Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WESTSEA CONSTRUCTION LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNDC, MNSD, FF

Introduction

This hearing dealt with cross applications. The landlord applied for a Monetary Order for damage to the rental unit and property; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit. The tenant applied for return of the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

In filing the landlord's Application the landlord erroneously placed the tenant's first name where the last name should appear and vice versa. I amended the landlord's Application to correctly identify the tenant pursuant to section 64 of the Act.

The landlord had served the tenant with hearing documents using a courier service that delivered documents to the tenant's mother's home and her sister's home. The landlord submitted that sending documents to the forwarding address given by the tenant was unsuccessful. It appears that the tenant did not provide the unit number when she provided her forwarding address. In any event, the tenant acknowledged that she received the landlord's documents and the tenant was prepared to respond to the claims against her. Therefore, I deemed the tenant sufficiently served with the landlord's Application and evidence pursuant to the authority afforded me under section 71 of the Act.

A witness for the landlord was present at the outset of the hearing. The landlord requested the witness testify first so as to avoid taking time away from the witness's work schedule. The tenant and her representative indicated they had no objection to this request. I recognized that to hear from the witness first was out of order but I

permitted the landlord to present its witness before hearing testimony of the parties given there was no objection or apparent prejudice to the tenant. After hearing the witness's testimony and before I excused him I obtained the witness's telephone number in the event it was necessary to re-call the witness. Neither party requested the witness be re-called during the remainder of the hearing.

Issue(s) to be Decided

1. Has the landlord established an entitlement to compensation from the tenant in the amount claimed?
2. Disposition of the security deposit.

Background and Evidence

The fixed term tenancy commenced February 1, 2014 and was set to expire January 31, 2015. The tenancy agreement provides that the tenant paid a security deposit of $550.00 and the tenant was required to pay rent of $1,100.00 per month. The tenant and an occupant, the tenant's boyfriend, resided in the rental unit together. On May 1, 2014, the tenant gave notice to end the tenancy with a stated effective date of June 1, 2014. The tenant vacated the rental unit on May 31, 2014.

Landlord's Application

The landlord's Application is for compensation from the tenant relates to a flood that occurred on February 4, 2014.

The following facts were undisputed. The rental unit is located in an upper floor of a high rise apartment building. In order to supply water to units on the upper floors a booster pump is required to operate. The booster pump in the residential property is powered by electricity. On the morning of February 4, 2014 electricity to the building was unexpectedly interrupted due to the actions of a third party installing a power pole down the street. Without electricity the booster pump stopped working and the upper units were without water. That morning the tenant's boyfriend notified the building managers about the lack of water in the rental unit. The bathroom sink faucet in the rental unit was left in the open position by the tenant or her boyfriend when the tenant and her boyfriend left the rental unit while the water supply was interrupted. While the tenant and her boyfriend were away from the rental unit the operation of the booster pump resumed after the electricity supply was restored and an electrician attended the property to restore the operation of the booster pump. Water overflowed the tenant's bathroom sink. The tenant's boyfriend returned home first and notified the building

managers of the flood. The building managers attended the unit to commence mop-up efforts and then investigated the extent of the water migration. The water had migrated through to common hallways and to 19 other rental units. A restoration company was called in to mitigate the water damage and restore the property.

The restoration company invoiced the landlord $8,768.68 on February 20, 2014 for emergency water mitigation, structural drying assessments, equipment usage, asbestos testing; the contractor's fee and applicable taxes. The landlord requested the tenant compensate the landlord for this invoice by way of a letter issued on February 24, 2014. The letter indicates that it was being sent by registered mail. The tenant stated that she received the letter from the building manager on March 12, 2014.

On March 12, 2014 the restoration company invoiced the landlord $3,891.70 for restoration of areas that suffered water damage including the rental unit, common hallways; and, other rental units. The invoice was detailed and identified the areas and unit numbers where work was performed and the nature of the work. The amount invoiced largely pertained to: removal and resetting of toilets, removal and installation of vinyl flooring, carpet cleaning and re-stretching; and, (re)installation of baseboard and trim. The landlord sought compensation from the tenant for this invoice by way of a letter issued on March 17, 2014.

The sum of the two invoices referred to above total $12,660.38 and the landlord provided evidence to show the invoices were paid by the landlord. The tenant did not pay the landlord any money toward the costs associated to the water migration or damage that resulted and did not consent to the landlord retaining the security deposit. By way of this application the landlord seeks compensation of $12,660.38 to recoup its losses. The landlord still holds the tenant's security deposit in trust and seeks authorization to retain it in partial satisfaction of the landlord's claims. The landlord also seeks recovery of the $100.00 filing fee paid for this Application.

The landlord submitted that the flood is the result of the tenant, or her boyfriend, leaving the bathroom faucet in the open position and then leaving the rental unit causing the sink basin to overflow. The landlord submitted that after the flood the tenant and her boyfriend admitted that they left the faucet in the open position.

The landlord's witness is an employee of the plumbing contractor the landlord utilizes to perform plumbing work at the residential property. The witness testified that a faucet left in the open position will eventually overflow a sink basin as the drain can take away only so much volume and a faucet left on for a while, say one-half to a full day, would result in a significant volume of water entering the basin. The witness testified that the

time it would take to overflow the basin would depend on a number of factors including: the volume of water entering the basin; the position of the plug and whether it is partially closed; and the capacity of the drain. Upon examination by the tenant's representative, the witness changed his statement to indicate that an overflow may take place anywhere from 10 minutes to a one-half of a day after a faucet is left running.

The landlord submitted that the tenant failed to carry tenant's insurance as stipulated in the tenancy agreement. Clause 29 of the tenancy agreement provides:

> LIABILITY AND INSURANCE: The tenant agrees to carry sufficient insurance to cover his property against loss or damage from any cause and for third party liability and the tenant agrees that the landlord will not be responsible for any loss or damage to the tenant's property. The tenant will be responsible for any claim, expense, or damage resulting from the tenant's failure to comply with any term of this Agreement and his responsibility will survive the ending of this Agreement.

The tenant acknowledged that she did not carry tenant's insurance. By way of the tenant's written submission she indicates that the landlord's insurance policy paid for the repairs; however, the tenant does not indicate where she ascertained this information. The landlord testified that a claim was not made through the landlord's insurance policy as the deductible is greater than the loss.

The tenant submitted that she notified the building manager that the drain was clogged on February 5, 2014, the day following the flood, and that the landlord took no action in response to her complaint until February 27, 2014 when the building manager plunged the drain and pulled out "gunk" and hair. Then the building manager called in a plumber. After the plumber made some repairs the drain was able to keep up with the water that flowed into the basin for approximately five minutes.

The landlord was of the position that the first time the tenant complained of a slow drain was on February 25, 2014 which the building manager responded to on February 26, 2014. The landlord submitted that it responds to plumbing complaints on a priority basis and that the landlord had not received a complaint from the tenant prior to February 25, 2014. The landlord stated that the building manager was not available to testify as he is no longer employed by the landlord but the landlord provided copies of correspondence the building manager wrote to the property manager at the time with respect to this matter. The landlord referred to correspondence that included an email from the building manager to the property manager dated March 13, 2014 which indicates that the tenant did not complain to the building manager about a slow or clogged drain until February 25, 2014, well after the flood. In the email, the building manager describes

how he attempted to clear the drain on February 26, 2014 but realized he needed a plumber. The following day a plumber attended the rental unit to clear the drain. In an email the building manager wrote to the property manager on March 20, 2014 he describes how he did not clear the drain as much as he wanted so he called in the plumber. The building manager also describes how the sink came loose due to his plunging efforts which required re-caulking of the sink.

The plumber that attended the tenant's unit on February 27, 2014 was the witness appearing before me. The witness testified that the building manager had advised him that the drain was running clear but that there was a small leak under the sink. The witness observed a "slightly pitted" chrome P-trap that was leaking slightly. The witness changed the older chrome P-trap to ABS piping and after that he tested the drain to ensure it was draining properly, which it was.

The tenant made no submission as to the position of the drain plug despite the plumber's testimony that it was impact how fast the sink would overflow. However, the tenant was of the position that she is not responsible for the flood because the drain was clogged and that if the drain was clear the water would not have overflowed the basin. The tenant's representative argued that the landlord was negligent by not ensuring the drain was draining properly upon providing the rental unit to the tenant. The tenant also explained that they had only been in the unit a matter of a few days before the flood occurred and she was not aware that the drain was clogged due to its limited use up to that point.

The tenant also claimed that the building manager was made aware that she and her boyfriend would be leaving the rental unit on February 4, 2014 when they enquired as to how long they would be without water.

The tenant's representative submitted that a flood is not a foreseeable consequence of leaving a faucet open. Rather, it is reasonable to expect that the only consequence to leaving a faucet open is a waste of water. Further, I heard from the tenant that she went to work earlier in the morning and was at work until later that afternoon but that her boyfriend stayed at the unit until 11:30 a.m. and returned at 12:30 p.m. meaning the water was running less than an hour before the flood occurred. The tenant did not present her boyfriend as a witness. Nor, was I provided any written statement from her boyfriend.

The tenant's representative submitted that, alternatively, liability rests with the third party that was responsible for the power outage.

Finally, as another alternative position, the tenant's representative submitted that should the tenant be found liable for a part of the damage, it would be appropriate to allocate 1% of the liability to the tenant.

Tenant's application

The tenant seeks return of the security deposit. A forwarding address for the tenant appears on the move-out inspection report dated May 31, 2014; however, the tenant did not indicate the unit number even though a unit number appears on her Application for Dispute Resolution. The landlord applied to retain the deposit as part of the landlord's Application made on June 13, 2014.

Analysis

Upon consideration of everything before me I provide the following findings and reasons with respect to each application.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Awards for damages are intended to be restorative. Accordingly, where an item is replaced as a result of damage and that item has a limited useful life, it is appropriate to reduce the replacement cost by the depreciation of the original item. In order to estimate depreciation of the replaced item, where necessary, I have referred to normal useful life of the item as provided in Residential Tenancy Policy Guideline 40: *Useful Life of Building Elements.*

In this case, it is undisputed that the tenant or the occupant left the bathroom sink faucet open while the water supply was interrupted and then left the rental unit while the faucet was still in the open position. The tenant's representative suggested that it reasonable to expect that the only consequence of doing so would be a waste of water. The

landlord's witness, a plumber, contradicted that presumption by testifying that eventually a sink will overflow if the faucet is left open with the water running. Not only do I reject the submission of the tenant's representative that a flood is not a foreseeable consequence of leaving an unattended faucet open; but, I am also of the view that a reasonable person would not assume that the drain will take away any water introduced into the sink by the faucet and that there would be no consequence of doing so except for wasting water. Therefore, I find the actions of the tenant, or the occupant, on February 4, 2014 were negligent.

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." Accordingly, it is not necessary for me to determine whether the faucet was left open and unattended by the tenant or her boyfriend whom she permitted in the rental unit.

The tenant raised the issue of the drain being clogged as the reason the drain was unable to accommodate the volume of water that was introduced in to the sink basin. It was undisputed that the building manager attended the rental unit in response to a complaint of a clogged drain on February 26, 2014. I also accept that the building manager plunged the sink based upon the tenant's testimony and the emails the building manager wrote. What the building manager retrieved from the drain as a result of his plunging efforts was not specified in his emails; however, in his emails he acknowledges that it was not as clear as he would have liked after his plunging efforts leaving me to accept that the tenant's submission that the drain was slow or clogged when the building manager attended the unit on February 26, 2015. However, I find that a slow drain on February 26, 2014 does not in itself demonstrate that the drain was unreasonably slow or clogged three weeks earlier on the day of the flood since a drain may become clogged or congested between the day of the flood and February 26, 2015 with debris, including hair which is what the tenant testified was retrieved from the drain.

Whether the drain was unreasonably slow or clogged and the landlord notified of a clog or slow drain on February 5, 2014 was in dispute. The tenant testified that a complaint concerning a clogged bathroom sink drain was made on February 5, 2014. This submission was not supported by any documentary evidence provided by the tenant and the landlord pointed to the landlord's policy to respond to plumbing complaints on a priority basis and the building manager's email where he denied receiving such a complaint prior to February 25, 2015 to counter the tenant's position. I find the evidence provided by both parties with respect to a complaint being made on February 5, 2015 is not conclusive; however, in either circumstance, I note that the tenant complaint(s) of a slow drain were only made after the flooding incident. Whether the drain was clogged

or slow, or to what extent, prior to the flooding incident of February 4, 2015 remains unclear. However, the tenant had not made a complaint about such an issue on or before February 4, 2015. Therefore, I find the tenant's defence, that the landlord was negligent, is not sufficiently supported by evidence.

Based upon the above, and on the balance of probabilities, I find the tenant or the occupant acted negligently by leaving a faucet open and unattended which resulted in water damage to the rental unit, other rental units, and the residential property; and, failure of the tenant to repair the damage, or compensate the landlord for such is a violation of section 32 of the Act.

Upon review of the tenancy agreement and upon hearing the tenant acknowledge she did not carry insurance, I am satisfied that the tenant violated her tenancy agreement by failing to carry a tenant's insurance policy that included third party liability coverage.

Having been provided undisputed evidence that the landlord had a restoration company respond to the flood of water shortly after the building manager was notified of the flood, and the restoration company proceeded to undertake emergency water mitigation efforts, I am satisfied the landlord took reasonable steps to mitigate losses. Therefore, I find the landlord is entitled to recover its losses associated to water mitigation and water damage that resulted from the flood of February 4, 2014.

With respect to the landlord's losses, I have reviewed the invoices issued by the restoration company and while the majority of the invoiced amounts relate to water damage mitigation and restoration efforts, it appears as though the landlord has benefited from new vinyl flooring in some of the rental units. As indicated earlier in this decision, where an item is replaced and the item has a limited useful life, it is appropriate to reduce the replacement cost by depreciation of the original item. Vinyl flooring has an average useful life of 10 years as provided under Policy Guideline 40 and the landlord did not provide any evidence to suggest the age of the vinyl flooring that was removed. Given this lack of information, I find the landlord has not demonstrated an entitlement to recover the cost of new vinyl flooring from the tenant considering the landlord has a benefit of new vinyl flooring in some units. Therefore, I reduce the landlord's award by the costs associated to replacing vinyl flooring.

Given the landlord was largely successful in this Application I award the landlord recovery of the $100.00 filing fee paid for this Application.

The landlord filed its application to retain the tenant's security deposit within the time limit for doing so and I authorize the landlord to retain the tenant's security deposit in partial satisfaction of the amounts claimed, as requested. Therefore, I provide the landlord with a Monetary Order calculated as follows:

February 20, 2014 invoice to respond to emergency	$ 8,768.68
February 21, 2014 invoice to restore water damaged areas	3,974.28
Less: new vinyl floor and cove base in rental unit	(395.06)
Less: new vinyl floor and cove base in unit one floor below	(395.00)
Less: new vinyl floor and cove base in unit two floors below	(395.06)
Plus: filing fee	100.00
Less: security deposit	(550.00)
Monetary Order for landlord	$11,107.84

Having authorized the landlord to retain the tenant's security deposit as requested by the landlord the tenant's request for return of the security deposit is moot and her Application is dismissed.

Conclusion

The landlord was largely successful in this Application and has been authorized to retain the tenant's security deposit and has been provided a Monetary Order for the balance of $11,107.84 to serve upon the tenant and enforce as necessary.

The tenant's application has been dismissed.

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: July 31, 2015

Residential Tenancy Branch