



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding RANCHO MANAGEMENT SERVICES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: CNR OPR LRE RR PSF

Introduction

Both parties attended the hearing and gave sworn or affirmed testimony. The female tenant was represented by her male partner and the landlord by the property manager. The representatives will be referred to hereinafter as 'the tenant' or 'the landlord' respectively. The 10 Day Notice to End Tenancy is dated January 5, 2018 to be effective January 19, 2018 and the tenant confirmed it was served personally on January 5, 2018. The tenant served their Application for Dispute Resolution dated January 14, 2018 personally on January 14. I find the documents were legally served pursuant to sections 88 and 89 of the Act for the purposes of this hearing. The tenant applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) To cancel a notice to end tenancy for unpaid rent pursuant to section 46;
- b) To provide immediate access to them and their guests pursuant to section 30;
- c) To reduce rent and obtain a rebate for repairs, services or facilities agreed upon but not provided (total \$4400);
- d) To provide facilities or services required by the tenancy agreement or law;
and
- e) To recover the filing fee for this application.

Preliminary Issue:

A question arose as to the landlord's legal name. Both parties agreed that the name on the tenancy agreement was not that used by the tenant in their application. Both parties agreed the landlord's name should be amended to the name that is on the tenancy agreement. This amendment was granted.

Issue(s) to be Decided:

Is the tenant entitled to any relief? Or is the landlord entitled to an Order of Possession if the tenant is unsuccessful in the application to set aside the Notice to End Tenancy?

Has the tenant proved on the balance of probabilities that the landlord has infringed their rights under the law or tenancy agreement by withdrawing services or facilities? If so, to how much compensation are they entitled? Are they entitled to recover their filing fee?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to provide evidence and to make submissions. The undisputed evidence is that the tenancy commenced in July 1, 2012, rent is \$2000 a month and a security deposit of \$1000 was paid. The landlord served a Notice to End Tenancy for unpaid rent in the amount of \$4296. She testified in the hearing that the tenant paid \$2165 on January 31, 2018 and a further \$1800 on March 2, 2018 but still owes unpaid rent to date. When asked about the wording of the receipts for the money received, the landlord had to call the office. The tenant said there was no limitation "for use and occupancy only" on them. They just had ticked off the boxes "rent" and "cash". The landlord agreed this was true after her office responded.

The tenant explained their claim for \$4400. He said they had no access to the building from January 3, 2018 to January 24, 2018 because their fobs were disconnected. They needed the fobs to enter, to use the elevator to their 12th floor unit and to get into the garage and garbage area. In November 2017, he said the landlord asked them to do a new deposit agreement for the bank as the tenants had changed banks. For some reason, the payments did not go through and the tenants paid cash for November. On January 3, 2018, there was a general note to tenants to talk to the property manager and give their fob numbers for security reasons. They were busy and did not do this right away so they assumed that was the problem when their fobs did not work on January 4, 2018. Then the property manager delivered the 10 Day Notice to End Tenancy on January 5, 2018 and said the fobs were stopped because rent was not paid. She said if they came in without fobs, she would call the Police. Due to the extreme stress of being locked out, their documents being inside their unit and the difficulty in using the new online system of filing applications, they were a few days late in filing this application.

Neighbours let them in for about a week but they needed the fobs to access the entrance, the elevators and to take garbage out and walk their dog. Their schedules were different from each other and depending on neighbours was unreliable and embarrassing, especially after the property manager told them she would call the Police if they entered without fobs.

They went to a friend's Airbnb for 12 days (Jan. 7-24) at a cost of \$60 a night for total of \$720. They paid a person to look after their dog for 17 days at \$25 a day for a total of \$425. They rented their parking stall to another person for \$165 a month and because of no fob to enter, they lost that contract for 2 months (total loss \$330). The female tenant also does makeup in her home and she lost about \$1,000 worth of business. They also suffered embarrassment and loss of reputation and this lingers as they are known as the persons who were locked out of the building. They request also a rebate of their rent from January 3, 2018 to January 24, 2018 due to lack of access to the building and facilities.

The landlord said she sent an email to D., the building manager to reactivate the fobs. She said the problem was caused by the tenants not supplying the fob numbers to D. so they were deactivated according to protocol for security. She also said she understands their fobs broke and they did not pay the fee for a new one. She said they had plenty of time to pay their rent as there were two 10 Day Notices given to them, one in December 2017 and one in January 2018.

The tenant said the manager attending today asked for the fobs to be activated on January 24, 2018. The manager responded by saying they were not wholly locked out but the tenant disagreed.

There was a problem with accessing the tenant's evidence in the new online system. It was illegible so they were given permission to upload it correctly by Tuesday March 20 when the final decision on damages would be rendered. Both parties were told that they could submit evidence to support their positions by March 20, 2018 and it would be considered.

The tenant uploaded some documentary evidence correctly. It appeared to closely approximate the original illegible evidence but additional statements and evidence were added. Receipts and emails were provided to support their position. However, they doubled their claim in this evidence submitted. The landlord submitted no additional documentary evidence. On the basis of the documentary and solemnly sworn evidence presented for the hearing, a decision has been reached.

Analysis:

Section 46 of the Act provides a tenancy may be ended on a 10 Day Notice for unpaid rent. The tenant has 5 days to pay the rent or file an application to dispute. The tenant received the 10 Day Notice on January 5, 2018 and filed an application to dispute and

served it personally on January 14, 2018 which is outside of the time limit allowed in section 46.

Section 66 of the Act permits the arbitrator to extend a time limit in exceptional circumstances. Policy Guideline (Guideline) 36 clarifies some criteria for this consideration as follows:

the party did not wilfully fail to comply with the relevant time limit

•

the party had a bona fide intent to comply with the relevant time limit

•

reasonable and appropriate steps were taken to comply with the relevant time limit

•

the failure to meet the relevant time limit was not caused or contributed to by the conduct of the party

•

the party has filed an application which indicates there is merit to the claim

•

the party has brought the application as soon as practical under the circumstances

I find the tenants were locked out of their unit during this time without access to their documents due to the landlord's actions. I note there is a new online system for filing which most likely delayed them also. I find they took reasonable steps to comply and they have an application which indicates there is merit in their claim. I find these are exceptional circumstances and pursuant to section 66 of the Act, I grant the tenants the extra four days they needed to file their application. I note it was not filed beyond the effective date of the Notice which was January 19, 2018 so the extension is permitted according to section 66 of the Act.

I find the weight of the evidence is that the tenants thought the situation was a temporary problem which would be solved by getting their fobs reactivated by the manager so they continued to pay rent on January 31 and March 2, 2018. There were a number of text messages in evidence showing this was their main concern. I find the text messages in evidence show the resident manager agreeing to activate a fob the tenant found on January 26, 2018 after he was authorized by the landlord. I find Guideline No. 11 states:

A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- *whether the receipt shows the money was received for use and occupation only.*
- *whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- *the conduct of the parties.*

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights.

I find according to the statement of rent record of the landlord in evidence dated February 16, 2018, the tenant owed rent of \$30 (balance forward) + \$2133 for January 1, 2018. I find the landlord confirmed in the hearing that the tenant paid \$2165 on January 31, 2018 and it was accepted by the landlord without limitation. I find this amount was owed for the period the tenant was entitled to possession (i.e. prior to January 19, 2018) so a question of waiver does not arise.

However, the landlord testified they accepted subsequent payments of at least \$1800 on March 2, 2018 so the question of the intent of the landlord arises. I find the receipt did not show the money was received for use and occupation only and the landlord did not inform the tenants of this. I find a previous 10 Day Notice to End Tenancy was issued in December 2017 which the landlord did not pursue and the text messages to and from the resident manager indicate that the tenants were not expecting the landlord to pursue the 10 Day Notice issued in January and were just concerned with getting their fobs reactivated. I find the tenant has continued to live in the residence and has paid rent subsequent to the Notice to End Tenancy. I find the landlord by implication waived their Notice ending the tenancy on January 19, 2018 as they accepted rent beyond what was owed and subsequent to the effective date of the Notice to End Tenancy without limiting the acceptance to 'use and occupancy only'. I set aside the 10 Day Notice to End Tenancy dated January 5, 2018 to be effective January 19, 2018. I find the tenancy is continuing until ended in accordance with the Act.

In respect to the tenant's claim for compensation for loss, I find awards for compensation are provided in sections 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;

2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Section 67 of the Act does *not* give the director the authority to order a respondent to pay compensation to the applicant if damage or loss is not the result of the respondent's non-compliance with the Act, the regulations or a tenancy agreement.

The onus is on the tenant to prove on a balance of probabilities that the landlord did not comply with the Act, or tenancy agreement and that this violation caused them loss. I note that the tenant significantly increased their claim when they submitted further evidence. The principles of Natural Justice are that a party must have notice of any claim against them and have the opportunity to respond. Based on these principles, I refuse to consider any claim beyond the \$4400 originally claimed in the evidence served on the landlord, which claim was addressed in the oral hearing. I find the landlord had no notice or service of the tenant's additional claim submitted after the hearing.

I find the tenant has satisfied the onus of proving they suffered loss due to the landlord deactivating their fobs and not authorizing reactivation immediately on being notified. I find the landlord violated sections 30 and 31 of the Act which provides that a landlord must not change locks or other means of access to the property unless the landlord provides each tenant with new keys or other means that give access to the residential property. I find the tenant's evidence credible that the property manager served them with the 10 Day Notice to End Tenancy on January 5, 2018 and informed them that she would not authorize reactivation until full rent was paid. I find she also disconnected the phone access to the building. The tenant's credibility was well supported by a video in evidence showing unsuccessful efforts to use the fob on the elevator to access their unit or the garage.

The tenant explained how they had neighbours let them in for a few days but that stopped when the property manager said she would call the police if they entered without fobs. They claim as follows:

1. \$883.30 for 12 nights Jan.12-23 at an Airbnb. Receipt provided. However, in the oral hearing the claim was for \$720 (12 days at \$60 day).
2. \$490 for boarding for their dog while they could not get access. Jan. 7-26 (18 days x \$25 day plus \$40 pickup and delivery). They explained how they could not keep the dog in their unit even while gaining entry through neighbours as they have to walk the dog twice daily for toileting etc. They could not depend on neighbours being available to let them and their dog back in. However, in the oral hearing, they claimed \$425 for this expense.
3. \$410 loss of parking rental. They rent a stall to a third party and he was unable to access the parking so they lost two months of rental income from him. In evidence is a series of text messages between the third party and the tenants expressing alarm at losing access and stating he would have to find another place. In the oral hearing, they claimed \$330 (\$165 x 2) for this.
4. \$500- \$1000 loss of work for female tenant + \$35 taxi. No invoices provided.
5. \$1652 rent rebate for 24 days locked out: Jan. 3-27.
6. \$4000 for extra meal cost, loss of gym, loss of garbage disposal, defamation of character, mental and physical anguish, threats to call police. They say they will deal with some factors for 6 or more months and claim \$250 per person per month for this loss. No receipts or other documents are filed in support of this.

I find the weight of the evidence is that the tenants were locked out from January 12 to 23rd, 2018 and they are entitled to the cost of their alternative accommodation which was \$720 in their original claim (\$60 a night x 12 nights). I also find they were unable to keep their dog in their unit while locked out so I find them entitled to recover the cost of \$425 for the alternate accommodation for the dog as originally claimed. In the hearing, the tenant stated he lost two months income for parking rented to a third party at \$165 a month for a total of \$330. I find them entitled to the above amounts they claimed in the hearing where the landlord had opportunity to respond and be heard.

In respect to the claim of \$500-\$1000 for loss of work and \$35 for a taxi, I find insufficient evidence to support this claim. Although the tenant claimed the female tenant had clients visit her for work in her unit, I find insufficient evidence to support this or the actual loss incurred. The taxi cost was not proven by receipt or as caused by the landlord.

Regarding the rent rebate requested, I find the weight of the evidence is that the building tenants were advised on January 3, 2018 to report their fob numbers to the resident manager or risk deactivation as there were concerns about building security. The tenant confirmed in his oral evidence that they did not report their fob numbers and

assumed they were locked out January 3 to 5 because of this. Therefore, I find them not entitled to a rent rebate for these days as I find the evidence inconclusive as to whether this lock out was caused by the landlord's actions or by their delay in compliance. However, I find the weight of the evidence is that the landlord willingly locked them out from January 5 to January 26 when the manager gave permission for fob reactivation. I find them entitled to a rent rebate of 22 days. Their rent is \$2000 a month so I find they are entitled to \$1419.31 ($\$2000/31 = \$64.51 \text{ day} \times 22 \text{ days}$).

In respect to the \$4000 claimed for extra meal cost, loss of gym, loss of garbage disposal, defamation of character, mental and physical anguish, threats to call police, I find insufficient evidence to support their claim for meals. I also find they are adequately compensated in the rent rebate award for the loss of garbage disposal and gym as these were included in the rent. Therefore I dismiss the portion of their claim for further compensation for meals and loss of building facilities.

However, I find they suffered significant loss of their peaceful enjoyment through the mental and physical anguish of being locked out together with the threats of the landlord to call the police if they entered without their fobs. I find it is the landlord's duty to protect the peaceful enjoyment of the tenants according to section 28 of the Act. I find the landlord violated section 28 and the tenants are entitled to some measure of compensation for this unreasonable disturbance and significant interference of their rights to enter the building and common areas. I find it reasonable to allow them \$1000 in compensation.

I dismiss their further claims for ongoing trauma due to the events. These were not included in their original claim, nor addressed in the oral hearing so the landlord had no opportunity to exercise their rights to hear and respond to these claims against them.

Conclusion:

I set aside and cancel the Notice to End Tenancy dated January 5, 2018 to be effective January 19, 2018. The tenancy is continued until legally ended in accordance with the Act. I find the tenants entitled to compensation as calculated below and to recover their filing fee for their application.

Air bnb accommodation	720.00
Dog accommodation	425.00
Lost parking income	330.00
Rent rebate	1419.31
Compensation allowed for loss of reasonable enjoyment	1000.00

Filing fee	100.00
Total monetary award	3994.31

I HEREBY ORDER THAT THE TENANT MAY DEDUCT \$3994.31 AS A RENT REBATE FROM RENT OWED TO THE LANDLORD.

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: March 25, 2018

Residential Tenancy Branch