Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

matter regarding Ocean Haven Residences Inc.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDL-S, FFL

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act ("Act")* for a monetary order for damages under the *Act*, regulation or tenancy agreement, to keep the security deposit to apply to their claim, and to recover the cost of their filing fee.

The Tenant and an agent for the Landlord (the "Agent") appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process. During the hearing the Tenant and the Landlord were given the opportunity to provide their evidence orally and respond to the testimony of the other Party; I reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure; however, only the evidence relevant to the issues and findings in this matter are described in this decision.

Neither party raised any concerns regarding the service of the Application or documentary evidence.

Preliminary and Procedural Matters

At the outset of the hearing, the Tenant asked if it could be adjourned, because he had thought he could raise issues to be considered at the hearing, rather than by applying for a cross application through the Residential Tenancy Branch ahead of the hearing. I asked the Landlord for his thoughts on the Tenant's request and the Landlord opposed an adjournment. He said he has waited this long and he is out $10,000. He said the Tenant has had months to look into it and apply for relief, but he didn't do it. The Tenant said "I am a little overwhelmed by the situation. I had items that were stolen from my premises. I think things should be held together."

The Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure"), 7.8 and 7.9, as well as Policy Guideline 45 address whether it is appropriate for an arbitrator to adjourn a hearing.

The Rules of Procedure state:

> **Adjourning a hearing**
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> **7.8 Adjournment after the dispute resolution hearing begins**
> At any time after the dispute resolution hearing begins, the arbitrator may adjourn the dispute resolution hearing to another time. A party or a party's agent may request that a hearing be adjourned. The arbitrator will determine whether the circumstances warrant the adjournment of the hearing.
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> **7.9 Criteria for granting an adjournment**
> Without restricting the authority of the arbitrator to consider other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:
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> • the oral or written submissions of the parties;
> • the likelihood of the adjournment resulting in a resolution;
> • the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
> • whether the adjournment is required to provide a fair opportunity for a party to be heard; and
> • the possible prejudice to each party.

Policy Guideline 45 quotes the criteria in Rule of Procedure 7.9

I found that I agreed with the Agent and declined to adjourn the hearing, because the Tenant had had sufficient time to enquire about this process in the months leading up to the hearing. I told the Tenant that he was still able to apply for relief, although he may have missed some deadlines.

The Tenant agreed that the Landlord had served him with the Application for Dispute Resolution according to the *Act*. I am satisfied that the Tenant was properly served with the Landlord's Application and documentary evidence.

The Agent said he did not receive the Tenant's evidence, because the Tenant left it underneath the mat at the Agent's father's office. The Agent said he has not been back

there since the Tenant would have left it; however, the Tenant said he left the documents there on February 4th, the last day he could leave it, according to the Rules of Procedure, and that he emailed the Agent to tell him that the package was there for him to pick up. The Agent said that serving it in this manner means that it is deemed served 3 days later, or February 7th, which does not give the Landlord the 7 days he is allowed to review the materials pursuant to the Rules.

In the hearing, the Agent did not explain why he could not or that he did not pick up the Tenant's documents, once he was advised of their existence and location via email on February 4, 2019. I find that the Agent was more focused on using the Rules to exclude the Tenant's evidence, rather than responding to my enquiries as to whether he had picked up the evidence and had time to consider it.

Based on the evidence before me in this set of circumstances, I find that the Tenant's documentary evidence was served in compliance with section 71(2)(c) of the Act. Pursuant to Rule 3.17, I find it appropriate to consider any relevant evidence that the Tenant submitted, even though it may not have been submitted in accordance with Rule 3.15. In the hearing, both Parties had the opportunity to be heard on the question of accepting this potentially late evidence. Based on everything before me on this matter, I find it consistent with administrative fairness and the rules of natural justice to consider the Tenant's relevant evidence.

Issue(s) to be Decided

- Is the Landlord entitled to a monetary order under the *Act*, and if so, in what amount?
- Is the Landlord entitled to recovery of the filing fee, pursuant to section 72 of the *Act*?

Background and Evidence

The Landlord submitted a copy of the tenancy agreement, which indicates that the first day of the tenancy was August 1, 2018. It was for a fixed term that ended on July 31, 2020, to continue on a month-to-month basis thereafter. The monthly rent was $1,300.00, due on the first day of each month. The Tenant paid a security deposit of $650.00 and a pet damage deposit of $650.00. The Parties signed the tenancy agreement on July 20, 2018.

In the hearing, the Parties advised that there was a fire in the rental unit on September 1, 2018, which coincided with the end of the tenancy. In an email submitted by the Agent, the Tenant gave the Agent his forwarding address on October 22, 2018.

The Agent said that the fire was accidental, but caused by some lighting the Tenant had installed and left turned on when he was absent from the rental unit. The Agent said that he was forced to pay a $10,000.00 deductible to the insurance company to have the rental unit renovated; he said he applied for dispute resolution for an order requiring the Tenant to reimburse him for this expense.

The Agent submitted a copy of a "Fire Investigation Report" for the incident at the rental unit on September 1, 2018. A summary at the end of this report states:

> The cause of this fire was determined to be electrical failure. The failure happened external to the electrical outlet located at the point of origin. At the time of the fire there was one plug in the upper receptacle of this outlet. The plug powered a length of rope lighting. Heat generated due to a failure of one of the electrical components making up the rope lighting. This ignited a nylon golf bag that was stored at the point of origin. The heat also caused the electrical outlet's breaker to trip on the house panel. The investigation was not able to determine which component of the rope lighting failed, due to the fact that much of the evidence at the point of origin had been burnt away including the LED controller for the lighting. Witness statements from responding firefighters and the tenant [redacted] corroborate the findings of this investigation.

The Tenant agreed with the Agent's characterization of the cause of the fire. In the hearing, the Tenant acknowledged that he had left the rope lighting on when he left the rental unit and that part of it was lying across his nylon golf bag.

The Tenant said that he works in the construction industry and that he offered to do the clean-up work himself. He said that the Agent had told him "to get in there and start doing the work myself. So it's not fair what he's saying. . . why am I coming up with this [deductible] myself? I gave him a way of not going through insurance."

The Tenant said that once the insurance adjuster had been though the unit on the Thursday after the fire: "I took work off on Friday, Saturday, Sunday – three days with friends – we removed all the kitchen cabinets out to the car port. And this was under a directive from him [the Agent] to get the stuff out of there and start working on the unit; I was not reimbursed for any of this work."

The Tenant submitted an email dated September 9, 2018, with a proposal of how he would renovate the damage done to the rental unit by the fire. He said that he would not charge the Landlord anything for this work, so that it would not cost him anything. However, a copy of texting records between the Agent and the Tenant indicate that the renovation company was already on site as of September 7, 2018. However, in one text dated September 9, 2018, the Tenant said that his lawyer told him that it was not too late for the Landlord to avoid going through insurance for the renovations.

A series of texts included the following communications on September 9, 2018:

Agent: Maybe your boss' construction company can write a proposal?

Tenant: Yep. Anything you want to see specifically? Just work order, as pricing is irrelevant?

Agent: We're going to go with the best job of course, but I think pricing is also relevant.

Tenant: OK, but with my job you won't be paying. Understand? Thanks for communicating on a Sunday.

Agent: Yes I understand, either way I won't be paying.

The evidence before me is that the Tenant did a lot of work to remove his belongings, and clean the walls with a special chemical more than once, to prepare them with primer and sealant, and to remove the kitchen cabinets and all plastic, including lights.

The Agent said that if he had not had insurance, this would have been a $60,000 claim, not a $10,000 claim. He acknowledged that the Tenant had offered to clean up the rental unit after the fire, but the Agent said:

> It is my prerogative who I want to do the repair work. He isn't able to do $60,000.00 work on his own. I was expecting a professional quote from a professional company. I don't know how what he said has anything to do with the hearing. I understand that you are panicked and scared, but you have to own up to where we are and what was done. Frankly it was your fault. I know it wasn't intentional but here we are.

The Landlord submitted a transaction receipt from a local restoration company, which evidenced the Agent paying the restoration company $10,000.00. This receipt notes that the payment is a "deductible invoice".

Analysis

Based on the documentary evidence and the oral testimony provided during the hearing, and on the balance of probabilities, I find the following.

In the hearing, I explained the test for damages or loss set out in Policy Guideline 16(C). This states that a party who applies 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, as the Applicant in this matter, the Landlord must prove the following:

1. That the Tenant violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the Landlord to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the Landlord did what was reasonable to minimize the damage or loss.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

The *Act* requires a tenant to repair damage that is caused by the actions or neglect of the tenant, other persons the tenant permitted on the property, or the tenant`s pets. Section 32 of the *Act* requires tenants to make repairs for such damage and section 37 of the *Act* requires the tenant to leave the rental unit undamaged. Based on the evidence before me, I find it is more likely than not that the Tenant was negligent in leaving the rope lighting turned on and lying across the nylon golf bag when he left the rental unit and that his actions caused the fire. I find that by doing so, the Tenant violated sections 32 and 37 of the *Act*. Further, I find that the violation caused the Landlord to incur damages or loss to the rental unit in the form of the financial cost to repair the fire damage.

The Landlord's evidence through the Agent is that the value of the loss is $10,000.00 or the insurance deductible to cover the cost of renovating the rental unit.
Policy Guideline 5, entitled "Duty to Minimize Loss", states that "the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss." The Guideline cites section 7(2) of the *Act* as the basis for this obligation. The Guideline goes on: "This means that the victim of the breach must take reasonable

steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided."

Policy Guideline 5 also states:

> Efforts to minimize the loss must be 'reasonable' in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.
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> The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed. The arbitrator may require evidence such as receipts and estimates for repairs or advertising receipts to prove mitigation.
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> If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved. The landlord or tenant entitled to contract for repairs as a result of a breach by the other party, may choose to pay a service charge that exceeds what one would reasonably be required to pay for the service in the circumstances. In that case, the arbitrator may award a reduced claim based on the reasonable cost of the service. If partial mitigation occurs, the arbitrator may apportion the claim to cover the period during which mitigation occurred. The landlord who does not advertise for a new tenant within a reasonable time after the tenant vacates a rental unit or site prior to the expiry of a fixed term lease may not be entitled to claim loss of rent for the first month of vacancy; however, claims for loss of rent for subsequent months may be successful once efforts to find a new tenant are made.

The question before me is whether the Landlord was reasonable in minimizing the damage or loss by selecting the company he did to renovate the rental unit, rather than turning to the Tenant to repair the damage for free. The Landlord did not provide any evidence that he compared and contrasted different proposals, including that of the Tenant. Rather, the evidence before me is that the Agent had a restoration company attend the rental unit the day after the fire to have them set up air scrubbers. While the Agent worked quickly to mitigate the damage to the rental unit as soon as possible, this is not equivalent to mitigating the financial cost of the repairs.

Based on the evidence before me overall and on a balance of probabilities, I find that the Agent did not do everything he could have done to mitigate the loss he is claiming in his Application. The Tenant was offering to arrange for the repairs to be done for free versus the Landlord paying another company through his insurer. As a result, I find it reasonable to divide the cost of repairing the damage between the Landlord and the Tenant. I award the Landlord half of what they seek to recover from the Tenant in the amount of **$5,000.00**.

Security Deposit

According to section 38 of the *Act*, a landlord must return a tenant's security deposit and pet damage deposit within fifteen days after the later of the end of the tenancy and the date on which the tenant provides his forwarding address to the landlord. In the evidence before me, the tenancy ended on September 1, 2018, and the Tenant provided his forwarding address to the Landlord on October 22, 2018. The Landlord applied for dispute resolution on October 17, 2018, so I find he did not extinguish his right to claim against the security deposit, as he had already applied for dispute resolution.

However, the Landlord was required to return the pet damage deposit within 15 days of October 22, 2018. As set out in section 38 (7), a pet damage deposit may be used only for damage caused by a pet to the rental unit, unless the tenant agrees otherwise. As the evidence before me makes it clear that the damage claimed was not caused by a pet, the Landlord was required to repay the pet damage deposit within 15 days of receiving the Tenant's forwarding address. Further, and pursuant to section 38(6), the Landlord must pay the Tenant double the pet damage deposit or **$1,300.00**.

As the Landlord was partially successful in the Application, I award recovery of half of the filing fee or **$50.00**.

Conclusion

The Landlord is granted a monetary order pursuant to section 67 of the *Act*, in the amount of $5,050.00, minus the security deposit of $650.00, minus double the pet damage deposit of $1,300.00, for a total of $3,100.00.

This monetary order must first be served on the Tenant and may then be filed in the Provincial Court (Small Claims Division) and enforced as an order of that court.

Although this decision has been rendered more than 30 days after the conclusion of the proceedings, section 77(2) of the *Act* states that the Director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period set out in subsection (1)(d).

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: March 18, 2019

Residential Tenancy Branch