day. I find that the tenant was significantly disturbed and experienced a significant loss of use of the unit for a 15 day period and that he is entitled to recover one half of the rent paid for that period, totaling $622.50. I find that from February 13 – April 1, a total of 49 days, the tenant experienced some minor

disruption and loss of space and I find that an award of one eighth of the rent paid for that period totaling $508.38 will adequately compensate him. In total, I award the tenant $1,130.88.

I dismiss the tenant's claim for aggravated damages. Aggravated damages are appropriate in situations when a landlord's willful or recklessly indifferent behavior has aggravated an injury. While the flood may have occurred in part because of the landlord's failure to properly instruct the tenant, I am unable to find that his behavior has been willful or recklessly indifferent.

Turning to the balance of the landlord's claim, I find that the tenant did not have the right to end the tenancy prior to the end of the fixed term. The only means by which the tenant could have done so would have been to follow the procedure outlined in section 45(3) of the Act, pursuant to which he would have been required to advise the landlord in writing that the landlord had breached a material term of the tenancy, give the landlord a reasonable period in which to correct the breach and failing that correction, give the landlord written notice to end the tenancy. I find that the tenant did not follow this procedure and in any event, I find that the landlord did not breach a material term of the tenancy.

Although the tenant claimed that the landlord did not act reasonably to mitigate his losses because he did not begin advertising until after the Easter weekend, I am not persuaded that advertising just a few days prior to the start of the weekend would have resulted in the landlord being able to retain a tenant who was available to stay for the balance of the two month term. I find that the landlord cannot be expected to turn the rental unit into a weekend vacation accommodation because of the tenant's breach.

I find that the landlord acted reasonably to mitigate his losses and I find that the tenant must be held liable for the loss of income suffered for the months of April and May. I award the landlord $5,000.00.

I dismiss the landlord's claim for advertising costs as the landlord provided a copy of an email exchange between himself and an advertiser but failed to provide a copy of a receipt showing the cost of placing the advertisement.

As each party has enjoyed some success, I find that each party should bear the cost of his own filing fees.

Conclusion

The tenant has been awarded $1,130.88 while the landlord has been awarded $5,000.00. Setting off the awards as against each other leaves a balance of $3,869.12 payable by the tenant to the landlord. I order the landlord to retain the $1,200.00 security deposit in partial

satisfaction of the claim and I grant him a monetary order under section 67 for the balance of $2,669.12. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

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: July 16, 2012

Residential Tenancy Branch