



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes            CNC, O, OLC

### Introduction

The Application for Dispute Resolution filed by the Tenant seeks the following:

- a. An order to cancel an eviction notice
- b. An order that the landlord comply with the Act, regulation or tenancy agreement.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing was sufficiently served on the landlord by mailing, by express post on March 16, 2017.

### Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the tenant is entitled to an order cancelling a Notice to End Tenancy
- b. Whether the tenant is entitled to an order that the landlord comply with the Act, regulation and tenancy agreement?

### Background and Evidence

The tenancy began on August 1, 2016. The tenancy agreement is oral and provides for a month to month term. The present rent is \$680 per month payable on the first day of the month. The tenant paid a security deposit of \$300 at the start of the tenancy.

The landlord seeks to end the tenancy alleging the tenancy has been frustrated. She has given the tenant two notices asking him to leave. Both notices are typed but they are not on the approved form. The notices allege the contract has been frustrated. However, the oral testimony of the landlord alleges the Tenant is disturbing other tenants with inappropriate

noises, is loud and obnoxious and has seriously interfered with the enjoyment of the rental unit by other tenants.

Policy Guideline #36 deals with the concept of frustration and provides as follows:

A contract is frustrated where, **without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now 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 if 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 their 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 15<sup>th</sup> 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.

#### Analysis:

I determined the conduct which the landlord is relying on as a basis for ending the tenancy is not a frustrating event as contemplated by the Residential Tenancy Act. In essence the landlord is alleging misconduct by the tenant. For there to be a frustrating event the contract must be incapable of being performed without the fault of either party. As a result I determined there is no basis for ending the tenancy because of frustration.

It may be there are grounds to end the tenancy for cause under section 47 of the Act which provides as follows:

#### **Landlord's notice: cause**

**47 (1)** A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

- (a) the tenant does not pay the security deposit or pet damage deposit within 30 days of the date it is required to be paid under the tenancy agreement;
- (b) the tenant is repeatedly late paying rent;
- (c) there are an unreasonable number of occupants in a rental unit;
- (d) the tenant or a person permitted on the residential property by the tenant has
  - (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
  - (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
  - (iii) put the landlord's property at significant risk;
- (e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that
  - (i) has caused or is likely to cause damage to the landlord's property,
  - (ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or
  - (iii) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;
- (f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;
- (g) the tenant does not repair damage to the rental unit or other residential property, as required under section 32 (3) *[obligations to repair and maintain]*, within a reasonable time;
- (h) the tenant
  - (i) has failed to comply with a material term, and
  - (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;
- (i) the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 *[assignment and subletting]*;
- (j) the tenant knowingly gives false information about the residential property to a prospective tenant or purchaser viewing the residential property;
- (k) the rental unit must be vacated to comply with an order of a federal, British Columbia, regional or municipal government authority;
- (l) the tenant has not complied with an order of the director within 30 days of the later of the following dates:
  - (i) the date the tenant receives the order;
  - (ii) the date specified in the order for the tenant to comply with the order.
- (2) A notice under this section must end the tenancy effective on a date that is
  - (a) not earlier than one month after the date the notice is received, and

- (b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
- (3) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.
- (5) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant
  - (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
  - (b) must vacate the rental unit by that date.

However, for that to be determined the landlord must give the tenant a one month Notice to End Tenancy in the approved form setting out the grounds and the tenant would have an opportunity to dispute that notice. I have not made any determination as to whether there are grounds to end the tenancy.

**This decision is final and binding on the parties.**

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: April 07, 2017

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Residential Tenancy Branch