Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT

Introduction

This hearing was convened by way of conference call concerning an application made by the tenants seeking a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement.

The landlord and both tenants attended the hearing, and the tenants were represented by an agent. The landlord, both tenants and the tenants' agent each gave affirmed testimony and the parties were given the opportunity to question each other and to give submissions.

No issues with respect to service or delivery of documents or evidence were raised, and all evidence provided by the parties has been reviewed and is considered in this Decision.

Issue(s) to be Decided

Have the tenants established a monetary claim as against the landlord for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement, and more specifically for recovery of pre-paid rent and the cost of heat, as well as undetermined amounts for the cost of registered mail and for the landlord's failure to return pre-pad rent?

Background and Evidence

The parties agree to the following facts:

- A fixed-term tenancy agreement was entered into by the parties for a tenancy to commence on November 1, 2018 and expire on October 31, 2019;

- Rent in the amount of $1,350.00 per month was payable on the 1st day of each month, and there are no rental arrears;
- The rental unit is a condominium apartment in a complex containing multiple units;
- The landlord does not reside in the complex;
- The tenancy ended abruptly on March 6, 2019 when the tenants and other occupants were required to vacate as a result of a City sewer rupture that day;
- The tenants had paid rent for the month of March, 2019;
- The security deposit and pet damage deposit were returned in full to the tenants within the time required by law;
- The tenancy agreement specifies that heat is included in the rent, and that electricity is not included in the rent.

The tenants have provided a Monetary Order Worksheet setting out the following claims:

- $593.43 for the cost of heat;
- $1,132.26 for recovery of a portion of pre-paid rent;
- an undetermined amount for the cost of registered mail and for filing this application; and
- an undetermined amount for the landlord's failure to return rent after the tenancy agreement was frustrated.

The tenant's agent testified that after the tenancy began the tenants learned that heat was provided by electricity. The tenants have paid the electric bills, but heat is to be included in the rent. The tenants claim $593.43 as estimated over the course of the tenancy. The tenants have provided a written calculation from November 1, 2018 to March 5, 2019. The bills have totaled $728.63, which the tenants have paid and copies of the bills have been provided as evidence for this hearing. A case summary has also been provided, as well as a document entitled BC Hydro End-Use Study Excerpt. It shows that non-heat electrical costs would be $29.02 per month, and in addition to GST and other costs, the tenants would have paid $32.50 per month. Multiplying that by 4.16 months is $135.20, and the tenants seek the difference from $728.63 which is the total of the amounts paid.

The landlord has advised the tenants that she's not responsible for heat because she was mislead by strata management; they told her heat was covered by the strata. The landlord also argues that she didn't understand the tenancy agreement, but practices business contract law. The landlord also said that the tenants didn't mitigate and

wasted heat. However, the landlord was having repairs made in the rental unit for the first month and a half of the tenancy, which included removing parts of walls exposing concrete which caused a lot of heat loss. There were also large industrial dehumidifiers which also used electricity. When the tenants notified the landlord about a bad odor, the landlord told the tenants to take it up with the restoration company, and the tenants did what they could to mitigate. Windows and the door were left cracked open due to smells from November through December, 2018. The tenant's agent was at the rental unit on December 9, 2018 and smelled the odors.

The tenant's agent also submits that it is not unusual for the Residential Tenancy Branch to make decisions and estimate costs. A search of Decisions resulted in 2 similar cases where heat was included in the rent but not electricity and the value was estimated. In one case the landlord was ordered to reimburse the tenant and in the other case the landlord was ordered to put the electrical utility in the landlord's name. Copies of those cases have not been provided as evidence for this hearing.

The tenant's agent further testified that the landlord has not returned to the tenants any portion of the rent paid for March, 2019, and the tenants claim recovery of $1,132.26. The sewer breakage happened at 4:00 a.m., and the tenants contacted the tenant's agent who also attended at the rental unit that morning. A restoration company told everyone they had to clear out as quickly as they could. There was a lot of sewage water on floors and electrical appliances were dangerous, and the tenants were told it was unhealthy to be there.

The tenants have little financial means and have been "couch surfing" for months. They are destitute and homeless. Under the *Frustrated Contract Act* and according to Residential Tenancy Policy Guideline #34, which uses flooding as an example and refers to the *Frustrated Contract Act,* compensation must be repaid within a reasonable time for the period after the tenancy was frustrated. The landlord has not repaid it because the landlord wanted to see if insurance would pay, then refused to answer, then said she's been afraid of having to pay the electrical bill if the tenants didn't do so. However, the electrical utility was not in the landlord's name, but the tenants' and has been paid in full. A week ought to have been a reasonable time for the landlord to reimburse the tenants. Further, the *Residential Tenancy Act* has a provision for double the amount of the security deposit or pet damage deposit if the landlord fails to return them or apply for dispute resolution within the time required, and should such penalties exist under the *Residential Tenancy Act* or the *Frustrated Contract Act*, such compensation should apply in this case.

The landlord also prepared a Mutual Release/Waiver asking the tenants to sign so they could not hold the landlord financially responsible and waive their right to dispute resolution, claiming that the tenants were not able to prove that the landlord failed to comply with the *Act* or the tenancy agreement. The tenants did not sign it. A copy has been provided as evidence for this hearing.

The tenant (TH) testified that there were no holes in the walls when the tenancy agreement was signed, but were there prior to the tenants moving in. The tenants were told in about mid-October that there was mold. The restoration company used a dehumidifier and a fan during the month and a half that repairs were being made.

The tenant (HW) testified that when the tenants first looked at the rental unit prior to signing the tenancy agreement they were not told of any repairs required. They moved in abit early with the landlord's consent, and were first told of repairs required on October 16, 2018 when they questioned the holes in the walls, and signed the tenancy agreement.

The tenants talked to the restoration company personnel about the odors, but they refused to deal with it. Around November 23 the tenants contacted the landlord asking that she talk to the restoration personnel, and apparently they told the landlord the smell was imaginary. The landlord told the tenants to seek legal counsel about the restoration company.

The landlord testified that she purchased the rental unit on October 1, 2018. The rental unit has not been re-rented; it's still under repair. The landlord agrees that she had suggested to the tenants that they make a claim against the restoration company for the odor they complained of, and provide a doctor's certificate to determine a claim against the strata, but the landlord didn't smell anything.

The landlord thought that the term in the tenancy agreement that says heat is included actually meant that it was available to the tenants. The landlord also submits that "heat" was checked off on the tenancy agreement because she was wrongfully advised by the strata manager that heat cost is included in the monthly strata fee, which the landlord paid. The intention of the parties was that the tenants pay for any utility cost arising out of their use and occupancy of the rental unit. None of the parties knew that heat was generated by electricity, and it was a mutual mistake.

The mold repair was completed around November 26, 2018 but the tenants kept telling the landlord about an odor on an external wall and stating that they had to leave the screen patio door open to relieve odor. However, the landlord was there around

November 28, and again December 7 and 17, staying for at least 1 hour on each occasion and neither the landlord nor her friend who was there as well noticed any odors. The company insisted there was no smell.

The landlord has also provided written submissions, wherein the landlord states that on or about January 23, 2019 the tenants requested the landlord to pay for the cost of heat.

After the flood, the landlord asked the tenants to cancel their electrical account and they agreed to pay the last bill, but the landlord hasn't received any proof of their payment. The landlord agrees to the amount of the tenants' claim for recovery of rent for March, 2019 but has not returned it because there is no way for the landlord to ensure that the last hydro bill was paid. Once they prove that and that there are no penalties, the landlord agrees to reimburse that amount.

The landlord submits that the tenants have failed to establish the amounts for electricity. The electric bills provided by the tenants show electrical consumption of an apartment but do not separate other electrical uses from heat consumption. Considering the number of devices different people use, how many people are in such an apartment, the amount of cooking people do, and their individual working schedules, there is no way to determine the amount of electricity that is applied to heat or other electric usage. The landlord has provided a Historical Table of electrical bills covering winter months from 2015 to 2018. The average monthly bill is around $117.28. The table provided by the tenants shows the average monthly consumption in winter is $183.87, being $66.59 more than the historic bills. The BC Hydro study provided by the tenants is not accurate and should not be considered. The rental unit does not use BC Hydro, but another electric utility company. The landlord submits that the tenants are not qualified to make the estimate and their self-audit is not accurate, and there is no way for the landlord to double check that.

The landlord has also provided 3 cases showing that tenants failed to show the value of their loss. The burden of proof is on the tenants and their monetary claim should not succeed. Further, the tenants failed to mitigate due to their excessive use of heat by opening windows and doors which would cause an increase and there's no way to know how much was wasted.

The landlord has also submitted copies of Decisions of the Residential Tenancy Branch and submitted that they support that when such an electrical bill does not separate electric consumption of different items, the monetary claim should be dismissed for failure to prove the amount or value of the loss, or sufficiently quantify its value.

Submissions of the Tenants' Agent:
The Residential Tenancy Branch can estimate a loss recognizing that the tenants did not waste heat. It is nasty that the landlord would withhold rent for no reason that was ever communicated to the tenants.

Submissions of the Landlord:
The landlord has provided a written submission, and further submits that the tenants have failed to meet the requirement of establishing the value of their loss, and due to their extensive use of electricity have failed to mitigate. The tenants accepted heat in the apartment.

Analysis

The landlord is correct, that in order to be successful in a claim for damage or loss, the onus is on the claiming party to satisfy the 4-part test:

1. that the damage or loss exists;
2. that the damage or loss exists as a result of the other party's failure to comply with the *Residential Tenancy Act* or the tenancy agreement;
3. what efforts the claiming party made to mitigate any damage or loss suffered; and
4. the amount of such damage or loss.

Heat/Electricity:

I have reviewed the tenancy agreement, and I do not accept the landlord's explanation that she thought that heat was available to the tenants, not that the landlord would pay for it, or that it was a mutual mistake. The tenancy agreement specifically states: "What is included in the rent: (*Check only those that are included and provide additional information, if needed.*)" Checkmarks appear beside water and heat, but other utilities, such as cablevision, electricity, internet or natural gas are not checked off. I find that heat was included in the rent, and the tenants have established elements 1 and 2 in the test for damages.

With respect to mitigation, any actions by the tenants would only mitigate the landlord's loss, not the tenants' loss. The tenants paid the hydro bills in good faith as required in the tenancy agreement, not realizing that the heat was electric. The only way the tenants could have mitigated is to request the landlord to reimburse them for the bills they paid, which they did. To say that the tenants accepted the heat in the apartment and therefore should pay for it is absurd.

With respect to the amount of such damage or loss respecting heat, the landlord suggests that since the tenants left windows and doors open that would cause an increase and there's no way to know how much electricity was wasted. The landlord also submits that the BC Hydro charts provided by the tenants should not be considered because they differ from the charts provided by the landlord from the utility used by the rental building, which is not BC Hydro or the same community. However, there is no dispute that for the first part of the tenancy repairs were being made, which exposed concrete in the walls, required industrial humidifiers and fans, and no compensation for the devaluation of the tenancy was ever offered to the tenants for that loss or for electrical consumption used during the repairs.

I have reviewed all of the evidentiary material, including past Decisions provided by the landlord. The *Act* permits me to make a determination and to use estimates if I consider it appropriate. Neither party can provide an accurate estimate of the overage of hydro that the tenants paid for by paying for heat contrary to the tenancy agreement, and given that no compensation was provided to the tenants for electrical usage by the restoration company, I accept the usage suggested by the tenants, and I find that the tenants have established a claim for heat in the amount of $593.43.

Pre-paid Rent

The landlord does not deny that the tenants are owed the sum of $1,132.26, and I find that the tenants have established that claim.

Undetermined Claims

The *Residential Tenancy Act* provides for recovery of a filing fee paid for the cost of make an Application for Dispute Resolution, but not for the cost of serving documents or preparing for a hearing. Since the tenants have not paid a filing fee, I dismiss the tenants' claims for recovery of registered mail and the filing fee.

The tenants' agent submitted that:

a) Under the *Frustrated Contract Act,* since the tenancy was frustrated, the landlord had an obligation to return the rent within a reasonable time;
b) That I can determine the amount of and make an award where establishing the value is not straightforward; and
c) The *Residential Tenancy Act* provides for double the amount of a security deposit if the landlord fails to return or claim against it within 15 days, and if such

> a provision is allowed for the landlord's failure to return the rent under either statute, it should be applied.

I agree with a) and b) above, but there is no provision or specific calculation in either the *Residential Tenancy Act* or the *Frustrated Contract Act* similar to doubling a security deposit. However, the tenant also referred to Residential Tenancy Policy Guideline 16 – Compensation for Damage or Loss, which states, in part:

> Under section 67 of the *Residential Tenancy Act* and section 60 of the *Manufactured Home Park Tenancy Act*, if the director determines that damage or loss has resulted from a party not complying with the *Act,* the regulations or a tenancy agreement, the director may:
>
> - determine the amount of compensation that is due; and
> - order that the responsible party pay compensation to the other party.
>
> An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:
>
> - "Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.
> - "Aggravated damages" are for intangible damage or loss. Aggravated damages may be awarded in situations where the wronged party cannot be fully compensated by an award for damage or loss with respect to property, money or services. Aggravated damages may be awarded in situations where significant damage or loss has been caused either deliberately or through negligence. Aggravated damages are rarely awarded and must specifically be asked for in the application.
>
> The amount arrived at must be for compensation only, and must not include any punitive element.

I am satisfied that the landlord ought to have known, and perhaps did know that the excess rent was to be returned to the tenants within a reasonable time. I also find that the landlord had no justification to withhold it after all these months. The tenants have been "couch surfing" and are destitute and homeless, however there is no evidence to support that had the landlord provided the required compensation earlier, the tenants would not have been able to find another rental unit that they could afford. Although no significant loss has been proven, it has been proven that there has been an infraction of a legal right, exasperated by the landlord's attempt to have the tenants sign away their right to make a claim. In the circumstances, I find that the tenants are entitled to

nominal damages in the amount of $200.00, and that any further award would serve only to punish the landlord, which I must not order.

In summary, I find that the tenants have established claims in the amount of $593.43 for recovery of heat costs; $1,132.26 for recovery of rent from the date the tenancy became frustrated; and $200.00 for nominal damages; for a total of $1,925.69.

Conclusion

For the reasons set out above, I hereby grant a monetary order in favour of the tenants as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of $1,925.69.

This order is final and binding and may be enforced.

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: May 18, 2019

Residential Tenancy Branch