Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **MNDCT, MNSD, FFT**

Introduction

This hearing dealt with a tenant's application for return of double the security deposit and pet damage deposit and compensation for loss of use of the rental unit.

Both parties appeared and/or were represented at the hearing and the parties were affirmed. The earing was held over two dates and an Interim Decision was issued. The Interim Decision should be read in conjunction with this decision.

The landlord had also made an application for monetary compensation for damage to the rental unit and it was joined to the tenant's application; however, as seen in the Interim Decision, the landlord's application was dismissed with leave to reapply and severed from the tenant's application.

At the outset of the reconvened hearing, I explored service of the landlord's rebuttal evidence, as ordered at the first hearing. I heard consistent testimony that the tenants were able to retrieve the landlord's evidence package from the post office before it was returned to sender and there was no need for the landlord to send another copy of her evidence to the tenants. Therefore, I was satisfied the tenants were in receipt of the landlord's rebuttal evidence and I admitted it into evidence for consideration in making this decision.

The hearing process was explained to the parties and the parties were given the opportunity to ask questions about the process. Both parties had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

Issue(s) to be Decided

1. Are the tenants entitled to return of double the security deposit and pet damage deposit?
2. Have the tenants established an entitlement to compensation for loss of use of the rental unit, and if so, a reasonsable amount?
3. Award of the filing fee.

Background and Evidence

The tenancy started in 2014 and the landlord collected a security deposit and pet damage deposit totalling $4500.00. By the end of the tenancy the monthly rent had increased to $4750.20. The tenancy ended on July 9, 2022.

A move-in inspection was done with an agent for the landlord. The parties were in dispute as to the whereabouts of the move-in inspection report. The tenants testified the move-in inspection report was taken by the agent and a number of months later the agent asked the tenants if they had it to which the tenants responded they did not. The landlord testified the agent left the move-in inspection report with the tenant and the tenants did not return it to the agent.

The landlord did not schedule a move-out inspection with the tenants and a move-out inspection report was not done together.

Claim for return of security deposit and pet damage deposit

The tenants gave the landlord their forwarding address in a text message on July 12, 2022. The tenants did not give any consent for the landlord to retain their security deposit or pet damage deposit and the landlord has not refunded the deposits to the tenants. The tenants filed for return of double their deposits on September 19, 2022, pointing to the text message as proof of service of a forwarding address. The landlord filed an Application for Dispute Resolution, claiming against the tenants' deposits for damage to the rental unit, on April 26, 2023 and used the tenant's forwarding address. As noted previously, the landlord's application was dismissed with leave due to incompleteness and late service.

Claim for loss of use of rental unit

It is undisputed that on November 14, 2021 the rental unit's sump pump failed, causing water to leak into the basement level of the house. The family room/playroom and a guest bedroom were primarily affected. The tenants notified the landlord, who was out of the country, right away. The tenants took action to replace the sump pump, soak up visible water and set up fans. A restoration crew attended the property to provide an emergency response that included removal of the carpeting around the perimeter of the family room/playroom and the bedroom and removal of the bottom portion of the drywall in these rooms. Fungicides were applied and dehumidifying fans were set up. The tenants' possessions were moved into the middle of these rooms.

It was undisputed that the emergency response was finished in early December 2021. The tenants purchased and laid down foam tiles to cover portions of the concrete floor and sharp tack strips. The landlord was still out of town in December 2021 and the tenants started emailing the landlord on December 7, 9, 16 and 24, 2021 to enquire as to when repairs would commence. The tenants also enquired about compensation for their loss of use of the basement. The landlord responded that she would look into it with her insurer. In late December 2021, the landlord orally complained to the insurance company about how long the contractor was taking to make repairs.

It was undisputed that repairing the basement did not commence during the remainder of the tenancy. The reason the repairs did not commence before the end of the tenancy was the crux of the dispute.

In January 2022, the landlord notified the tenants that they would be ending the tenancy so that the landlord's daughter may occupy the property and the tenants should look for new living accommodation. The landlord testified that she felt awful about giving the tenants such notification and she proceeded to point the tenants toward another available rental unit in the area. The tenants did not move out and the landlord testified that since she did not hear any thing further from the tenants in January 2022, she assumed the basement repairs were underway. The landlord submitted that the tenants had been very involved in previous repairs of the property and she had authorized the tenants to choose the colour for the new carpet.

The tenants responded that they would always accommodate a contractor's need to enter the unit and would schedule entries; however, the restoration contractor had told

them they could not make decisions for the owner and that the owner would have to deal with the insurance company and the contractor. The renovation job was much more involved that a single repair or maintenance issue they may have assisted with in the past. The tenants stated they informed the landlord that the landlord had to deal with the renovation as they could not and they assumed the landlord was dealing with the insurance company and/or contractor since she told them she would look into the matter in December 2021.

The tenant testified that in March 2022, the restoration contractor contacted the tenant to seek a local phone number for the landlord as the contractor had the landlord's phone number in a different city. The tenant provided the contractor with the landlord's local phone number. The landlord responded that she believed the contractor had her other phone number. The landlord testified that in March 2022 the contractor did contact her to ask the reason the repair work had not been scheduled. The landlord testified that she told the contractor she did not know the reason and thought it had been scheduled.

The landlord testified that she emailed the tenants on March 9, 2022 to ask something to the effect of "what's happening?" and/or "what's your intentions?". The landlord could not locate the email during the hearing but the tenants did and I instructed them to read it aloud, which they did. The content of the email sounded as though the landlord was explaining the reason the landlord asked the tenants to vacate, so that her daughter can occupy the rental unit, and ask what the tenant's intentions were in response to the landlord's request.

In April 2022 the landlord served the tenants with a Two Month Notice to End Tenancy for Landlord's Use of Property.

On May 6, 2022 the landlord emailed the tenants to notify them that she had put the repairs of the basement on hold and that she was looking into compensation for their loss of use.

Based on square footage of the house, found on the BC Assessment website, the tenants are seeking a rent abatement for the rent paid for the finished basement area of the house for the period of November 14, 2021 through July 9, 2022. The BC Assessment website reflects a finished basement area equivalent to 26% of the total square footage of the house. Accordingly, the tenants seek compensation equivalent to 26% of the monthly rent of $4680.00 and $4750.20 for the period of November 14, 2021 through July 9, 2022, or $9,545.55.

The tenants acknowledged they still had use of the laundry room and storage area in the basement but pointed out that they had to pass through the construction zone to access these areas.

The tenant testified that their children had frequently used the playroom prior to the water leak but could not after November 14, 2021. Also, the tenants used the bedroom downstairs to accommodate guests and they could not use the bedroom at Christmas time or anytime after November 14, 2021 to accommodate their guests.

The landlord was agreeable to compensating the tenants for loss of use from November 14, 2021 until the end of January 2022. The landlord argued that the tenants did not sufficiently mitigate their loss. The landlord was of the position that had the tenants contacted the contractor, or her, she would have followed up and the repairs could have been finished by the end of January 2022. The landlord also argued that the basement area is not as valuable as the upper floors of the house and the tenant's calculations are excessive. The landlord suggested the tenants and their children were still able to use the basement despite the carpeting and drywall being removed because they had laid down foam tiles and the tenants had told the landlord that the kids were "having a ball" playing downstairs. When the landlord's daughter took possession of the house after the tenancy ended, she was able to use the basement without carpeting and drywall.

The tenant argued that they did not permit their children to play downstairs and that the basement was not useable since their furniture was in the middle of the rooms and they were concerned about mould in the basement. The basement family/playroom were very important to them and their children and the loss impacted their family significantly. The tenants argued that the tenants had enquired about the repair status and the landlord said she would look into it in December 2021 and then informed them that she put the repairs on hold in May 2022. Expecting the tenants to manage the renovation is unreasonable and the contractor would not deal with them anyways. When the landlord returned home, which is only three blocks from the rental unit, the landlord made no effort to inspect the state of the basement.

Analysis

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

Return of security deposit and pet damage deposit

Section 38(1) of the Act provides that the landlord has 15 days, from the date the tenancy ends or the tenant provides a forwarding address in writing, whichever date is later, to either refund the security deposit, get the tenant's written consent to retain it, or make an Application for Dispute Resolution to claim against it. Section 38(6) provides that if the landlord violates section 38(1) the landlord must pay the tenant double the security deposit.

In this case, the tenancy ended on July 9, 2022; however, I find the text message of July 12, 2022 does not meet the service requirements of section 88 of the Act for providing a forwarding address to the landlord in writing. A text message is not recognized as a permissible method of service. Therefore, I find the tenants were not entitled to doubling of their deposits when they filed their application seeking such in September 2022.

The tenants did include their forwarding address on their Application for Dispute Resolution that was filed in September 2022 and the landlord acknowledged receipt of their Application for Dispute Resolution in early October 2022. Where a forwarding address is served for the first time, in writing, by way of a tenant's Application for Dispute Resolution it is the practice of the Residential Tenancy Branch to order the landlord, at the hearing, to take action to dispose of the security deposit and pet damage deposit within 15 days of the hearing. By the time of the hearing, the landlord did make a claim against the tenant's deposits, in April 2023; however, the landlord's claim was dismissed. Further, the landlord's claim was for damage and I find the landlord has extinguished the right to make a claim against the tenant's security deposit and pet damage deposit for damage by failing to schedule and prepare a move-out inspection report with the tenants, under section 36(2) of the Act. Therefore, I order the return of the tenant's security deposit and pet damage deposit to the tenants, in the single amount, with this decision.

Although I have ordered return of the deposits, the landlord retains the right to make a claim for damage against the tenants, not their deposits, if she so choses, no later than two years after the tenancy ended.

Provided to the tenants with this decision is an award of $4500.00 for return of the single amount of the deposits, plus interest that I calculate to be $48.15.

Loss of use of basement

It is undeniable that the tenants suffered a loss of use of a portion of the rental unit as a result of a failed sump pump starting on November 14, 2021. Even when there is no fault of the landlord, the landlord may be held liable to compensate the tenants for loss of use due to breach of contract (the tenancy agreement). The landlord did not provide the tenants with a finished basement area in the condition bargained for when the tenancy formed as a result of the sump pump failure. The landlord acknowledged that the tenants are entitled to some compensation but disagreed with the amount claimed. I note that the landlord had even looked into obtaining compensation for the tenants for loss of use through her insurance policy. Since the landlord was unsuccessful in having such a loss covered by her insurance company, I hold the landlord liable to compensate the tenants.

The landlord objected to the rate of the compensation being 26% of the monthly rent, and the period of time for which the tenant's seek compensation due to the tenant's lack of mitigation.

With respect to mitigation, I find I am satisfied the tenants took reasonable action to mitigate losses. The tenants acted swiftly to stop the water ingress by installing a new sump pump and cleaning up visible water and notifying the landlord of the issue. The tenants permitted entry to the restoration company to undertake the emergency response while the landlord was out of the country. The tenants kept the landlord apprised of the situation by sending the landlord photographs of the basement taken on December 7, 2021 and then sent a number of follow up emails to the landlord in December 2021 to enquire about the repairs and their loss of use.

I accept the tenant's position that the contactor would not deal with the tenants to authorize or make decisions concerning the repair work that would be made as being likely since the contractor would be paid by the landlord's insurance company or the landlord. When the landlord notified the tenants in late December 2021 that she would look into the matter with her insurance company, I find it was within reason that the

tenants waited for the landlord to notify them when repairs would be underway and continue to follow up with the tenants since it was the landlord's property that was being repaired.

During the hearing, the landlord testified that she assumed the repairs were underway in January 2022 because she did not hear anything from the tenants; however, that position contradicts some of the landlord's written submission. The landlord wrote under the title "Extenuated Circumstances" in part:

> "Jan. 11, Landlord notified tenants that a family member was going to move into the house asap. Tenants were very upset…. Landlord did not want to upset the tenants further and did not question that they had not initiating the work to commence."

The above statement appears to acknowledge the landlord was aware the repairs were not underway, which contradicts her testimony that at the time she assumed they were underway.

It is undeniable that the landlord was aware of the water leak, that portions of the basement carpeting and drywall had been removed because the tenants send photographs of such, and the landlord had made an insurance claim. Having heard the landlord state during the hearing that she felt sick about telling the tenants they had to move out, I am of the view it is more likely that the landlord was avoiding contact with the tenants in January 2022.

I find the effort required to follow up with the insurance company and the contractor fell clearly upon the landlord, not the tenants. The landlord's lack of involvement and effort to pursue the repairs in January 2022 is, in my view, demonstrates lack of mitigation on the landlord's part.

Also of concern is that the landlord acknowledged receiving a phone call from the contractor in March 2022 asking the landlord why the restoration work had not been scheduled; yet the landlord did not proceed to schedule the work. Rather, the landlord wrote an email to the tenants explaining why she asked them to move out and asked what their intentions were with respect to moving out. Clearly, the landlord could have scheduled the restoration work in March 2022 but the landlord did not. By reaching out to the tenant about their intentions, rather than to notify them that the repairs would be scheduled, I am of the view the landlord was holding off on having the repairs made until the tenants moved out. This finding is also supported by the email the landlord

sent to the tenants on May 6, 2022 where she expressly states she has put the repairs on hold until after the tenancy is over.

In light of the above, I find the repairs were not made for the remainder of the tenancy due to the landlord's insufficient action and decision to hold off on making the repairs during the remainder of the tenancy. Therefore, I find the landlord breached the tenancy agreement by not providing the tenants with all of the space they had bargained for under their tenancy agreement and I find the tenants entitled to compensation from the landlord for loss of use from November 14, 2021 through to July 9, 2022, as requested.

As for the rate of compensation, I find the tenant's request for compensation for 100% of the basement's finished area to be excessive. While I see the rationale in the tenant's calculation is related to finished square footage of the basement relative to the entire house, the tenants still used the playroom/family room to access the laundry and storage area and they used the affected rooms to store their possessions in the center of the rooms. While this is not full use of the affected area, it is some use with some value associated to it. I also find the landlord's position that the basement area is less valuable than the upper two floors to be compelling as below grade areas are typically less desirable and not used as primary living area when there are living areas above grade. Also of consideration is that the guest bedroom is not a bedroom the tenants used everyday such as the bedrooms upstairs. Therefore, I decrease the tenant's request from 26% to a portion I view as more reasonable in the circumstances, which is 15%.

Based on a rent abatement of 15%, I calculate the tenant's award for loss of use of the basement to be:

November 14, 2021 to April 30, 2022:

Rent payable for rental unit = $4680.00 / 30 days = $156.00 per day
Rent abatement = 15% = $23.40 per day
# of days for this period = 167 days
$23.40 x 198 days = $3907.80

May 1, 2022 to July 9, 2022:

Rent payable for rental unit = $4750.20 / 30 days = $158.34 per day
Rent abatement = 15% = $23.75 per day
# of days for this period = 70 days
$23.75 x 70 days = $1662.50

Total rent abatement = $3907.80 + 1662.50 = $5570.00

The tenants had success in their application and I award the tenants recovery of the $100.00 filing fee that they paid for this application.

In keeping with all of my findings and reasons above, I provide the tenants with a Monetary Order to serve and enforce upon the landlord, calculated as follows:

Return of the security deposit and pet damage deposit	$ 4500.00
Interest on deposits	48.15
Compensation for loss of use	5570.00
Filing fee	100.00
Monetary Order for tenants	$10218.15

Conclusion

The tenants are provided a Monetary Order in the sum of $10218.15 to serve and enforce upon the landlord for return of the security and pet damage deposits, interest on the deposits, loss of use of the basement, and recovery of the filing fee.

The landlord's application against the tenants for damage to the rental unit is dismissed with 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: July 20, 2023

Residential Tenancy Branch