Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Trafalgar Management Ltd. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **MNDCT**

Introduction

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*.

Agent TW attended on behalf of the landlord ("the landlord"). The tenant attended.

Both parties had full opportunity to provide affirmed testimony, present evidence, cross examine the other party, and make submissions.

The landlord acknowledged receipt of the tenant's Notice of Hearing and Application for Dispute Resolution. The tenant acknowledged receipt of the landlord's materials. Neither party raised issues of service. I find the tenant served the landlord in accordance with section 89 of the *Act*.

The hearing process was explained, and each party had the opportunity to ask questions.

Issue(s) to be Decided

Is the tenant entitled to the following:

- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*.

Background and Evidence

The parties agreed the tenancy began in July 1998. Rent is currently $1,458.96 monthly payable on the first of the month. A security deposit of approximately $700.00 was paid by the tenant at the beginning of the tenancy which the landlord holds. A copy of the Agreement was submitted. The tenant continues in occupation of the unit.

The tenant provided testimony of the issue giving rise to this claim. He explained that he is seeking reimbursement of all rent paid from May 19, 2019 to October 2, 2019 because the toilet in the unit was non-functioning for a significant part of the time causing him considerable inconvenience, anxiety and distress.

The tenant testified that on May 19, 2019, he first informed the landlord of a problem of clogging of the toilet. (The landlord's evidence was that the complaint was made May 29, 2019). He stated that from this date until the toilet was replaced on October 2, 2019, he experienced persistent problems with the toilet clogging or overflowing.

The tenant said that he never knew when the toilet would work or not. As a result, if he had to use the toilet at night, he often left his apartment to find a public toilet rather than take the risk that the toilet would clog or overflow. A normal plunger was not effective. The tenant submitted several pictures of a clogged toilet.

The tenant said that he had guests staying for part of this period and it was inconvenient as well as embarrassing to have an unreliable toilet. The tenant testified that he celebrated his birthday in his unit and planned with a neighbour that the guests could use the neighbour's toilet rather than his own.

The tenant testified that he had undergone surgery in May 2019 and suffered immense inconvenience from not having a reliable toilet in his unit. The tenant submitted a copy of a letter from his physician stating that he was upset and depressed over the non-functioning toilet which exacerbated his medical condition.

The landlord acknowledged five separate complaints from the tenant to which the landlord responded by attending with a repair person within 1 to 9 days of each

complaint. The landlord stated that she made every effort to swiftly address the tenant's complaints with the toilet.

The landlord stated that she relied on the advice of the repair persons and had various repairs done; components of the toilet were replaced; the toilet was augured, and the drains inspected. The landlord submitted a substantial evidence package supporting the landlord's assertions of a timely, appropriate response and an earnest, but ineffectual, effort to resolve the issue. These documents included five invoices from drainage and plumbing companies. The agent also testified that she, the agent, had attended and provided service of the toilet. The agent testified that the toilet worked perfectly after each repair visit.

In her written evidence, the landlord stated in part:

> *"Between May 29, 2019 and September 7, 2019, the toilet at [unit] was serviced a total of five times. During that time three new toilet flapper valves and one master flush valve were installed. All of the individuals serving the toilet found that it functioned perfectly satisfactorily other than minor clogs that potentially stemmed from large or hard stools or excessive toilet paper. According to all service people involved, none saw a plunger anywhere in the bathroom on any of the service visits."*

The tenant testified that he lost patience with the landlord's vain efforts to find a permanent solution. In early August 2019, he asked the landlord to replace the toilet. The landlord refused saying there was no advice that the replacement would address the problem.

The tenant also contacted a health authority about the issue and submitted a confirming letter in this regard; as well, he posted about the issue on a public website and reached out to public servants, such as the mayor. The tenant submitted a copy of a letter dated September 26, 2019 from a neighbour (B.C.) who observed the overflowing toilet and stated the toilet was "disgustingly clogged".

In September 2019, the tenant testified that he contacted the City; the City representatives quickly conducted an inspection and determined the toilet should be replaced. At the City's direction, the toilet was replaced on October 2, 2019. The tenant submitted a copy of the City's Order.

The tenant stated that the problems complained of have not reoccurred since the toilet was replaced.

In response to the tenant's assertion that the landlord should have replaced the toilet sooner as an obvious and common-sense solution, the landlord replied, "I did not replace the toilet because we were told the toilet was not the problem."

Analysis

While I have turned my mind to the documentary evidence and the testimony of the parties, not all details of the submissions and arguments are reproduced here. The relevant and important aspects of the claims and my findings are set out below. Both parties submitted considerable evidence and disputed testimony in an 81-minute hearing.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy agreement or the *Act*, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. The purpose of compensation is to put the claimant who suffered the damage or loss in the same position as if the damage or loss had not occurred. Therefore, the claimant bears the burden of proof to provide sufficient evidence to establish **all** of the following four points:

1. The existence of the damage or loss;
2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the *Act*.

In this case, the onus is on the tenant to prove entitlement to a claim for a monetary award. 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.

A landlord is required under the Act to provide a unit "suitable for occupation by a tenant". Section 32 states:

> ***32*** *(1)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****.*

(emphasis added).

The tenant's claim is akin to a claim for loss of quiet enjoyment.

Section 28 of the *Act* deals with the tenant's right to quiet enjoyment. The section states as follows:

> 28 A *tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*
> (a) *reasonable privacy;*
> (b) ***freedom from unreasonable disturbance****;*
> (c) *exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
> (d) *use of common areas for reasonable and lawful purposes, free from significant interference.*

(emphasis added)

The Residential Tenancy Policy Guideline # 6 - Entitlement to Quiet Enjoyment states as follows:

> *A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means* ***substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations*** *in which the landlord has directly caused the interference, and situations* ***in which the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these.***
>
> *Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.*

…

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16).

I acknowledge that the landlord disagreed with the tenant's version of events and asserted that the landlord responded reasonably quickly, provided qualified workers who conducted inspections, and accepted their proffered advice. The landlord asserted the landlord had taken all reasonable steps to fix the problem.

I accept that it was inconvenient for the tenant to have an unreliable toilet that could clog and overflow. I found the tenant's evidence amply supported by letters, emails, photographs and other documents. The tenant clearly expressed his frustration and exasperation with the landlord's failure to solve the problem. The tenant lived through this period and was articulate in his description of the inconvenience and loss of hygiene.

I find it implausible that the landlord did not locate the solution for the problem with a clogged toilet over a period of almost 5 months if efforts were "reasonable". I find that in the 3-month period before the toilet was replaced, the landlord should have taken more energetic and diligent steps to get to the root of the matter. I find it puzzling that the agent testified to passively accepting advice which repeatedly was not solving the problem. It is inexplicable that the landlord refused the tenant's request made in early August 2019 to replace the toilet. I find that by denying the severity of the tenant's grievances and refusing to do what he reasonably suggested, the landlord minimized and dismissed his serious concerns and did not give his complaints the attention warranted.

Based on testimony, the documentary evidence and the weight I have given to the parties' evidence, I therefore find the landlord did not take reasonable steps to address the tenant's complaints after July 1, 2019, several weeks after the first complaint. I find the tenant has met the burden of proof on a balance of probabilities for a claim for compensation for loss of quiet enjoyment for the months of July, August and September 2019.

It is difficult to place a value on the inconvenience the tenant incurred in this situation. I considered *Policy Guideline 16: Compensation for Damage or Loss* which states:

An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:

- *"Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.*

I find the tenant has suffered loss of quiet enjoyment; however, the precise valuation of the significant loss has not been established. I cannot calculate the number of days that the tenant did not have a functioning toilet.

I find this is an appropriate situation to award the tenant nominal damages.

In consideration of all the testimony and evidence, the provisions of the Act and Guidelines, I award the tenant damages of $500.00 a month for each of the three months (July, August and September 2019) before the toilet was replaced on October 2, 2019, for a total award of $1,500.00.

The tenant may deduct this amount from rent in the amount of $750.00 for each of two upcoming, successive months.

Conclusion

I award the tenant a Monetary Order of $1,500.00. The tenant may deduct this amount from rent in the amount of $750.00 for each of two upcoming, successive months.

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: March 25, 2020

Residential Tenancy Branch