Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

FINAL DECISION

Dispute Codes:

MNDC, FF

Introduction

This hearing was reconvened after an initial hearing held on September 30, 2009.

This hearing is scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application for a monetary Order for loss or damage and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing and were reminded that they continue to provide testimony under oath.

Preliminary Matters

The hearing commenced at the scheduled time of 10:30 am in the absence of the landlord; the landlord's legal counsel was present. At 10:34 am the landlord entered the conference call hearing. Testimony was ceased and I introduced myself and the other parties present. At approximately 10:43 am the landlord exited the conference call hearing and immediately reentered the hearing.

When the landlord first entered the hearing her telephone line was causing some interruption. The landlord was placed on mute and her agent checked to ensure the landlord could hear the proceedings. When the landlord dialed into the hearing the second time her line was free of interference and muting was no longer necessary.

Issue(s) to be Decided

Is the landlord entitled to compensation for damage to the rental unit in the sum of $16,655.21?

Is the landlord entitled to filing fee costs?

Background and Evidence

This tenancy within a strata development commenced in November 2008 and ceased in May 2009. The landlord is claiming compensation for damages as the result of bills

submitted by the strata management for repairs required to adjacent units as the result of water leaks originating from the tenant's unit.

The resident manager and property manager testified for the landlord that on December 13, 2008 an overflowing toilet from the tenant's unit leaked into the unit below. The property manager testified that the second leak occurred on January 1, 2009 and that during this occurrence the unit below the tenant's experienced a significant amount of water damage. The resident manager stated that the third leak was minor and was not related to the toilet.

The landlord submitted that the second, most serious flood was the result of the tenant's son having damaged the toilet while it overflowed. The landlord's legal counsel stated that the tenant's son only had to turn the water supply off, but that, in a panic, he broke a water line which caused a serious flood to the unit below.

The landlord's property manager testified that the toilets are low-flow and that the tenant's had been given instruction on the proper use of these toilets. During the hearing the parties agree that the tenants were made aware of the deficiencies with the toilet. The tenant testified that she did not become aware of the problem until she had moved into the unit.

The property manager witness testified that she has been a realtor for over 13 years and that the rental units carpets required replacement and that the cost of $3,000.00 was adjusted from the sale price of the rental unit, based upon carpet replacement estimates. The landlord testified that the carpets were fourteen years old, but in good shape.

Both parties provided a copy of June 2006 strata council meeting minutes which indicate that on May 24, 2006 a notice was delivered to each resident indicating that there would be no insurance deductible for toilet overflows and that the council "strongly recommends that you replace the toilet(s) in your suite." The landlord stated that only 11% of the owners within the building chose to replace their toilets.

The tenant evidence indicates that at the start of the tenancy the landlord did not inform the tenants of the deficiencies with the toilets and that after the first flood the landlord failed to purchase insurance in an attempt to mitigate any loss.

The tenant's evidence indicated that after the first flood the tenant called the landlord in China and asked the landlord to replace the toilet; as suggested by the strata council. The landlord confirmed contact occurred with the tenant immediately following the first flood. The landlord testified that when she spoke with the tenant after the overflow occurred on January 1, 2009 she did tell the tenants to arrange installation of a new toilet and that the landlord would pay for the costs. There is no agreement as to when this conversation occurred, but the landlord did not make any arrangements herself and the toilet was not replaced.

The landlord submitted that the toilet was not defective but that the problems with the toilet were one of design, which resulted in the need for caution. The landlord stated

the tenants were told they must not use a lot of toilet paper and must, in some cases, double flush. The tenant stated that she was not made aware of this deficiency at the start of the tenancy and that after the January flood they were forced to use common area toilets much of the time, in fear that another flood would occur.

The parties signed a document entitled "Property Management Agreement" which states in party:

> In the event of fire, water leakage and other pertinent incidents during the management period as a result of carelessness on the part of the manager, (the tenant) undertakes to assume all liabilities and losses so caused."

The landlord testified that the tenant had assumed responsibility for any costs due to flooding and that the tenant should have purchased liability insurance.

The landlord confirmed that she did not purchase insurance.

Analysis

I have considered the landlord's claim that the tenant, by signing the "Property Management Agreement", should accept all liability related to the rental unit. I find that the respondent was a tenant, not a property manager and that this is supported by the landlord's Application for Dispute Resolution made against the tenant.

First, I will consider the document signed between the parties which assigns all liability to the tenant. Section 5 of the Act prohibits any attempt to contract out the Act:

> (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
>
> (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

The landlord may not avoid or transfer her responsibility to mitigate losses to the tenant. I have no evidence before me of any material term of this tenancy that required the tenant to obtain insurance.

Section 7 of the Act provides:

> (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.

(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.

(Emphasis added)

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or *Act*, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

I find that the landlord has incurred a loss and damages due to a flood of the rental unit below the tenant's unit. In relation to the damages having occurred as a result of a breach of the tenancy agreement or the Act; I find that the agreement signed between the parties is unenforceable as this document attempts to circumvent the landlord's responsibilities provided under the Act.

I find that prior to renting out this unit the landlord was aware of the deficiencies of the toilet. Expecting tenants to utilize a toilet by using a limited amount of toilet paper, double flushing and caution in general is not reasonable. A toilet is an essential service of any tenancy and should be maintained in proper working condition. The landlord made an informed decision to retain the low-flow toilet, despite knowledge of its deficiencies and the recommendation that it be replaced.

Section 32 of the Act provides:

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(4) A tenant is not required to make repairs for reasonable wear and tear.

(5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

I have considered the landlord's claim the tenant's son was negligent as a result of removing a part of the toilet during the January 1, 2009 flood. I have rejected this claim, as I find that if the landlord had replaced the toilet, as suggested by the 2006 strata council recommendation, the tenants would not have been faced with the problems presented by the toilet. I have accepted the landlord's submission that the tenant's son did panic, but find that he was not negligent, only perhaps ignorant of the inner components of a toilet. I find that the January 1, 2009 flood occurred due to the deficiency with the toilet and, whether this deficiency is by design or not, that the tenant's actions were not responsible for the flood.

In regard to mitigation, I find that the landlord failed to mitigate her loss by purchasing insurance and, combined with the decision to retain the existing toilet that, on the balance of probabilities, the landlord must assume responsibility for the flood damages that have occurred. Therefore, I dismiss without leave to reapply the landlord's claim for compensation and loss. I

As the landlord's application is without merit I find that the landlord is not entitled to filing fee costs.

Conclusion

The landlord's Application for Dispute Resolution is dismissed without leave to reapply.

The landlord is not entitled to filing fee costs.

This interim 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: November 19, 2009.

Dispute Resolution Officer