Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, MNDC, OLC, FF

Introduction:

A hearing was convened under the *Residential Tenancy Act* (the "Act") to deal with the tenants' application filed May 5, 2017 for compensation for damage or loss and for recovery of the application filing fee. Initially the tenants had also applied for an order cancelling a 10 Day Notice to End Tenancy for Unpaid Rent and for an order that the landlord comply with the Act. However, at the outset of the hearing they withdrew those requests as they were no longer relevant.

The tenants had the opportunity to make the majority of their submissions at a hearing held on June 19, 2017, which was adjourned and continued on today's date in order to allow the landlord to made his submissions and present his evidence.

Both of tenants and the landlord and his son attended at both of the hearing dates. Both parties were given a full opportunity to be heard, to present documentary evidence, to make submissions, and to respond to the submissions of the other parties.

Service of the tenants' application and notice of hearing was not at issue. At the continuation of the hearing I had the landlord's responsive evidence before me, which had not been served on or processed by the Residential Tenancy Branch by the date of the first hearing.

Issues to be Decided

Are the tenants entitled to compensation?

Are the tenants entitled to recover the application filing fee?

Background and Evidence

It was agreed that the parties entered into a tenancy agreement beginning June 16, 2015 for a term expiring June 30, 2017, after which the tenancy would continue on a month to month basis. A copy of the tenancy agreement was in evidence. It was signed by both of the tenants on May 25, 2015.

Rent of $2,600.00 was due on the first of each month. A security deposit of $1,300.00 was paid by the tenants and remains in the landlord's possession, although correspondence in evidence suggests that the tenants asked the landlord to use the deposit toward their last month's rent.

The tenancy agreement states that a built-in vacuum is included. It also includes an addendum stating that the tenants "will assume responsibility for all lawn maintenance and/or gardening required" and that "the landlord will provide a ride-on lawnmower for the tenants' use in order to cut the lawn of the property."

Both parties submitted written statements as well as making oral submissions at the hearing. The landlord's son asked specifically that I review his written submission as well as hearing his oral submissions and I have done so. I have also reviewed the tenants' written submissions. I have incorporated the written submissions of both parties into the summary of the evidence below.

Claim for storage space

The tenants testified that the property was advertised as including a three car garage and that when they toured the property they commented expressly on the large and finished garage space. In written submissions they said that when they met the landlord on or about May 15, 2015 they had already made their security deposit. At that point he told them that he would be temporarily walling off one of the garage spaces in order to store his own materials, as this would save him $100.00 monthly in storage costs. The tenants indicated this was contrary to their understanding of the agreement they believed that they had made when they made the deposit and the landlord said he would only use the space for six months. The landlord never vacated that space and later denied having said that he would do so.

The tenants included an undated photograph of the garage in question. They also included internet advertising evidencing the cost of storage lockers. They claim loss of use of the third garage at $100.00 per month for 24 months, for a total of $2,400.00.

The landlord in response stated that the third garage was never promised to the tenants. The landlord submitted an advertisement for the rental property apparently from 2015 stating that the property has a two car garage. The tenants say this is not the advertisement to which they responded. The landlord also submitted a letter from the current tenant saying the rental was advertised as having a double garage.

Claim for ride-on lawn mower

The tenants point to the term in the addendum that the landlord would provide a ride-on lawn mower. They say that the property was over 2 acres of grass and provided a photograph of the lawn. They say that the landlord failed to provide the ride-on mower so that over 2015 they mowed the lawn with a push mower. The tenants further said that in late spring of 2016 the landlord advised that he had purchased the ride-on mower but would be doing the moving himself. However, he cut the grass only once in 2016. The tenants cut the grass with their push mower the majority of the time. The tenants say that using the push mower required additional time and claim $20 per hour for an additional 64 hours of work over the two years of the tenancy, for a cost of $1,280.00.

The landlord in response says that he did not provide the ride-on mower because the tenant refused to sign a liability waiver with respect to same. The landlord further said that he mowed the tenants' grass himself at his own expense. There was no evidence of the waiver or of the landlord's request that the tenants sign a waiver.

The landlord did submit an email from another tenant dated May 12, 2017, thanking him for his efforts to maintain the property: "Grateful you got a ride lawn mover last year as it is a very time consuming task" (reproduced as written). The landlord also submitted a letter dated June 6, 2017 from the renter who has taken over the applicants' unit, saying that the landlord had offered him the use of a ride-on mower on the condition that he sign a liability waiver but that he has chosen to have the landlord do the lawn maintenance.

The applicant tenants say they were never asked to sign a waiver and would have signed one if they had been asked.

Claim for built-in vacuum

The tenants say that the agreement included the use of a built-in vacuum and that the rental home was 3,800.00 square feet. They said there was no suction in the vacuum and that they asked the landlord several times to have it repaired but he did not do so.

They say they were without the use of the built-in vacuum for the whole of the tenancy and instead used their own. They claim loss of use of $20.00 per month for 24 months for a total of $480.00.

The landlord's response is that no other tenant has complained about vacuum and it is working. The landlord submitted a letter dated June 6, 2017 from the current tenant of the same rental property, confirming that although the suction is not strong, the vacuum is strong enough.

Sewer flooding of the main floor

Lastly, the tenants testified that on December 18, 2016, sewage flowed into the main floor. Service people attended and drained the holding tank and repaired the pump. The tenants allege that the overflow was caused by the landlord's failure to maintain the pump and/or empty the holding tank.

The tenants said that at that time the service operator expressed surprise at the amount of "non-flushable" materials in the holding tank. They also say that the landlord was charged double the regular amount because of the materials in the system that had to be removed.

The tenants also said that the alarm on the pump went off again on or about December 21, 2016, at which point the landlord had the pump replaced.

The tenants had a restoration company assist with cleaning of the rental unit. That company advised that for important health reasons the laminate would have to be removed and replaced and they would have to vacate for about five weeks as the laminate removal would also complicate the kitchen cabinet reinstallation.

As the prospect of securing temporary accommodation was not realistic for their family the tenants informed the landlord that they would instead vacate when they could secure other housing. They say the landlord responded that it would be acceptable for them to vacate with notice anytime they chose, as he had not yet scheduled the flooring work.

The tenants lived in the rental unit for several months against the advice of the restoration company while they looked for other housing. They gave written notice on April 30, 2017 that they would be ending the tenancy on May 31, 2017. In their letter they say: "As you know we are required to vacate the above address in order to carry

out the repairs required as a result of the sewer flood which occurred at the property in December 2016."

The tenants made a claim with their insurance provider. They claimed for groceries and cleaning supplies and for some damaged contents (towels, blankets). They also claimed for moving costs (packing, storage, unpacking) and for the cost of increased hydro over the period of clean-up.

The tenants accepted a lump sum payout from their insurer representing a percentage of each of these claims. They claim against the landlord for the balance of those claims.

The tenants also claim for the insurance deductible of $1,000.00. Evidence of this was provided.

Lastly, they claim the "increase in future insurance deductible due to claim" of $1,000.00. The tenants say that they were not able to provide evidence of this amount because of how their insurer operates.

The tenants' evidence included correspondence with the insurer about their insurance claim and a letter dated February 26, 2017 to the landlord seeking compensation.

The landlord in response submitted that the tenants were responsible for the sewage overflow because they reset an alarm attached to the pump rather than advising the landlord that it was flashing. He said that the alarm goes off when the tank is close to capacity and by resetting it the tenants switched off the pump. In support of this allegation the landlord submitted a photograph of the alarm on the pump. He also submitted letters from his plumber, his electrician, his insurer, and the current tenant in the same rental property.

The letter from the owner of the plumbing and gas company is undated and states that the sewer pump unit in question "stopped pumping once the pump alarm was reset, causing the subsequent overflow on December 18, 2016. The site is routinely maintained (per/annum), parts have been replaced whenever and wherever necessary. The landlord should not be considered liable for this mishap."

The letter from the owner of an electric company is dated June 8, 2017 and states that the sewer overflowed "because the visible alarm was reset. The tenant . . . at the time informed us that they reset the button on side of alarm box. This caused sewage overflow. The alarm is tested once a year to confirm successful operation."

The correspondence from the landlord's insurer, an email, is dated June 7, 2017 and states: "We have found [landlord] to be co-operative and reasonable throughout the course of this claim. Based on the information provided to us, we found no evidence of him being legally liable for the sewer back up event of December 18th."

The letter from the landlord's current tenant says: "If our family is to hear any audible noise and/or alerts and buzzers, we will contact the landlord IMMEDIATELY and not disable any such 'alarms' without prior consent and/or approval from the landlord. . . "

The tenants commented that these letters are not on professional letterhead and appear to have been written by the same person who drafted the landlord's written submissions. They say there is also no way of establishing that the signatures are legitimate and that the evidence is not sworn.

The male tenant said that when he first looked at the property with the landlord, he specifically asked about the alarm and was told not to worry about it. He also said that he had not seen the alarm activated until the overflow. The tenants also say there was no evidence that the system had been serviced regularly and they had never seen evidence of its being serviced and that there were no service tags affixed to it. Lastly, they doubted that any qualified plumber would suggest that restarting an alarm would stop a pump from working.

In written submissions the landlord alleges that the tenant "is making fraudulent monetary claims for expenses never incurred, has failed to pay rent in full, and has many utility bills still outstanding and owed to the landlord." He also said that he served the tenants with a 10 Day Notice for Unpaid Rent when they withheld May rent and that the tenants then filed their application out of spite.

Analysis

I do not accept the landlord's submission that the tenants are motivated by spite and that their claims are fabricated. There is a letter from the tenants to the landlord in late February seeking compensation for the flood.

The landlord complains that the tenants owe utilities and that they withheld their rent without authority. The landlord's recourse would have been to end the tenancy based on the 10 Day Notice. There is no evidence that the landlord brought an application to do so, or that he has filed an application for any of the amounts he says are owing. The

landlord remains free to seek compensation from the tenants (subject to the applicable timelines) by way of a separate application.

Sections 7 and 67 of the Act establish that a party who does not comply with the Act, Regulation or tenancy agreement must compensate the other party for damage or loss that results from that failure to comply.

My conclusions on whether the landlord has breached the Act, regulation or tenancy agreement and, if so, whether that breach has caused an actual loss to the tenants, are set out below with respect to each of the tenants' claims.

Storage space

The tenancy agreement indicates that the use of a "double garage" is included. The tenants said that they learned that the landlord would be reserving the third portion of the garage for himself for at least six months on May 15. They signed the tenancy agreement on May 25. The contract is legally binding and if the tenants had wished to secure their ability to use the third garage after six months they should have added that to the agreement or the addendum at the time of signature.

Instead, the tenants are alleging a collateral agreement that does not square with the advertisement supplied by the landlord for a double garage. The tenants themselves have not submitted the advertisement to which they say they responded.

The tenants have not claimed that they had belongings that they needed to store in the third garage or advised that they incurred additional expense storing these belongings elsewhere.

There is not enough evidence to make out this portion of the tenant's claim. I make no award for the tenants for loss of storage space.

Ride-on mower

The tenancy agreement requires the tenants to mow the lawn and maintain the yard. It also indicates that the landlord will supply a ride-on mower.

There is no mention in the addendum of the waiver requirement. The landlord has not submitted the waiver in evidence.

The letter from the landlord's current tenant indicates that the current tenant was asked to sign a waiver and chose instead to have the landlord do all the yard work. The applicant tenants, by contrast, say they were not asked to sign a waiver and that the landlord did not maintain their lawn, either.

Other than as indicated, I do not give much weight to the June 6, 2017 letter or the May 12, 2017 email because the current tenants have an obvious interest in preserving their relationship with their landlord. More importantly, the May 12, 2017 email does not give any detail around the frequency of landlord's maintenance of the lawn. It therefore establishes very little. The May 12, 2017 email does indicate that the landlord acquired the ride-on mower "last year" – which supports the applicants' position that for the first year of their tenancy there was no ride-on mower at all. The May 12 email also underscores how substantial the lawn work is, which is also consistent with the tenants' position.

On balance, I find that the tenants have established the landlord breached the agreement by failing to provide a ride-on mower and that the tenants were therefore obligated to maintain the lawn without one for the duration of the tenancy. I award the tenants the amount claimed.

Built-in vacuum

The tenants have not supplied any evidence that the built-in vacuum was broken. Nor have they supplied evidence of any correspondence with the landlord about this issue. They have also stated that they used their own vacuum cleaner for the duration of the tenancy and have not argued that it was substantially more difficult or time-consuming to do so. I do not accept they have established any compensable loss in the circumstances.

Sewer overflow

The landlord alleges the tenants were negligent in failing to advise that the alarm had gone off. However, he submitted no evidence, either written or oral, to establish that the alarm was ever discussed with the tenants. The tenants said that the landlord explicitly discounted the importance of the alarm, and the landlord did not challenge the tenants' testimony in this regard. There is no mention of the import of the alarm in the tenancy agreement or addendum. The June 6, 2017 letter from the current tenant is not evidence that the applicant tenants received the same caution. I do not accept that the landlord made the applicant tenants aware of the importance of the alarm.

Nor do I accept that resetting an alarm would cause the pump to stop working. It is more likely that the alarm went off either because the pump had already stopped working, because the holding tank was close to capacity. The landlord is responsible for both. Section 32(2) of the Act requires a landlord to maintain a rental property in a state of repair that is compliant with health, safety and housing standards required by law. Residential Policy Guideline #1 clarifies that a landlord is responsible for emptying and maintaining septic systems. I accept the tenants' evidence that the tank was overly full and clogged. I also accept their evidence that after the second overflow, the landlord had the pump replaced. This is further confirmation that the pump was broken, and not simply deactivated by the tenants. I note the landlord did not dispute this evidence.

On a balance of probabilities I conclude that the landlord breached s. 32(2) of the Act.

However, I would not award the tenants the amounts claimed for which their insurer covered only a percentage. The tenants chose to take a lump sum payout that represented a percentage of their actual costs and the landlord should not have to bear the consequences of this choice. As the landlord is responsible for the sewage overflow, the landlord should pay the cost of the tenant's insurance deductible, however.

I would also award the tenants the amount they seek for the loss of the use of the kitchen and bathroom for 2.5 days. The tenants contracted to have running water and be able to use their kitchen and bathroom. The sewage overflow, regardless of whose fault it was, meant that the tenants were not able to use what they contracted for. I accept that not having running water and therefore not being able to wash or flush the toilet or work effectively in the kitchen is worth the amount claimed.

The tenants did not address why they were required to take a day off work. Under normal circumstances the landlord is responsible to deal with contractors for major repairs such as this. Nor did the tenants provide any evidence that this loss was actually suffered. Many employers pay for these types of absences. I would not award the tenants the cost of a lost day of work.

I would not award the tenants the increased deductible they may encounter the next time they make a claim (if they make a claim). This is not a loss that has been incurred or that will even necessarily ever be incurred.

As the tenants were successful to some degree in this application, and as they have attempted to resolve their monetary claim with the landlord outside of this process, I find that the tenants are also entitled to recover the $100.00 filing fee.

Conclusion

I issue a monetary order for the tenants in the following terms:

Item	Amount
Loss of use storage space	$0
Loss of use ride-on mower	$1,280.00
Loss of use built in vacuum	$0
Sewage overflow claims (loss of use water/kitchen bath: $209.68; insurance deductible: $1,000.00)	$1,209.68
Filing fee	$100.00
Total Monetary Order	**$2,589.68**

I issue a monetary order in the amount of **$2,589.68** against the landlord. The landlord must be served with this order as soon as possible. Should the landlord fail to comply with this order, it may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act. Pursuant to s. 77 of the Act, a decision or an order is final and binding, except as otherwise provided.

Dated: August 29, 2017

Residential Tenancy Branch