Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, MND, MNDC, FF

Introduction
This hearing dealt with an application by the landlord for an order of possession, a monetary order and an order permitting retention of the security deposit in partial satisfaction of the claim. Both parties appeared and gave affirmed testimony. No issues regarding the service of evidence were identified.

The landlord had been granted an order of possession on an earlier application so this hearing dealt only with the balance of his application.

Issue(s) to be Decided
Is the landlord entitled to a monetary order and, if so, in what amount?

Background and Evidence
The rental unit is one side of a side-by-side duplex. The landlord bought the duplex new in 2000. On the upper level is the main living space and a half bathroom; on the lower level is three bedrooms and a full bathroom.

The tenant has lived in the unit since 2004. The landlord and the tenant signed a new tenancy agreement in 2004. That agreement was for a two year fixed term tenancy and has continued since as a month-to-month tenancy. The monthly rent is due on the first day of the month. In November the rent was $940.24. As of February 1 the rent will be $967.51. The tenant has paid a security deposit of $400.00.

At the present time the tenant's nineteen-year-old daughter and her daughter's boyfriend also live in the rental unit.

The duplex is connected to municipal sewer and water. The landlord testified that there was a problem with the sewer connection in 2008 and they had to dig everything up to fix the problem at that time. The parties gave different explanations for the blockage on that occasion. The landlord said paper towels; the tenant said tree roots.

The landlord testified that later in the day on October 19, 2015, he received a telephone call from the tenant advising him that the toilet had backed up. He went over to the unit that day and tried the clear the blockage with a plunger. His efforts were unsuccessful.

He returned the next day with a 150 foot snake. He removed the toilet and tried to clear the blockage with the snake. Once again, he was unsuccessful.

He had a plumber attend at the unit the next day. The landlord filed a copy of the plumber's invoice for October 21. The landlord's evidence is that the plumber cleared the line and reinstalled the toilet, at a cost of $241.50, but that afternoon the tenant called and advised that the toilet was plugged again.

The plumbing company went back to the rental unit and unplugged the sewer again. This time the plumber installed an outdoor cleanout so the line would be easily accessible for clean-out in the future. The landlord filed a copy of the plumber's invoice in the amount of $244.91 dated October 22 for this work.

The landlord testified that on October 27 he received a call advising that the toilet was plugged up again. This time the plumber inspected the sewer line with a special camera. They found a blockage approximately sixty-four feet from the building. The plumbers advised the landlord that the line would have to be excavated to remove the blockage. The landlord filed a copy of the plumber's invoice in the amount of $151.75 for this visit dated October 27, 2015.

The landlord testified that an excavator was brought to the unit on October 28 and on October 29 a five foot by fifteen foot hole was dug; the sewer line was cut; the blockage was removed; and the line was repaired. In addition to the excavator, a substantial amount of dirt had to be moved by hand; otherwise the concrete of the front entry and foundations would have had to be cut. The landlord testified that everything was operating by the afternoon of October 31. They left the hole open for a few days to make sure there would be no other problems before filling it in on November 4. The landlord filed copies of the invoices for the contractor's work, which refer to work done between October 28 and November 4.

The invoice from CD, one of the contractors, stated that: "When sewer line was cut and examined there was evidence of a large volume of paper towel causing a major clog." This invoice was in the amount of $537.50.

The landlord also filed a statement from the plumber which described their activities as follows:

> "On October 21, 2015, you called asking us to come to 6111 Marsh Rd. to unplug a sewer drain. My technician Mark was there at 9:00 a.m. and after two hours he managed to get the drain unplugged. He found evidence of foreign material, mostly paper towel clogging the drain. Later that same day, [tenant] called and said the line was plugged again. Another technician Austin attended and unplugged the drain again. He also installed an outdoor cleanout so the line could be easily accessible for clean up purposes. The drain system worked fine until October 27, 2015 when there was another clogged sewer drain so we returned with a special camera for inspecting underground sewer lines. The camera indicated that the sewer line was clogged at approximately 64 feet with more paper towel and the line was unplugged again. You were advised that the sewer line would have to be excavated to properly clear the line."

The landlord testified that he had to obtain permits from Fortis, BC Hydro and the local district before digging and that he did not obtain those permits until October 29. He filed copies of various permits. In the hearing the tenant challenged the authenticity of the permits filed in evidence.

The tenant testified that she first experienced problems with the sewer in September but she was not sure whether she said anything to the landlord at that time or not. This is not the same testimony she gave at the hearing in January where she testified that:

> "The tenant testified that she notified the landlord sometime in September about the problem. He told her that he would not be able to take care of the situation until he returned from a three week trip. She could not remember when or how she contacted the landlord. The tenant testified that the plumbing worked – albeit sluggishly – in September."

The tenant stated emphatically that neither she, nor the other two adults living in the rental unit, would have flushed paper towel down the toilet.

The tenant testified that the house is built on a cement pad and over the years the house has settled leaving it lower than the adjoining unit and lower than the municipal sewer line. She testified that the plumber told her that this creates a negative flow situation; in other words the slope of the sewer line is back towards the home, not towards the street. In addition, she said the plumber told her that there were two "bellies" in the line – bulges in the pipe where debris could get caught.

The tenant testified that over the course of her tenancy there have been fifteen different tenants in the adjacent unit. The current next-door neighbour has three children aged four, six and thirteen years. The tenant argues that the something flushed into the sewer line by the next door neighbours or even something from the main sewer line could have flowed back, past the “Y” joint, into the line from her rental unit, causing the blockage.

When the plumber examined the line with the camera she looked at the images. The camera went 64 feet before it was stopped by the blockage. She could see human waste but could not see the front of the blockage.

The landlord testified that the duplex was built to Code which included compacting the soil to certain required specifications before the concrete was poured. In addition, the sewer lines were laid in sand and small aggregate; and were inspected before the trenches were filled in. As a result, there had been no settling of the rental unit or the sewer lines.

He also testified that the line from the adjoining unit is a straight line from the unit to the municipal line. The sewer line from this rental unit curves from the unit to the straight line thereby creating the “Y” joint. The municipal sewer is lower than all the homes on the street so it would be impossible for anything from the main sewer line to flow back into the sewer lines coming from either rental unit.

The landlord also argued that for foreign material to travel from the adjoining unit to the tenant’s side of the “Y” joint it would have to flow uphill and around a ninety degree corner. Further, if the foreign material was from the adjoining unit the blockage would have occurred at the “Y” joint, not several feet past it.

The tenant challenged the authenticity of the documents filed by the landlord in his evidence. Specifically she stated that:

- Fortis would never have granted a permit for mechanical digging in the location.
- The plumber who signed the letter never attended the site; only a nineteen year old apprentice did.
- The person who submitted the invoice for excavating work told her he was never at this unit.

In addition, she stated that the landlord owns the excavator that was used on the project.

The landlord acknowledged that he owns the company that submitted the invoice for the excavator work. The invoice was for 6.5 hours at $80.00/hour. He stated that he usual rate for this machine with an operator is $90.00/hour; that machine was at the site for two days; and using his machine was a much cheaper option than using the plumber's excavator.

The landlord testified that all of the individuals who had submitted invoices or letters were at the site. He also testified that Fortis did a site inspection before issuing the clearance letter.

The landlord testified that the adjoining unit has never reported any difficulty with its sewer connection and that the plumbing at that unit worked fine throughout this time period.

Analysis

Claim for Damages

The problem with the tenant's explanation for the blockage in the sewer pipe is that sewer pipes run on gravity. Through the building permit and inspection process municipalities ensure that modern homes are built higher than the municipal water line so that domestic sewage flows downhill to the municipal sewer line. Before anything would flow back to the rental unit the home would have had to sink low enough that it was below the municipal sewer line. There is no evidence that the home has sunk to this degree.

While I have no reason not to accept the tenant's testimony that she personally did not flush paper towels down the toilet she lives with two other people, neither of whom provided any evidence. The tenant's evidence is that she spends most of her time in her room and she rarely goes upstairs. As a result she cannot really say what the other occupants of the home have done or not done, particularly in the bathroom.

Although the tenant challenged the authenticity of every single document filed by the landlord, there is nothing in the nature of the documents or the tenant's assertions that would lead me to the conclusion that they are not valid and accurate documents.

There is nothing wrong with a landlord seeking compensation from a tenant for their own labour or equipment as long as those claims are in line with market rates. I find that the landlord's explanation of the invoice submitted by his company reasonable.

I find that the only reasonable explanation for the blockage in the sewer, and the resulting costs of repair, is that paper towels were flushed down one of the toilets in the

rental unit. Accordingly I find that the tenant is responsible for the cost of repairing the blockage in the amount of **$1758.16.**

Claim for Rent
For a variety of reasons the tenant has not paid any rent for the period November 1, 2015 to the date of the hearing; a total of $4755.70 (three months @ $940.24/month and two months @ $967.51/month).

The tenant acknowledges that she owes this amount to the landlord. She says she has the money and would like to pay the rent. The tenant was also clear that she does not want to remain in the unit and does not want the tenancy to continue but is having difficulty finding a new place to live.

In a decision dated January 25, 2016, the landlord was granted an order of possession effective two days after service. He stated that he has known the tenant for a long time. He knows that she has health problems and that she is having difficulty finding a new place to live. The parties had originally agreed that the tenant could stay in the unit until this hearing which was scheduled for February 2 but was rescheduled to March 1 at the request of the Residential Tenancy Branch. The end result has been that the temporary arrangement has gone on longer than anticipated.

The landlord would like to receive payment for the months that the tenant has lived in the unit but does not want to do anything that could be interpreted as reinstating the tenancy.

I find that the tenant owes the landlord **$4755.70** for rent and/or use of the rental unit for the period November 1, 2015 to March 31, 2016, and I grant the landlord a monetary order in this amount.

The tenancy was ended by the previous decision and the evidence is clear that neither party wants to reinstate the tenancy. The evidence is also clear that the landlord has only delayed enforcing the order of possession to give the tenant time to find alternate housing.

In light of these circumstances, and the explicit statements made under oath in the hearing by both landlord and tenant, any payment made by the tenant towards payment of the sum of $4755.70 and accepted “for use and occupancy only” should not be interpreted as a waiver by the landlord of his rights pursuant to the order of possession or as a reinstatement of the tenancy.

Further, if the tenant's occupancy should extend past March 31, 2016, any payment made by the tenant "for use and occupancy only" will not reinstate the tenancy, at least in the short term. All "use and occupancy only" arrangements are only intended to be short-term and cannot continue indefinitely. While there is no hard and fast rule that may be applied, the parties should be aware that at some point in the future, if the status quo continues, an arbitrator may find that the tenancy has been reinstated and the order of possession previously granted is no longer enforceable.

Finally, as the landlord was successful on this application he is entitled to reimbursement from the tenant of the **$50.00** fee he paid to file it.

Conclusion

I find that the landlord has established a total monetary claim of $6563.86 as calculated above. I order that the landlord retain the deposit and accrued interest of $414.16 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of **$6149.70.** If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

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: March 28, 2016

Residential Tenancy Branch