Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Headwater Projects
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, O

Introduction
This hearing was set to deal with the tenant's application for a monetary order. The hearing commenced October 6 at 10:30 am. The landlord had filed 16 pages of late evidence which consisted of a four page statement and a number of attachments. She said the tenant had not provided her forwarding address so the documents had been posted to the door of the rental unit. By then the tenant had moved out of the rental unit so service was not effective. The tenant gave the landlord her new address in the hearing.

The parties were not able to complete the evidence in the time allotted for the hearing so it was scheduled for continuation on October 27 at 1:00 pm; a date and time convenient to all participants.

I was sick on October 27 and unable to conduct the hearing so a new hearing date was arranged for November 1 at 1:00 pm.

The landlord said she sent the evidence package to the tenant at her new address by courier but she was not able to provide any tracking information. She said she had also e-mailed the evidence to the tenant on October 31. The tenant said she had only received the four page statement by e-mail but none of the attachments. I advised the parties that I would defer any decision on the admissibility of the landlord's evidence until the end of the hearing.

I heard the landlord and a landlord witness, and part of the tenant's rebuttal evidence, in the time set aside for the hearing. As the parties were not able to complete their testimony in the time allotted for the hearing I ordered that it be continued on Wednesday, November 23, 2016 at 1:00 pm; a date and time convenient to all the parties.

At the end of the hearing I gave several orders verbally, which were repeated in the Interim Decision dated November 3. Those orders included a direction that the landlord

re-serve her original evidence package by Canada Post Registered Mail and to submit a copy of the tracking receipt to the Residential Tenancy Branch prior to the hearing. I also asked the landlord to send the attachments in that package to the tenant by e-mail as soon as possible.

At the end of the hearing the landlord indicated that she would be submitting copies of all the tenancy agreements signed by the tenant and the landlord, as well as a statement from the individual who arranged for the execution of the last agreement.

At the hearing on November 23 the landlord said she did not get a copy of the Interim Decision and as a result she had not reserved her original evidence package as directed by myself nor had she sent the attachments to the tenant by e-mail. She verbally provided the courier tracking number for the original package but there was no way for me to verify that information.

The landlord had served the tenant with additional evidence by Canada Post Registered Mail and the tenant confirmed receipt of those documents. That evidence package consisted of all tenancy agreements signed by the landlord and the tenant.

Despite several opportunities to do, the landlord did not serve its original evidence package by a means permitted by sections 88 or 89 of the *Residential Tenancy Act* and did not provide proof that the tenant had received any of the attachments to the four page statement which the tenant acknowledged receiving. As a result, those attachments were not admitted into evidence.

No other issues regarding the exchange of evidence were identified.

Issue(s) to be Decided

Is the tenant entitled to a monetary order and, if so, in what amount?

Background and Evidence

The rental unit is a two bedroom, one and a half bath unit. There are two levels to the unit. The kitchen, living area and half bath on lower level; the two bedrooms and full bath are upstairs. The total square footage of the unit is 725 square feet. Above the bedrooms is the roof of the building. There are twelve units in the building.

Both parties testified that the tenancy started July 1, 2010 as a one year fixed term tenancy. The monthly rent, which was due on the first day of the month, was $2025.00. Over the next six years five additional fixed term tenancy agreements were signed. One was for a fourteen month term; two were for a 12 month term; one was for a six

month term; and one was for a three month term. Some were signed before the expiry of the term; some signed after. Sometimes the rent remained the same; sometimes there was a small increase. By the end of the tenancy the monthly rent was $2101.25. Each agreement contained a provision that at the end of the term the tenancy would end and the tenant must move out. On each agreement the tenant has initialled that clause.

The landlord testified that it is their policy to enter into fixed term tenancies. Typically, if there have been no issues they offer the tenant the option of a new tenancy agreement.

The term of the last undisputed tenancy agreement ended on May 31, 2016. Both parties testified that in May the tenant was told that the landlord did not want to renew its' tenancy agreement with her. The tenant sent the landlord a letter outlining her situation. The landlord said that although she was under no obligation to do so, she went to bat for the tenant and obtained permission to give her a short-term fixed tenancy agreement ending August 31. Her thinking was that this would allow the tenant's daughter a chance to finish the school year and the tenant sufficient time to find a new place. The tenant says that a new tenancy agreement was never presented and she never signed one.

The landlord submitted a copy of a document that appears to be signed by the tenant and another employee of the landlord. The tenant insists that the signature and initials on the document are not hers.

The background to all of this is that the landlord was in the process of remediating the building envelope. They had been doing work on two other units, during which they had relocated the tenants. The whole process took longer and was much more expensive than anticipated. The landlord did not want to repeat this experience.

The landlord knew that this unit needed a lot of work but they really did not know how much. They had found mold in those two units and there was no knowing what they would find in this unit when they opened up the walls. In addition, the owner was running out of patience with this tenant, who had presented a number of issues during her tenancy, so he decided that he did not want to renew this tenancy agreement.

The tenant says she first contacted the landlord about three leaks in her bedroom ceiling sometime late in 2012 or early 2013. In June 2013 the landlord had a vent installed in one area of the ceiling. The ceiling continued to leak but there was no apparent pattern to the leaks. Sometimes it remained dry when it rained and sometimes it leaked when it was dry outside.

The landlord testified that the tenant reported a mysterious dripping and staining on the bedroom ceiling. After a lengthy period of investigation they determined that the problem might be the roof assembly. They installed vents in all units to allow for proper breathing. This was done at least two years ago.

The tenant said she was told that the purpose of the vent was to dry out the drywall. She also said that she was told to stay out the bedroom. For the next three years she did not use her bedroom and slept on the couch. She kept her clothes in the closet and the bed and some other furniture in the room, but she did not sleep in it.

The tenant testified that the mattress got soaked in a big flood in 2013. She says the water destroyed the mattress and it never did dry out. She never removed the mattress nor did she raise an issue with the landlord about the mattress until this application for dispute resolution. When she moved out of the rental unit, she left the bed behind. On this application she claims $600.00 for replacement of the mattress. She testified that she bought the mattress in 2010 for $600.00 or $700.00.

The tenant said that she was working full-time as a nurse, going to grad school, and/or was too sick to make an issue of the situation. The landlord testified that they had no knowledge that the tenant was not using the bedroom.

There is no evidence that the tenant raised the issue of the leaking roof with the landlord between the time the vent was installed and the spring of this year. Further, the tenant acknowledged that she never applied to the Residential Tenancy Branch for a repair order and/or a rent reduction order.

The tenant filed transcripts of text messages between the landlord and herself at the end of January 2016. The landlord is asking for access to the unit because another unit had recently had a leak similar to the ones the tenant had experienced in the past. The contractor was concerned that the problem could be stucco and flashing failures so they were checking all past leaky suites. The only concern the tenant expresses in this exchange is about the mess in her unit. She does not say anything about ongoing leaks in her unit or that she is unable to use the bedroom as a result.

The tenant also filed transcripts of text messages over the next two months about the heater, the washing machine and the condition of the carpets. In all of these exchanges the tenant is asking for repairs and/ or replacements of elements in the unit. Nothing is said about a leaking ceiling.

On April 8 the tenant advised the landlord that “My ceiling was leaking for 2 days. Wasn’t home, just saw it.” She reports that her whole bedroom floor is wet.

On April 15 the tenant asks the landlord about the plans for the ceiling. The landlord responds that they are letting it dry out and that they did a dye test. She asks the tenant to report if anything comes through when it rains to let them know. A week later the tenant advises that nothing came through with the previous night’s rain where the ceiling had been opened up but it was still dripping from the other spot.

The next day the landlord says they will be in the unit later in the day. She asks the tenant to: “Shuffle any stuff out of the way so they could open up the ceiling even further . . he wouldn’t yesterday as there is stuff everywhere in that room.” The tenant responds that: “There is nothing in that room, actually.” She asks that no one come until Monday because she has company.

The tenant testified that in May some of her neighbours told her that they had mold in their homes and the landlord was fixing their suites.

It is during this time that the term of the tenancy agreement expired and the tenant asked to have her tenancy extended.

On June 18 the tenant again asks about the plan for the ceiling. The landlord responds that the contractor is coming that week.

The tenant testified that in the spring a man named Paulo opened up a portion of the ceiling. This area was covered with plastic. She testified that sometime later Paulo came back and opened up the plastic. He pulled out a bunch of insulation. She could see something black on the insulation. She asked him if that was mold. He said no. Paulo told her to leave the windows open and let the insulation dry out.

The landlord called two witnesses to talk about the work they had done in the rental unit. The first was AS, the contractor. AS said his firm does leak investigation and exterior maintenance on high rise buildings. He described the process they followed to identify the source of a water leak in the tenant’s bedroom. On their first visit they ran a sprinkler on the roof for a half-day, drying to duplicate the effect of rainfall. The results were not conclusive. On the second visit they did a different test. On that occasion some drywall had been removed from some areas of the ceiling. They could see that the vapour barrier was in place and the insulation was intact. They kept testing until they finally got water coming in by the closet; which was the location of the reported leak.

The witness said they finally identified the source of the leak. A sealant had failed at a flashing on the roof, water penetrated, and travelled along a steel beam until it accumulated in a little pocket in the vapour barrier. Eventually the moisture came through a hole made where a drywall screw had penetrated the poly vapour barrier.

On the third visit they saw that the vapour barrier had been hacked open. He said that when they cut open poly they use an X-Acto knife to make a straight cut and tape back the poly. After they are finished their work they tape the poly back in place using a special tape.

This witness described the unit as being filthy and in a state of complete disarray. His employees wore rubber gloves to moves items aside. He said this started at the front door of the unit and continued all the way to the upstairs bedroom.

The landlord also called Paulo, an independent plumber. He testified that he attended at the unit because there was a leak in the ceiling. He reported to the landlord that the leak was a result of a roof issue or a sprinkler issue. When he looked at the ceiling the drywall was still in place and he did not touch it. He never went back to the unit.

While he was testifying the tenant interjected that this was not the person who had cut open the poly. She said the person who cut open the poly was the same person who had repaired her toilet at some time in the past. This witness said he had fixed some other things in her unit but not the toilet. The tenant then said maybe she was mistaken when she identified the person who had cut up the poly as Paulo.

The landlord testified that only AR and the exterminator had been in the rental unit and that if anyone had cut the poly, it must have been the tenant.

On July 28 the landlord advised the tenant that they are “good to proceed with the reapplication of your ceiling which will include removing and replacing all the insulation.” The landlord also advised the tenant that “it looks like we may need to really tear apart your unit” and that this “may require relocation depending on how long it will take” and that “I would start looking for alternative housing”.

The landlord promises the tenant whatever assistance she can offer in her search for new accommodation including good references. She does provide the tenant with a good reference letter and offers to talk to any prospective landlord.

In a text message dated August 4 the landlord tells the tenant that: “If they are needing confirmation as to why you are moving out you can note that your fixed term lease technically ends August 31st, regardless of the repairs required in your suite. Typically we have offered option to sign a new fixed term but in this case won’t due to the work that must be done while it is vacant.”

After a contentious exchange with the tenant the landlord states on August 9: “At the end of the day your lease is up as of August 31 with no rollover to month-to-month option so regardless of the mold situation and detail of such, it isn’t technically anything that could be argued . . “.

On August 9 the tenant filed this application for dispute resolution.

Meanwhile, on August 2 the tenant reported the presence of pantry moths in the unit to the landlord.

The tenant testified that she is the Director of Care for an organization that delivers palliative care. She says that she usually works twelve to fourteen hours days and July was a very busy month for her.

She has a housekeeper who comes to her home twice a week. This housekeeper does all of their food preparation and is the person who uses the kitchen most. On August 1 the housekeeper reported the presence of moths in the upstairs bathroom, in the kitchen, and in the closet of the tenant’s bedroom. The tenant testified that she had not noticed anything before then because it was usually late when she got home.

The tenant immediately called a pest control company. She said it is her experience that it takes the landlord a long time to make repairs so she went ahead with the arrangements on her own. The company treated the unit on August 2. They told the tenant that they could tell from the number of moths that the situation had existed for some time. It takes the moths about three weeks to hatch so it would be a few weeks after this treatment before the situation would clear up.

On August 2 the tenant notified that landlord that pest control was coming because “there are moths everywhere”. The landlord responded that they would cover the costs of pest control and cleaners as long as they had the invoices or receipts for any payments made by the tenant.

The tenant paid the pest control company $250.00 and provided a copy of the invoice to the landlord. The landlord has accepted responsibility for this cost and says they have credited the tenant's account with this amount.

The tenant also claimed $200.00 for cleaning. She says she pays her housekeeper $30.00/hour. She pays in cash and does not have any receipts. The tenant did not provide any accounting of how much time the housekeeper spent cleaning, over and above her usual duties.

After the fumigation the tenant and her daughter quit living at the unit. They did this, not a result of any instruction from the pest control company, but because her teenage daughter was upset by the sight of moths and larva in the unit.

Her daughter stayed with her father. The tenant said she was able to use her boss's office as temporary accommodation. It had limited cooking facilities. She returned home to shower.

The tenant claimed compensation for her and her daughter having to eat out for thirty days (the balance of August) at a daily cost of $60.00/day for a total claim of $1800.00. No documentation was filed in support of this claim.

The tenant said the pest control company told her that the moths were a result of dampness. She argued that the source of the moths was the holes in the bedroom ceiling. The landlord said that their pest control company told her that pantry moths were from infested food. There was no evidence before me from a qualified pest control technician.

The tenant also said she was required to throw out a pantry unit she had bought at Canadian Tire in 2010 for $200.00, and all their food. She claimed the full replacement value of $200.00 for the pantry and $500.00 for the food.

Whatever the pest control company used left a sticky film over everything. The tenant did not want to pack anything unless it had been cleaned first.

The landlord sent one of their staff to clean after the fumigation and to help the tenant pack. When they moved into the tenant's bedroom the cleaner told her everything had to be thrown out because it smelled so bad. The tenant said they threw out bags and bags of clothing, bedding and linens. It had all been sitting in the bedroom for years, not being used.

On September 15 the tenant advised the landlord that she had found another place. On October 1 she left the landlord a telephone message that she had moved out of the rental unit. The tenant paid the August rent but did not pay the September rent.

Analysis

The tenant testified that she holds a Masters Degree in Nursing. According to their evidence both the landlord and the tenant have very responsible positions and yet, both seemed unable to have more difficulty than most parties in a dispute resolution hearing in presenting their respective cases in an organized and coherent manner. In particular, neither was very clear about the chronology of events or the dates of these events.

On any claim for damage or loss the party making the claim must prove, on a balance of probabilities:

- that the damage or loss exists;
- that the damage or loss is attributable solely to the actions or inaction of the other party; and,
- the genuine monetary costs associated with rectifying the damage.

When a tenant claims for loss of chattels the normal measure is the actual value of the item at the time of the loss, i.e. as used goods, not its' replacement cost.

Section 7(2) requires any party who claims compensation from the other for damage or loss to do whatever is reasonable to minimize the damage or loss.

Part of minimizing damage or loss that may be caused by a fault in the rental unit such as a leaky roof is notifying the landlord of the repair required and, if the landlord does not respond to the request for repairs, applying to the Residential Tenancy Branch for a repair order and, if applicable, a rent reduction order. A tenant cannot ignore a required repair for years and then apply for compensation for that same period.

The tenant's claim for 31 months loss of use of the bedroom is dismissed. There is no evidence that she raised the issue with the landlord with any diligence even though she raised many other repair issues with the landlord and she signed several renewal tenancy agreements during this period. There is no evidence that prior to an e-mail in mid-June of this year that she told the landlord she was not using her bedroom. Finally, the tenant was clear that she had not made any application to the Residential Tenancy Branch.

I find that once the water issue was raised with the landlord this spring the landlord responded in a reasonable and timely manner. No compensation will be granted for this period.

The tenant's claim for damage to the bed is dismissed for a similar reason. If the bed was damaged in 2013 the tenant had some responsibility to report that loss in a timely manner and to show that she had taken some steps to minimize the damages. The claim for damage to the bed was not raised with the landlord until August 2016. The delay in taking any action also reduces the tenant's credibility on this particular claim.

The tenant's claim for loss of use in August is dismissed. The tenant was clear that they vacated the unit because they did not like the sight of moths and larva, not for any safety reason. The fact is the unit was infested with moths and larva for weeks before the tenant's housekeeper reported them to the tenant. She and her daughter were able to live with them then; there was no reason why they could not continue to do after the unit had been treated by the pest control company.

The tenant's claim for loss of the pantry and food is dismissed for several reasons:

- Even if the source of the moths was not infested food, the tenant's neglect contributed substantially to the severity of the eventual problem. The landlord is not solely attributable to the action or inaction of the landlord.
- There is no evidence as to the actual value of a six-year-old pressboard cabinet.
- There is no evidence to substantiate the tenant's claim that she had to dispose of $500.00 of unsealed groceries.

Similarly, there is no documentation about the actual costs incurred by the tenant for cleaning. The tenant could have produced a letter from her housekeeper about any extra work that she was required to do over and above her usual duties but she did not. This claim is also dismissed.

The landlord has agreed that it is responsible for the pest control company's invoice of $250.00.

The tenant also claimed compensation for having to move out of the rental unit. Basically the tenant's position is that she did not have a fixed term tenancy agreement that required her to move out of the rental unit. The landlord's position is that they did and as such, they are not required to pay the tenant any compensation for moving.

Throughout the proceedings the tenant stated that she did not sign the last tenancy agreement submitted by the landlord. On the second last day of the hearing the landlord said she would be calling the administrative person who witnessed the tenant's signature as a witness. She never did. In the end, all I am left with is the oral testimony

of two witnesses. One who says the documents was properly executed in front of someone else; one who says it's not her signature on that document.

The onus of proof was on the landlord to prove that there was a valid fixed tenancy agreement in place. Where the only evidence is the conflicting oral testimony of two parties there is nothing to tip the balance of probabilities in the landlord's favour. Accordingly, on the evidence before me I cannot find that there was a final fixed term tenancy agreement ending August 1 and I must find that there was a month-to-month agreement in place.

Even if I had found that the parties had signed that last tenancy agreement the landlord's position would have been untenable. Many cases have found that when a landlord and a tenant sign a succession of fixed tenancy agreements, after a while the tenant is entitled to expect that their tenancy will continue and that it will not be ended without proper cause. Many cases have also held that landlords cannot use fixed term tenancy agreements as a means of avoiding the provisions of the legislation that refer to ending a tenancy for cause or ending a tenancy for landlord's use.

It is clear that the primary reason for ending this tenancy was the anticipated repairs to the rental unit. The landlord said as much in her oral testimony and in her text message to the tenant dated August 4, 2016.

When a landlord wants to make repairs to a rental unit in a manner that will require the unit to be vacant section 49(5) allows a landlord to serve the tenant with a 2 Month Notice to End Tenancy for Landlord's Use. Section 51 provides that a tenant who has been served with such a notice is entitled to one month rent free.

Section 62(3) allows an arbitrator to make any order to give effect to the rights, obligations and prohibitions under the Act, including and order that a landlord or tenancy comply with the Act, the regulations or the tenancy agreement. I find that the landlord should have served the tenant with a 2 Month Notice to End Tenancy for Landlord's Use and failed to do so. If the tenant had been served with the notice as required she would have received the last month of her tenancy rent-free. I find that the tenant retained possession of the rental unit throughout September. As that was her last full month of tenancy, she is not required to pay any rent for that month.

This decision only relates to the tenant's liability for the September rent and does not have any bearing that the landlord may make for unpaid rent or loss of rental income for October.

In her calculation of her monetary claim the tenant made reference to the security deposit paid. Her application for dispute resolution was filed prior to the end of the tenancy and any claim to the security deposit was premature. Any claim for the return of the security deposit is dismissed with leave to re-apply. Either party may file an application against the security deposit in accordance with section 38.

As the tenant achieved some success on this application she is entitled to reimbursement from the landlord of the $100.00 fee she paid to file it.

Conclusion

a. I find that the tenant has established a total monetary claim of $350.00 comprised of the cost of pest control in the amount of $250.00 and the $100.00 fee the tenant paid to file this application, and pursuant to section 67 I grant the tenant a monetary order in this amount. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that court.
b. I have found that the tenant is not responsible for the September rent.
c. All other claims of the tenant have been dismissed, with the exception of the claim for the return of the security deposit, which was dismissed with leave to re-apply.

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: December 19, 2016

Residential Tenancy Branch