Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDLS, MNDCLS, FFL

Introduction

This hearing was convened as a result of the landlord's Application for Dispute Resolution ("application") seeking remedy under the *Residential Tenancy Act* (*"Act*"). The landlord applied for a monetary order for damage to the unit, site or property, for authorization to keep all or part of the security deposit and pet damage deposit, for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement, and to recover the cost of the filing fee.

Two agents for the landlord ("agents"), legal counsel for the landlord ("landlord's counsel"), the tenant and legal counsel for the tenant ("tenant's counsel") appeared at the teleconference hearing and gave affirmed testimony. The parties were advised of the hearing process and were given the opportunity to ask questions about the hearing process during the hearing. A summary of the testimony and evidence is provided below and includes only that which is relevant to the hearing.

Neither party raised concerns regarding the service of documentary evidence. The parties confirmed that they were served by the other party and that they had the opportunity to review the documentary evidence prior to the hearing. I find the parties sufficiently served as a result under the *Act.*

Preliminary and Procedural Matters

The parties confirmed their email addresses at the outset of the hearing. The parties were advised that the decision would be emailed to the parties which will include any applicable orders to the appropriate party, as applicable.

In addition to the above, while the landlord originally applied for a monetary claim of $25,500.00 comprised of $25,000.00 for the landlord's insurance deductible, plus

$500.00 for the cost of liquidated damages, the agents confirmed that they landlord has reduced the monetary claim to $9,277.14 as the cost of the actual repair for water damage and has waived the liquidated damages portion of the landlord's claim. As a result, the parties confirmed their understanding that I would only be considering the reduced portion claimed of $9,277.14 before the filing fee, if applicable. The parties were also advised that I would be dealing with the tenant's security deposit and pet damage deposit in this decision.

Issues to be Decided

- Is the landlord entitled to a monetary order under the *Act,* and if so, in what amount*?*
- What should happen to the tenant's security deposit and pet damage deposit under the *Act?*
- Is the landlord entitled to the recovery of the cost of the filing fee under the *Act?*

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A fixed term tenancy began on November 10, 2016 and reverted to a month to month tenancy after November 30, 2017. The tenant paid a security deposit of $487.50 and a pet damage deposit of $487.50 at the start of the tenancy, which the landlord continues to hold and have accrued $0.00 in interest to date. The parties agreed that the tenant vacated the rental unit on October 24, 2017.

There is no dispute that the rental unit flooded. The cause of the flood was water coming from the kitchen sink tap. The landlord alleges that the tenant was negligent in leaving the kitchen tap over the counter and in the on position when she left the rental unit which resulted in a flood once the water was turned back on in the building. The tenant's position was that she thought she had turned the kitchen tap off before leaving the rental unit and the tenant's counsel raised the issue that due to what was portrayed as signage concerns, the landlord should hold some liability as well.

The landlord submitted photographic evidence which shows a notice to the residents of the building that water will be turned off on October 12, 2017 between 8:00 a.m. and 5:00 p.m. ("notice"). The agents testified that the notice was placed in all of the usual places that notices for residents are placed including the lobby, elevator, and hallways. The agents confirmed that once the water was turned back on in the building there were two water leaks found on October 12, 2017; one related to the contractor and the other

leak which is the subject of this hearing involving the tenant's rental unit. The agents stated that when walking by the rental unit, they could hear water on and on an emergency basis, entered the rental unit and found water pouring over the counter and onto the floor flooding the rental unit so they immediately turned the tap off as it was found to be in the on position.

The tenant first testified that after determining that the kitchen tap was not working she shut off the tap before leaving the rental unit and they later testified that she thought she had turned the tap off before leaving the rental unit but could not be certain. In addition, the tenant had no response to the agents' testimony when it was stated by the agents that the tap was found to be over the counter and not over the sink when the agent entered the rental unit to turn the water tap off.

A copy of the invoice for the restoration company was submitted in the amount of $9,277.14 in support of the landlord's claim and lists the loss date as October 12, 2017 which is the day of the water leak.

Regarding the forwarding address from the tenant, there is no dispute that the tenant originally neglected to include her unit number when providing her forwarding address to the landlord and as a result, the landlord's mail was returned as it could not be delivered as addressed. There is also no dispute that the tenant eventually provided her unit number and full written forwarding address on October 24, 2017 and that the landlord failed against both the security deposit and pet damage deposit ("combined deposits") on November 6, 2017.

One of the agents testified that the building insurance deductible was $25,000.00 which is why the original amount claimed was over $25,000.00 and that the landlord is minimizing the cost to the tenant by only claiming the actual amount of the costs to repair the rental unit after the water leak in the amount of $9,277.14.

The agents stated that while they could not recall who posted the notices in the building, they were posted in the usual way by one of the three managers. The agents could not recall where the photo was taken of the notice submitted in evidence. The landlord confirmed that they immediately hired the restoration company after finding the rental unit leak to minimize any further damage to the building.

Tenant's counsel asked if the landlord made any determinations about the insurance related to the person living below the rental unit ("tenant living below"). The response was that the insurance of the tenant living below was not determined as it would only cover contents of the tenant only and not the building. The tenant's counsel raised the issue that their request for a copy of the landlord's insurance policy was not disclosed as requested. The landlord's counsel stated that the person who has access to the landlord's insurance policy was not available to provide a copy of the insurance policy so in the alternative, an agent testified as to the amount of the insurance deductible for the landlord which for the building in question remains $25,000.00. The agents also stated that in other building the deducted is twice that amount but for the building in question, it is $25,000.00.

The tenant stated that when she entered the rental unit to do some clean up on October 12, 2017, she used the stairs and not the elevator and claims she did not see the notice regarding the water shut off. The tenant confirmed that when she turned on the kitchen sink in the rental unit that she wondered why the water was not on and confirmed that she did not ask anyone in the building to determine why the water was not coming on when she turned on the tap in the kitchen. When the tenant was asked if she had direct memory of turning the water off before leaving the rental unit, the tenant replied "I thought I did."

The tenant's counsel raise three issues; the first issue being that the landlord has a duty under section 7 of the *Act* to minimize their damage or loss and without a copy of the landlord's insurance policy, the tenant and the tenant's counsel does not know if the deductible is more or less than the amount claimed against the tenant. Tenant's counsel referred to two previous decisions; the file numbers of which have been included on the cover page of this decision for ease of reference and are referred to as "previous decision 1" and "previous decision 2". The second issue raised was that the amount claimed does not include the offset of the tenant's combined deposits. The third issue raised was that the landlord should hold some liability as there was uncertainty as to who posted the notice and where and that the landlord "must provide concrete evidence".

The landlord's counsel stated that an arbitrator is not bound by previous decisions under the *Act* and that both previous decisions 1 and 2 differ in key details as the exact amount of the damage is known and a copy of the invoice was submitted in support of that amount as claimed, while the other related to a strata matter which this matter does not relate.

Analysis

Based on the documentary and digital evidence, the testimony of the parties and on the balance of probabilities, I find the following.

Test for damages or loss

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 sections 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 what was reasonable to minimize the damage or loss.

In the matter before me, the landlord bears the burden of proof to prove all four parts of the above-noted test for damages or loss.

Firstly, I will note that the two file numbers provided by counsel during the hearing were not correct and had too many digits to return any matching decision results. Therefore, given that copies of those decision were not submitted in evidence for my consideration nor were the correct file numbers provided, I afford no weight to the those decisions. I do; however, concur with the landlord's counsel who correctly raised the fact that I am not bound by another arbitrator's previous decision under the *Act* and will make a decision based on the evidence presented in the specific matter before me.

Section 37 of the *Act* applies and states in part:

Leaving the rental unit at the end of a tenancy

37 (1) Unless a landlord and tenant otherwise agree, the tenant must vacate the rental unit by 1 p.m. on the day the tenancy ends.
(2) When a tenant vacates a rental unit, the tenant must

(a) **leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear,**

[My emphasis added]

I find the testimony of the tenant to be vague and inconsistent. In reaching this finding I have considered that the tenant first testified that she turned off the water tap before she left the rental unit and then later admitted that she “thought” she did and could not be certain. The agents; however; provided consistent and specific testimony as to how the tap was found in the on position with water flooding over the counter onto the floor of the rental unit on October 12, 2017. I also note that the tenant did not dispute the agents’ testimony that the kitchen tap was found over the counter and not over the sink itself. I find the tenant was negligent as a result and that it is more likely than not that the tenant left the kitchen tap over the counter and in the on position before leaving the rental unit as it was later found by the agent(s).

Furthermore, I afford little weight to the tenant’s claim that she did not see the notice about the water being turned off as I find that even if the tenant did not use the elevator and used the stairs as claimed, that based on the testimony before me, and regardless of who posted the notices, that notices were likely posted throughout the building as claimed by the agents in the hallways, lobby and elevator locations. I find the photographic evidence supports that the landlord advised residents of the building of the water shut-off date and time. Therefore, I find it is more likely than not that the tenant would have been aware of the water being shut off and that she likely did not ask anyone in the building about the water as she already knew the reason as the tenant had claimed she was there to clean the rental unit. Furthermore, I find the tenant failed to exercise reasonable due diligence to ensure the water tap was definitely in the off position and directly above the sink versus over the counter where it could and did cause flooding.

As a result, based on the balance of probabilities I find the tenant was negligent by leaving the tap in the on position as claimed by the landlord. Therefore, I find the tenant breached section 37 of the *Act* by causing water damage to the rental unit that exceeds reasonable wear and tear and that the tenant is liable for those costs accordingly.

Regarding the cost of the landlord’s insurance deductible, while there was no insurance policy before me I have considered the affirmed testimony of the building manager who stated she personally knew the building insurance deductible to be $25,000.00 and that other buildings close by were as much as $50,000.00. I also find that the amount of $25,000.00 is consistent with the landlord’s original application for the $25,000.00 deductible which was also listed and consistent with what the landlord originally wrote

on the outgoing condition inspection report before later reducing that amount to the actual cost of the water damage repair which was less than the deductible.

In addition to the above, I find the landlord complied with section 7 of the *Act* which requires that an applicant seeking monetary compensation under the *Act* do what is reasonable to minimize the damage or loss. By seeking the amount on the invoice of $9,277.14 which is much lower than an insurance claim which I find would have more likely than not been $25,000.00 based on the testimony before me, I grant the landlord **$9,277.14** as claimed which I find is supported by the invoice submitted in evidence.

As the landlord's application had merit, I grant the landlord **$100.00** in full recovery of the cost of the filing fee pursuant to section 72 of the *Act.*

The landlord continues to hold the tenants' combined deposits of $945.00 which have accrued $0.00 since the start of the tenancy.

Monetary Order – I find that the landlord has established a total monetary claim in the amount of **$9,377.14** and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the tenant's combined deposits as follows:

ITEM DESCRIPTION	**AMOUNT GRANTED**
1. Water damage repair	$9,277.14
2. Filing fee	$100.00
Subtotal	$9,377.14
(Less tenant's combined deposits of $975.00)	*-($975.00)*
TOTAL	**$8,402.14**

I authorize the landlord to retain **$975.00** of the tenant's combined deposits in partial satisfaction of the landlord's monetary claim as I accept that the landlord filed within 15 days of October 24, 2017 by applying for dispute resolution on November 6, 2017. I note that there was no dispute during the hearing that the tenant did not provide her full written forwarding address including unit number until October 24, 2017 to the landlord. The landlord is granted a monetary order pursuant to section 67 of the *Act* for the balance owing by the tenant to the landlord in the amount of $8,402.14.

Conclusion

The landlord's claim is successful.

The landlord has established a total monetary claim of $9,377.14 as indicated above. The landlord has been authorized to retain $975.00 of the tenant's combined deposits in partial satisfaction of the landlord's monetary claim. The landlord is granted a monetary order pursuant to section 67 of the *Act* for the balance owing by the tenant to the landlord in the amount of $8,402.14. The landlord must first serve the tenant with the monetary order and if needed, the monetary order may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: June 18, 2018

Residential Tenancy Branch