



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, RR, O

Introduction

This hearing dealt with an application by the tenant for orders setting aside a 10 Day Notice to End Tenancy for Non-Payment of Rent and an order reducing the rent for repairs, services or facilities agreed upon but not provided. The tenant's application did not include a request for a repair order.

The landlord has a related application, the file number of which is noted on the front page of this decision, which is scheduled for February 2, 2016. The landlord had originally filed his claim as a cross-application to the tenant's application but because of administrative issues it had to be scheduled for a later date. On that application the landlord is claiming, among other things, a portion of the repairs costs for a sewer blockage. He is alleging that the tenant is responsible for the blockage, a claim that she denies. In this hearing I did not hear all of the evidence that would allow me to determine whether the tenant was or was not responsible for the sewer blockage and the associated costs as that is one of the principal issues of the landlord's application.

Both parties appeared at this hearing. The landlord had filed 58 pages of evidence and a CD on time. The tenant said she was not able to play the CD. I advised her that the CD was a recording of a telephone message and the complete transcript of the recording was included in the written material. The tenant had served and filed 43 pages of written evidence after the deadline for doing so. The landlord indicated that he had received the evidence and was prepared to go ahead. Accordingly, I accepted that package into evidence.

The tenant advised that she had subsequently served and filed a package of photographs. The landlord said he had received the photographs on Monday, January 11. As of the date of the hearing the photographs had not been received by the Residential Tenancy Branch. The tenant said she had not been able to submit the photographs earlier because they were on a cell phone that had died and she could not

get them developed until she received her GST cheque. She said she had couriered them to the address given to her by the Service BC staff. The address she gave was for the previous Residential Tenancy Branch location in Victoria, an address several years out of date. Upon questioning the tenant said the photographs were of the current condition of the bathroom.

After hearing that the tenant's description it appeared that the photographs were most relevant to an application for a repair order, which was not the application before me. Based upon the fact that the tenant had not filed the photographs until two months after she filed this application for dispute resolution and that they were only marginally relevant to the issues before me, I advised the parties that I was not going to accept the photographs as evidence if they did arrive and I was not going to adjourn the hearing.

Issue(s) to be Decided

- Is the 10 Day Notice to End Tenancy for Non-Payment of Rent dated November 5, 2015 valid?
- Should a monetary order be made in favour of the tenant and, if so, in what amount?

Background and Evidence

The rental unit is one side of a side-by-side duplex. The landlord bought the duplex new in 2000. On the upper level is the main living space and a half bathroom; on the lower level is three bedrooms and a full bathroom.

The tenant has lived in the unit since 2004. The landlord and the tenant signed a new tenancy agreement in 2004. That agreement was for a two year fixed term tenancy and has continued since as a month-to-month tenancy. The monthly rent is due on the first day of the month. In November the rent was 940.24. As of February 1 the rent will be \$967.51.

At the present time her nineteen-year-old daughter and her daughter's boyfriend also live in the rental unit.

The duplex is connected to municipal sewer and water. The landlord testified that there was a problem with the sewer connection in 2008 and they had to dig everything up to fix the problem at that time.

The landlord testified that later in the day on October 19, 2015, he received a telephone call from the tenant advising him that the toilet had backed up. He went over to the unit that day and tried to clear the blockage with a plunger. His efforts were unsuccessful.

He returned the next day with a 150 foot snake. He removed the toilet and tried to clear the blockage with the snake. Once again, he was unsuccessful.

He had a plumber attend at the unit the next day. The landlord filed a copy of the plumber's invoice for October 21. The landlord's evidence is that the plumber cleared the line and reinstalled the toilet but that afternoon the tenant called and advised that the toilet was plugged again.

The plumbing company went back to the rental unit and unplugged the sewer again. This time the plumber installed an outdoor cleanout so the line would be easily accessible for clean-out in the future. The landlord filed a copy of the plumber's invoice dated October 22 for this work.

The landlord testified that on October 27 he received a call advising that the toilet was plugged up again. This time the plumber inspected the sewer line with a special cameral. They found a blockage approximately sixty-four feet from the building. The plumbers advised the landlord that the line would have to be excavated to remove the blockage. The landlord filed a copy of the plumber's invoice for this visit dated October 27, 2015.

The landlord testified that an excavator was brought to the unit on October 28 and on October 29 a five foot by fifteen foot hole was dug; the sewer line was cut; the blockage was removed; and the line was repaired. In addition to the excavator, a substantial amount of dirt had to be moved by hand, otherwise the concrete of the front entry and foundations would have had to be cut. The landlord testified that everything was operating by the afternoon of October 31. They left the hole open for a few days to make sure there would be no other problems before filling it in on November 4. The landlord filed copies of the invoices for the contractors work, which refer to work done between October 28 and November 4.

The landlord testified that he had to obtain permits from Fortis, BC Hydro and the local district before digging and that he did not obtain those permits until October 29. He filed copies of various permits. In the hearing the tenant challenged the authenticity of the permits filed in evidence.

The tenant's version of events is somewhat different.

She testified that they usually experience a flooding problem every fall. Usually she starts by using a plunger and products like Liquid Plumber. In the past, if the situation got worse it was repaired.

The tenant says that problems started in August 2015. She filed a copy of the invoice for the plunger as proof of the date on which the problems started.

The tenant testified that she notified the landlord sometime in September about the problem. He told her that he would not be able to take care of the situation until he returned from a three week trip. She could not remember when or how she contacted the landlord. The tenant testified that the plumbing worked – albeit sluggishly – in September.

On her application for dispute resolution the tenant stated that they were not able to use the toilets for all of October and November. In the hearing the tenant testified that they were not able to use the toilets for all of October but she did concede that everything was operational from October 31 on.

The tenant testified that in October they used a bucket for a toilet and every few days they emptied the buckets into a garbage bag. Eventually the garbage bags were taken to the dump. The tenant filed copies of the invoices from the dump as proof of her statement. There were three receipts dated November 19, 2015, and a fourth receipt, which is very difficult to read but appears to be for a date in October. When asked why this garbage was not disposed of sooner the tenant said the district was not sure what to do with it and she did not have the money for the dump fees any sooner. On each of the receipts submitted into evidence someone has written a note that says: “receipts for disposing of wet newspaper used to soak up floodwaters”.

The landlord submitted evidence of a telephone message left for him by the tenant on October 29. The message basically says that this was the fourth day without a toilet and the landlord had promised the day before that it would be fixed. The tenant testified that the reference to four days was the this was the fourth day the toilet had been sitting in the bathtub.

The landlord testified that the floor of the bathroom was damaged when the plumbers used their machine. He talked to the tenant about replacing it and arranged for a contractor to come in. He says the contractor went to the rental unit twice but no one answered the door; a statement the tenant denied.

On November 5 the landlord left a letter for the tenant. The letter states that he wants to have a contractor fix the flooring. He asks the tenant to contact him and gives two telephone numbers at which he can be reached.

The landlord also posted a 10 Day Notice to End Tenancy for Non-Payment of the November rent on that date.

The tenant testified that when she and the landlord talked on October 31 he told her he would be back on November 4. She thought he would collect the rent then but instead he served her with a notice to end tenancy. The landlord's evidence is that when he asked the tenant for the rent on November 5 she refused to pay.

The tenant filed this application for dispute resolution on November 13, 2015, within the five day time limit. Her application states that: "personal property damaged by flooding, could no collect rent form my daughter and son-in-law in the amount of \$600.00 because we were left with no toilet for Oct/Nov 2015 and dirty flooding of sewage into the house".

Both parties testified that the landlord came to the rental unit on December 2 looking for the rent. The tenant testified that she was very ill that day so she did not speak to the landlord directly. She told her daughter's boyfriend to tell the landlord that she would be going to the bank the next day to cash her cheque and get the rent money. She filed a copy of a bank document to show that she withdrew \$1212.00 on December 3. She said the landlord never came back to collect the money.

The landlord sent the tenant a letter dated December 7 telling the tenant that the November and December rents were due and that he "was not going to chase you all around to try and collect overdue rent" as he has done in the past. He reminds the tenant that he wants to arrange for repairs to the bathroom and asks the tenant to contact him. Once again, he gives his address and two telephone number.

The tenant acknowledged receipt of both letters.

The landlord made no attempt to collect the January rent and the tenant made no attempt to pay it.

The tenant testified that until last summer she would either deliver the rent to the landlord on the first or at least call him on the first. She said the landlord has made it very clear that she is not to come to his home.

The landlord testified that in the past he would come to the unit to pick up the rent or, if it was late, the tenant would bring it to his home. The tenant and her daughter came to his home on October 2 and he did tell not to come back because of his wife's illness. He also testified that he told the tenant he was going to be away for two weeks.

When asked why she never called the landlord about paying the rent the tenant said that recently he has been following her around town, which she considers a form of harassment. She said she is a little afraid of the landlord. The tenant said this is the same reason she has not called the landlord about arranging for the repairs to the bathroom. She said she is okay with contractors coming to the house but not the landlord.

The tenant testified that she has the rent money. In her testimony she was very clear that she was not withholding the rent because of the disruption in plumbing services. She said the reason she has not paid the rent is that he landlord never came to collect it.

Analysis

Section 26(1) of the *Residential Tenancy Act* provides that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulation or the tenancy agreement, unless the tenant has an order from the Residential Tenancy Branch allowing the tenant to withhold payment of all or any portion of the rent. The tenant did not have an order allowing her to withhold the rent. Secondly, it is the tenant's obligation to pay rent not the landlord's obligation to collect it. In either event, the tenant has not paid the rent without any legal right for not doing so. Accordingly, I find that the 10 Day Notice to End Tenancy dated November 5, 2015 is valid and the tenant's application for an order setting it aside is dismissed.

Section 55(1) of the *Residential Tenancy Act* provides that if a tenant makes an application to set aside a landlord's notice to end a tenancy and the application is dismissed or the notice to end tenancy is upheld, the arbitrator must grant an order of possession of the rental unit to the landlord. Therefore, I grant the landlord an order of possession effective two days after service on the tenant

The evidence is clear that there was a disruption in the sewer services to the rental unit. The landlord's evidence was clear and well-documented. The tenant's evidence was inconsistent and her documentation did not always support her oral testimony, e.g. the notation on the garbage dump invoices that the disposal was of paper towels, not the contents of a toilet. As a result where there is a conflict of evidence I prefer that of the landlord.

I find that the tenant reported the issue on October 19, 2015, and that plumbing services were disrupted in whole or in part until December 31.

As explained in *Residential Tenancy Policy Guideline 16: Claims in Damages*:

“Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. A landlord is expected to provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. If, on the other hand, the tenant is deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of an abatement of rent or a monetary award for the portion of the premises or property affected.” (Underlining added)

Section 65(1) allows an arbitrator who has found that a landlord has not complied with the Act, regulation or tenancy agreement to order that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of the tenancy agreement.

If fault were not an issue I would find that the disruption represents 50% of the value of the tenancy for almost two weeks, or \$235.00.

However, as set out in the Introduction I did not hear all of the evidence that would allow me to determine whether the tenant caused the sewer blockage, in whole or in part. As a result my finding of damages in favour of the tenant is provisional only, subject to the outcome of the landlord's application. I will not issue a monetary order in favour of the tenant at this time. If the result of the landlord's application is that the tenant was not responsible for the sewer blockage she may contact the Residential Tenancy Branch through the toll-free number and I will issue a monetary order in favour of the tenant in the amount of \$235.00. Of course, if the finding is that the tenant was responsible for the sewer blockage a monetary order in her favour will not be granted.

No compensation will be considered for the period after October 31. Subsection 7(2) of the *Residential Tenancy Act* provides that a landlord or tenant who claims compensation for damage or loss that has resulted from the other's non-compliance with the act, the regulations or the tenancy agreement must do whatever is reasonable to minimize the damage or loss. The evidence is clear that the landlord has been trying to arrange for the repairs to the bathroom and the tenant has not followed up on his requests.

Conclusion

- a. An order of possession, effective two days after service on the tenant, has been granted to the landlord. If necessary, this order may be filed in the Supreme Court and enforced as an order of that Court.
- b. A provisional monetary order has been made in favour of the tenant. The details of the order are set out above.

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 25, 2016

Residential Tenancy Branch

