Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND FF

Preliminary Issues

The Tenant raised the issue that the matters pertaining to the Landlord's claim for costs of appliance repairs and repair of the master bedroom window were heard in a previous dispute resolution proceeding and that there was another hearing to dispute a notice to end tenancy. I informed both parties during the hearing that I would be reviewing the previous decisions to determine which matters could be heard in the claim that is before me.

Upon review of the decisions from the January 21, 2011 and March 7, 2011 dispute hearings I have confirmed that the matters pertaining to the appliance repairs and master bedroom window repair were heard and rulings made. Accordingly I find the Landlord's request to recover costs pertaining to these repairs constitutes res judicata.

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

Consequently, I find the Landlord is barred from raising in this hearing the matters pertaining to the previous appliance repairs and master bedroom window repair that were contained in the Tenants' application that was heard January 21, 2011, and may only seek compensation for new matters raised in this application; i.e. for other damages to the rental unit.

Introduction

This hearing convened on December 29, 2011, and reconvened for the present session on January 11, 2012. This decision should be read in conjunction with my interim decision of December 29, 2011.

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order for damage to the unit, site or property, and to recover the cost of the filing fee from the Tenants for this application.

The parties appeared at the teleconference hearing, provided affirmed testimony, and were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

1. Has the Tenant complied with my Orders that were issued during the December 29, 2011 hearing?
2. Has the Tenant breached the *Residential Tenancy Act*, Regulation, and/or tenancy agreement?
3. If so, has the Landlord met the burden of proof to obtain a Monetary Order as a result of that breach, pursuant to section 67 of the *Residential Tenancy Act*?

Background and Evidence

I informed the Tenant that a letter received from him January 9, 2012 was placed on file which states that he did not return the kitchen island to the Landlord as I had Ordered him to do during the December 29, 2011 hearing. He advised that he had submitted additional evidence via fax on January 10, 2012; however this additional evidence has not been received by me or placed on the file as of today's hearing.

The Landlord confirmed he received several pages of a typed statement titled the Tenant's evidence and that it was personally delivered to his residence by the Tenant last evening, January 10, 2012. He confirmed that he heard nothing from the Tenant in regards to making arrangements to deliver the kitchen island as ordered in our previous meeting.

The parties agreed they entered into a fixed term tenancy agreement that began on December 1, 2007 that was extended annually from June 30, 2009 until it ended June 30, 2011. The Tenant continued to occupy the unit until July 2, 2011. Rent was payable on the first of each month in the amount of $2,200.00 and on or before December 1, 2007 the Tenant paid $1,100.00 as the security deposit and $1,100.00 as the pet deposit. A move in inspection report was completed December 3, 2007 and signed by the Tenant and Landlord's Agent and on July 2, 2011 the move out inspection report was completed and signed by the Tenant and the Landlords Agent. The Landlord was not aware of the Tenant's forwarding address until just prior to making his application for dispute resolution near the end of September 2011.

The Landlord advised this rental unit condo was built in 2007 and had only been occupied for six months by the previous tenant before this tenancy began. By

November 25, 2010 the Landlord became aware of damages to the unit, a flood had occurred in February 2011, at which time they determined that the unit was being kept in an unclean state as indicated in the previous hearing. The Landlord attempted to end the tenancy at that time however he was denied by the *Residential Tenancy Branch (RTB)* and is now faced with claiming these damages now that the tenancy has ended.

The tenancy was scheduled to end June 30, 2011 however when the Agent attended the unit he found the Tenant was not ready to move as things were not packed and the Tenant requested one more day. When the Agent returned to the unit July 2, 2011 the Tenant had still not moved or packed and claimed he could not find a truck to move him. The agent made a few calls and had arranged for a mover within about one hour, who attended and assisted the Tenant in moving.

The Landlord made reference to his evidence, to support his claim for repairs to the unit, which included the move out condition report that was signed by the Tenant and photographs that were taken by the Landlord on July 3 or July 4, 2011. The Landlord had initially applied for $8,536.94 but when he completed he summary listing the items and receipts it came to $8,800.14. He advised that when I questioned him about why the amounts were different during the previous hearing he was afraid that if he requested to amend his application his entire claim would be denied. He said he followed the instructions provided by the RTB to provide a list itemizing each item being claimed and the amount, which is what he did. He did not submit each receipt as he thought that would not make sense having several receipts from different places as he was told we would refer to the itemized list during the hearing. He advised he has all of the receipts if I wish to see them.

He did not list a dollar amount for the Kitchen Island on his itemized list as he cannot afford to have this replaced at this time so did not have an actual cost. He believes this island to be worth $3,000.00 as it was the same as the kitchen cabinets, high end with granite counter top.

He stated all of the appliances are high end stainless steel and were new in 2007. They were all repaired and in good working order since the January 25, 2011 decision was issued and all of them required some sort of repair or extensive degreasing at the end of the tenancy in July 2011.

He referenced his evidence again with photos showing that there were over 149 holes in the one bedroom wall alone, several doors were damaged and several large holes throughout the rental unit. He was charged $560.00 for a team of cleaners to clean the unit over and above all the work he had to do to clean and repair the unit.

The Landlord added to his written submission that the main bathroom, the one that was not the ensuite bathroom, had extensive damage caused by cigarette smoke. He said the smoke damage was so bad that they had to remove all the caulking as it could not be bleached, had to bleach the grout, the bathroom fan had burnt out due to constant use and disgusting filth inside, the sink was cracked and was a solid unit with the vanity so both had to be replaced. The smoke damage was so extreme that it took over four coats of paint to return the bathroom to a white color.

The Tenant affirmed that he was aware that his tenancy would not be extended again and that he continued to occupy the unit until July 2, 2011. He argued that he was denied access to the unit or building to clean as he turned in his keys at the move out inspection.

He questions the Landlord's claim as there are no receipts provided; there are only numbers on a paper. He is of the opinion that he should not have to pay for the Landlord's labour to perform work on his own property.

He confirmed that he did not comply with my Order to return the kitchen island and stated that he does have it and will be returning it at the end of the month. I questioned why he would take the island in the first place when he knows full well that it was not his property. He initially claimed that he was instructed to remove all of his furniture so that repairs could be conducted on the rental unit after the flood occurred in February 2011 and that he moved his furniture and the island into storage at that time and never brought those items back. After a brief discussion I told the Tenant that I found his testimony of these events to be improbable and he confirmed several times that he occupied the unit for the remaining six months without any furniture what so ever in the living room or kitchen and that only the bedroom furniture remained in the unit while he paid storage for the remainder of his furniture which included the Landlord's kitchen island. When I questioned him where he ate his meals or relaxed he said he was correcting his testimony to say there was some furniture there.

The Tenant further confirmed he did not follow my orders to ensure his evidence was served to the RTB and the Landlord five clear days prior to the hearing. He was relying totally on his written submission that he failed to submit until the day before this hearing convened.

I asked the Tenant if anyone was smoking in the unit to which he promptly answered "no one smoked in the unit". After a few other clarifying questions the Tenant admitted that his son smoked and that he may have been smoking inside the bathroom but that

he asked him not to. He confirmed that his son is currently 24 and that he was at least 20 when they first occupied the unit and that the Agent was well aware that his adult son would be occupying the unit with him.

The Tenant argued that the Landlord's claims do not take into consideration normal wear and tear of the unit for the duration of his tenancy. He believes the Landlord should not be entitled to claims that would bring the unit back to new condition. He confirmed the unit was never painted during his tenancy and he point to the Landlord's photographic evidence which supports the good condition of several walls. He admits there were numerous holes in the east wall of the master bedroom but disagrees with the other damage being claimed as he did not hang anything on any of the remaining walls except for one wall in the bathroom.

I asked the Tenant how the dents in the stainless steel appliances occurred. He states that he has no recollection of these dents but then stated his movers may have caused them on moving day.

The Tenant argued that the stains under the carpet were from him and not his dog. He claims they were caused by his wet feet when leaving the bathroom after his shower. He confirmed he did not have the carpets professionally steam cleaned at the end of the tenancy and argued that he was not consulted by the Landlord or his agent before the carpets were replaced. He has no knowledge as to what type of carpet it was replaced with or if the carpet was of similar quality. He confirmed he had a medium sized dog who occupied the unit with him the entire tenancy.

The Tenant noted that the damage to the window was pre-existing at the start of the tenancy as noted in the previous hearings and the move in condition report and therefore he should not be held responsible for the claim of $263.23.

The Tenant claims he does not know why the bathroom vanity was replaced or why any of the bathroom repairs had to be done. He argues there are no visible baseboards in the kitchen nor are there blinds in the kitchen.

In closing the Landlord confirmed he has all of the receipts available if I wished him to submit them. He argued that the bathroom required extensive repairs due to smoke damage and the cracked sink which was attached to the vanity. Furthermore the unit can be seen on the agent's website which shows the kitchen has baseboards and blinds. The painting quote was provided prior to any of the clean up and he saved money by doing a lot of the work himself. The unit was so filthy with grease that he had to even degrease the deck. He argued that wet feet do not soak through carpet,

underlay and stain the cement leaving a smell of urine as was the case with this carpet. He has no doubt it was dog urine. His pictures support how damaged the unit was with big holes and damaged doors. The Landlord stated this unit was way beyond normal wear and tear as “this place was trashed”.

The Tenant was provided the opportunity to provide closing remarks at which time he asked if he needed to provide testimony as to why his evidence was late. I told him I would not consider his testimony for the late evidence and that he needed to provide his closing remarks. The Tenant began by repeating his previous testimony. After I redirected him the Tenant stated that he is of the opinion that the restoration of the suite does not merit restoring it to new condition.

Analysis

I have carefully considered the aforementioned and the Landlord’s documentary evidence which included, among other things, copies of: a letter from the property management company; the move out condition inspection report; the move in condition inspection report; registered mail receipts dated December 23, 2011 which was the second package of evidence with the few remaining documents, and December 21, 2011 which was the first package of evidence which was received by the Tenant six calendar days before the December 29, 2011 hearing; receipts for work performed at the rental unit; the tenancy agreement; lease addendums for extensions; and a detailed list of items and costs being claimed.

Sections 88 and 90 of the Act provides for service of documents and stipulates that evidence served via registered mail is deemed to have been received five days after it was served.

In this case the evidence proves the Tenant was sent two registered mail packages of evidence with the first package sent December 21, 2011 and signed received on December 23, 2011 which is six days prior to the December 29, 2011 hearing. The remaining evidence was sent December 23, 2011 and deemed to have been received December 28, 2011 which is one day prior to December 29, 2011. When we convened on December 29, 2011 I granted the Tenant leave to adjourn the hearing to provide him time to provide evidence in response to the Landlord’s claim due to mail service delays during the Christmas season. At this time the Tenant was ordered to provide his evidence to the RTB and the Landlord five clear days before the reconvened hearing.

The *Residential Tenancy Branch Rules of Procedure 4.1* stipulates that if the respondent intends to dispute an application for dispute resolution, copies of all

evidence the respondent intends to rely upon as evidence at the dispute resolution proceeding must be received by the Residential Tenancy Branch and served on the applicant at least five days before the dispute resolution proceeding as those days are defined in the "Definitions" part of the Rules of Procedure**.**

Considering evidence that has not been served on the other party in accordance with the Rules of Procedure, or in accordance with an Order issued by a Dispute Resolution Officer, would create prejudice and constitute a breach of the principles of natural justice. Therefore as neither the applicant Landlord nor I have received copies of the Tenant's evidence in accordance with my previous Order or the Rules of Procedure, I find that the Tenant's documentary evidence cannot be considered in my decision. I did however consider the Tenant's testimony.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*.

After careful consideration of the aforementioned I favor the evidence of the Landlord, who provided photographic evidence, the inspection reports, a letter from his agent, and a itemized list of his monetary claim as he stated he was instructed to do so as proof of the condition of the unit and his costs, over the evidence of the Tenant who provided no evidence to support his arguments and who disregarded orders to repair the unit issued in previous hearings and completely ignored my Order to return the Landlord's property, the kitchen island. I favored the evidence of the Landlord over the Tenant, in part, because the Landlord's evidence was forthright and credible. The Landlord readily acknowledged that he did what he could to attempt to end this tenancy earlier but was denied, and he affirmed that he has all of the supporting receipts available to submit if I requested. In my view the Landlords willingness to admit he did not know he had to submit the actual receipts because he thought they would create a messy pile of receipts so he did what he was instructed to do and provide a detailed list, lends credibility to all of his evidence.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test*

of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

I find the Tenant's explanations of why he removed the kitchen island, why he didn't return it, why he didn't repair the unit, or if there was someone smoking in the rental unit, to be improbable as in each case, after further questioning the Tenant changed or altered his testimony. After review of the decisions from the previous hearings I note that there was acknowledgement by the Tenant that there was damage to the unit with holes in walls and doors, which were caused during his tenancy, and that he had previously admitted that his son was smoking inside the rental unit. Therefore I find that the Tenant's explanations to be improbable, not to mention do not meet the requirement under section 62 of the Act to comply with Orders issued by the Director. I further note that although the Tenant had previously filed for reduced rent due to a reduction in the use of space in the unit during repairs there is no mention that the Tenant was paying to store his possessions or the Landlord's kitchen island. This leads me to question the credibility of the Tenant's testimony. Rather, I find the Landlord's explanation as to the condition of the unit at the end of the tenancy and his attempts to lessen the costs of repairs by doing work himself to be plausible given the circumstances presented to me during the hearing.

Applicants are advised that they are required to provide a detailed list itemizing the items being claimed and the amounts attributed to each item. Accordingly I accept the Landlord's testimony that is what he did when preparing his evidence and I further accept his affirmed testimony that he has the supporting receipts.

I do not accept the Tenant's testimony that he will be returning the Kitchen Island to the Landlord at the end of the month as he has clearly demonstrated that he does not comply with Orders issued by Dispute Resolution Officers acting as a delegate of the Director and at this point I do not have any evidence that this island is still in the Tenant's possession. Accordingly I award the Landlord a monetary claim for the Kitchen Island in the amount of **$3,000.00,** pursuant to section 67 of the Act.

Section 32(2) of the Act provides that 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.

Section 32 (3) of the Act provides that 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.

Section 37(2) of the Act provides that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

Based on the aforementioned, I find there to be a preponderance of evidence before me to prove the Tenants have breached sections 32(3) and 37(2) of the Act, leaving the rental unit unclean and damaged at the end of the tenancy which caused the Landlord to suffer a loss in bringing the unit back to a state that makes it suitable for occupation by a tenant; after consideration is given to the age, character and location of the unit, as required by section 32(1) of the Act.

I note that the Supreme Court of Canada decided that where there is a breach of a statutory duty, claims must be made for negligence. In all cases the applicant must show that the respondent breached the care owed to him and that the loss claimed was a foreseeable result of the wrong. In this case, I have no doubt that the Tenant ought to have known that the condition he left the rental unit in would result in losses to the Landlord and that the Tenant not only had foresight he had been previously Ordered by the Dispute Resolution Officer to correct these wrongs prior to the end of his tenancy.

The *Residential Tenancy Policy Guideline # 16* stipulates that a Dispute Resolution Officer may award damages when the evidence affirms that there has been an infraction of a legal right causing the Landlord to suffer a loss.

Awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. Where an item has a limited useful life, it is necessary to reduce the replacement cost by the depreciation of the original item. In order to estimate depreciation of the replaced item, I have referred to the normal useful life of items as provided in *Residential Tenancy Policy Guideline 37* as follows:

- Normal useful life (NUL) of interior paint is 4 - 5 years. Therefore I allowed ¼ of the costs being claimed for the paint as listed below.
- Bathroom cabinets and sinks NUL is 25 years. Therefore I allowed 21/25 of the claim.
- Carpets NUL is 10 years therefore I allowed 6/10 of the claim.

After careful consideration of the aforementioned and the documentary evidence, I hereby find the Landlord has met the burden of proof to establish a monetary claim for **$3,650.30** which includes the amounts as indicated below, pursuant to section 67 of the Act.

$260.12	Miscellaneous Materials (light bulbs, cleaning supplies, waste removal, small electrical items)
$295.45	Paint (1/4 of $1,181.82 of total amount claimed for paint)
$763.39	Carpet (6/10 of $1,272.32 claim for carpet)
$487.34	Bathroom vanity and counter/sink (21/25 x $580.16)
$84.00	Bathroom fan
$1,200.00	Landlord's labour to clean and repair the unit – I found the total amount claimed for labour to be excessive as there is insufficient evidence prove the Landlord has experience with this type of work. Therefore I have allowed the claim for labour based on 80 hours x $15.00 per hour.
$560.00	For professional cleaning of the rental unit

The following items were not accepted as claimed and have been dismissed as they are either res judicata or there is insufficient evidence to support the claim:

- Bathroom light
- New window in master bedroom
- Bathroom accessories ($62.62)
- Bathroom mirror
- Bathroom accessories ($30.07)
- Appliance repairs ($559.51, 838.76, 997.65, 222.76).

The Landlord has primarily been successful with his claim; therefore I award recovery of the **$100.00** filing fee.

Conclusion

The Landlord's decision will be accompanied by a Monetary Order in the amount of **$6,750.30** ($3,000.00 + $3,650.30 + $100.00).

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: January 11, 2012.

Residential Tenancy Branch