Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LTE VENTURES INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR MNDC MNSD RR FF

Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Tenants on October 23, 2016. The Tenants filed seeking a $6,556.87 Monetary Order for: cost of emergency repairs; for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement; the return of the security deposit; reduced rent for repairs or services and facilities agreed upon but not provided; and to recover the cost of the filing fee.

Due to an administrative error the Tenants' application was originally scheduled to be heard during a 1 hour hearing on December 1, 2016, at the same time as the Landlord's application was scheduled to be heard. Although both applications stemmed primarily from the same issues surrounding a water leak and the presence of mold in the rental unit, each application stood on their own merits. Those applications were different enough that I severed the Tenants' application from the December 1, 2016 hearing, in accordance with the Rules of Procedure. The Tenant's application, which was filed after the Landlord's application, was adjourned to be heard at this hearing held on January 24, 2017.

During the December 1, 2016 hearing I heard submissions regarding service and receipt of evidence. Each party submitted evidence listing their own file number instead of submitting separate evidence packages for each separate file. Those file numbers are listed on the front page of this Decision. I accepted the evidence submitted by both parties for both applications and arranged for both packages of evidence be set before me during this hearing, as they were during the December 1, 2016 hearing.

This teleconference hearing was attended by two agents for the Landlord (the Landlords) and both Tenants. At the outset of this hearing I informed both parties that I had each of their evidence submissions before me which were received on file prior to the December 1, 2016 hearing.

I heard the Tenants state they had submitted an Amendment to their Application for Dispute Resolution with additional evidence to the RTB on January 23, 2017, the day before this hearing. That amendment and evidence had not been placed on the file before me prior to this hearing.

In response to my question why they waited so long to file the amendment, the Tenants stated their Application for Review Consideration, which was filed in response to the Decision relating to the Landlord's application for Dispute Resolution, was dismissed. The Tenants said that due to that dismissal they wished to change their application to increase their monetary claim amount in response to items awarded to the Landlords.

When determining if I would consider the Tenants' application for amendment, I turned to Residential Tenancy Branch Rule of Procedure 4 which provides the requirements for amending an application for Dispute Resolution as quoted below:

> *Rule of Procedure 4.3 …amended applications and supporting evidence should be submitted to the Residential Tenancy Branch directly or through a Service BC office as soon as possible and in any event early enough to allow the applicant to comply with Rule 4.6.*
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> *Rule of Procedure 4.6 …the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the Act and these Rules of Procedure. In any event, a copy of the amended application and supporting evidence should be served on the respondents as soon as possible and must be received by the respondent(s)* ***not less than 14 days before the hearing****.*
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> [Reproduced as written, with my emphasis added in bold text]

Res judicata is a doctrine that prevents rehearing of claims and issues arising from the same cause of action, between the same parties, after a final judgment was previously issued on the merits of the case.

Based on the above, I concluded the Tenant's Amendment did not meet the filing requirements set out in the Rules of Procedure. In addition, I considered the Tenants' submissions that their amended application was submitted in an attempt to counter the awards issued to the Landlord and was clearly an attempt to reargue the matters relating to the Landlord's application after the Tenant's Application for Review Consideration was dismissed. The *Act* does not provide for matters to be continuously reargued after a final judgment has been made, as to do so would constitute res judicata. Accordingly, the Tenant's application to amend the matters currently before me was dismissed, without leave to reapply.

Each person was reaffirmed and reminded of the conduct during the hearing. I informed the parties that because the security and key deposits were disbursed in my December 9, 2016 Decision, I could not consider the Tenants' request for the return of those deposits. Therefore, I continued to hear submissions relating to the remaining items listed on the Tenants' October 23, 2016 application for Dispute Resolution.

Both parties were provided with the opportunity to present relevant oral evidence, to ask questions, and to make relevant submissions. Although I was provided a considerable amount of evidence including: verbal testimony; written submissions; and digital evidence; with a view to brevity in writing this decision, I have only summarized the parties' respective positions below.

Issue(s) to be Decided

Have the Tenants proven entitlement to monetary compensation?

Background and Evidence

The terms of the tenancy agreement were undisputed during the December 1, 2016 hearing as stated in my December 9, 2016 Decision as follows:

> *The Tenants occupied the rental unit on July 1, 2015 and entered into subsequent fixed term tenancy agreements. The latest tenancy agreement commenced on July 1, 2016 and was not set to end until June 30, 2017. Rent began at $910.00 per month and was increased in the second tenancy agreement to $936.00, payable on the first of each month. On July 1, 2015 the Tenants paid $455.00 as the security deposit which was increased to $468.00 on July 1, 2016. In addition the Tenants paid $50.00 as a key deposit.*
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> [Reproduced as written p 3 para 1]

I heard the Tenants state they were seeking monetary compensation for the reasons as summarized as follows: the Landlords took advantage of the Tenants' situation in order to renovate the entire kitchen; the Tenants suffered a loss and harassment from the Landlords; the Landlords were "intentionally negligent" exposing the Tenants and their unborn child to toxic mold putting their health and safety at risk.

The Tenants submitted email evidence in support of their submissions that on July 1, 2016 they requested the Landlord conduct repairs which stated, in part, "Kitchen Tap- It leaks a little bit".

I heard the Tenants state they did not have tenant's insurance. They submitted evidence of a July 16, 2016 email they sent to the Landlords where they informed the Landlords the female Tenant was pregnant and where they requested "some temporary arrangement to cover the molds so that it does not harm us during the stay till the end of tenancy in the current apartment".

The Tenants asserted the Landlords failed to inform them of their course of action and argued there was no evidence that the contractors were not available to begin the work earlier. They were of the opinion the Landlords had no intention to take action to resolve

the presence of mold while they continued to reside in the rental unit. They noted the Landlord suggested they purchase and apply a mold spray.

The Tenants sought $6,556.87 which was comprised of the following:

- $1,950.00 to compensate for the costs incurred to have food delivered and to eat outside of the rental unit. The Tenants alleged they were not able to use the kitchen once the mold was found. The amount claimed was based on a daily rate of $25.00 per person for 39 days and not actual food receipts.
- $390.00 reduced rent for no use of the kitchen based on $10.00 per day.
- $42.00 for the cost of a mold testing report which was completed based on a sample delivered by the Tenants to a laboratory on August 15, 2016, the last day the Tenants had possession of the rental unit.
- $2,000.00 for putting their family at a potential health risk and for harassment. The Tenants alleged the Landlords had harassed them by: (1) failing to repair the mold immediately as they were told it was only an 8 hour job to fix the problem; and (2) causing the Tenants to have to pack and move when they were in no condition to do so. I heard the Tenants state this claim was intended to be punitive for the Landlords' failure to repair the unit and provide a safe unit for their health.
- $973.00 moving expenses based on an estimate. The Tenants conducted the move themselves and argued they had to take vacation time from work to accommodate their move.
- $1,039.50 to accommodate for the increased amount of rent they now have to pay at their new rental unit for the remaining period of their lease in their former unit that had the mold.
- $13.02 for hydro moving charges as per the invoice submitted into evidence.
- $55.60 for Canada Post mail forwarding charges
- $26.00 for an overpayment made for June 2016 rent.
- $508.00 for personal services to work on this dispute resolution process; taking time off of work; and looking for a new apartment.

The Landlords disputed all items being claimed by the Tenants. The Landlords' submissions are summarized below:

- The Tenants were restricted from using the cabinet underneath the sink which was sealed off with duct tape. The remainder of the kitchen: stove; fridge; sink; and other cabinets; were available for the Tenants use.
- Any loss suffered by the Tenants was the result of their own neglect in failing to report the water issue to the Landlords in a timely manner.
- The Tenants failed to have insurance and failed to provide receipts for expenses being claimed.
- The Landlords did not dispute the presence of mold. They asserted there was no value in testing the mold on the last day the Tenants occupied the rental unit; which they considered an unnecessary expense. Once the mold had been detected the Landlords submitted they began to take action in getting it remediated.

- The Landlords argued they acted prudently and the Tenants assertions that they delayed in conducting repairs are unfounded. The Landlords received the Tenant's email July 4, 2016; they attempted to gain access on July 7, 2016 and the Tenants refused which delayed the Landlords' access to July 8, 2016.
- The Landlords stated there were multiple steps involved in arranging this type of remediation. They had numerous on-site visits (July 8, 9, 14, and 25, 2016) to scope out the work and obtain reports on the extent of the work. The 8 hours of work mentioned by the Tenants was only the first step for the mold abatement if there was no evidence that the mold had spread to the floor or wall.
- The Landlords noted that it was the Tenants' actions which caused the tenancy to end as found in their previous Decision. It was also the Tenants who chose to end the tenancy early, prior to the effective date of the Notice.
- There was no evidence that the Tenants had suffered an injury or health issue. The Landlords provided the Tenants with information on how to contain mold and how mold becomes an issue if it is disturbed.
- The Landlords argued they put a seal around the cabinet, with duct tape, on July 25, 2016; and the Tenants' video evidence and sample test date proves the Tenants intentionally took off the duct tape and exposed the mold; therefore, the Landlords were not responsible for any continued exposure.
- It was the Tenants actions which caused this tenancy to end and the costs incurred with their move were the result of the Tenants' choices for which the Landlord cannot be held responsible. The Landlords noted the Tenants submitted they were seeking costs based on a moving estimate and then conducted the move themselves.
- The Tenants made a personal choice to acquire another rental unit at a higher rent and to pay for mail forwarding instead of contacting everyone to have their address changed.
- The invoice from hydro does not indicate the Tenants were charged a hook up or activation fee.
- As per the Landlord's decision, personal time to prepare for dispute resolution is not an expense that can be claimed on an application for Dispute Resolution
- The June rent overpayment was considered in the calculation awarded to the Landlord in the previous decision.
- It was never the Landlord's intention to renovate the entire kitchen as they had installed a new faucet and counter top in September 2015; at which time the cabinets were in good condition. The renovations were not a choice they were the result of the Tenants' failure to notify the Landlords of the water leak and the Tenants' negligence in the manner in which they treated the new counter top.

In closing, the Tenants asserted the duct tape was not a good solution as it came off after a couple days; they took their video displaying the amount of water spilling into the cabinet on the last day of their tenancy; they could smell mold outside the cabinet in the kitchen; they felt the mold was spreading into the air; and the Landlords wanted to take advantage of them by renovating the whole kitchen.

My findings made in the December 9, 2016 Decision included, in part, as follows:

Notwithstanding the Tenants' submissions that they only used the cupboard under the sink to store their empty bottles, I do not accept the Tenants' submissions that the existing mold would not have or could not have been noticed by them at an earlier date. Given the amount of mold in that cabinet it had to have been present for several weeks if not months.

In addition, I accept that the condition of the new countertop that was installed in August 2015 and the unclean stated the rental unit was left in at the end of the tenancy was the result of the Tenants' disregard for the Landlords' property. As such I find the Tenants had breached sections 32 and 37 of the Act.

Overall I find the Tenants neglected to maintain and clean the rental unit in a manner that complied with section 32 of the Act and Policy Guideline 1…

[Reproduced as written p 9 para 2-4]

Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*. After careful consideration of the foregoing; documentary and digital evidence; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

Section 7 of the *Act* provides as follows in respect to claims for monetary losses and for damages made herein:

7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 provides that the party making the claim for damages must satisfy **each component** of the following: the other party failed to comply with the *Act,* regulation or tenancy agreement; the loss or damage resulted from that non-compliance; the amount or value of that damage or loss; and the applicant acted reasonably to minimize that damage or loss. I concur with this policy and find it is relevant to the Landlord's application for Dispute Resolution [my emphasis added with both text].

It is important to note that where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence,

the party with the burden of proof has not met the onus to prove their claim and the claim fails.

In this case, the Tenants have the burden of proof. I find the Tenants submitted insufficient evidence to prove the Landlords breached the *Act* or to prove the Tenants did what was reasonable to minimize or mitigate their loss. I make these findings in part after consideration that this tenancy ended due to the Tenants' failure to inform the Landlords of the water issue in a timely manner and due to the Tenants' disregard for the Landlords' property which caused damage to the counter top; as found in my December 9, 2016 Decision.

Furthermore, I find the Tenants submitted adverse evidence which supports the Landlords' argument the Tenants failed to inform them of the water or mold problem in a timely manner. After review of the Tenants' digital evidence taken on August 14 or 15, 2016, which displayed what they alleged was the amount of water that they stated "normally happens around the area" and said "water spilled around it normally happens in day to day usage"; I find it irrefutable that that volume of water they displayed would have been visible by the Tenants and would more than likely would have caused water to seep onto the floor from the cabinet. In considering these events under the reasonable persons test, that volume of water displayed in the Tenants' video ought to have caused the Tenants concern enough that they should have reported it to the Landlord prior to July 1, 2016.

If the Tenants were truly concerned for their health and needed to determine the effects of the black substance under the sink, they ought to have had the substance tested when it was first found and not six weeks later on their last day or two in the unit. In addition, there was insufficient evidence to prove the substance that was tested in their report was collected from inside the rental unit as the sample was dropped off at the lab. In addition, it should be noted that the *Act* does not provided for an arbitrator to award punitive damages.

Thirdly, there was insufficient evidence to prove the Tenants' use of the kitchen was not restricted. I accept the Landlords' submissions that it was reasonable to leave the mold undisturbed and seal the cabinet so as not to cause mold spores to enter the air, until such time as the Tenants vacated the unit and the Landlords could then remediate it in accordance with mold and asbestos remediation requirements.

From their own submissions, the Tenants confirmed they did not have tenant insurance. Tenant insurance may have assisted them in moving into temporary accommodations until they secured a new rental unit or assist with costs incurred with their move. In absence of insurance, I conclude the Tenants did not take reasonable steps to minimize or mitigate any loss, as required by section 7 of the *Act.*

I accept the Landlords' submissions that the June 2016 rent overpayment had been accounted for in the Landlords' application.

Based on the totality of the evidence before me I conclude the Tenants have not met the burden of proof to support their monetary requests and their application is dismissed in its entirety.

The Tenants were not successful with their application; therefore, I declined to award recovery of their filing fee.

Conclusion

The Tenants were not successful with their application and it was dismissed in its entirety.

This decision is final, legally binding, 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: February 2, 2017

Residential Tenancy Branch