Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, CNR, MND, MNR, MNSD, MNDC, FF

Introduction
This hearing dealt with two related applications. One was the tenant's application for a monetary order and an order setting aside a 10 Day Notice to End Tenancy for Non-Payment of Rent. The other was the landlord's application for an order of possession, a monetary order and an order permitting retention of the security deposit in partial satisfaction of the claim. Both parties appeared and had an opportunity to be heard. As the parties and circumstances are the same on both applications, one decision will be rendered for both.

At the beginning of the hearing the tenant withdrew her application to set aside the landlord's notice to end tenancy. The parties confirmed that the landlord had taken possession of the rental unit and an order of possession was not required.

Evidence Issues
At the beginning of the hearing the tenant said she had not received a copy of the landlord's application for dispute resolution or any of his supporting evidence. The landlord had filed proof of service by registered mail of the application for dispute resolution, notice of hearing and supporting evidence to the address for service provided by the tenant on her application for dispute resolution. The tenant said that the address she had provided was for the central office of the safe house at which she was residing and that staff had not given her this package. As the documents had been served in accordance with the Residential Tenancy Act I advised the tenant that I would be considering the landlord's application and evidence.

With regard to the tenant's application the landlord acknowledged receipt of the tenant's application for dispute resolution and amended application for dispute resolution; both in the same envelope. The landlord also acknowledged receipt of a letter from the tenant to him dated May 24, 2014 in the same envelope.

The landlord said he did not receive a copy of the evidence filed by the tenant at the Residential Tenancy Branch on June 27, 2014, which consisted of:

- The handwritten notice posted at the rental unit by the landlord on June 20, 2014; and,
- A letter from M.

The tenant testified that she gave these documents to the landlord when the parties and the police were at the rental unit. The landlord denied receiving any documents from the tenant at that time. The landlord had also filed a copy of the same notice as part of his evidence package so it was being considered in evidence in any event. The letter from M was of limited evidentiary value so has not been considered in the preparation of this decision.

The tenant also filed an evidence package consisting of a DVD and two pages of invoices. The landlord said he did not receive this evidence. The tenant said it was sent to the landlord by registered mail and she would file the proof of service before the continuation date of the hearing.

The parties did not finish all their evidence on the first date set for hearing and it was continued at a date and time convenient to the parties.

At the continuation date the tenant said she had moved out of the safe house and the rules were that she was not allowed to go back. As a result she was not able to access any of her records, including the registered mail receipt for the last evidence package served on the landlord. She also said that she tried contacting her worker at the safe house but that person is away on holidays.

After the hearing concluded I did look at the photographs and videos on the tenant's DVD. They are not date stamped. The tenant's videos of the rental unit are very similar to the photographs submitted by the landlord. This is video of the notice on the door and the cameras, just as described by the landlord. There is no video or photos of the landlord's loaded truck, as the tenant had said there would be. Neither was there any video or photos of everything packed and ready by the door, as described by the tenant

The tenant also indicated that her Victim's Services Advocate was away on holidays; she thought until August 21. She asked for an adjournment to allow the advocate to testify. I deferred my decision on this request until the end of the hearing.

After hearing all the evidence I decided not to extend the hearing in order hear these witnesses for two reasons;

- The point of the evidence was said to be to establish that they had called the landlord and told him that he should not have changed the locks and that the tenant wanted her possessions. The landlord had testified that the advocate had called him on the tenant's behalf. There was no conflict in the evidence of the two parties on this particular point so additional testimony was not required to tip the balance of probabilities one way or the other.
- The tenant filed her application for dispute resolution on June 6. The advocate(s) could have written a letter describing their interaction with the landlord at any time before leaving on holidays and the tenant could have filed the letter(s) as part of her evidence.

Issue(s) to be Decided

- Is either party entitled to a monetary order and, if so, in what amount?
- What disposition should be made of the security deposit?

Background and Evidence

The rental unit is a house located in the Lower Mainland. The landlord bought this house on February 14, 2014. He lived in the house, cleaning and renovating it, until he rented it to the tenant. Since then he has made his home on Vancouver Island.

The landlord's evidence is that the realtor did not disclose any negative history about the house. When he asked the neighbours about the neighbourhood they reported that it used to be rough but was changing as more and more families moved in. He stated that he had no problem while he lived in the house.

On April 5, 2014, the parties signed a tenancy agreement. The monthly rent of $2200.00 was due on the first day of the month. The tenant was to pay a security deposit of $1100.00. The tenant gave the landlord two cheques – he says each was in the amount of $1100.00. The landlord agreed that the tenant could start moving in. A move-in inspection was conducted and a move-in condition inspection report was completed. The tenancy agreement contained a telephone number for the landlord but not an address.

The tenant moved into the house with her three children aged seventeen, twelve and five years, and her five-month-old grandson. Her grandson's mother – the tenant's oldest daughter – did not live in the house.

With the knowledge and consent of the landlord, the tenant sublet the lower level of the house to three roommates.

The landlord testified that after he returned home he noticed that the cheques given to him by the tenant were post-dated for April 15 and April 17. In a subsequent telephone conversation the tenant promised to make the payments by direct transfer; one on Friday April 11 and the other on April 17. The landlord agreed to this arrangement.

The tenant deposited $1100.00 on April 11 and $900.00 on April 17.

The landlord's evidence is that over the next two days he left several telephone messages for the tenant. When he did not hear from her he went to the rental unit. The tenant answered the door and was pleasant to him. She told the landlord she had deposited $1100.00 and blamed the discrepancy on the bank. When he asked to see the receipt she told him that the receipt was in her van which was being repaired. She also told him that she had left her telephone in the van and had not received any of his messages. The landlord said that although he was suspicious of the tenant's explanation he returned the cheques to her. He subsequently went to the bank and ascertained that only $900.00 had been deposited.

The landlord testified that on May 12 he sent the tenant a registered letter asking for payment of the $200.00. The landlord filed the registered mail receipt. The records of Canada Post show that the item was mailed on May 12 and was signed for by the tenant on May 14.

The tenant's testimony is that before moving in the landlord agreed to accept $900.00 for the April rent. In her rebuttal evidence the tenant said she and the landlord agreed she could pay $900.00 and do the lawn maintenance. She said this negotiation occurred on the telephone.

The landlord adamantly denies this version of events.

The tenant paid the May rent in full.

On the night of May 18 the house was violently attacked. The house and the tenant's van were sprayed with gunfire; a window was broken; and bear spray was pumped into the house. The tenant was at work at the time of the attack. The children had to be taken to hospital for treatment.

The tenant and her family were placed in a safe house. Except for one night near the end of May that was spent in the rental unit the tenant and her family had been staying in safe houses from the time of the assault until the date of the hearing.

The day after the assault the tenant called the landlord from the RCMP detachment. The landlord subsequently met with the police. He also met with the tenant at the rental unit. At that point the tenant was not sure whether she wanted to continue living in the house.

The landlord spoke to R, one of the sub-tenants. R said he was going to stay in the house. The landlord gave R his telephone number. He also arranged to have the smashed window repaired and ordered replacement doors.

The tenant testified that she had liked the house but Victim Services and the police were advising her not to stay in the house, primarily because the children had been traumatized by the event.

On May 24 the tenant wrote the landlord a letter that said: "I [tenant's name] give notice on this day May 24th to move out we couldn't give you notice only because on the lease agreement you had no address listed Police and Social Workers advised me to move out as of the shooting at [address] on May 19 2014 My children were bear mased and are scared to return Victims Service put my family in transition house because for safety concerns."

She testified that she did not send it to the landlord because she did not have his address.

The tenant testified that between May 24 and May 31 she had two telephone conversations with the landlord. She said he was not very cooperative with her. She said that two advocates from the safe house also spoke to the landlord. They asked the landlord for his address, which he provided to them.

The landlord's evidence is that he did not talk to the tenant until June 4 when she responded to his messages about the unpaid June rent. The tenant stated that she thought his request for rent was ridiculous in the circumstances.

According to the landlord the tenant told him she did not want to stay in the house to which he responded by saying that she should move her things out so he could rent it to someone else.

The landlord issued and posted a 10 Day Notice to End Tenancy for Non-Payment of Rent on June 4. He called the tenant and advised her of his action.

One June 6 the tenant filed this application for dispute resolution and the landlord received it on June 11. The tenant said she got the landlord's address for service from the 10 Day Notice to End Tenancy.

The tenant testified that the safe house was an hour and half drive from the rental unit. She was not working and had no income so could only go to the rental unit when she received a coupon for gas. She said she went to the rental unit every two or three days between June 1 and June 20 and that by June 20 she was almost packed. She wanted to arrange for storage but was not able to until she received her child tax credit closer to the end of the month.

The landlord testified that he went to the house on June 20. No one was there. While the landlord was at the house the tenant's oldest daughter arrived. The landlord asked her to let him in the house but she refused. He told the daughter that he intended to change the locks in three days.

The landlord says the daughter called her mother and relayed his message. He was told they would be there tomorrow.

The landlord posted a note on the door which said: "I give you [tenant] 3 days notice to change the new lock. Please call me back if you are here. My phone number is . . .otherwise I'll take action on June 23 – 2014."

The tenant says her daughter called her on the 21st and told her that the landlord was changing the locks right now. She went to the house on the 22nd and could not get in because the locks were changed.

The landlord says he stayed in the neighbourhood for the next three days watching the house. He did not observe anyone going in or out.

On June 22 he called the police. At his request the police checked the interior of the house and reported that no one was in it. He did not enter the house.

The landlord testified that he changed the locks at 5.30 pm on June 23 and installed cameras aimed at the door. The tenant also asked several neighbours to come into the house as witnesses to its condition. They all filed letters describing what they saw.

The tenant had an advocate call the landlord on her behalf on June 24. The advocate told the landlord that the tenant wanted to get her possessions. The landlord said he

was willing to come and open the house at a date and time provided by the tenant. The advocate told the landlord that they would coordinate the move with the police.

The tenant says she talked to the police on June 25 or 26.

A couple of days after he heard from the advocate the landlord heard from the police. The tenant's move-out was scheduled for Saturday, June 28 at noon.

On June 28 everyone arrived on schedule. The tenant had arranged with a friend who had a truck to help her with the move but the friend went away for the weekend.

The tenant said her stuff was scattered everywhere, which was not how she had left things. The police stayed for about 45 minutes; the landlord never came into the house. The tenant worked at packing until 6:00 pm. By the end of the day she had not finished packing.

The landlord says that at the end of the day he did not see any vehicles at the house so he called the police. The police went into the house with him. When he went inside he saw that the tenant had put everything into one room.

The landlord says that on June 29 he went into the lower level of the house. According to the tenant, the last of the sub-tenants, R, had move out of the house on June 7.

The landlord says that the sub-tenants had left lots of stuff. He loaded up everything that had been left in the lower level into his truck. The landlord testified that he did not touch anything that had been left upstairs. He passed an RCMP officer on his way away from the rental unit.

The tenant received a call from the officer. He asked her if she was moving because there was a red truck outside the house filled with bags. She called the landlord. They met at the house.

The tenant said they went into the basement. She landlord was asking her when she could get the rest of her things out of the house. She promised to be out by July 5.

The tenant says she observed some of her possessions on the truck in addition to things that belonged to the sub-tenants. The landlord asked her what to do with the things on the truck and she told him to put it all back in the house.

The landlord says he put everything back downstairs and locked the doors.

The tenant and the landlord met at the house on July 5. This time the tenant's friend with a truck was there. The tenant says the landlord had already packed everything of hers. The landlord said that on June 28 when he did not know what the tenant was doing, he put some items in bags.

The tenant finally finished moving on July 5th.

The landlord testified that everything he had put on the truck and them put back in the basement was still in the basement after the tenant was finished.

The landlord was able to re-rent the unit for August 1.

Analysis

There is no evidence that either the landlord or the tenant were the intended targets of the attack.

There is no evidence that the landlord knew, when he rented the house to the tenant, that he had any reason to believe that the house had a history that would make it subject to any type of unwanted attention including an attack of this nature. Accordingly, the tenant's claim for the insurance deductible for her van is dismissed.

With regard to the rent to be paid for April I accept the landlord's evidence that he asked for, and was trying to collect, $1100.00 for the April rent. Not only was the tenant's testimony not consistent on this point but the landlord's evidence is corroborated by the registered mail receipt.

The next issue is the tenant's claim for return of the rent paid for the period May 19 to May 31 and the landlord's claim for the June rent.

Basically the tenant's claim is based upon the argument that the event of May 18 frustrated the tenancy agreement and relieved her from its obligations.

Frustration is a legal concept and is succinctly described in *Residential Tenancy Policy Guideline 34: Frustration*. The *Guideline* explains that :

> "A contract is frustrated where, without the fault of either party, a contract become incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is not impossible. Where a contract is frustrated, the parties to the

> contract are discharged or relieved from fulfilling their obligations under the contract.
>
> The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated is what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of heir own deliberate or negligent act or omission.
>
> The *Frustrated Contract Act* deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the *Frustrated Contracts Act,* the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated."

The fact that the downstairs sub-tenant remained in the house until served with the 10 Day Notice to End Tenancy for Non-Payment of Rent is proof that the house was habitable and that the police had not designated it as being off limits to tenant or any other resident. While it is understandable that the tenant would not want to move back into the house after the events of May 18, particularly in light of the impact of those events on her children and grandchild, that in itself does not mean that the contract is incapable of being performed.

I find that the tenancy agreement was not frustrated. The tenant's claim for reimbursement of part of the May rent is dismissed.

When the landlord took possession of the rental unit he was relying on the concept that the tenant had abandoned the rental unit. Section 44(1)(d) states that a tenancy ends when the tenant vacates or abandons the rental unit.

Section 24(1)(b) and (2) of the *Residential Tenancy Regulation* states that a longs may consider that a tenant has abandoned personal property if it is located in a rental unit:

- that the tenant has not ordinarily occupied or for which he or she has not paid rent for a continuous period of one month, **or,**
- from which the tenant has removed substantially all of his or her personal property;

AND

- the landlord has received an express oral or written notice of the tenant's intention not to return to the residential property, **or,**
- the circumstances surrounding the giving up of the rental unit are such that the tenant could not reasonable be expected to return to the residential property.

The tenant's letter of May 24 is ambiguous. It could be read that the tenant has moved out or that she intends to move out at some unspecified time in the future. The condition of the rental unit on June 23 is ambiguous as well. There is very little furniture, some personal belongings and household goods scattered about, and some garbage. Many rental units are left in this condition after a tenant moves out. The application for dispute resolution filed by the tenant and received by the landlord on June 12 is ambiguous; on the one hand the tenant applies to have the tenancy continued and on the other she applies for a refund of the security deposit which can only be granted after a tenancy has ended. Finally, the tenant knew the landlord intended to change the locks and had his contact information but did not call him, or have someone else call him on her behalf, until June 24, three days after the day she said her daughter told her about the note.

It is possible to see how on June 23 the landlord may have concluded that the tenant had removed substantially all of her personal property and had received an express written notice of the tenant's intention not to return to the residential property. However, because of the ambiguity of the all of the factors he could consider, he assumed a risk when he went ahead and took possession of the rental unit on June 23 without obtaining a writ of possession in advance.

By taking possession of the house on June 23 the landlord ended the tenancy. Everything after that was just negotiations to have the tenant remove her possessions without the need for the landlord to obtain a writ of possession and hire a bailiff.

The tenant effectively retained control of the rental unit until the locks were changed. She had the key that her sub-tenant gave her, she kept her possessions in the house because she had not yet arranged for storage, and she was going to the house regularly.

I find that the tenant is responsible for the June rent for the period of June 1 to June 23, a total of $1686.70 ($73.33/day X 23 days).

Although the tenant complained that the landlord disturbed her belongings there is only the contradictory oral evidence of the parties on this topic. Even if the tenant's belongings were disturbed, a point on which I make no determination, both the landlord and the tenant were away from the house for days at a time. Neither has any way of knowing whether any other unauthorized person accessed the house or the shed between May 18 and June 23.

Except for some vague allegations the tenant has no evidence that any of her personal possessions are damaged or missing as a result of the landlord's actions, except for the fish that she says died after the landlord changed the locks. The tenant did not file any evidence about the replacement cost of the fish. Further there is no evidence that she took any steps to mitigate any potential losses once she learned that the landlord would be changing the locks.

The tenant's claim for storage costs is dismissed. The effect of this decision is that she was able to store her belongings in the rental unit for free from June 24 to June 30.

The tenant's claim for the cost of gas is dismissed. The only evidence on this point I s that the gas she used was paid for by voucher.

In conclusion, I find that the tenant is responsible for the balance of the April rent in the amount of $200.00 and a portion of the June rent in the amount of $1686.70, a total of $1886.70.

As the landlord was partially successful on his application I find that he is entitled to reimbursement from the tenant of the $50.00 he paid to file it. The tenant did not have to pay a fee to file her application for dispute resolution so an order of reimbursement from the landlord need not be considered.

Pursuant to section 72 I order that the landlord may retain the security deposit of $1100.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance of $836.00.

Conclusion

A monetary order in favour of the landlord has been made. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that court.

All claims by the tenant have been dismissed.

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: September 05, 2014

Residential Tenancy Branch