Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, MNDC, FF

Introduction

This hearing dealt with a landlord's application for a Monetary Order for compensation for damage to the rental unit and residential property; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit. The landlords appeared and were represented by legal counsel during the hearing. One of the two named tenants, referred to as AH, appeared at the hearing and was assisted by another person during the hearing.

Preliminary and Procedural Matters

This hearing was held over two dates and an Interim Decision was issued after the first hearing date. The Interim Decision should be read in conjunction with this decision. As provided in the Interim Decision, I found the other named respondent, referred to as JJ, to be deemed served with notification of this proceeding.

All parties 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.

During the first date of hearing both parties were ordered or authorized to make further submissions. At the reconvened hearing I confirmed that the parties had served the other party with their respective submissions. Although AH had served the landlords with her submission after the deadline for doing so, the landlords' lawyer had no objection to its inclusion. Accordingly, I have accepted and considered the written submissions and evidence provided during the period of adjournment in making this decision.

I noted that the tenant's written submissions did not include issues that were raised by the person assisting the tenant at the first hearing date, most notably the content on the

invoices prepared by the restoration company. The tenant confirmed that she would not be pursuing those issues and that her positon as to her liability for the amounts claimed against her is as reflected in the written submissions and oral submissions during the second hearing date. Accordingly, the issues raised during the first hearing date as to the content of the restoration company's invoices were not further explored or considered.

As noted in the Interim Decision, I had reserved my decision as to the standing of JJ as a tenant. Below, I provide my findings and reasons with respect to this matter.

AH and the landlords executed a written tenancy agreement on February 15, 2014 for a one year fixed term tenancy set to commence March 1, 2014. AH also signed a *Strata Property Act* Form K entitled "Notice of Tenant's Responsibilities" on February 22, 2014. Upon expiry of the fixed term the tenancy continued on a month-to-month basis.

In the spring of 2015 AH notified the landlords that JJ was moving in to the rental unit. Both AH and JJ signed a new Form K on April 22, 2015 in the space provided for signature of a tenant. The Form K indicates that the persons signing the document are tenants of the subject condominium unit under a tenancy that commenced in March 2014. The Form K signed by AH and JJ was given to the female landlord by AH; however, the parties did not amend the existing written tenancy agreement in writing to add JJ as a tenant. The landlord filed the Form K with the Strata Corporation. In May 2015 AH went to Ontario for a number of months but left many of her possessions in the unit and JJ continued to occupy the rental unit until August 2015 when AH returned. The landlords collected rent from AH for every month up to and including the last month of tenancy which was August 2015. AH testified that JJ paid rent to her.

The landlord's lawyer pointed to the definition of "tenancy agreement" and the common law, including citations of certain court cases, in submitting that JJ was a tenant of the landlords. The definition provided under the Act includes tenancy agreements that are written, oral, express or implied and licenses to occupy. The landlord's lawyer pointed out that JJ was provided use and occupancy of the rental unit, along with the services and facilities of the property, with the full knowledge and permission of the landlords; JJ paid rent; and, JJ signed the form K indicating she was a tenant.

Of consideration in making my decision is that neither AH nor JJ presented any objection to finding JJ was a tenant at the time of the flood on May 28, 2015.

Upon review of the email communication between JJ and the landlords that was included in evidence I note that at no time does JJ indicate she is not a tenant.

Upon consideration of everything, I find the landlord's lawyer presented reasonable and supportable arguments in asserting that JJ was a tenant and I was not provided any submissions or evidence that would oppose or contradict those submissions. Therefore, I accept that on the balance of probabilities JJ became a tenant in April 2015 when JJ signed the Form K as a tenant which was presented and accepted without objection by the landlord.

Issue(s) to be Decided

1. Have the landlords established an entitlement to compensation from the tenants in the amount claimed?
2. Are the landlords authorized to retain the security deposit?

Background and Evidence

A one year fixed term tenancy commenced with AH starting on March 1, 2014 and upon the expiration of the fixed term the tenancy continued on a month to month basis. The monthly rent was set at $1,400.00 and payable on the first day of every month. As provided earlier in this decision, JJ became a tenant in April 2015. The last month of tenancy was August 2015. Keys and possession of the rental unit was returned to the landlords as of September 1, 2015.

At the start of the tenancy the landlords collected a $700.00 security deposit and a deposit of $300.00 for the fitness facility and party room located in the residential property. Collecting the $300.00 deposit was not compliant with the Act and, as provided under Residential Tenancy Branch Policy Guideline 29: Security Deposits, I have treated the $300.00 as a security deposit meaning the landlords are holding a $1,000.00 security deposit. The landlords continue to hold the security deposit and have requested authorization to retain it. Accordingly, I have considered the landlord's request to retain the security deposit as being $1,000.00.

By way of this application, the landlords seek a Monetary Order in the amount of $25,000.00 against the tenants. Although the landlords assert that their actual losses exceed $25,000.00 the landlords have limited their claim to the statutory limit imposed by the Act.

Although I was provided a considerable amount of oral and written submissions, with a view to brevity, I have only summarized the parties' respective positions below.

The landlords' lawyer submitted that JJ caused damage to the rental unit and common areas and other condominium units in the residential property, in violation of section 32 of the Act, and the tenants are liable to compensate the landlords for the losses they incurred as a result.

It was undisputed that on May 28, 2015 JJ ran a bath and then fell asleep which resulted in water overflowing the bathtub. The rental unit, other condominium units in the building, and common areas were damaged by the escape of water. The Strata Corporation responded by hiring a restoration company to provide emergency services. The emergency response was invoiced to the Strata Corporation in the amount of $15,901.74 which was then charged to the landlords' strata account. The landlord provided JJ a copy of the invoice and JJ paid the Strata Corporation's property management company $10,000.00 in US Dollars, which was the equivalent of $12,575.00 in Canadian dollars at the time, leaving a balance of $3,326.74. Also, at the time of paying $10,000 USD to the property management company JJ indicated to the landlords via email that she would pay the balance of the invoice; however, no other monies were received from JJ.

The Strata Corporation proceeded to repair the common areas and other condominium units, except for the rental unit, at a cost of $23,942.57. This amount was also charged to the landlords' strata account. A copy of this invoice was also presented to JJ who in turn advised the landlords that she would not be paying anything more toward the damage and repairs.

The total paid to the restoration company by the Strata Corporation for emergency response and repairs to common areas and other units was $39,844.31 and this amount does not include repairs to the rental unit. The Strata Corporation has an insurance deductible of $50,000.00 and did not make an insurance claim.

The landlords paid the amounts charged to their strata account due to the flood, $39,844.31 less the $12,575.00 payment from JJ, on September 14, 2015.

In addition to recovering the net amount paid to the Strata Corporation, the landlords claimed that that they suffered a loss in the value of their condominium of $25,000.00 due to the flood damage. The landlords obtained quotes to repair the flooring and replace the bottom portion of the drywall in late August 2015 for the sum of $4,017.32. The landlords did not proceed to make repairs. Rather, they entered into negotiations with a private buyer in early September 2015. On September 17, 2015 the landlords entered into a Contract for Purchase and Sale with a private buyer to sell the rental unit for $350,000.00 with a completion date of October 15, 2015. On September 25, 2015

the landlords received an email from a realtor indicting that the market value of the rental unit would be approximately $370,000.00 to $375,000.00 had they sold it on the open market. The landlords seek to hold the tenants responsible for the loss in value.

The landlords did file a claim under their insurance policy and received $10,580.00 from their insurer. $10,000 was paid for damage to common areas and $580.00 toward building upgrades. The landlords have applied the insurance proceeds of $10,580.00 against the amounts claimed against the tenants.

The tenant was of the position that the landlords were insufficiently insured and in breach of their strata by-laws in failing to have sufficient coverage for the strata's $50,000.00 insurance deductible. The tenant was of the position that the financial burden the landlord's incurred is a result of their failure to carry sufficient insurance and this burden cannot be passed on to the tenants. The tenant submitted that the landlords' decision to carry less insurance coverage equates to a failure to mitigate their losses as the landlords' loss would have the amount of the insurance deductible.

The landlords' lawyer argued that carrying insurance coverage for less than $50,000.00 was not a breach of the by-law but in any event a contravention of the by-law does not amount to negligence on part of the landlords. The landlords' lawyer submitted that landlords met their obligation to take reasonable steps were taken to mitigate losses after the flood occurred as was their obligation.

The landlord's lawyer submitted that had the landlords carried more insurance coverage the insurer could pursue the tenant to recover its losses. The tenant was of the position that was speculative.

The landlords' lawyer submitted that failure to carry sufficient insurance is a position that could be argued the tenants. The tenant pointed out that under the terms of tenancy she was required to carry personal injury insurance but not liability insurance. AH acknowledged that she did not carry any tenant's insurance. I was not presented any evidence to suggest JJ carried tenant's insurance or made a claim under a tenant's insurance policy. The landlords' lawyer responded by pointing out that the tenant was not precluded from carrying liability insurance and could have acquired it at her option.

As to the loss in value of the rental unit, the tenant submitted that the assessed value of the rental unit for the 2015 tax year was $334,000.00 and the landlords received more than that in the private sale. Also, it would appear the landlords did not mitigate their loss by making the repairs and selling the unit on the open market or after repairs were

made. The landlord's lawyer argued that the assessed value for tax purposes is most often well below market value.

Analysis

Upon consideration of everything presented to me, I provide the following findings and reasons.

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.

Under section 32 of the Act, a tenant is required to repair damage caused by their actions or neglect, or those permitted on the property by the tenant. Undisputedly, JJ's actions or neglect resulted in water damage to the rental unit, other condominium units in the building and common hallways which resulted in several thousands of dollars in remediation and repair work. Not only was JJ found to be a tenant but JJ was permitted on the property by AH. Accordingly, I find that AH and JJ are jointly and severally liable for damages or losses that resulted from the actions or neglect of JJ.

The amount the landlords paid to the Strata Corporation for the emergency flood services and repairs to other units and common areas was not in dispute. Rather, the tenant raised the issue of mitigation and primarily pointed to the landlords' decision to carry insurance that was considerably less than the Strata Corporation's $50,000.00 insurance deductible.

Upon review of the strata by-laws presented to me by the tenant, I am of the view the landlords were not in breach of the by-law. Section 33.16(3)(b) provides that the owner is to purchase insurance that insures against i) damage to any strata lot, the common property, limited common property or common assets and ii) Claims by the Strata Corporation for compensation arising from the payment of an insurance deductible to the Strata Corporation's insurance…

The landlords did carry insurance for damage to the common property as evidence by the landlords' insurance policy paying $10,000.00 for such damage and I am satisfied that their obligation under part i) was satisfied. As for part ii) I find this subsection does not apply as the Strata Corporation did not make an insurance claim under the strata's insurance policy thus the Strata Corporation did not pursue the landlords for reimbursement of an insurance deductible.

As to the tenant's submission that the landlords should have and could have carried more insurance I accept that position but I find that it such an argument also applies to the tenant. Although the tenancy agreement did not require the tenant(s) to purchase liability insurance, there is nothing in the tenancy agreement that would preclude AH or JJ from purchasing a tenant insurance policy that includes liability coverage. Rather, it would appear to me that both parties simply chose to not purchase or explore the benefits of purchasing more insurance coverage.

I accept the landlords' lawyer argument that failure to carry more insurance coverage is not a basis to absolve the tenants of their obligations under the Act and the liability that results. I also accept as a reasonable argument that had the landlords carried more insurance the tenants may have been pursued by the insurance carrier in an effort to subrogate their losses.

Considering the Act requires a tenant to repair damage they cause by way of their actions or neglect; and, the actions of the tenant or a person permitted on the property by the tenant resulted in damage for which the landlords have suffered a loss, I find the tenants liable to compensate the landlords for the losses attributable to the tenants' actions or neglect.

I have been provided copies of invoices and communications that undeniably demonstrate that the landlords paid the Strata Corporation the net amount of $27,269.31 for emergency services and repairs that were required as a result of the flood, after taking into account the payment made by JJ to the Strata Corporation [calculated as $39,844.31 less $12,575.00]. The landlords' loss was offset by a payment from their insurance carrier in the sum of $10,580.00. Therefore, I find the tenants liable for the balance of $16,689.31 [calculated as $27,269.31less $10,580.00].

As to the landlords' claim that the tenants are responsible for the landlords' suffering a loss in value of their condominium of $25,000.00, I find the landlords' evidence is very weak. The landlords provided evidence that they were in negotiations with a prospective private purchaser as early as September 2, 2015 and entered into a binding

agreement for sale on September 17, 2015 yet they did not appear to take steps to determine the market value of the unit until they sought further information as to its value on September 25, 2015. Of further consideration is that the email provided by the realtor does not indicate he viewed the unit and the landlord seeks the realtor's opinion as to the unit's market value had it been sold on the open market. Yet, the landlords chose not to sell it on the open market. It is not uncommon for a sale price for a property sold privately to differ from a sale price had the property been sold on the open market as other factors may come into play such as the sellers not having to pay a sales commission to a realtor. The landlords' decision to enter into an agreement for a private sale prior to determining the unit's market value, without the benefit of subjecting the unit to several buyers on the open market but likely benefiting from not paying a sales commission are decisions that have both benefits and consequences for which the tenants could not have reasonably foreseen and I find they are not liable for any consequences that are the result of the landlords' decision to sell the unit privately.

Interestingly, the landlords did not provide evidence from the purchaser in an effort to demonstrate the "discount" the purchaser realized because of the condition of the rental unit.

While the assessed value provided by the tenant may be low and considered weak evidence I find the landlords' evidence is also weak and the landlords have the burden of proof.

Despite being provided copies of invoices to replace the flooring in the rental unit and replace the drywall, I have not awarded the landlord compensation for those amounts as the landlords did not make the repairs or pay such amounts. Of further consideration is that the costs are for replacement cost and do not take into account depreciation. For instance, the evidence before me indicates the building was constructed in 2007 and I was not provided evidence to show the flooring had been replaced since then. Accordingly, it would appear that the flooring was already a number of years old at the time of the flood. Since the landlords did not pay to make the repairs and sold the unit a short time later, I find the best evidence as to the value of the damage in the rental unit would have been the decreased value of the unit. However, for reasons provided above, I find the landlords did not provide sufficient and relevant evidence to establish the loss in value attributable to the damage.

In light of all of the above, I find the landlords did not meet their burden to prove the tenants are entirely responsible for the landlord's failure to receive "market value" for their condominium considering they entered into a quick and private sale for their own

reasons. Accordingly, I make no award for loss in value of the rental unit and I dismiss this portion of the landlords' claims against the tenants.

In summary, the landlords have established an entitlement to recover $16,689.31 from the tenants and I award this amount to the landlords plus recovery of the $100.00 filing fee paid for this application.

The landlords are still holding the $1,000.00 security deposit and I authorize the landlords to retain the deposit in partial satisfaction of the amounts awarded to the landlords with this decision. Accordingly, the landlords are provided a Monetary Order in the net amount of $15,789.31 [calculated as $16,689.31plus $100.00 filing fee, less $1,000.00 security deposit] to serve and enforce upon the tenants.

Conclusion

The landlords are authorized to retain the tenants' security deposit of $1,000.00 and have been provided a Monetary Order for the balance of $15,789.31 to serve and enforce upon the tenants.

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: September 09, 2016

Residential Tenancy Branch