Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCT RP RR PSF FFT**

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- an order to the landlord to make repairs to the rental unit pursuant to section 32;
- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $4,461 pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

Both applicants attended the hearing. The landlord was represented at the hearing by its property manager ("**RY**"), its caretaker ("**JG**"), and its agent ("**PC**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Preliminary Issues

1. Identity of Applicants

The applications are a tenant of the landlord ("**RR**") and her sub-tenant ("**HW**"). They are roommates and both reside in the rental unit. RR signed a tenancy agreement with the landlord. RR received permission from the landlord to sublet a portion of the rental unit to HW. There is no contractual relationship between the landlord and HW. As such, HW does not have standing to bring an application against the landlord. HW is, technically, a tenant of RR. However, as they share the rental unit, the Act does not apply to their contractual relationship.

I order that HW be removed as a party to this application. HW was permitted to participate in the hearing as a witness and provide testimony in support of the RR's application.

2. Service of Documents

The parties agreed that the opposing party served the majority of their documentary evidence (and, in RR's case, the notice of dispute resolution package) in accordance with the Act. However, each party attempted to serve evidence on the other outside the deadlines set out in the rules of procedure (RR served evidence on the landlord five days before the hearing, and the landlord served evidence on RR two days before the hearing).

The parties did not demonstrate why it was necessary for them to have served these documents late, or why they could not have been served prior to the deadlines set out in the rules. As such, I decline to allow these documents into evidence. The parties were permitted to give testimony as to the documents contents.

3. Amendment to Increase Amount Claimed

At the hearing, the tenant sought to further amend the application to include a claim for damages on the same grounds as the damages already sought for the period of time between the day she made this application (February 1, 2020) and the date of the hearing (April 6, 2020).

Rule of Procedure 4.2 states:

> **4.2 Amending an application at the hearing**
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> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.
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> If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

In this case, the tenant seeks compensation in connection with the landlord's ongoing breach of section 32 of the Act (by failing to repair the rental unit). The tenant seeks compensation in the form of a 70% rent reduction. She calculates this to be $36.20 per day. 65 days have elapsed between the date the application was made, and the day it was heard. Accordingly, the tenant seeks an additional $2,353 in damages.

I find that such an increase should have bene reasonably anticipated by the landlord. Therefore, pursuant to Rule 4.2, I order that the tenant's application be amended to include a claim for $2,353 ($36.20 x 65).

4. Settlement of a Portion of the Application

Pursuant to section 63 of the Act, the Arbitrator may assist the parties to settle their dispute and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a decision or an order. During the hearing the parties discussed the issues between them, engaged in a conversation, turned their minds to compromise and achieved a resolution of their dispute.

Both parties agreed to the following final and binding settlement of the issues of repairs being made to the rental unit and that the landlord provide the tenant with services or facilities required the tenancy agreement or Act (the "**Non-Monetary Issues**").

They agreed to settle the Non-Monetary Issues on the following terms:

1. The landlord will hire a licensed heating or mechanical professional (the "**Inspector**") to inspect the rental unit and the residential property to determine the cause of the lack of heating in the rental unit.
2. RR and a representative of the landlord may accompany the Inspector on the inspection.
3. The Inspector will prepare a written report setting out the cause or causes of the lack of heating in the rental unit and recommend repairs necessary to fix this issue.
4. The landlord may follow these recommendations and repair the rental unit or residential property.
5. If the landlord does not undertake these repairs, the tenant may re-apply to the Residential Tenancy Branch for an order that the recommended repairs be made.

These particulars comprise the full and final settlement of all aspects of the Non-Monetary Issues. The parties gave verbal affirmation at the hearing that they understood and agreed to the above terms as legal, final, and binding, which settle all aspects of the Non-Monetary Issues between them.

I will address the balance of the tenant's claim below.

Issues to be Decided

Is the tenant entitled to:

1) a monetary order of $6,681.36; and
2) recover her filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The tenant moved into the rental unit approximately three and a half years ago. She entered into a tenancy agreement with the former owner of the rental unit. In September 2018 the landlord purchased the residential property. The tenant entered into a fixed term tenancy agreement with the landlord starting September 1, 2018, which ended on November 30, 2019. Monthly rent was $1,564.16. On December 1, 2019 the parties entered into a new fixed-term tenancy agreement ending November 30, 2020. Monthly rent is $1,603.26. The tenant paid the prior owner a security deposit of $752, which the landlord currently holds in trust for the tenant.

The rental unit is the upper suite of a three-suite residential property. Neither party testified as to the exact age of the residential property, but both referred to it as "old" during the hearing. All three suites are heated by a central furnace located in the basement. The thermostat controlling the temperature is located in a lower suite occupied by JD (the "**Lower Unit Occupant**").

The tenant and HW testified that the rental unit is improperly heated. They testified that the temperature in the rental unit frequently gets as cold as 11 degrees Celsius during the winter. They provided several photographs of a thermometer located in the living room of the rental unit which show the temperature to be sub-15 degrees Celsius.

The tenant and HW testified that they have spent several months trying to get the landlord to address this issue. They testified that they first notified the landlord of this issue in April 2019. RR notified the landlord that it was "14/15C all winter" by text message. PC relied by text "I'll add that to the summer list. I'll make sure u guys won't be cold this winter."

The parties submitted substantial text messages records between themselves and between the landlord and the Lower Unit Occupant relating to the heating issue. The following dates and events are drawn from these texts, as supported by the parties' testimony.

On September 3, 2019, PC notified the tenants that JG had moved next door and would be able to fix the heat.

On October 1, 2019, RR texted JG and asked him to "fix the heat before it starts getting super cold." RY testified that in the following days JG and RR attempted to coordinate a day that JG could inspect the rental unit. RR did not dispute this. On October 16, 2019, JG attended the rental unit. On October 17, 2019, JG advised the tenants to ask the Lower Unit Occupant to close their air ducts, which should force more hot air up into the rental unit.

RR responded to JG on October 23, 2019 and advised him that the lower unit ducts could not be closed, and that she "turned up the heat on the main floor from 19 to 21C. It's still 15C in our place." JG responded that he would have to replace the vent covers. To date, this has not been done.

On November 2, 2019, JG texted RR and offered to buy her a heater “until [he could] figure it out”. He dropped the heater off at the rental unit on November 4, 2019. The heater blew a fuse in the rental unit on November 6, 2019. The tenant does not use the heater as a result.

JG contacted the Lower Unit Occupant on November 12, 2019 for permission to attend the lower unit to see if the heating issue could be fixed. He attended the lower unit on November 12, 2019. It is unclear what (if any) work was done in the lower unit on this visit, but on November 22, 2019, JG messaged him and asked him to turn the heat up in the lower unit to attempt to increase the heat in the rental unit.

On November 25, 2019, JG asked the Lower Unit Occupant to tape the vents in his unit to see if that would help increase the heat in the rental unit. The Lower Unit Occupant did this on November 26, 2019. It does not work, and the rental unit continued to be cold.

On November 29, 2019, PC advised RR that a furnace vendor would attend the rental unit to see if the furnace needed replacing. On December 10, 2019, the furnace technician inspected the furnace and confirmed that it was running fine, but that it was “old”.

On December 12, 2019, RR texted PC to advise him that she was “laying in bed freezing”. PC replied that JG told him “it was figured out. The guys checked the furnace and said it was fine. [JG] went to your unit at 4:30 and it was well heated. He believes that [Lower Unit Occupant] needs to keep the heat on.” RR disputed that it was well-heated and advised PC that it was 13 degrees Celsius. PC said he would follow up with JG and offered to cover two months of hydro payments for RR.

On December 13, 2019, RR wrote PC that she spoke to the Lower Unit Occupant, who said that he’d leave the heat on 24 hours, but that this did not improve the heating situation in the rental unit. She wrote that the heat was 21 degrees in the lower unit but did not rise above 14 degree in the rental unit.

In an attempt to remedy the issue (by preventing the Lower Unit Occupant from turning down the heat), on December 26, 2019, the landlord attempted to move the thermostat controls out of the lower unit into the basement, where it was accessible by all tenants. This was unsuccessful, as it caused the furnace to make “loud noises” and the heat not to work at all.

On February 3, 2020, the landlord had the vents and ducts cleaned. This did not solve the problem, and the rental unit remained under-heated.

On February 12, 2020, the landlord replaced the furnace. This did not solve the problem. The rental unit continues to be under-heated.

Both the tenant and HW testified that, due to the lack of heat in the rental unit, they each had to stay with their parents for one week during December 2019. Otherwise, they continued to reside in the rental unit, despite the heating issues.

The tenant argued that they are entitled to a rent reduction from October 1, 2019 to April 6, 2020 (the date of the hearing). The assert that the landlord has breached section 32(1) of the Act that states:

> **Landlord and tenant obligations to repair and maintain**
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> **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.

The tenant stated that the landlord breached the municipal *Standards of Maintenance Bylaw* No. 5462 (the "**Bylaw**"), which states:

> 18. Heating Systems
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> 18.1 (1) Heating systems shall be maintained in a safe and good working condition so as to be capable of safely attaining and maintaining an adequate temperature standard, free from fire and accident hazards and in all residential accommodation capable of maintaining every room at a temperature of 72E Fahrenheit (22E Celsius) measured at a point 5 feet (1.52 m) from the floor.

The tenant testified that photographs of thermometers submitted into evidence were taken in the rental unit living room, with the thermometer roughly five feet off the floor.

The landlord did not dispute the applicability of the Bylaw to the rental unit.

The tenant argued that she is entitled to a rent reduction of 70%, based on a decision of an arbitrator of the Residential Tenancy Branch dated December 5, 2008. In that decision, the tenant suffered a chronic lack of heat in the rental unit from 2005 to 2008, where the temperature "routinely dropped down to about 15 degrees C". The arbitrator did not provide any explanation as to how they arrived at 70% as the appropriate amount of reduction of rent.

Based on a 70% deduction, the tenant calculated her damages at the time of making this application as follows:

Month	Monthly Rent	Daily Rent	70% of Daily Rent	Days Without Adequate Heat	Amount Owed
October	$1,564.16	$50.46	$35.32	28	$988.96
November	$1,564.16	$52.14	$36.50	30	$1,095.00
December	$1,603.26	$51.72	$36.20	31	$1,122.20
January	$1,603.26	$51.72	$36.20	31	$1,122.20
				Total	**$4,328.36**

The tenant argued she should be entitled to a further $36.20 per day from February 1, 2020 to April 6, 2020 (the date of this hearing). There are 65 days between those dates. Her monetary claim for this period of time is $2,353 ($36.20 x 65).

In total, the tenant claims for $6,681.36.

The landlord did not deny that the temperature in the rental unit was as alleged by the tenant. Rather, the landlord argued that they acted reasonably to address the tenant's issues. It argued that they conducted an investigation, provided the tenant with a space heater in the meantime, and ultimately replaced the furnace. The landlord argued that the early delay in assessing the problem was due to the tenant not being able to set up a time with JG to conduct an inspection.

The landlord further submits that the cause of the lack of heating in the rental unit is not any deficiency in the rental unit or residential property, but rather due to the Lower Unit Occupant turning down the heat for the entire house. The landlord argued that this is beyond the landlord's control and does not amount to a breach of the Act.

Analysis

The landlord did not dispute that the temperature in the rental unit was as RR and HW alleged. As such, I accept the RR and HW's evidence on this point in its entirety. I find that between October 3, 2019 and April 6, 2020, the temperature in the rental unit was routinely below 15 degrees Celsius.

As the landlord did not dispute the applicability of the Bylaw to the rental unit, I find that it is applicable.

As stated above, section 32(1) of the Act requires the landlord to provide and maintain the rental unit in a state of decoration and repair that complies with the housing standards required by law.

Rule of Procedure 6.6 states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

So, the tenant bears the burden to prove that the landlord breached the Act by failing to maintain the rental unit in a state of repair or decoration that makes it capable of maintaining every room at a temperature of 22 degrees Celsius.

The fact that the temperature in the rental unit was regularly below this level is not in dispute. Rather, the cause of the low temperature is in dispute. The landlord argued it is caused by the Lower Unit Occupant turning down the heat for the entire residential property. The tenant argues this is not the case. The tenant was unable to articulate the cause of the inadequate heat in the rental unit. As the ducts have been cleaned and the furnace has been replaced, it is likely that the cause of the issue does not lie with either of these.

Neither party called the Lower Unit Occupant as a witness. Such testimony would have assisted greatly in determining the cause of lack of heat in the rental unit. Without it, I am unsure as to whether he adjusted the thermostat or at what temperature he kept it set to. I note that on December 13, 2019, RR write that the heat was 21 degrees in the lower unit but only 14 degrees in the rental unit. I do not know if the thermostat could be set to a higher level so as to cause the rental unit to reach 22 degrees. If this were the case, the landlord would not be in breach of the Bylaw or, consequently, the Act.

Indeed, the only evidence tendered regarding the thermostat level set by the Lower Unit Occupant is that it was set below the level required by the Bylaw, which would make it all but inevitable that the rental unit would be below the required level as well. This is insufficient evidence to demonstrate that the rental unit was incapable for being heated to a temperature of 22 degree Celsius.

The tenant bears the onus to prove the landlord breached the Act. Based on the evidence presented at the hearing, I cannot say if the lack of heat was due to the actions of the Lower Unit Occupant or of the failure of the landlord to repair or maintain the rental unit.

Accordingly, I find that the tenant has failed to discharge her evidentiary burden. As such, I dismiss the tenant’s application.

In light of the fact that the landlord has agreed to hire a professional inspector to assess the cause of the lack of heat in the rental unit, I grant the tenant leave to reapply in the event the inspector’s report determines that the cause of the loss of heat was not due to the actions of the Lower Unit Occupant.

As the tenant has not been successful in her application, I decline to order that the landlord reimburse her the filing fee.

Conclusion

I dismiss the tenant's application, with leave to reapply.

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: April 9, 2020

Residential Tenancy Branch