Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, FFL, MNSD, MNDCT, FFT

Introduction

This hearing dealt with monetary cross applications. The landlords applied for monetary compensation for unpaid and/or loss of rent for the month of November 2020 and authorization to retain the tenant's security deposit. The tenants applied for compensation for moving expenses, damaged personal property, return of the security deposit and return of a portion of rent paid for the month of October 2020.

Both parties appeared or were represented at the hearing and had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure. The hearing process was explained to the parties and the parties were permitted the opportunity to ask questions about the process. The parties were affirmed. The parties were ordered to not make a recording of the proceeding.

The hearing was held over two dates and an Interim Decision was issued on February 16, 2021. The Interim Decision should be read in conjunction with this decision. As seen in the Interim Decision, the landlords were ordered to provide additional evidence to me and the tenants during the period of adjournment; namely:

- a copy of the plumber's invoice/report/or any other document that shows the plumber's findings/services/activity at the property on October 3, 2020.
- a copy of the insurance claim documentation including information pointing to the cause of the loss and the losses claimed by the landlords.

During the period of adjournment, I received a copy of the plumber's invoice of October 3, 2020 and a video taken by an insurance adjuster showing the residential property and where the sewage escaped. I did not receive any documentation pertaining to the landlord's insurance claim as to the losses claimed by them despite my order to provide

such. The landlords stated he did not see that part of my order. The landlords also indicated that obtaining the video took quite a significant amount of communication with the insurance company.

The tenants confirmed that they received the same evidence I did during the period of adjournment. Accordingly, I admitted the additional evidence into evidence for consideration in making this decision.

I should be noted that I was provided a considerable amount of evidence for this proceeding, including oral testimony, documentary evidence, photographs, and, videos. With a view to brevity in writing this decision, I have only summarized the parties' respective positions and described the most relevant evidence.

Issue(s) to be Decided

1. Are the landlords entitled to unpaid and/or loss of rent for November 2020?
2. Are the tenants entitled to recovery of a portion of the rent they paid for October 2020, compensation for damaged personal property, and moving expenses?
3. Disposition of the security deposit.
4. Award of the filing fee(s).

Background and Evidence

The month to month tenancy started on February 16, 2020 and the tenants paid a security deposit of $650.00. The tenants were required to pay rent of $1300.00 on the first day of every month. The rental unit was described as a basement suite and the landlords resided above the rental unit.

The tenants paid rent for October 2020. The sewer mainline backed up on October 3, 2020 and the tenants vacated the rental unit on October 10, 2020.

On October 3, 2020 the landlords were out of town and the tenants reported to them that there was a significant plumbing issue at the property. The landlords called a neighbour and a plumber to respond to the issue. The landlord arrived at the property shortly after the plumber. The plumber cleared the sewer line and the landlord reinstalled the toilet. The tenants cleaned up the mess.

On October 4, 2020 the restoration company attended the property and performed additional sanitization and moisture readings. Excessive moisture was found in the

flooring and the drywall. Portions of the drywall had to be removed, the bathroom vanity and sink were removed and the items in the storage room had to be relocated. Dehumidifying fans were also left to run to dry the affected areas. It was determined that the flooring needed to be replaced. It was estimated that it would take 6 – 8 weeks to restore the property.

The parties exchanged numerous text messages between October 3 and 10, 2021. Below, I have reproduced the text messages concerning reimbursing the tenants for rent they had paid.

On October 4, 2020 the landlord sent a text message to the tenants advising:

> "I just spoke with my mother in law. She says our insurance won't cover any alternate living expenses for you guys as that would have been what your tenant insurance would have covered. What we can do is reimburse you a pro rated amount of the rent for the time you have to be out of the unit if that's what ends up being the case.
>
> Is the flooring in your bedroom different from the laminate throughout the suite? If so, we can try to fit as much of your stuff in there so when they rip up the floors we don't have to move all of your stuff into storage."

[highlighting added by tenants]

On October 7, 2020 the landlord wrote the tenant a text message stating:

> "That's fine. I can not reimburse you your pro rated amount until you have sent the letter I have asked for. If you want to send that. **You will be getting your pro rated amount for the remainder of this month, as the insurance company has just stated they will reimburse me for the loss of income. Once I have that, you will get that money.**
>
> You will be moved out on Saturday. Once you've moved your stuff out, you will need to ensure the bedroom, kitchen cupboards, fridge and stove are cleaned out and at that **point I will do a walk through to assess damage not resulting from the insurance claim and proceed to give you your damage deposit back**."

[emphasis and highlighting added by tenants]

The tenants delivered a notice to end tenancy to the landlord on October 7, 2020 with an effective date of October 10, 2020. Included in the tenant's notice is the following paragraph:

1. The Landlord stated by text message on October 7, 2020, that the Tenant is entitled to receive the pro-rated amount for the remainder of the contracted month, equivalent to $880.74, which will be covered by the Landlord's insurance policy as a loss of income. The calculation is as follows:

$1,300.00 / 31 = $41.94/day

$41.94 * 21 days = $880.64

On October 8, 2020 the tenant and landlord exchanged the following messages:

"If you can *etransfer* the pro rated amount to my email instead of writing a cheque that would be good. Thanks"

at 9:35 AM –

"Just have to speak to my insurance company one more. **They will likely be the ones who will calculate the refund as they are the ones covering it**."

[Tenant is first message; landlord is second message]

The tenants moved out on October 10, 2020. The landlords did not refund any portion of the October 2020 rent to the tenants.

As for insurance coverage, the landlord testified during the hearing that they did not make a claim for rent to their insurance company for loss of rent even though he had informed the tenant they were going to do so. I enquired as to whether the landlords had insured the property so that their policy reflected a tenanted suite to which the landlord stated they had insured the property to include a tenanted suite. I had ordered the landlords to provide a copy of their insurance claim but that was not provided by the landlords.

The tenants did not carry any tenant's insurance.

The landlord testified the restoration was completed in November 2020 and the unit was re-rented for January 2021.

The parties were in dispute as to whether the rental unit was inhabitable after the sewage back-up. The landlord was of the position the rental unit was still inhabitable. The tenants were of the position it was not.

The parties were in dispute as to the cause of the sewer back-up. In summary, the landlord submitted that the cause of the back-up was due to a construction defect in the sewer line that he called a "belly". The tenants testified that the plumber extracted "baby wipes" from the sewer line at the 75 foot mark and it was the landlords who flushed baby wipes into the system as the tenants do not have a baby and the landlord had admitted to them that he may have flushed baby wipes.

The plumber's invoice, dated October 3, 2020, provides the following description of his findings and services performed:

> Arrived to backed up mainline. Augered 36' to blockage 3 times. Camera inspected then line found toilet paper and face wipes at 36'. Camera inspected the line to find belly at 44-66' long. Customer flushed toilet and ran facets in house. 100% water flow. No back up. Customer is going to call city to get info on belly in line to see if it's on their side. Customer might call back for a quote for a possible mainline repair depending on what city says.
> Camera Inspection.

A video provided by the insurance company appears to show the location of the sewer backup which a drainpipe in the floor of the basement, in a utility room.

Landlord's claim

The landlords are making a claim to recover loss of rent for November 2020 on the basis the tenants failed to give one full month of notice as required under the Act. The landlords seek to retain the security deposit in partial satisfaction of the loss.

The tenants object to the landlords being compensated for November 2020 rent as they moved out due to the the rental unit being uninhabitable and the landlord informing them they would be getting a refund of rent for October 2020 and making a claim for loss of rent through their insurance.

Tenant's claim

The tenants are seeking recovery of the rent for the days after they moved out (October 11 – 31, 2020) as the landlord had represented to them that they would get a pro-rated return of rent for October 2020; and, because the tenancy became frustrated due to the sewage back up and the restoration work that was expected to take 6 – 8 weeks.

The landlord was of the position they are not bound by what they communicated to the tenants in the text messages concerning a refund of pro-rated rent for October 2020. The landlords were of the position the tenancy was not "frustrated" and that the

restoration could have been soon quicker than 6 – 8 weeks had the landlords not had all of the flooring in the rental unit replaced.

In addition, the tenants seek recover of loss of personal possessions in the storage room that were ruined by the sewage backup; and, moving costs on the basis the landlords were negligent in disposing of wipes in the toilet and those actions caused the sewage back up.

The landlords pointed out that the plumber's invoice shows "face wipes" were found in the sewer line, not baby wipes, and there is no way to determine who flushed "face wipes" into the common sewer line, suggesting it could have been done by a guest or prior to the landlords purchasing the property. The landlords also took the position that if baby wipes were flushed it would not constitute negligence on part of the landlords as the packaging states they are flushable and one is only negligence if they knew they were not flushable. The female landlord stated she does not use face wipes. The landlord suggested a guest could have flushed a face wipe as well and pointed out the landlords were away when the sewer back-up occurred. The tenants denied flushing face wipes or baby wipes and doubted a guest of theirs would do so.

Analysis

Upon consideration of everything presented to me, I provide the following findings and reasons.

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 section 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 whatever was reasonable to minimize the damage or loss.

The above outlined test for damages is set out in Residential Tenancy Policy Guideline 16: *Compensation for Damage or Loss*.

Landlord's claim

It is undisputed that the tenants vacated the rental unit on October 10, 2020 without giving the landlords at least one full month of written notice. It is before me to determine whether the landlords are entitled to compensation for loss of rent for November 2020.

The parties were in dispute as to whether the rental unit remained inhabitable despite the sewer back up and restoration work that was required; however, I find it unnecessary to make that distinction. I find the landlords did not provide sufficient evidence to satisfy me that they suffered a loss of rent for November 2020 given their representations to the tenants they were going to include loss of rent in their insurance claim and the landlord's failure to provide documentary evidence to show what they had claimed under their insurance. If the landlords chose not to claim loss of rent due to the sewer back-up despite having the property insured to include a tenanted suite, as the landlord testified during the hearing, then I find that constitutes a failure to mitigate losses on part of the landlord. As such, I find the landlords have not met their burden of proof under part 2 and 4 of the test for damages outlined above and I dismiss their claim.

Having dismissed the landlord's claim for unpaid and/or loss of rent against the tenants, I deny their request to retain the security deposit and I make no award for recovery of the filing fee they paid for their Application for Dispute Resolution.

Tenant's claim

In is undisputed that the tenants paid rent for the month of October 2020 in full, shortly before a sewer back up occurred on October 3, 2020, and the tenants vacated the rental unit on October 10, 2020. At issue is whether the tenants are entitled to recovery of the rent they paid for the days after they vacated.

The parties provided opposing positions as to whether the rental unit remained inhabitable after the sewer backup or the tenancy became frustrated. However, as I stated previously, I find it unnecessary to make that distinction. It is clear to me that the landlord represented to the tenant multiple times before the tenants vacated that the tenants would be refunded their pro-rated portion of October 2020 rent and the tenants relied upon those representations in finding new living accommodation and ending the tenancy with short notice.

Section 91 of the Act provides that the common law applies to landlords and tenants, except where modified or varied under the Act. The doctrine of estoppel exists in the common law, including estoppel by representation.

Estoppel by representation is a positive representation made by a party and where the other party acts upon the representation it would be inequitable for the party making the representation to dispute it or do anything inconsistent with it.

Under the basis of *estoppel by representation*, I find it would be unfair and unjust to permit the landlords to depart from the representations they made to the tenants that they would receive a refund of pro-rated rent for October 2020 upon which the tenants relied. Therefore, I grant the tenant's request for recovery of pro-rated rent for October 2020.

The landlord had indicated in his text message of October 8, 2020 that the insurance company would make the calculation; however, the landlords did not provide any documentation from the insurance company for the tenants and I to review. Therefore, I calculate the tenant's award as follows:

> Rent paid for October 2020: $1300.00
> Days in October 2020: 31 days
> Days in October 2020 after tenants vacated: 21 days
> Award calculated as: $1300.00 x 21/31 days = $880.65.

As for the tenant's moving costs and loss of personal possessions contaminated by sewage, I note the landlords never made representations to the tenants that they would pay for these items.

The tenants did not carry tenant's insurance and had they done so they would have likely benefited from replacement of their contaminated possessions. A landlord is not the personal insurer of his/her tenants. As such, the only premise the tenants may succeed in having the landlords compensate them for their damaged personal property and moving costs would be where the tenant's losses are the result of negligence on part of the landlords.

The tenants were of the position the landlords were negligent in flushing wipes in the toilet, whether it be face wipes or baby wipes, as the tenants did not flush such items in the toilet.

Upon review of the plumber's invoice and the testimony of both parties, I find the plumber's invoice does not support either version of events the parties provided me orally during the hearing. The landlord had attributed the sewer back-up to a "belly" in the sewer line; however, I note it was a clog that had to be augered at the 36' in the line and the "belly" was found further down the line at the 44'. The tenants testified the plumber told them he found "baby wipes" 75' down the sewer line; however, the plumber wrote on the invoice that he found "face wipes" and toilet paper in the clog he cleared at 36'. I find the best evidence as to the cause of the sewer back up is as indicated on the plumber's invoice which is a clog consisting of accumulation of wipes and toilet paper and I rely upon that in making my determination as to negligence.

Although the plumber points to an accumulation of toilet paper and face wipes in the sewer line as the reason the sewer line became clogged, I find there is a lack of further detail for me to make a conclusion as to whether the clog was solely the result of wipes entering the system, as suggested by the tenants. Although the landlord acknowledged he may have flushed baby wipes, it is unknown whether doing so is the sole cause of the clog. There was also toilet paper found in the clog and, although toilet paper is flushable and designed for sewer systems, too much toilet paper can also cause a clog. Assuming the wipes caused or contributed to the clog, whether it be baby wipes or facial wipes, it is impossible to determine based on the evidence before me how many wipes there were, who flushed the wipes, and how long ago the wipes entered the sewer line. As suggested by the landlord, a guest may also introduce un-flushable products into a sewer system or wipes may have been introduced before they purchased the property. Also of consideration, is that the clog occurred while the landlords were out of town and the tenants were at the property.

Given the above, I find there is insufficient proof the landlords were negligent and that negligence is the sole reason the tenants suffered damages. Therefore, the tenant's request for compensation for moving costs and damaged personal possessions is dismissed.

Unfortunately, sewer back ups, water line breaks, and fires occur from time to time and determining who is responsible for causing the incident is not always accomplished which is why tenant's insurance is usually recommended, and in some tenancies, a requirement so as to provide coverage for such unexpected events.

The tenants did have some success in their Application for Dispute Resolution and I award them recovery of the $100.00 filing fee they paid.

I further order return of the tenant's security deposit to them as the landlord's claim against the security deposit has been dismissed.

In light of all of the above, I provide the tenants with a Monetary Order to serve and enforce upon the landlords, calculated as follows:

Pro-rated rent for October 2020	$ 880.65
Security deposit	650.00
Filing fee	100.00
Monetary Order for tenants	$1630.65

Conclusion

The landlord's claim is dismissed in its entirety.

The tenants were partially successful and are provided a Monetary Order in the amount of $1630.65 to serve and enforce upon the landlords.

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: May 13, 2021

Residential Tenancy Branch