Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Regius Investment Corporation
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDL, FFL

Introduction

This decision pertains to the landlord's application for dispute resolution made on May 2, 2018, under the *Residential Tenancy Act* (the "Act"). The landlord seeks a monetary order for damage caused to the rental unit pursuant to section 67 of the Act, and a monetary order for recovery of the filing fee pursuant to section 72(1) of the Act.

Two agents for the landlord (referred to as "landlord" herein), the tenant, and the tenant's agent attended the hearing before me, were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The parties did not raise any issues in respect of service of documents, and confirmed having exchanged evidence pursuant to a Decision made by an arbitrator on June 12, 2018, at the first hearing regarding this matter, and which was adjourned to today's date.

While I have reviewed all oral and documentary evidence submitted, only relevant evidence pertaining to the issues of this application is considered in my decision.

Issues to be Decided

1. Is the landlord entitled to a monetary order for damage caused to the rental unit?

2. Is the landlord entitled to a monetary order for recovery of the filing fee?

Background and Evidence

The parties confirmed that a tenancy began in April 2012, though the parties signed a tenancy agreement that commenced on September 1, 2016, and that the tenancy was for a fixed term ending August 31, 2017. Rent was $2,100.00 a month and the tenants paid a security deposit ($1,000.00); the landlord returned the security deposit after the tenancy ended. The landlord submitted into evidence a copy of the written tenancy agreement.

The landlord submitted in its application that the rental unit was “located on the top floor of a heritage building with exclusive use of a deck.” In early March 2017, the landlord discovered that water was seen running down the front of the building. The landlord went to investigate, and found that the down drainpipe was plugged with soil. The landlord testified that early on during the repairs, he believed that the tenant’s insurance company would be handling any claim related to the cost of repairing the deck and pipes. However, after unsuccessfully dealing with the insurance company, the landlord chose to file this application in an effort to resolve the matter.

The landlord testified that because it is an old building (that was “gutted and rebuilt” in 1989), the rental unit has an old-style porch. When they went to inspect the deck, it was full of water at least 5 to 6 inches deep, and that the water appeared to be there for some time. The landlord noted that they built a brand-new deck in 2014.

There was extensive repairs made, including dismantling drainage pipes, which had lots of debris in them. The gutter elbow pipe became completely full of debris and, during a period of freezing temperatures, the elbow pipe split. The landlords submitted into evidence a photograph of the split pipe, along with various other photographs of the damaged pipes and deck. Further, the landlord testified that the amount of debris was substantial, and that water ended up getting into the original framing of the building.

The landlord submitted into evidence a copy of an engineer’s report (the “Report”), dated December 18, 2017, which was referred to by both parties. The Report describes the layout of the downspout and drain and curb gutter. The Report indicates that the engineers were shown the damaged elbow, in which the engineer stated that the soil in the elbow “appeared to be potting soil, as it had large amounts of vermiculite and other fertilizers in it.” The landlord’s position is that the tenants kept potted plants on the deck and that they washed the soil down the gutter and drain, which lead to a build up.

The Report further indicates that the engineer “concurs that this [that the soil plugged up the elbow, which swelled up and split due to rain] is a plausible explanation for the damage to the downspout elbow, and the water damage to the wood soffit.” Several

photographs within the Report show leaves, debris, and what appears to be soil, collected from the elbow.

The landlord claims $1,721.61 in compensation for the damage, which consists of $810.00 for labour ($30/hr x 27 hours), re-installation, drilling and refinishing costs in the amount of $500.00, the cost of the engineer's report for $411.61. I note that no additional documentation, such as receipts or invoices, were submitted in support of the claim for $500.00.

The tenant's agent submitted that the tenancy agreement, clause 2, states that "Regular and irregular inspection with proper notice of any or all units will be done to verify any health or cleanliness concerns" and that the landlord failed to fully mitigate their damage by not conducting regular inspections. The landlord responded that they do annual inspections in the spring. The landlord also responded that the same clause of the tenancy agreement requires that "the tenant must maintain suite and patio/balcony in a safe and clean manner." He added that there "are large trees surrounding the property."

In reviewing the tenancy agreement, I note that clause 20 reads as follows:

> "20. Patios and Balconies must be kept clean and neat with no clotheslines, garbage or items that may damage the general appearance of the buildings. Patio and deck maintenance is required as per this agreement and includes leaf removal, debris, snow dam problems, and ensuring that the drains are clear."

The agent referred to "multiple leaks" in the engineering report, which he argues suggests that the tenant's rental unit was not the only potential cause of the damage. However, I was unable to find any reference to multiple leaks in the report. The agent testified that a representative of the insurance company came out to inspect the damage in March 2017; the landlord testified that he was never contacted by anyone from the tenant's insurance company.

The tenant testified that a possible explanation for the buildup of debris leading to the damage was that there had been work done earlier on the deck, and that the workers likely did not properly clean up the paint debris. The landlord disputed this submission, and said that the workers had cleaned up the debris.
The agent submitted that where there are any ambiguities in an agreement (such as the tenancy agreement), that the ambiguity is to be decided in favor of the drafter. This is known as the *contra proferentem* rule, which I will address in my analysis, below.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

The landlord seeks a monetary order for compensation for damage to the rental unit and adjacent deck and surrounding area. The purpose of compensation is to put the person who suffered the damage or loss into the same position as if the damage or loss had never occurred. The party claiming compensation must provide evidence establishing that they are entitled to compensation. In determining whether compensation is due, I must determine whether:

1. a party to the tenancy agreement failed to comply with the Act, regulation, or tenancy agreement;

2. loss or damage resulted from their non-compliance;

3. the party who suffered the damage or loss can prove the amount or value of the damage or loss; and,

4. the party who suffered the damage or loss has acted reasonably in minimizing their damage or loss.

The tenants were required to conduct “deck maintenance [as] required as per this agreement and includes leaf removal, debris, snow dam problems, and ensuring that the drains are clear.” The landlord submitted that the tenants kept potted plants on the deck, and that the potting soil was washed into the drain. The engineers report supports the landlord’s argument. The tenant did not dispute that they kept potted plants on the deck, nor did he dispute that he failed undertake any sort of deck maintenance. The only explanation offered was that the debris may have been caused by previous workers on the deck.

The agent raised the issue of *contra proferentem* interpreting clauses 2 and 20 of the tenancy agreement. In cases were there is an ambiguous term of an agreement, where the parties dispute the term, and where neither party has provided additional evidence that might bring clarity to the term, I must apply the *contra proferentem* rule. *Contra proferentem* is a rule of contractual interpretation which provides that an ambiguous

term will be construed against the party responsible for its inclusion in the contract. This interpretation will therefore favour the party who did not draft the term, because the party not responsible for the ambiguity should not be made to suffer for it. This rule endeavours to encourage the drafter to be as clear as possible when crafting an agreement upon which the parties will rely.

In this case, however, the agent merely referred to the *contra proferentem* rule without arguing as to how the clauses were ambiguous. The tenant nor his agent testified to, or provided any evidence, to support an argument that the terms were ambiguous. As such, I do find that it is appropriate to apply the rule in this instance, as there is no ambiguity with either clause.

I find that, based on the oral and documentary evidence, that the tenants failed to comply with the tenancy agreement by failing to clear debris and keep the drains clear.

Did the damage to the rental unit and building occur from that non-compliance? But for the build up of soil and non-clearing of leaves and debris, the damage to the building and the frozen elbow pipe would not have occurred.

The landlord has submitted a monetary worksheet outlining the various costs related to the damage. The tenant disputed that the per hour rate of $30.00 was unreasonable and that he saw the landlord do the work himself and that the work “wasn’t very good.” However, neither the tenant nor his agent disputed that the amount claimed was in and of itself unreasonable. Regarding the claim for $500.00, as I noted previously, there is no documentary evidence explaining or supporting the purpose of that claim, and as such I dismiss that aspect of the claim without leave to reapply. I do, however, find that the landlord has proven the amount claimed for the damage to be in the amount of $810.00 for labour costs, and the $411.61 claimed for the cost of the engineer’s report.

Has the landlord acted reasonably in mitigating their loss? I find that they have. The landlord attempted to repair much of the work himself. While the landlord has a duty to make regular inspections of its property, it is incumbent on tenants to fulfill the obligations of their tenancy agreement. I do not find that the landlord did not mitigate its losses by failing to perform more-frequent inspections. The landlord also attempted to mitigate its loss by resolving the matter with the tenant’s insurance company, but was rather unsuccessful in that regard.

Taking into consideration all the oral and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord

has met the onus of proving their claim for compensation for damage.

For the reasons set out above, pursuant to section 67 of the Act, I find that the landlord is entitled to a monetary award in the amount of $1,221.61.

As the landlord was successful in its application, I grant them a monetary award in the amount of $100.00 for recovery of the filing fee.

Conclusion

The landlord is granted a monetary order in the amount of $1,321.61. This order must be served on the tenants and may be filed in, and enforced as an order of, the Provincial Court of British Columbia (Small Claims).

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: August 13, 2018

Residential Tenancy Branch