Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF

Introduction

This is the final decision that deals with the tenant's monetary claim against the landlord for damage or loss under the Act, regulations or tenancy agreement, as amended. The hearing was held over three dates and two interim decisions were issued. The interim decisions should be read in conjunction with this decision. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

A number of preliminary and procedural matters have been recorded in the interim decisions and I have not duplicated them here. Rather, only procedural matters that occurred since the second interim decision are reflected in this decision as described below.

During the final day of hearing, the landlord named on the tenancy agreement appeared personally. He consented to having his name added as a respondent. The application has been amended accordingly.

The tenants sought to amend some of the amounts they had claimed against the landlords. The landlords did not indicate they had an objection to the tenants changing the amounts claimed as the landlords maintained their position that they were not liable to compensate the tenants. I permitted the tenants to change the amounts claimed given the lack of objection from the landlords.

Near the end of the third hearing date I requested the landlord provide a copy of correspondence received from the landlord's insurance company with respect to denial of coverage for the February 2015 sewage back-up. The requested documentation was

received and I have reflected the reason indicated in the insurance company's correspondence in this decision.

Issue(s) to determine

1. Have the tenants established an entitlement to compensation from the landlords for damages and losses related to a sewer back-up that occurred in February 2015?
2. Have the tenants established an entitlement to compensation from the landlords for losses associated to the loss of use of a fireplace?

Background and Evidence

A tenancy agreement was entered into by the landlord and one of the named co-tenants (referred to by initials DG) starting March 1, 2013 for a fixed term set to expire October 31, 2015. Starting October 1, 2014 the tenancy agreement was amended to add the three other co-tenants. The monthly rent of $4,300.00 was payable on the first day of every month.

I heard that the rental unit is a house approximately 79 years old with three floors of approximately the same square footage on each floor. The upper floor contained three bedrooms and two bathrooms; the main floor provided the kitchen and living areas; and the basement level had a self-contained basement suite plus a laundry room and storage area.

The tenants' monetary claims against the landlord pertain to a sewer back-up that occurred in February 2015 and repairs not made to a chimney. I heard a considerable amount of testimony from the parties and I was provided written submissions and evidence from both parties; however, with a view to brevity I have summarized the position of both parties below.

A. Sewer backup

It was undisputed that in March 2013 a sewer back up occurred at the property while DG was a tenant. The City was called and responded by clearing the sewer line. The City billed the landlord for the work they performed. The landlord also took responsibility for cleaning up the affected areas of the house, including replacement of the soiled carpeting.

DG submitted that he was at the property when the City attended the property in March 2013. DG stated that he understood from the City crew that the sewer line was an old pipe and tree roots had penetrated it. DG notified the owner's agent with this information by way of an email dated March 18, 2013. A copy of the email was included as evidence. It reads, in part:

"Thank you for arranging for the city to come by and fix the drain so quickly. Below is a brief summary of what they told me:

- The blockage was caused by roots growing down the pipe in the front yard
- This will continue to happen because there are so many tree roots. They said that once things dry out in the summer the roots will seek the water in the pipe and they expect it will require another cleaning by June/July if we want to be sure to avoid a flood. I can schedule another appointment if you like."

The tenant DG stated that the owner's agent did not specifically respond to the information concerning the sewer line but did respond to the matter of carpet replacement.

DG sent the owner's agent another email on June 215, 2013 which also referred to the sewer line. The last paragraph of the email reads:

> "I wanted to re-iterate that the city workers who came by to un-block the sewer were quite adamant that the problem would re-appear when the weather dried up and the tree roots started looking for water. If this problem were to recur now, we have a tenant in the suite and he would have to be relocated at the owner's expense."

The owner's agent acknowledged receiving emails from the tenant but claimed the City had not advised the landlord that the issue was tree roots. The landlord had provided a copy of the notice received from the City on March 16, 2013. It contains several points concerning responsibility to maintain sewers including allocation of costs incurred by the City to clear a sewer line. It indicates that the Superintendent will determine the cause of the blockage after it is cleared. If the blockage is determined to be the responsibility of the property owner the owner shall be held responsible for paying for the costs to clear the blockage. The notice also indicates that if the cause of the blockage is undetermined or unknown the owner is responsible for paying for the blockage to be cleared.

The landlord submitted that a bill was received from the City and it was paid by the owner but that the cause was not indicated in the correspondence received from the City.

DG submitted that the landlord took no action to clear the sewer line after the March 2013 blockage. The landlord submitted that the landlord did respond to issues that required repair, including subsequent complaints of blocked plumbing. In May 2014 and June 2014 the landlord sent a plumber to deal with a blockage in the upstairs bathroom. The plumber removed the toilet, snaked the line and retrieved a tampon. The May 26, 2014 invoice indicates that household garbage should not be discarded in the toilet. The bathtub drain was also cleared of a long string of accumulated hair. The June 9, 2014 invoice advises use of a strainer in the bathtub.

Starting May 2013 DG sub-let the basement suite to a third party and on October 1, 2014 the tenants sub-let the basement suite to its current occupant for $1,300.00 per month. The landlord submitted that the basement suite was sub-let without written consent or authorization of the landlord as provided in the tenancy agreement. The tenants did not deny that they did not obtain written consent to sub-let the basement suite but were of the position that the owner's agent was aware that they were renting the basement suite based on emails and verbal conversations. I noted that a number of the emails provided by the tenants include reference to a person or a tenant residing in the basement suite. A photograph of a wet and swollen tampon and a long string of accumulated hair was provided as evidence.

On February 22, 2015 the sub-tenant notified the tenants that sewage had backed up into the basement suite. This is the primary event that is the subject of this dispute.

The tenants contacted the owner's agent concerning the sewer backup on February 22, 2015. The landlord called a plumber to attend the property and the sewer line was snaked and cleared. The plumber's invoice dated March 2, 2015 indicates an emergency call of a sewage back up in the basement toilet and bathtub. The service provides was to "snake sewage line." The invoice does not indicate the cause of the blockage or what was retrieved from the sewer line and the cause of the blockage was the primary dispute concerning this event.

The tenants were of the position that the blockage was caused by tree roots penetrating the old sewer line. The tenants were of this position considering that was the cause of the blockage in March 2013 and the landlords took no action to clear the line periodically as they were advised to do. The tenants provided a photograph of area where the plumber had been accessing the sewer line in the basement. In the

photograph a tool-bit that was attached to the “snake” can be seen. The tenants included a caption that “a small clump of stringy roots can be seen tangled into the end of the toolbit.”

The landlord was of the position the blockage was likely caused by the tenants introducing garbage into the sewer line. The landlord pointed to the tampon and long string of hair that was retrieved from the plumbing lines in May 2014. The landlord also provided photographs of the sewage that overflowed from the basement toilet in February 2015. The landlord’s photograph of the overflowing toilet includes excrement, some toilet paper and three tampons.

The tenants did not deny that those objects were retrieved from the upper bathroom fixtures in May 2014 but were of the position that it was unrelated the blockage that was seen in the basement. The tenants did not specifically respond to the photograph of the overflowing sewage seen in the landlord’s February 2015 photograph.

A restoration crew attended the property shortly after the February 2015 back-up and commenced efforts to decontaminate and dry the affected structure. DG and the sub-tenant cleared the basement suite of the sub-tenant’s personal possessions. Many of the sub-tenants possessions were not salvable and were disposed of and those that were salvageable were cleaned and stored in the laundry room and storage room on the basement level. The sub-tenant initially stayed with his parents while remediation efforts were underway but the tenants subsequently provided the sub-tenant with use of one of the upstairs bedrooms and shared use of the bathroom, kitchen and living areas with the tenants rather than see him go to a hotel.

For approximately 10 days the restoration crew worked on the drying and decontaminating the property which included running fans for several days. After 10 days the restoration crew stopped working at the property. I heard that this was due to the landlord’s insurance company declining coverage. The reason for declining coverage, as provided in a letter written by the landlord’s insurance company on April 14, 2015, was because the insurance company do not write risk for four unrelated occupants sharing a home. Work on the property resumed approximately 10 - 14 days later by way of contractors hired by the landlord. The basement suite was habitable starting April 19, 2015 although there were still some deficiencies.

The sub-tenant pursued the tenants under his own Application for Dispute Resolution (the file number is referred on the cover page of this decision). The tenants appeared at that proceeding as the named landlords. In the decision issued for that proceeding the Arbitrator recorded the sub-tenant’s submission that he carried tenant’s insurance but

did not purchase additional insurance to cover sewage back up. The sub-tenant had submitted that had not been informed by the landlords (the tenants in this case) that the sewer had backed up the previous year. The Arbitrator also recorded that the landlords (the tenants in this case) did not dispute the sub-tenant's claim. The Arbitrator awarded the sub-tenant compensation totalling $7,796.54 for loss of his personal possessions; purchase of masks and gloves; loss of wages to clean and dispose of contaminated possessions; and, recovery of rent and utilities paid for the days the basement suite was not habitable. In awarding the sub-tenant compensation the Arbitrator found that when the tenants became the landlords they assumed the responsibility of a landlord toward the sub-tenant. The Arbitrator found that the landlords (the tenants in this case) did not inform the sub-tenant of a previous sewer backup so that he could obtained sufficient insurance to protect himself against a known risk; and, they did not take action against their landlord despite knowledge of a previous blockage and that their landlord had not made repairs to the sewage pipe after the backup in 2013.

The tenants were asked as to the reason they did not inform the sub-tenant of the previous sewer blockage and the landlord's failure to regularly clean the line. DG responded by stating that if he informed prospective sub-tenants of that then they would be unlikely to rent the basement suite.

The landlord also submitted that a prudent tenant in a basement suite would carry sewer backup insurance as it well known that sewers will back up in the lowest level first.

With respect to the sewer back up that occurred in February 2015, the tenants seek the following compensation from the landlord as amended:

Description	Amount claimed
Amount awarded to sub-tenant by Arbitrator under sub-tenants claims against tenants.	$7,796.54
Increased hydro cost for running fans. Amount calculated based on analysis appearing on spreadsheet prepared by tenants showing hydro consumption.	79.22
Area of main suite given up by tenants to accommodate sub-tenant for 57 days during restoration. Calculated as $800.00/mo x 57 days.	1,524.00
Loss of use of laundry and storage room in basement used to accommodate sub-tenants possessions during restoration. Calculated as $500.00/mo x 57 days.	937.65
DG's time spend moving and cleaning sub-tenant's personal property; contacting landlord with respect to progress of restoration; letting contractors into the property. Calculated as 22.5 hours at $50.00 per hour.	1,125.00
Total claim, as amended	$11,462.41

With respect to the claim for DG's time, DG acknowledged that the landlord had not agreed to pay him for his efforts and he did not put the landlord on notice that he intended to charge the landlord for his time spent dealing with the contractors or performing other activities in relation to dealing with the sewer back up.

The landlord was not agreeable to the tenant's request to be compensated for his time. The landlord submitted that a restoration crew dealt with the decontamination of the property and the landlord hired contractors to repair the unit after that. Accordingly, there was no need for the tenant to do anything. Further, any time DG spent dealing with the sub-tenant's possessions are the not responsibility of the landlord.

In summary, the tenants were of the position that the landlords were negligent in maintaining the property, especially after the first sewer back up occurred, and that as a result of the landlords' negligence the tenants suffered damages and loss from the second sewage backup as outlined above.

The landlord was of the position the tenant's claims were exaggerated and the sub-tenancy agreement was not provided to the landlord until after the flood. The landlord maintains that the landlord has not obligation to the sub-tenant and suggested that the sub-tenant and tenants are actually friends.

The landlord also submitted that the owner lived at the property for approximately two years before the tenancy started and during that time there were no issues with the sewer line. Problems with the sewer line arose after the start of the tenancy and the landlord pointed to the tenants disposing of garbage in the toilet as the main cause of the blockage. The landlord maintains that the landlord was not negligent in the obligation to repair and maintain the property and pointed to a number of repair and maintenance calls paid for the by the landlord.

B. Non-functioning chimney

The tenants submitted that there are three fireplaces in the rental unit; however, only one was functioning. The tenants described how lighting a fire in the wood burning fireplace would result in smoke coming into the basement suite fireplace. Also, the chimney flue did not close properly leaving the living room cold. The tenants claimed to have communicated the issue to the landlord's agent many times and pointed to the emails submitted as evidence. The tenants are seeking compensation of $150.00 for the months of October 2014 through March 2015 as these are the winter months during which time the temperature and ambience of the living room with the wood burning fireplace was diminished.

It was undisputed that the landlord did send someone to look into the tenants' complaints regarding the chimney and solutions were proposed. However, the landlord submitted that the solutions proposed were very costly and replacing the chimney is a big project. The landlord was of the position that the fireplaces worked but were drafty and that is commonplace in older houses such as this one.

The landlord was also of the position that the rental unit was rented "as is" and that if three working fireplaces were a stipulation it should have been noted in the tenancy agreement.

The landlord pointed out that there had been plywood in front of the fireplace in the basement suite. The issue with the fireplace only became an issue after the sub-tenant moved in in October 2014. The tenants responded by pointing out that the issues with the chimney were brought to the landlord's attention before October 2014 but they limited their claim to start October 2014.

Analysis

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.

Upon consideration of everything presented to me, I provide the following findings and reasons with respect to each of the claims made by the tenants.

A. Sewer backup

Residential Tenancy Policy Guideline 16: *Claims in Damages* provides policy statements with respect to claims for damages and loss. As provided in the policy guideline, monetary claims may be considered as claims in tort or breach of contract. To consider a claim in tort, the applicant must do so under the law of negligence. Firstly, I consider whether the sewer back was the result of negligence.

In this case, both parties made submissions that the other party was negligent and I was presented evidence by both parties as to the suspected cause of the sewer blockage that occurred in February 2015. The tenants submit that the blockage was caused by tree roots and the landlords submit that it was caused by disposing of garbage in the toilets, including tampons. I was not presented any evidence by an expert in sewer systems; however, I find it reasonable that both tree roots that penetrate a sewer line and garbage that is introduced to the sewer line are capable of blocking a sewer line on their own and to a greater extent or more rapidly if both come into the sewer line at the same time. The question becomes, were there tree roots or garbage or both in the sewer line in February 2015.

The plumber's invoice that was issued by the plumber who cleared the sewer line in February 2015 does not indicate the reason for the blockage. Unfortunately, I am left with the evidence presented to me by the parties which I find to be suggestive but not

conclusive. For instance, the tenant took a photograph of the tool-bit used to clear the sewer line in February 2015; however, the photograph is taken quite far away from the tool-bit used to clear the line and despite the tenant's statements that the fibers seen near the tool-bit represent tree roots I am less certain given the photograph before me. Nevertheless, I find it rather telling that the tenants made their position known to the landlord; yet, the landlord did not call the plumber to refute the tenants' position. In considering the landlord's evidence that a tampon was found in the upstairs toilet in May 2014 and several were found in the sewage that backed up in February 2015, I am satisfied that the tenants, or persons permitted on the property by the tenants, had flushed tampons in the toilet(s) prior to the February 2015 blockage. I also find it rather telling that none of the tenants refuted this evidence or offered any indication as to how frequently this may have occurred.

In the absence of independent evidence from the plumber or other professional to establish the cause of the blockage of the sewer line in February 2015, I find both parties have presented evidence that points to a reasonably and equally likely cause for the sewer blockage and, in my view, the blockage was most likely the result of a combination of tree roots and flushing of inappropriate items such as tampons down the toilet. Since I have found it likely the blockage was the result of a combination of actions or neglect on part of both parties, I find both parties were likely negligent and that it is appropriate for both parties to share in the damages or losses that resulted.

The landlord undisputedly did pay for clearing of the sewer line and repairing the property so that it was habitable but the landlord has not made a claim against the tenants and those costs were not before me. Accordingly, I am left with apportioning the tenants' losses as provided below.

With respect to the amounts awarded to the sub-tenant by another Arbitrator I do not extend any portion of that liability to the landlord as I find there was an assumption of risk on part of the tenants. I make this finding considering the tenants made a deliberate decision to sub-let the basement suite to a third party and they chose not to inform the sub-tenant about the previous sewer back up, despite having this knowledge and the knowledge that the landlord had not been clearing the sewer line regularly. Nor, did the tenants seek repair orders against the landlord with respect to clearing of the sewer line regularly. I find the tenant's actions to be inherently risky in the circumstances and they must bear the consequences of their decisions.

In keeping with the above reasons, I also deny the tenants' claims to recover the loss of use of their third bedroom, living areas and laundry/storage area so as to accommodate the sub-tenant and his possessions. Again, the tenants' loss is attributable to their

decisions to engage in a risky endeavour with respect to sub-letting of the basement suite and negligently failed to disclose a known risk to their sub-tenant.

In recognition that the landlord was partly negligent to the tenants with respect to ensuring the line remained clear of tree roots and the tenants suffered loss of use of a portion of the rental unit for a period of time for which they paid rent, I find it most appropriate to award the tenants loss of use under the premise of breach of contract. As provided in policy guideline 16 compensation for loss of use may be awarded to a tenant even where there was no fault of the landlord as the fundamental agreement between a landlord and tenant is for the landlord to provide the tenant with use of the rental unit in exchange for the tenant paying rent. Thus, where there is loss of use of all or part of the rental unit an award to the tenant based on the area lost is appropriate.

I heard that the basement suite was inhabitable for 57 days and that the basement suite represented approximately two-thirds and I proceed to estimate the rent associated to that area based on the monthly rent the tenants paid for the rental unit as a whole. However, in determining the tenant's award I have reduced the above-described calculation by 50% to reflect their likely contribution to the sewer blockage and loss of use of the affected area.

I calculate the tenants' award as follows:

Monthly rent associated to area of basement suite estimated as:
Rent x (basement level / # of floors in house) x (area of basement suite in basement)
=$4,300 x (1/3) x (2/3)
=$955.56

The monthly rent associated to the basement suite area is then calculated on a per diem basis and multiplied by the number of days the area was uninhabitable:
($955.56 / 30 days in a typical month) x 57 days area uninhabitable
=$1,815.56

I reduce the above amount by 50% to reflect the tenants' contribution to the sewer back up and loss of use.
$1,815.56 x 50% = $907.78 award to tenants for loss of use of basement suite area

I further award the tenants' 50% of the additional hydro costs they incurred to run the drying fans or $39.61 [$79.22 x 50%].

I deny the DG's request to recover $1,125.00 from the landlord for his time as much of this time was allocated to cleaning and moving the sub-tenant's possessions and for reasons already given I find the landlord is responsible for the tenants' decisions related to their dealings with the sub-tenant. The balance of this claim pertains to the DG's time spent communicating with the landlord and letting in contractors. It is not uncommon for tenants to let contractors in to the rented premises so as to accomplish necessary repairs but if it was problematic for the tenant I find it reasonable to expect the tenant would communicate that to the landlord so that the landlord could make alternative arrangements. Therefore, I deny this claim as there was no agreement between the parties for the landlord to compensate the tenant; the tenants' losses associated to the sub-tenant are the tenants; and, the tenant did not act to minimize his losses if he suffered any with respect to communicating with the landlord and contractors during the restoration.

B. Non-functioning chimney

Where a rental unit is equipped with fireplaces I find it reasonable that a tenant would expect the fireplaces to be functional unless the landlord has disclosed that they are not. It is not upon the tenant to note all of the features or fixtures of a rental unit and stipulate that they are functional in the tenancy agreement as the landlord suggested the tenant was required to do with respect to the fireplaces.

I note that in a number of emails presented to me as evidence, the tenant had requested the chimney be cleaned and inspected during the tenancy and before October 2014 when the tenants start seeking compensation for losses associated to the chimney. I also note in the emails that the landlord's response was to accommodate the tenant's requests and he arranged for cleaning and inspection. The landlord did not respond by indicating the fireplaces were non-functioning or not provided as part of their agreement

In light of the above, I it likely that both parties had an expectation that the fireplaces were functional when the tenancy formed and the monthly rent was set. While I heard that the basement fireplace had plywood in front of it, which I expect would indicate it was not operational, the fireplace in question for which the tenants seek compensation is in the upper level. The problem with this fireplace was two-fold: the flue was stuck open allowing cold air to enter the room and use of the fireplace resulted in smoke penetrating the basement fireplace. I find it unacceptable to permit to smoke to enter the rental unit which rendered the fireplace unusable.

I reject the landlord's position that the rental unit was rented "as is" or any implication that relieves the landlord of the obligation to repair and maintain given section 32(5) of the Act provides that a landlord's obligations to repair and maintain apply whether or not a tenant knew of the landlord's failure to repair and maintain at the time of entering into the tenancy agreement.

Given the dysfunctional flue created two losses for the tenants: increased heating costs and loss of a feature they were paying for, I find their request for compensation of $150.00 per month during the winter months of October through March 2015 to be within reason and I grant this portion of their claim. Therefore, I award the tenants $900.00 as requested.

Filing fee and Monetary Order

The tenants were partially successful in their application and I award them recovery of one-half of the filing fee they paid for this application, or $50.00.

Based on all of the above, the tenants are provided a Monetary Order in the total sum of $1,897.39 for loss of the basement suite area; additional hydro costs; the non-functioning chimney; and, the filing fee [$907.78 + $39.61 + $900.00 + $50.00]. To enforce the Monetary Order it must be served upon the landlord and it may be filed in Provincial Court (Small Claims) to enforce as an order of the court.

Conclusion

The tenants were partially successful in their claims against the landlords. The tenants have been provided a Monetary Order in the sum of $1,897.39 to serve and enforce as necessary.

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: December 31, 2015

Residential Tenancy Branch