Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding E.K. Smith Construction Company Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

MNR, FF

Introduction

The landlord has applied for dispute resolution requesting a monetary Order for unpaid site rental and to recover the filing fee costs.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. The parties confirmed receipt of all documents supplied by the other. I have considered all of the evidence and testimony provided.

Preliminary Matters

The landlord's application included a request for compensation covering a period of time that was decided previously through the dispute resolution process (file 796888.) A decision was issued on November 13, 2012, in consideration of the period of time in the tenancy from December 2011 to October 2012, inclusive. The November 13, 2012 decision currently stands, and may not be changed via any subsequent application. Therefore, I considered only the portion of the application claiming a loss of rent from December 1, 2012 to August 1 2013; inclusive.

In finding that the estate of the tenant should be named as the respondent I took into account submissions, the Act and Residential Tenancy Branch (RTB) policy.

The *Manufactured Home Park Tenancy Act,* (The Act), provides a definition of tenant:

> ***"tenant"*** *includes*
>
> *(a) the estate of a deceased tenant, and*
>
> *(b) when the context requires, a former or prospective tenant.*

Counsel for the respondent pointed to RTB policy guideline #19; *Assignment and Sublet,* and argued that any debt that may exist is debt of the estate and not of the executrix. Counsel had written the landlord on January 24, 2013 indicating that the home was passed to the daughter by right of survivorship and not through the tenant's estate and that the landlord was then required to take action against the estate. Counsel pointed out that any new action would likely result in a "dry judgement" as there is no money in the estate.

The landlord testified that the landlord's daughter had become a joint owner of the home prior to the death of the tenant, resulting in her automatic assignment as the tenant of the site. As an owner the executrix could have informed the landlord that she would end the tenancy or make the necessary repairs to the home. The landlord said that when the landlord made the application for dispute resolution he did not know that the tenant's daughter was an owner of the home; the landlord was not sure who the executor was.

Policy #19 suggests:

> *Where a tenant or lessee dies, the executor or administrator of the estate becomes the assignee of the tenancy in law and, as such, is responsible for any rights and obligations under the original tenancy as a representative of the original tenant. The tenancy may subsequently be ended in accordance with the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), or may pass to a person who has a right to the tenancy in accordance with the appropriate statute.*

I determined that the definition of tenant, provided by the Act, includes the estate of a deceased tenant and that the landlord erred when he failed to name the estate as a respondent. I find based on the suggested policy that the executor of the estate has become the assignee of the tenancy and that while the tenancy may pass to the person who has a right to the tenancy, in this case the tenant's daughter did not assume the tenancy. She did not pay rent and she did not live in the unit. Therefore, I have concluded that the estate of the deceased tenant is responsible for the rights and obligations under the tenancy agreement.

The landlord was given the opportunity to withdraw the application, allowing him to reapply using the correct respondent name. As a result of my finding determining that the estate of the deceased tenant should be named as a respondent both parties agreed to amend the application to reflect that finding.

The parties confirmed that this matter is not currently before the Supreme Court of British Columbia.

Issue(s) to be Decided

Is the landlord entitled to compensation for unpaid rent in the sum of $3,741.66 from December 2012 and August 2013?

Is the landlord entitled to filing fee costs?

Background and Evidence

The parties agreed to the following facts:

- The tenancy commenced February 23, 1995, for rental of a site in a manufactured home park;
- Rent was $398.61 per month due on the 1st day of each month;
- In May 2011 the tenant's daughter became a joint owner of the manufactured home;
- In September 2011 the tenant deceased; and
- Rent was paid via post-dated cheques issued by the tenant, in full to November 2011, inclusive.

A copy of the tenancy agreement; park rules and regulations; a copy of the transfer of the home in May 2011 and the tenant's death certificate were provided as evidence.

A notice of rent increase issued, effective June 1, 2011, indicated rent was $398.61. The landlord issued a subsequent notice of rent increase after the tenant was deceased; that notice did not name the tenant's estate or the executrix.

The landlord supplied copies of email communication between him and the tenant's daughter, sent in October 2011. On October 26, 2011, after acknowledging the death of the tenant, the landlord made a request for rent payments. In a letter to the tenant's daughter, dated November 12, 2012 the landlord acknowledged that no real attempt to sell the home had been made and in written submissions the landlord acknowledged that the tenant's daughter had removed anything of value from the home.

The tenant submitted that the home has been abandoned since December 2011 as no one has lived in the home since her mother vacated and no rent has been paid since November 2011. The landlord had the right to terminate the tenancy in an attempt to mitigate any loss, but he failed to do so.

The landlord confirmed receipt of documents in January 2013, prepared by the executrix's legal counsel, for possible judicial review of the decision issued on November 13, 2012. Those documents were supplied as evidence; a date for judicial review has not been pursued by the estate. The documents included disclosure that the tenant's daughter was executrix; that the lease between the deceased tenant and landlord had yet to be terminated and that the landlord should name the tenant's estate in any notice of dispute resolution.

On July 3, 2013 the landlord sent a letter to legal counsel for the tenant's daughter. The landlord pointed out that upon the death of the tenant, her daughter became sole owner

of the home at which time she then assumed the responsibilities of ownership. Since the home was on the landlord's site, payment of taxes, garbage fees and site rent must be made. The landlord acknowledged that the tenant's daughter believed the home had been abandoned since October 2011, yet the daughter had attempted to sell the home, contrary to the B.C. Electrical Safety Act. The landlord suggested the daughter had no intention of making the home ready for sale; that is it in poor condition, that enquires had been made to move the home; all of which make their submission that the home was abandoned "pretty thin."

The landlord has claimed the loss of rent revenue from December 2012 to August 2013, as the estate has yet to properly end the tenancy, as required by the terms of the tenancy agreement. The landlord referenced section (h) of the park rules and regulations supplied as evidence which require:

- thirty days written notice of the intention to move;
- that service to the lot will end when the home is removed at the end of the tenancy;
- that the lot must be cleaned at the end of the tenancy;
- all electrical connections must be disconnected and serviced by a licenced electrician and a water; and
- that sewer connections must be disconnected and serviced by a licenced plumber.

On September 16, 2013 the landlord issued a 10 day Notice to end tenancy for unpaid rent, in the executrix's name. The Notice had an effective date of September 26, 2012. The Notice did not name the tenant's estate. The landlord said he believed that the tenancy should then have ended, but in his original application for dispute resolution he did not pursue an Order of possession for the site as he is not in the habit of putting people out of their homes. The respondent believed that the Notice ending tenancy was invalid as it did not name the tenant's estate.

The landlord confirmed that he was aware of attempts made by the estate to sell the home. Email evidence supplied as evidence indicated that by April 19, 2012 there had been only 2 people interested in purchasing the home, but the tenant's daughter believed that both had been thwarted by the landlord. The landlord had emailed the tenant's daughter on April 19, 2012, indicating that 1 person who was interested in a possible purchase was unemployed and did not meet the park age requirement. The landlord reminded the daughter that as executrix she must pay all outstanding rent owed.

On November 22, 2012 the landlord wrote the tenant's daughter and explained that he believed she had not made any real attempt to sell the home. During the hearing it was confirmed that no request for assignment, in the approved form, had been submitted to the landlord by the estate.

The respondent provided a copy of a December 18, 2012 email sent by a realtor who had been hired by the estate to sell the home. The email indicated that the realtor had gone to view the home and that later that afternoon the owner of the park had telephoned her wanting to know what she was doing at the property. The email continued:

> *"He told me that the place was unfit to live in and that if I did list it he would have my license. You indicated that you were going to talk to your lawyer and we all decided to hold off on the listing."*

The tenant stated this amounted to intimidation of their realtor and interfered with their right to dispose of the property. The landlord denied having made these comments to the realtor.

On June 3, 2013 legal counsel for the landlord wrote counsel for the tenant's daughter; a copy of this correspondence was supplied as evidence. Counsel indicated that on June 3, 2013 a hauling company representative had attended at the rental site and had told the park owner he had been asked to provide an estimate to move and dismantle the home. Counsel wrote:

> *"As the tenancy of the mobile home is under litigation, and there is unpaid rent, (the tenant's daughter) does not have the right to move the mobile home. She must also comply with the requirements of the Manufactured Home Park Act before the mobile home can be moved."*

The landlord could not explain what litigation his counsel had been referring to in this letter.

A June 18, 2013 letter from the tenant's daughter's legal counsel to counsel for the landlord indicated that the landlord had been interfering with attempts to move the home and sale of the home. The landlord had written the City of Parksville, telling an inspector not to issue any permits allowing the home to be moved; due to Court proceedings. A 2nd company was told they could not remove the home as it was under litigation.

The respondent submitted that this interference with an attempt to resolve the problem, by obtaining a quote for removal of the home points to a further absence of any attempt to mitigate the loss claimed by the landlord.

On June 21, 2013 counsel for the landlord sent a letter to the respondent's counsel explaining that the landlord was not interfering with the 2 realtors, other than pointing out that the home could not be sold unless it complied with current electrical and safety standards. Any home in the park must comply with legal requirements for safety.

Analysis

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Section 7 of the Act provides:

> ***7*** *(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)

The landlord stated that the tenant failed to properly end the tenancy; thus leaving the landlord with an accumulated debt for unpaid rent. There is no dispute that once the tenant was deceased in October 2011 no one lived in the home and that rent was not paid. Even though I have determined that at the point of the tenant's death the estate became responsible for any debt; the landlord had a responsibility to take steps to minimize the claim he has made.

RTB policy suggests that where the tenant has vacated or abandoned a site, the landlord must try to rent the site again as soon as is practicable. There is no doubt that the site had been vacated and that the landlord was aware of this fact as early as October 2011 when he acknowledged the death of the tenant.

The landlord testified that when he issued the 10 day Notice ending tenancy for unpaid rent in September 2012, he believed the tenancy ended on the effective date of that Notice; September 26, 2012.

When a Notice ending tenancy is not disputed and rent is not paid in full within 5 days of receipt of the Notice section 39(5) of the Act determines that the tenancy is conclusively presumed to have ended. This would then have placed the landlord in the position of being able to obtain an Order of possession for the site. The landlord did make an application for dispute resolution but declined to request an Order of possession; a decision I find failed to take into account the requirement to mitigate future losses. If the

landlord had intended to mitigate any future loss I find that it would have been reasonable to obtain possession of the site.

Even if the obligations and rights of the tenancy had transferred to the deceased tenant's daughter in 2011; the landlord would have been in the same position. In the absence of any attempt to minimize the loss claimed, such as proceeding with possession of the site naming the tenant's daughter or, at least once he had received the judicial review documents that set out the daughter's position that he must name the estate; I find the landlord failed to seek a remedy within a reasonable period of time. It was not until August 1, 2013 that the landlord submitted his application for the time period claimed.

A tenant or an estate or a landlord may end a tenancy, and in this case, as the claimant, the landlord had a responsibility to minimize the claim he has made; I find that he failed to do so. I have rejected the landlord's claim that he is not in the habit of putting people out of their homes, as he was fully aware the unit had remained vacant since 2011; that belongings had been removed from the home, that rent was not paid beyond October 2011 and that the deceased tenant or her daughter had effectively abandoned the site.

Section 34 of the Act provides:

> ***34*** *(1) A landlord may consider that a tenant has abandoned personal property if*
>
> > *(a) the tenant leaves the personal property on a manufactured home site that he or she has vacated after the tenancy agreement has ended, or*
> >
> > *(b) subject to subsection (2), the tenant leaves the personal property on a manufactured home site*
> >
> > > *(i) that, for a continuous period of one month, the tenant has not ordinarily occupied and for which he or she has not paid rent, or*
> > >
> > > *(ii) from which the tenant has removed substantially all of his or her personal property.*
>
> *(2) The landlord is entitled to consider the circumstances described in paragraph (1) (b) as abandonment only if*
>
> > *(a) the landlord receives an express oral or written notice of the tenant's intention not to return to the manufactured home site, or*
> >
> > *(b) the circumstances surrounding the giving up of the manufactured home site are such that the tenant could not reasonably be expected to return to the manufactured home site.*

On June 3, 2013 the landlord's counsel had indicated the tenant did not have the right to move the home; at which point, from the evidence before me I find the home was

abandoned. On June 18, 2013 the daughter's legal counsel wrote the landlord's counsel alleging interference by the landlord in their attempts to remove the home from the site. There was no evidence before me detailing any further efforts to sell or remove the home; there was no longer an expectation that the home would be moved or sold; it was vacant and rent had not been paid since November 2011. At the point of June 3, 2013, I find that there was no reasonable expectation that either the executrix/deceased tenant's daughter would return to the site.

If the landlord had intended to mitigate the loss he is now claiming it would have been reasonable of the landlord to take steps to name the estate and/or daughter, at the very least, once he was given the January 2013 judicial review documents which set out the position that the estate should be named. However, the landlord did not take any steps to end the tenancy, in an attempt to mitigate the loss of site rental income; the landlord has stated that it is the tenant who must end the tenancy.

I find that the landlord is relying only on the sections of the Act that serve his claim for compensation and that he has not considered the steps that he must take to minimize a claim, such as requesting an Order of possession for the site. Not only can a tenant end a tenancy, but, as the landlord has demonstrated, he is able to end a tenancy.

Therefore, based on the absence of any attempt to mitigate the loss the landlord has claimed I find that the claim for unpaid site rent is dismissed without leave to reapply.

In relation to the end of the tenancy, I find, pursuant to section 37(4) of the Act, that the tenancy ended effective June 3, 2013; when the landlord informed the estate/tenant's daughter, that she could not remove the home from the site.

Conclusion

The claim for unpaid site rental to August 2013 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 *Manufactured Home Park Tenancy Act*.

Dated: November 13, 2013

Residential Tenancy Branch