Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

This hearing convened as a Tenants' Application for Dispute Resolution, filed on March 27, 2021, in which the Tenants requested monetary compensation from the Landlord in the amount of $35,000.00 from the Landlords.

The hearing was conducted by teleconference on August 27, 2021, and December 21, 2021. Both parties called into the hearings and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me. Both Tenants called into the hearing. The Landlord noted on the tenancy agreement was a property management company; at the hearing before me the owner of the company, S.W., appeared as did the previous owner L.M.

The parties were cautioned that recordings of the hearing were not permitted pursuant to *Rule 6.11* of the *Residential Tenancy Branch Rules*. Both parties confirmed their understanding of this requirement and further confirmed they were not making recordings of the hearing.

The original hearing was adjourned to permit service of evidence between the parties. When the hearing reconvened on December 21, 2021, the parties agreed that all evidence that each party provided had been exchanged. No other issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the

evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matter—Date and Delivery of Decision

The hearing of the Application concluded on December 21, 2021. This Decision was rendered on January 31, 2022. Although section 77(1)(d) of the *Residential Tenancy Act* provides that decisions must be given within 30 days after the proceedings, conclude, 77(2) provides that the director does not lose authority in a dispute resolution proceeding, nor is the validity of the decision affected if a decision is given after the 30 day period.

Issues to be Decided

1. Are the Tenants entitled to monetary compensation from the Landlords?

2. Should the Tenants recover the filing fee?

Background and Evidence

The Tenant, M.W., testified as follows. She confirmed that the tenancy originally began as a fixed term tenancy on February 1, 2019, and was scheduled to end January 31, 2020, following which it went month to month. Monthly rent was $1,250.00 per month.

The nature of the Tenants claim relates to losses incurred as a result of a leaking toilet at the rental unit which the Tenants alleged damaged the Tenants' possessions, caused them to be physically ill and resulted in a premature end to their tenancy.

M.W. confirmed that they did a move in inspection when the tenancy began. She stated that at that time she did not notice that there was a crack in the toilet and discovered this on January 20, 2020, some time after they were already suffering the physical effects of the mold.

The Tenant testified that she informed the Landlord of the crack as soon as they discovered it . Although the Landlord had a professional plumber attend and replace the tank immediately, this did not initially solve the problem at which time the Landlord's father's company, L.W., then came in to deal with the toilet. The Tenant stated that L.W.'s repair was insufficient and L.W. repeatedly attended the rental unit over the

course of six months and did not properly resolve the issue. She stated that at one point they discovered that the toilet was not bolted to the floor and the flange was replaced three times.

The Tenant moved from the rental unit on February 12, 2021.

The Tenant confirmed that she had tenant's insurance, and that she made a related insurance claim and was paid a total of $6,583.58. In the claim before me, the Tenants sought compensation for the difference between the amounts they received from the insurance proceeds and the amounts they believe would compensate them for their actual lost.

In this respect, the Tenant stated the insurance company paid for a hotel for a couple weeks, but they reduced the payment by $758.88 for the month of February and the Tenant's $1,000.00 deductible. In March and April, they deducted $1,250.00 per month as it was the insurance company's position that the Tenants would have paid rent if thye had lived in the rental unit. The Tenant stated that she could not find a replacement rental and stayed in a hotel out of necessity. She confirmed that they found a short term rental as of March 1, 2020, for $4,000.00 per month. After this they found a long term rental as of June 15, 2020, for $1,795.00 per month.

The Tenant also testified that her rug and buffet were damaged and required replacement. She also claimed the cost of a suitcase as she testified they only had a few moments to pack up and it was during a snowstorm, so she ran out to a store and bought a suitcase. Again, the Tenants claimed the difference between the amount the Tenants believe these items were worth and the amount they received from the insurance company for the cost of replacing these items.

In terms of the amounts claimed the Tenants filed a Monetary Orders Worksheet, in which they claimed the following:

1	Deduction from insurance proceeds for February rent	$758.88
2	Deduction from insurance proceeds for March rent	$1,250.00
3	Deduction from insurance proceeds for April rent	$1,250.00
4	Food not covered by insurance	$300.00
5	Cost to replace suitcase	$100.00
6	Replacement of rug (difference between value and cash value paid by insurance company)	$1,931.16

7	Buffet replacement (difference between value and cash value paid by insurance company)	$6,387.15
8	Filing fee	$100.00
9	Pain and suffering A.K.	$10,000.00
10	Pain and suffering M.W.	$12,922.81
	TOTAL	**$35,000.00**

In terms of the pain and suffering claims, the Tenants claimed $10,000.00 for M.W. and $12,922.81 for A.K. In terms of the $12,922.81 claimed for A.K.'s pain and suffering, she confirmed that it was to "round it off" to $35,000.00. She claimed that during this whole time she was very sick, on antibiotics three times, and missed four months of work. As to her loss of income, she claimed she made $2,000.00 per month. She did not provide copies of her income tax returns or her pay stubs to substantiate these amounts. She also stated that she did not pursue compensation from the insurance company for pain and suffering and lost income as she did not have the funds to retain a lawyer.

The Tenant confirmed that since they moved out of the rental unit, they are both fine.

In response to the Tenants' claims the Landlord, S.W. testified as follows. He confirmed that it was the Landlord's position that they acted in good faith, responded as quickly and appropriately as they could, and therefore should not be responsible for compensating the Tenants at all.

In terms of the Tenants' claims for deductions from their insurance proceeds for rent, S.W. stated that the Landlord already refunded the February rent and did not charge them for March and April. In support the Landlord provided a copy of the cheque stub for the February rent refund.

S.W. further confirmed it is the Landlord's position that the Tenants' insurance should have covered all their losses and noted that clause 46 of the tenancy agreement required the tenant to have insurance. He also confirmed they check to make sure these Tenants had insurance.

In terms of pain and suffering, S.W. confirmed that it is the Landlord's position that such claims are not recoverable under the *Act*. He also stated that even if that amount were recoverable, the Landlord submits that the Tenants have not proven the amounts claimed.

S.W. further stated that they do not believe the Tenants dealt with this in a timely manner. He noted that the flooring issue was reported on February 8, some time after they claimed to have discovered the leake. The Landlord offered to help, and the Tenant would not let the Landlord attend the rental unit until February 11. S.W. stated that it was the Landlord's position that if her health was at risk, she should have let the Landlord in right away.

In terms of the Tenants claim that the Landlord hired an unskilled worker, S.W. stated that the person they hired was competent, has done work like this in the past, and there was no negligence on their part. Further, the Landlord submitted an email from a plumber who wrote that neither the Landlord, the insured, or the tenant would have been aware of the water sitting under the toilet due to the poly under the laminate flooring. As such, it wasn't the person who did the work, it was stagnant water that no one was aware of.

D.T. stated he is a master builder and a property manager. He stated that the Tenant appears to be fixated on the toilet repair and what she claims is an inadequate repair. He noted that pursuant to the current BC Building Code, the toilet is never fastened to the floor, rather it is attached to the flange, which is in turn attached to the floor. The wax seal over the toilet flange prevents leakage. He acknowledged that the R.R. invoice makes reference to this being an issue, but R.R. is a service company, not qualified and ticketed plumbers and they are simply incorrect.

In reply the Tenant confirmed that she did receive compensation for February and did not pay rent for March and April.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, and the *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at**:**

www.gov.bc.ca/landlordtenant.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on

the civil standard, that is, a balance of probabilities. In this case, the Tenants have the burden of proof to prove their claim.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;
- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;
- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

This is a four part test and where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

Section 32 of the *Act* mandates the Tenant's and Landlord's obligations in respect of repairs to the rental unit and provides as follows:

Landlord and tenant obligations to repair and maintain

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.

> (2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.
>
> (3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.
>
> (4) A tenant is not required to make repairs for reasonable wear and tear.
>
> (5) 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.

After consideration of the testimony and evidence before me, and on a balance of probabilities I find the following.

The evidence confirms that neither party was aware of the leaking toilet for nearly a year of the tenancy. The evidence further confirms that immediately upon being informed of the leaking toilet, the Landlord took corrective measures. I accept the Landlord's testimony and evidence that the Landlord took appropriate steps to repair the toilet and to respond to the Tenants' concerns. In doing so, I find the Landlord acted in accordance with section 32 of the *Act.*

I am also not satisfied the Landlord, or persons hired on behalf of the Landlord, were negligent in any way. I am persuaded by the Landlord's evidence that the leak was not apparent to the Tenant, or the Landlord, nor was the moisture under the toilet obvious to anyone as the moisture was present under the laminate flooring and therefore not visible. Again, I find the Landlord attended to the requested repairs as soon as they were made aware of the issue and complied with their obligation to repair and maintain the rental unit. For these reasons I find the Tenants have failed to prove the Landlord breached the *Act* or the *Regulations.*

It is clear the Tenants suffered a loss as a result of the leaking toilet. However, as aptly noted by the Landlord's representative, the Landlord is not the Tenants' insurer. This is a general rule but one which was solidified in this case as the parties specifically agreed to this when signing the tenancy agreement as the agreement clearly provided that the Tenants were obligated to obtain tenant's insurance.

While I have mentioned section 7 of the *Act,* for clarity I reproduce that section in its entirety:

Liability for not complying with this Act or a tenancy agreement

> (1)If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
>
> (2)A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement *must do whatever is reasonable to minimize the damage or loss*.

[emphasis added]

Section 7(2) requires a claiming party to do whatever is reasonable to minimize the damage or loss. I find the duty to mitigate includes an obligation to have *sufficient* insurance, and to pursue insurance reimbursement diligently. The Tenants obtained some insurance reimbursement but argue this was insufficient to cover their actual loss. While that may be the case, that does not mean the Landlord is obligated to make up the difference. The Tenants chose to negotiate with their insurance company without the assistance of legal counsel, again, this choice should not be to the detriment of the Landlord as it is the Tenants' obligation to minimize their losses.

I therefore find the Tenants claim should be dismissed as the Tenants failed to prove the Landlord breached the *Act* or *Regulations* and the Tenants failed to mitigate their losses as required by section 7 of the *Act.* As noted previously, a claiming party must prove all four elements of the four part test and where the claiming party has not met *each* of the four elements, the burden of proof has not been met and the claim fails. In this case the Tenants have failed to prove two crucial parts of this test.

In the event I am incorrect in the above finding, I find the Tenants' claim should be dismissed for the following additional reasons.

The Tenants concede they received reimbursement for their February rent and were not charged rent for March and April. To award them reimbursement would provide them a windfall over and above compensation in the strict sense. As they did not pay rent for this time period, there is no basis to reimburse them these funds.

As well, I find the Tenants have failed to prove their actual loss as it relates to their pain and suffering claim. The Tenant, M.W., conceded they picked a number for compensation for A.K. in order to "round up" their claim to $35,000.00. The Tenants failed to provide any basis for the amounts claimed in this respect. Even the Tenant's

claimed loss of income was not supported by documentary evidence such as pay stubs or income tax returns. As such, I find they have failed to prove their actual loss. (Notably, the Tenants stated that they did not pursue related compensation from their insurance company as they did not wish to engage the services of a lawyer; I find this to be further evidence of their failure to mitigate their losses.)

Finally, awards for damages are to be compensatory and should put the claiming party in the position they would have been had the loss not occurred. In this case, the Tenants were reimbursed for various household items. They received reimbursement from the insurance company for the cash value of those items, and presumably these values took into consideration the depreciation cost of those items. The Tenants failed to address this in their submissions and to award them the *full* replacement value would put them in a better position as they would exchange their second-hand items for new.

For these reasons I find the Tenants' claim should be dismissed without leave to reapply. As they have been unsuccessful in their claim, their request to recover the filing fee is similarly dismissed.

Conclusion

The Tenants claim for monetary compensation from the Landlord is dismissed without leave to reapply.

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: January 31, 2022

Residential Tenancy Branch