Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, FF

Introduction

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

- a monetary order for damage to the rental unit pursuant to section 67; and
- authorization to recover her filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenants confirmed that the landlord's mother handed the female tenant a copy of the landlord's dispute resolution hearing package and initial written evidence on July 18, 2014. Although the landlord had planned to have her mother, who served evidence and attended the rental unit on one occasion, participate in the hearing, she agreed that it was not necessary to include her mother as the tenants were not disputing those events involving her mother.

The landlord testified that she sent the tenants a copy of her second written evidence package by registered mail on December 24, 2014. She entered into written evidence a copy of the Canada Post Tracking Number and Customer Receipt to confirm this registered mailing. The tenants testified that they have not yet received this registered mailing. However, I confirmed that the tenants had received copies of all of the materials included in the landlord's second evidence package during the course of their tenancy. The male tenant said that he received a Canada Post notice the previous day that registered mail was waiting for his pickup at the nearest postal station. In accordance with sections 88 and 90 of the *Act*, I find that the tenants have been deemed served with the landlord's second written evidence package on the fifth business day after this package was mailed to the tenants.

The tenants testified that they had not served the landlord with a copy of their late written evidence package received by the Residential Tenancy Branch on January 2, 2015. As noted at the hearing, I have not considered the tenant's written evidence. I

noted that the tenants entered into sworn oral testimony much of the material included in their written evidence submission.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for damage arising out of this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

On January 31, 2014, the parties signed a one-year fixed term Residential Tenancy Agreement (the Agreement) for the rental of a main floor unit in a large strata building. The landlord said that the rental unit was six years old when the tenancy began. Although the tenants moved into the rental unit on February 28, 2014, the Agreement called for a tenancy from March 1, 2014 until February 28, 2015. Monthly rent was set at $1,500.00, payable in advance on the first, plus utilities. The tenants paid a $750.00 security deposit on February 15, 2014. The landlord entered into written evidence a copy of her report of the joint move-in condition inspection of March 1, 2014, which showed no significant damage to the rental unit when the tenants entered into their tenancy.

This tenancy ended on October 26, 2014, when the tenants surrendered vacant possession of the rental unit to the landlord. The parties agreed that the tenants gave the landlord written authority to retain their security deposit as well as a $597.50 payment for damage that occurred during this tenancy unrelated to the landlord's current application for a monetary award for damage.

The landlord applied for a monetary award of $5,000.00, plus the recovery of the $50.00 filing fee. This damage claim was to reimburse her for the deductible portion of the insurance claim submitted as a result of damage arising from an overflowing toilet in the tenant's rental unit on April 9, 2014. There was no dispute that extensive damage resulted from this bathroom toilet incident of April 9, 2014. Although the landlord did not know the full cost to the strata corporation (the strata) or the strata corporation's insurance company, the tenants did not dispute her sworn testimony that the repairs exceeded $25,000.00.

The landlord entered undisputed evidence that the strata council president noticed flooding in the parkade below the rental unit when he returned to the strata complex on the evening of April 9, 2014. The strata council president rushed to the rental unit to alert the tenants to the flooding that was coming from their rental unit. The landlord gave sworn testimony that the toilet had been overflowing for approximately one hour. The landlord testified that the strata council president made arrangements for a plumber

to attend the premises. In her written evidence, the landlord noted that the male tenant had advised that he had heard some odd noises coming from the toilet a few days before this incident, but had not taken action.
The male tenant testified that he assisted his three year-old daughter when she used the toilet that evening to have a “small poop.” He said that he remained there until she had finished her business in that bathroom. After flushing the toilet, it stopped and he had no reason to believe there was any problem. He said that he did not notice anything unusual until shortly before the strata council president arrived at his door. He said that he walked across a nearby floor and discovered that water must have been leaking under the flooring as it was “squishy”. Upon checking the bathroom, he noticed a small amount of feces and a small section of toilet paper in the toilet bowl. He said that he immediately shut the water off and proceeded to plunge the toilet. The male tenant said that he placed a number of calls to the landlord, but when he could not contact her, decided to call a restoration company to come out and assist with this flooding problem.

Once the landlord was alerted to the problem the following day, the strata looked after arrangements with the restoration company, which continued its repairs and restoration of the rental unit and the parkade below it for the next two weeks. Repairs were made to all flooring, kicks on cabinets, drywall, repainting and other features of the rental unit.

The landlord testified that her mother attempted to gain access to the rental unit on April 21, 2014 to have a plumber inspect the toilet in the bathroom where the flood began. She maintained that the female tenant initially refused entry to her mother and plumber. The tenants confirmed that the female tenant initially refused entry, but noted that the female tenant was experiencing severe depression and emotional issues following her loss of an unborn child a month before this flooding incident occurred. Both parties agreed that the female tenant allowed the landlord’s mother and plumber to inspect the toilet in the bathroom of the rental unit later that day. When the plumber returned to the strata complex on April 24, 2014, the plumber once more inspected the toilet. On both occasions, the plumber found nothing wrong with the toilet or the way that the toilet was installed or operating. The tenants confirmed that they never had any further problems with this toilet after April 9, 2014. The male tenant testified that he believed he was successful in repairing the toilet.

The landlord gave sworn testimony that the insurance company advised her that the restoration company concluded that the damage arising from the flood resulted from operator error or negligence on the part of the tenants. She entered into written evidence a copy of a July 15, 2014 email she sent to the tenants in which she alleged that “the Strata Corporation’s insurance company has determined that as there is no

specific defect to the plumbing, the cause of the damage was human error." She also entered into written evidence a copy of the Emergency Water Loss Report prepared by the restoration company, which noted the following in part:

- *…tech inspected the toilet in the main level and noticed that toilet paper and small bits feces was present inside the toilet bowl.*
- *Residents advised that they had heard noises over the past couple days coming from their toilet but did not believe anything was wrong with it…*

The landlord also entered into written evidence a copy of the insuring agreement for her policy, confirming that her policy included a $5,000.00 deductible provision for water damage. The landlord testified that no Addendum was created for this tenancy requiring the tenants to obtain tenants' insurance as a condition of renting the unit. The landlord said that her new tenancy agreement with the subsequent tenants who moved into this rental unit contains an Addendum requiring the new tenants to hold tenants' insurance.

Although I could not consider the tenants' written evidence, the female tenant read into testimony the contents of the provisions of the strata's bylaws regarding insurance, in which the owners of the strata unit are held responsible for damage that occurs originating from their strata unit. These bylaws also note that the property insurance must include a provision for insurance against major perils, which would include water damage. The female tenant said that she obtained this portion of the bylaws from the strata council approximately three weeks before this hearing.

While the landlord carried insurance, which covered the excess of the strata's repair costs beyond the $5,000.00 deductible, the landlord said that no policy was available whereby she could obtain a lower deductible for this provision. The landlord also testified that the strata bylaws changed at the most recent Annual General Meeting and it is possible that the portions cited by the tenant were not in place at the time of the flooding incident in April 2014.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual

monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage.

Much of the evidence from the parties is undisputed. The tenants did not dispute that the flooding incident of April 9, 2014 originated in their rental unit and caused major damage to the rental unit and the strata complex. They did not dispute that repairs were extensive and required the landlord to incur a loss of $5,000.00 due to the deductible amount cited in her insurance policy. The tenants did not dispute the landlord's evidence that she paid this deductible over time, eventually looking after the entire $5,000.00 deductible charge by October 25, 2014.

For her part, the landlord did not dispute that the tenants took immediate action to turn off the water valve in the bathroom when the flooding was discovered, that the tenants tried to telephone on the evening of April 9, 2014, and that the tenants and the strata council president took immediate action that night to undertake emergency repairs. Other than the incident of April 21, 2014, when the landlord claimed that the female tenant delayed her mother's attempt to have a plumber inspect the toilet in the bathroom, the landlord has not claimed that the tenants interfered with or hindered the repair and restoration of the rental unit. The parties also agreed that by April 21 and 24, 2014, when the plumber inspected the rental unit, the toilet was working properly and nothing was out of order. The parties also confirmed that no subsequent problems arose with this toilet during the course of this tenancy.

The area of dispute narrows to who was responsible for the flooding incident of April 9, 2014, and ultimately who bears the responsibility for the landlord's $5,000.00 deductible payment.

I first observe, as was evidenced in this case, that it is certainly prudent for all tenants to carry adequate tenants' insurance. However, there was no express provision in either this Agreement or any attached Addendum requiring the tenants to carry such tenants' insurance. In accordance with the legal principle of "*contra proferrentem*", the drafters of the Agreement, in this case the landlord, bears responsibility for any gaps, deficiencies or lack of clarity in that Agreement or in an absent Addendum that would attach additional conditions of tenancy. After experiencing this situation, the landlord has wisely included an Addendum in her new tenancy agreement for this strata unit.

Knowing why a flood from a toilet occurred is somewhat speculative under these circumstances. There may be many reasons, some of which are attributable to tenants' actions while others may not be attributable to tenants. As the landlord bears the burden of establishing her claim, I have given careful consideration to the sequence of

events and the documentation she has provided to support her claim for the recovery of her deductible payment. In this regard, I give little weight to the two inspections conducted by the plumber on April 21 and 24, 2014, conducted as they were well after the repairs and restoration work had been undertaken and for the most part completed. Confirmation that the toilet was working well on those dates was not disputed and, in fact, provides little information as to why the toilet did not work properly on April 9, 2014.

Although the landlord has maintained that the restoration company, the strata's insurance company and the plumber who undertook work on behalf of the strata's insurance company attributed the damage to human error, I find that the landlord has not provided sufficient direct evidence from any of those sources to enable me to make a finding that the tenants were responsible for this damage.

At the hearing, the male tenant asked the landlord if she knew whether any of the officials from the restoration company were certified plumbers. The landlord said that she did not know whether any of the restoration company employees who viewed the site were certified plumbers. Whether or not any of them were certified plumbers, I find that the Emergency Water Loss Report, the primary document provided by the landlord with respect to the restoration company's work, provides little direct support for the landlord's claim that the tenants were responsible for the damage. The only statement that lends marginal support to this contention is the statement that the strata's preferred plumber, which apparently worked on the plumbing issue, inspected the toilet and determined that the repairs to the toilet were the responsibility of the resident in that rental unit (i.e., the tenants). I find this type of written evidence is very indirect support for the landlord's claim, at best. There is no detail whatsoever as to what the plumber for the other company said. I find that this second-hand report is insufficient to establish that the plumber who actually inspected the toilet reached an informed conclusion that the tenants' actions or those of their three-year old daughter were negligent or cause for rendering the tenants responsible for the damage that ensued.

The landlord has not provided any report or written document regarding these issues from the plumber cited in the restoration company's Emergency Water Loss Report, the strata corporation or the strata corporation's insurance company. The landlord has not called any witnesses from any of the above-noted sources. Instead, she relied extensively on her own assertion that they made such determinations, as stated in her July 15, 2014 mail to the tenants. Evidence from any of the above-noted sources would have been far more convincing than the brief references in the restoration company's report. Had such evidence been provided, the landlord may very well have been able to demonstrate to the extent required that the tenants were indeed responsible for the

losses she incurred. Such evidence could have been obtained by the landlord in advance of this hearing of the landlord's application and was not.

As outlined above, the party submitting a claim for losses or damage bears the burden of establishing entitlement to a monetary award. Circumstantial evidence alone is no adequate substitute for submitting evidence from those who inspected and made informed conclusions as to the cause of damage arising from a tenancy. For these reasons, I find that the landlord did not supply direct evidence of any significant type to support her claim that the tenants were responsible for this damage. As I find that the landlord has failed to demonstrate her entitlement to the issuance of a monetary Order for damage arising out of this tenancy, I dismiss her claim without leave to reapply.

As the landlord has been unsuccessful in her application, I dismiss her application to recover her filing fee from the tenants.

Conclusion

I dismiss the landlord's application without 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: January 09, 2015

Residential Tenancy Branch