Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Harron Investments Inc.
and [tenant name suppressed to protect privacy]

DECISION

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

Introduction

This is a hearing of applications by the landlord and by the tenant. These applications were the subject of an earlier hearing conducted by conference call on January 13, 2014. The tenant failed to attend the hearing; the tenant`s application was dismissed and the landlord was granted a monetary award for unpaid rent and an order for possession by decision dated January 13, 2014. The tenant applied to review the decision and orders. His application for review consideration was dismissed by decision dated January 23, 2014. The tenant then applied to the Supreme Court of British Columbia for a judicial review of the January 13th and January 23rd decisions of the Residential Tenancy Branch. The tenant`s application for judicial review was heard on March 10, 2014. The Honorable Mr. Justice Weatherill granted the tenant`s application for judicial review. In his reasons he found that the original hearing by the Residential Tenancy Branch was procedurally unfair because the tenant was not present at the January 13th hearing; he determined that the matter needed to go back to a dispute resolution officer for a rehearing. The Supreme Court ordered that the order for possession and Writ of Possession issued by the Supreme Court be vacated.

The new hearing ordered by the Supreme Court was scheduled to be conducted on December 11, 2014 as face to face hearing at the offices of the Residential Tenancy Branch in Burnaby and I was appointed to conduct the new nearing. The tenant attended the hearing with his interpreter and the landlord`s representatives attended and participated in the hearing.

Issue(s) to be Decided

Is the tenant entitled to deduct the cost of carpet replacement from rent due to the landlord?
Should the Notice to End Tenancy for unpaid rent be cancelled?
Is the landlord entitled to a monetary award for unpaid rent?

Is the landlord entitled to an order for possession pursuant to the Notice to End Tenancy?

Background and Evidence

The rental unit is an apartment in New Westminster. The tenancy began in 2006. In 2013 the current landlord purchased the rental property subject to the existing tenancies. When the landlord assumed ownership of the rental property it prepared a form of estoppel certificate, setting out the terms of the pre-existing tenancy agreement. The tenant signed the document and noted the following deficiencies:

> There are: broken toilet shower, water leak under the toilet, Painting was supposed to be done every 10 years NOT DONE.

The tenant signed the form. There was no mention of any issues with the carpet on the certificate.

The landlord's representative testified that the tenant failed to pay rent due for November, 2013 in the amount of $685.00. the landlord then served the tenant with a 10 day Notice to End Tenancy for unpaid rent. The tenant paid only $224.00 for December rent. The full rent has been paid since December while these proceedings have unfolded.

The landlord's representative testified that the tenant complained about the carpet flooring in the rental unit, in particular wrinkles in the carpet. She testified that the landlord offered to replace the carpet with laminate flooring as it had done to other units in the rental property. The tenant objected to laminate flooring so the landlord offered to have the carpet re-stretched or "kicked". The landlord's representative testified that the tenant did not accept the offer to re-kick the carpet. She said the carpet in the rental unit was old, but still serviceable. The landlord's representative testified that the tenant changed the carpet in the rental unit without the landlord's permission and then refused to pay rent for November, whereupon the landlord served the tenant with a 10 day Notice to End Tenancy for unpaid rent. The tenant filed an application to dispute the Notice to End Tenancy, but failed to attend the conference call hearing on January 13, 2014 and the landlord was granted an order for possession and a monetary order in the amount of $1,196.00, being the amount of unpaid rent plus the $50.00 filing fee for the landlord's application.

The tenant testified at the hearing that in October, 2012, at the time that the landlord repainted the exterior of the rental property, he received permission from the owner to

change the carpet in the rental unit. The tenant said that the owner, named “Dave” told him that he could replace the carpet and deduct the amount of the carpet from his rent. The tenant said that there was a meeting in October 2012 when both the owner and the manager of the apartment were present and this was when he was given verbal permission to change the carpet. The tenant said that the owner told him the carpet was 45 years old. The tenant said that the carpet was torn and could not be cleaned. The tenant testified that he had the carpet cleaned several times, but the carpet cleaner finally refused to perform any more cleanings because of the poor condition of the carpet. The tenant testified that he did not replace the carpet in October, 2012 because he could not afford to do so. The tenant said that there were cockroaches underneath the carpet when it was replaced and the carpet installer performed some kind of chemical treatment before laying the new carpet.

In a written submission in support of his application for review consideration of the original January 13, 2014 decision in this matter, the tenant said:

> In 2008 I have got agreement with landlord (name) Ltd. because the floor became unstable for me to change the carpets / renovate on my own with the right to deduct from my rent.

The tenant said that he was unaware that the rental property was purchased by a new owner in May 2013; he said that he thought there was merely a change of property managers and he contended that his earlier permission to change carpets was still in place. The tenant also submitted that the change of carpets constituted an emergency repair because of the bad condition of the carpet and he was justified in changing the carpet and deducting the cost from his rent. The tenant acknowledged at the hearing that he made no written requests to the landlord to demand that the landlord make repairs, including the replacement of the carpet.

The tenant also said that the landlord discussed installing laminate flooring. The tenant said that he requires carpeted flooring for medical or health reasons. He mentioned the likelihood of falling due to the slippery nature of laminate floors. The tenant said he had medical authorization to have carpeted flooring. He produced a note at the hearing apparently written on a prescription pad. Because the document was not delivered to the landlord or to the Residential Tenancy Branch prior to the hearing, I declined to receive it as evidence at the hearing. The tenant also brought a sample of the new carpet to the hearing. I saw the large carpet sample, but I did not retain it as physical evidence and the tenant kept the sample and took it with him when the hearing concluded.

At the conclusion of the hearing the tenant requested a further adjournment of the proceeding so that he could produce the former owner of the property to attend a reconvened hearing to provide testimony to confirm the tenant's evidence that he was given permission to change the carpet.

Analysis

At the conclusion of the hearing I refused to grant the tenant's request to adjourn the proceeding. When the Supreme Court directed that a new hearing be held, the Judge gave the tenant specific advice with respect to the evidence that would be expected at the new hearing. The Judge remarked that:

> Now, if you go to this hearing and you say that the previous owner said, "I could put this carpet in", and you don't bring the previous owner, you're not going to be getting, I don't think, much sympathy from anybody. In the meantime, I am going to urge you two to see what you can do to work it out.

Because the tenant has given conflicting verbal and written testimony about when he was allegedly given permission to replace the carpet, and because he was specifically told what evidence he would be expected to present at a new hearing and he failed to heed that advice, I declined to grant an adjournment. This proceeding has been outstanding for more than a year and further delay is unwarranted and prejudicial to the landlord.

The *Residential Tenancy Act* provides by section 26 (1) that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent. The *Residential Tenancy Act* permits a tenant to deduct an amount from a rent payment without first obtaining an order only when the tenant has paid for emergency repairs as defined by the Act and the landlord has not reimbursed the tenant after the tenant has provided written particulars to the landlord. The only other exception to the requirement to pay rent is contained in section 43(5) of the Act; it provides that: If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.

Emergency repairs are defined by section 33 of the *Residential Tenancy Act* as follows:

> **33** (1) In this section, **"emergency repairs"** means repairs that are

(a) urgent,

(b) necessary for the health or safety of anyone or for the preservation or use of residential property, and

(c) made for the purpose of repairing

(i) major leaks in pipes or the roof,

(ii) damaged or blocked water or sewer pipes or plumbing fixtures,

(iii) the primary heating system,

(iv) damaged or defective locks that give access to a rental unit,

(v) the electrical systems, or

(vi) in prescribed circumstances, a rental unit or residential property.

Carpet and flooring is not one of the items listed in section 33 (1) (c) of the Act and I find that replacement of carpet does not constitute an emergency repair. I find that the tenant is not entitled to deduct the cost of the carpet replacement from rent on this basis.

The tenant testified that he received the landlord's verbal permission to replace the carpet himself and to deduct the cost from rent. The tenant has given conflicting written and verbal evidence concerning the alleged permission that he was given. There is no dispute that he did not receive permission from his current landlord to change the carpet. I did not find the tenant's evidence as to permission from his former landlord to be convincing and I do not accept it as accurate because it is contrary to the ordinary and expected behavior of a commercial landlord for it to give a tenant an unrestricted consent to perform a major improvement to the rental unit without regard to cost or to the character of the improvement. I reject the tenant's evidence as to permission on the further basis that the standard terms that form part of the tenancy agreement only permit a tenant to repair at his own expense, damage that he has caused and to make emergency repairs only in the prescribed circumstances. The tenant is seeking to introduce oral testimony to allege a permission that is contrary to the standard terms of the tenancy agreement. I find that the acceptance of this oral testimony so as to vary or alter the terms of the tenancy agreement would constitute a violation of the "parole evidence rule", and I decline to accept the tenant's evidence on that basis as well. The rule has been described as follows:

> It has long been a substantive rule of law in the English speaking world that in the absence of fraud or mutual mistake, oral statements are not admissible to modify, vary, explain or contradict the plain terms of a valid written contract between two parties.
>
> It should be noted that there is a very sound basis for the rule for to consider any or every oral statement made by one party or the other during contract negotiations so as to vary, modify, or contradict the plain language finally adopted could throw the best written contract into doubt, and constant turmoil. Where a contract is clear and unambiguous, oral statements or reservations made by either party do not change it.
>
> If terms of the contract are ambiguous or clearly susceptible to more than one meaning then parole evidence is admissible to show what the parties meant at the time of making the contract and how they intended it to apply.

The standard terms that form a part of all tenancy agreements, as set out in the schedule to the Residential Tenancy Regulation, provides by section 1(2) that any change or addition to the tenancy agreement must be agreed to in writing and initialed by both the landlord and the tenant. I do not accept the tenant's oral evidence concerning an agreement permitting him to replace the carpet at the landlord's expense for the reasons I have given. The tenant's application to cancel the Notice to End Tenancy, to claim a monetary award and to claim repair orders or a rent reduction are all dismissed without leave to reapply.

The tenant has continued to pay rent while these proceedings have unfolded; the payments have been accepted by the landlord: "for use and occupancy only" and they do not constitute a reinstatement of the tenancy. The tenant has not made any meaningful proposal to pay the rental arrears and the landlord has requested that the tenancy end and the landlord be granted an order for possession as well as a monetary order for the outstanding rent. The order for possession previously granted was vacated by the Supreme Court, but the monetary order that was granted on January 13, 2014 in the amount of $1,196.00 was not vacated by the court. I allow the landlord's application on this review hearing and I confirm that the original monetary order in the amount of $1,196.00 continues to be a valid, binding and enforceable order in this proceeding.

Conclusion

I have dismissed the tenant's application and pursuant to the landlord's application and request at the hearing, I grant the landlord an order for possession effective January 31, 2015, after service upon the tenant. This order may be registered in the Supreme 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 *Residential Tenancy Act*.

Dated: January 8, 2015

Residential Tenancy Branch