Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding XERANA HOLDINGS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **FFT MNDCT OLC PSF**

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "*Act*") for:

- Authorization to recover the filing fee for this application from the landlord pursuant to section 72;
- A monetary order for damages or compensation to the tenant pursuant to section 67;
- An order for the landlord to comply with the *Act*, Regulations or Tenancy Agreement pursuant to section 62; and
- An order that the landlord provide services or facilities required by the tenancy agreement or the *Act* pursuant to section 62.

The tenant attended the hearing and the landlord attended the hearing represented by his legal counsel, AA ("landlord"). The landlord acknowledged receipt of the tenant's original application for dispute resolution and the amendment filed on March 14, 2019. Both parties were prepared to have the tenant's application heard.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here.

Preliminary Matter – Naming of the Respondents

The landlord advised there are two landlords named on the tenancy agreement, which was filed as evidence. The tenant did not include the corporate landord when the application was filed and did not object to the landlord's application to have the second landlord included. In accordance with rules 4.2 and 6.1 of the Residential Tenancy Act Rules of Procedure ("Rules"), the application is amended to include the corporate landlord as reflected in the cover page of this decision.

Preliminary Matter – Late Evidence

On Friday, March 29, 2019, three days before the hearing, the tenant provided additional documentary evidence to the landlord by email. Copies were also uploaded to the Residential Tenancy Branch website for my viewing. The landlord sought to exclude the additional evidence on the grounds that the photographs were available to the tenant when she exchanged the first set of evidence to the landlord on March 19th and that they are immaterial to the hearing. The tenant submits the evidence could not be submitted 14 days before the hearing because some receipts were acquired after the due date.

Rule 3 provides comprehensive rules for service and exchange of evidence. If a party does not comply with the time lines included in Rule 3, that party risks the evidence not being considered. I considered whether the acceptance of the late evidence would prejudice either party or result in a breach of the principals of natural justice and the right to a fair hearing. I determined that if I were to accept the tenant's late evidence, the landlord would be denied the opportunity to prepare for and submit their case and rebuttal to it. This would be prejudicial against the landlord and ruled the tenant's late evidence would not be considered.

Preliminary Matter – Orders by consent

The tenant's original application requests an order for the landlord comply with the *Act*, regulations or tenancy agreement. Specifically, the tenant requests the landlord comply with clause 10(1)(a) of the tenancy agreement: *the landlord's obligations to maintain the residential property in a reasonable state of decoration and repair, suitable for occupation by the tenant. The landlord must comply with health, safety and housing standards required by law*. The landlord advised there is a mutual agreement to end the tenancy on April 30, 2019 and this agreement was filed in evidence. The landlord agrees to comply with all aspects of the tenancy agreement and sections of the *Act* until the end of the tenancy and does not admit to any non-compliance.

The tenant also requested an order for the landlord provide services or facilities required by the tenancy agreement or law. The tenant advised she filed the application when there was snow and ice on the ground. The tenant agreed to withdraw this portion of her claim. Pursuant to my authority under section 64(3)(c) of the *Act*, I amended the tenant's application to withdraw her claim pertaining to an order for the landlord to provide services or facilities.

Background and Evidence

Both parties provided a copy of the tenancy agreement as evidence. The parties entered into this fixed term tenancy agreement on September 3, 2018 although the tenant had lived in the rental unit for approximately 3 years. The tenancy will end on April 30, 2019, by mutual agreement. The tenancy involves a rental unit located in a building consisting of multiple units with an outdoor parking lot.

The tenant provided the following testimony. On the morning of February 14, 2019, the tenant left her rental unit and walked to the parking lot to get in her car and go to work. She slipped on ice on the parking lot, falling backward, landing on her elbow and shoulder. She called her partner who advised her to take photographs of the area then proceeded to work but she left work early, complaining of discomfort. She attended a walk-in clinic later that evening and provided the initial medical consultation as evidence. The tenant also provided photographs of the parking lot she says she took that day.

The following day, February 15, 2019, the tenant advised the landlord of her slip and fall. In the email, the tenant advises the landlord that there was lots of ice and requests there be salt put down due to the danger. She advised the landlord she is in pain, has a doctor's appointment and requests the landlord deal with the snow and ice in the future. As a result of the accident, the tenant has been visiting doctors and medical specialists and provided doctors notes and specialist reports as evidence.

The tenant purchased prescription medicine to alleviate her pain and saw counsellors for emotional distress. She cannot perform full duties at work and cannot swim due to her injuries. The tenant testified she has missed a total of 10 days from work, made up of half days; no paystubs were entered as evidence.

On cross examination, the landlord's counsel elicited from the tenant the following testimony. No investigation into the cause of the slip and fall was conducted and there are no witnesses. There was no communication with the landlord in writing about ice or snow removal prior to the incident. The email sent the day after the incident was the first time she notified the landlord of the ice and snow. The tenant says that in the past, she notified the landlord of various issues by text message and the landlord responds in person at her door. The tenant did not retain copies of the previous texts.

The landlord's witness KSM was called to testify. Due to his deficient English language skills, it was apparent to me that the witness didn't understand the questions asked of him, nor was he able to provide testimony that I could understand. The witness' testimony is not reproduced here as I believe the principles of fairness would be compromised if I were to consider any of it.

When examined by his counsel, the landlord provided the following testimony. The landlord oversees the property, taking care of the property maintenance and tenants. He and the witness KSM are responsible for shovelling snow, salting the common outdoor areas and spraying ice melter. KSM advised him on February 12th that KSM had shovelled the parking lot and the landlord needed to purchase more salt. The landlord purchased salt from the drug store at 3:15 p.m. that same day, and a copy of the receipt for the salt was provided as evidence. The salt was applied to the common areas of the building by KSM on February 12th.

The condition of the parking lot the morning of February 14th was clear of ice and snow. As evidence, the landlord provided an undated letter from a ground floor tenant which states, (as written):

> 'My suit is on the first floor and my window is facing the parking lot. I dropped off my son at school at 8:35 as usuel on the date of February 14th, the weather was sunny and there was no ice/snow on the ground to make it slippery. And I did not witness anyone slipping in the parking lot because our parking lot is always cleaned.'

There were never any complaints made to the landlord regarding snow removal by any of the building tenants. Specifically, between February 12th and February 14th, no complaints were made by the tenant. There were no previous reported incidents of people slipping and falling in the parking lot or other common areas of the building.

The landlord testified and provided weather reports regarding the weather conditions from February 12th to February 14th. The reports show snow falling on February 12, stopping at 5:00 a.m. on February 13 and no precipitation on February 14th. By February 13th, the landlord and KSM had cleared the snow that had fallen the previous 2 days.

Analysis

Residential Tenancy Policy Guideline PG-16 [Compensation for Damage or Loss] addresses the criteria for awarding compensation.

It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

1. a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
2. loss or damage has resulted from this non-compliance;
3. the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss. **(the 4 point test).**

The tenant must establish the landlord has failed to comply with the *Act*, or the tenancy agreement, by failing to keep the parking lot free of ice and snow.

The tenant submits that the landlord breached clause 10(1)(a) in the tenancy agreement which is mirrored as section 32 of the *Act.*

Section 32 of the *Act* sets out the landlord's obligation to repair and maintain:

> A landlord must provide and maintain residential property in a state of decoration and repair that
>
> a. complies with the health, safety and housing standards required by law, and
> b. having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Pursuant to section 32(5) of the Act:

> A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

The tenant did not provide any witness statements or seek them out the day of the accident to verify the conditions of the parking lot when she fell. The tenant's photographs are undated and do have any landmarks to reference where they were taken. Since the tenant did not notify the landlord about the fall at the time, the landlord was unable to investigate the condition of the parking lot. The landlord provided credible evidence of salting and shoveling and weather conditions.

I find the tenant has failed to establish the landlord has failed to comply with section 32 of the *Act*.

As the tenant has failed to establish the landlord breached the *Act* or tenancy agreement, it is unnecessary to consider the remaining three points of the test.

The tenant's application for compensation pursuant to section 67 of the *Act* is dismissed.

As the tenant was unsuccessful in her application, she is not entitled to recover the $100.00 filing fee from the landlord.

Conclusion

The tenant's application for a monetary order for compensation for damages or loss under the *Act,* regulations or tenancy agreement pursuant to section 67 and to recover the filing fee pursuant to section 72 is dismissed without leave to reapply.

The tenant's application that the landlord comply with the *Act*, regulations or tenancy agreement in accordance with section 62(3) of the Act is granted. By consent, the landlord shall comply with all aspects of the tenancy agreement and sections of the *Act* as it applies to the landlord until the end of the tenancy.

The tenant's application for the landlord to provide services or facilities required by the tenancy agreement or Law pursuant to section 62 of the *Act* is withdrawn.

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: April 12, 2019

Residential Tenancy Branch