Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1044270 BC LTD
and tenant name suppressed to protect privacy

DECISION

Dispute Codes MNDCT, RPP, OL

Introduction

This hearing involved cross applications made by the parties. On August 28, 2018, the Tenant made an Application for Dispute Resolution seeking an Order for the return of her personal property pursuant to Section 65 of the *Residential Tenancy Act* (the "*Act*") and seeking monetary compensation pursuant to Section 67 of the *Act*.

On September 6, 2018, the Landlord applied for a Dispute Resolution proceeding seeking a determination on an Order of Possession pursuant to Section 44 of the *Act*.

This hearing was set down to be heard on October 15, 2018 at 9:30 AM and both parties participated in that hearing. The Arbitrator who conducted that hearing was unable to finish the entire hearing in the allotted timeframe, so it was adjourned to November 26, 2018 at 9:30 AM to be completed. However, due to unforeseen circumstances, the original Arbitrator was unable to attend and complete the hearing. Consequently, the hearing was set down to be re-heard on January 14, 2019 at 9:30 AM.

The Tenant attended the January 14, 2019 hearing and D.F. and D.L. attended the hearing as agents for the Landlord. All in attendance provided a solemn affirmation.

The Tenant advised that a Notice of Hearing package and her evidence was served to the Landlord by registered mail and the Landlord confirmed receipt of these packages. Based on this undisputed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was served with the Notice of Hearing package and evidence.

The Landlord advised that a Notice of Hearing package was served to the Tenant by being posted on the door of her new address on September 6, 2018 but the Tenant stated that she did not receive this package. The Landlord also advised that their evidence was posted to the Tenant's door and the Tenant acknowledged that she received this evidence. However, as both parties confirmed service of these documents at the previous hearing, I am satisfied that the Tenant was served with the Notice of Hearing package and evidence.

During the January 14, 2019 hearing, the Tenant stated that it was prejudicial for her to have this proceeding reheard from the start by a new Arbitrator as some issues had already been discussed and the Arbitrator from the previous hearing had advised her to go back to the rental unit to assess the damage to her personal property and submit an itemized list of damaged items for consideration.

I note that the instruction provided by the previous Arbitrator in the Interim Decision dated October 17, 2018 states only: "The Tenant was given instructions to provide itemized cost details for each item on the monetary order worksheet as soon as possible prior to the reconvened hearing date to both the Landlord and the Residential Tenancy Branch (the "RTB")." There were no specific instructions that required the Tenant attend the rental unit to make such documentation. As well, the Landlord advised that the Arbitrator did not make any such orders, as alleged by the Tenant, and confirmed that the Arbitrator only ordered that the Tenant provide a monetary worksheet of itemized cost details.

While the Tenant's position is understandable, she was advised that there were circumstances beyond the control of any party that rendered the original Arbitrator unable to continue this proceeding. Furthermore, she was advised that all the matters would be heard from the start again, and to completion. As such, there was no prejudice to either party and I elected to continue the hearing.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to an Order that the Landlord return her personal property?

- Is the Tenant entitled to a Monetary Order for compensation?
- Is the Landlord entitled to an Order of Possession based on frustration?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on October 20, 2015. Rent was established at $2,000.00 per month and was due on the first of each month. A security deposit was not paid. The tenancy agreement was submitted into evidence corroborating these details.

The Landlord submitted that the tenancy was frustrated as per Section 44(1)(e) of the *Act* due to a fire in the rental unit on June 27, 2018 that was not caused as a result of any negligence by the Landlord. This fire caused substantial damage and rendered the rental unit uninhabitable.

However, the Tenant maintained access to the rental unit after the fire as she would not return the keys and she would not allow the restoration company access to the rental unit. He stated that the restoration company received keys from her on June 29, 2018, they completed their assessment, and then they returned the keys to her that day without making a copy.

The Landlord provided alternate accommodation to the Tenant that started on or around July 9, 2018.

The Tenant advised that she had informed the Landlord that the dryer had been “running hot” but nothing was done to address this issue. She stated that she was doing laundry one day when she opened the dryer and saw that there were flames in the barrel.

As she was unable to put out the fire, she evacuated the rental unit and called the fire department. She advised that there was only smoke damage to the rental unit and that she stayed at a hotel for days after the fire.

She stated that the fire department had been trying to contact the Landlord after the fire without success, but she was advised by the fire department that it was not safe to go into the house after the fire.

She stated that she gave the keys to a restoration company on June 29, 2018, that they made copies of these keys, and that they returned the keys to her. She stated that this restoration company went into the rental unit, contrary to the order of the fire department.

She stayed in a hotel until July 15, 2018 and then she moved into the new apartment that she rented from the Landlord. The Tenant stated that she returned the rental unit keys to the Landlord's assistant during the week of July 22, 2018 because the Landlord told her that the locks would be changed.

As well, she stated that she was advised by the fire department and the police department that she should not go into the rental unit as it was highly unsafe due to people that had taken up residence in the unit.

She submitted that on July 17, 2018, she discovered that the rental unit had been broken into and that her property and vehicles had been stolen. It was her belief that the Landlord should have been responsible for securing the premises after the fire and that the Landlord did not, so squatters ended up inhabiting the property.

It was also her belief that no one was permitted into the rental unit after the fire, as ordered by the fire department and the police department.

The Tenant advised that the RCMP had discovered that there were squatters occupying the home as of August 2018 and they were responsible for causing a second fire on November 18, 2018 which caused substantially more damage to the property. She had been seeking an Order of Possession of the rental unit to be awarded to her, but she is not seeking one now, based on this second fire. She consents to an Order of Possession being awarded to the Landlord as of the date of the second fire.

She stated that she requested permission from the Landlord for access to the rental unit to mitigate her losses, but she had no luck in gaining access as the Landlord advised her that the insurance company had the keys. She stated that the Landlord contacted her in November 2018 to advise her that there was a second fire which destroyed her property. She submitted that if this second fire did not happen, she would have been able to document her property after the first fire.

She advised that she did not have insurance due to the fact that the Landlord served her a notice to end her tenancy in 2017. She stated that her insurance company would not provide her with insurance unless she produced a new copy of a tenancy agreement proving that she had rental accommodation.

The Landlord advised that their insurance company assessed the damage to the rental unit near the end of July 2018 as over $100,000.00 and declared the unit uninhabitable as per a report dated July 30, 2018. As well, there is an email dated July 4, 2018 from the restoration company declaring that the rental unit was not livable.

The cause of the fires is still under investigation by the insurance company and both of them have been deemed to be suspicious. There is evidence that the first fire originated somewhere else in the rental unit other than the dryer and the second fire was determined to have been created by hydrocarbon, likely as a result of drug use from the squatters.

The Landlord is seeking an Order of Possession as the Tenant still maintained possession of the rental unit and did not return the keys until a month after the first fire. As such, no remediation was conducted after the first fire as there was confusion about who was in rightful possession of the rental unit. He advised that they were unaware if the locks were changed or not, but the insurance company used a locksmith to gain access to the rental unit near the end of July 2018 because the Tenant would not grant access or return the keys.

He stated that they never prevented the Tenant from having access to the rental unit and that she could go in there freely. He summarized the Tenant's contradictory submissions as her stating on one hand that the rental unit was livable, thus retaining the keys, but on the other hand stating that the Landlord was denying her access to the rental unit. He reiterated that she had unimpeded access to the rental unit for a month after the fire as she refused to return the keys and he referenced documentary evidence that was submitted supporting this position.

The Landlord could not proceed with remediation through their insurance company as the Tenant maintained she had rightful possession of the rental unit even though she returned the keys. The Landlord made their Application seeking an Order of Possession under Section 56.1 of the *Act* to be determined for June 27, 2018; however, the second fire occurred while they were waiting for a decision to be made on this matter.

In addition, due to the extensive damage by the second fire, the insurance company does not know if the rental unit can be salvaged.

The Landlord spoke with their own insurance company who advised that there would be no reason why the Tenant would have been prevented from obtaining insurance. He stated that the Landlord is not at fault for the Tenant not purchasing the necessary insurance.

The Tenant submitted that she is seeking compensation claims in the amount of **$2,779.98** for lost electronics, **$162.00** for replacement of six birth certificates, **$90.00** for replacement of six government services cards, **$270.00** for replacement of six passports, **$800.00** for replacement of children's toys, **$1,500.00** for the loss of household wares, **$1,200.00** for replacement of clothing and eyewear, and **$5,000.00** for lost furniture.

As she was not able to access the rental unit, she could not provide an itemized list as per the previous Arbitrator's request; however, she did submit a list of items of what she could remember to the best of her knowledge to support these amounts claimed for. She stated that there is no question that she owned these items.

The Tenant submitted that she was also seeking compensation in the amount of **$59,715.00** for replacement of a stolen vehicle; however, she advised during the hearing that she would like to remove this claim from her Application.

The Landlord reiterated that the Tenant had access to the rental unit for a month after the fire and it was her responsibility to safeguard or remove her belongings. However, she did not and consequently did not mitigate her loss. Furthermore, he stated that there was no evidence of loss or receipts provided to account for these items.

Policy Guideline # 16 was referenced with respect to the onus being on the party making the Application to substantiate their loss with compelling evidence. As well, a previous Residential Tenancy Branch decision was submitted to support this position. He advised that the Tenant's claims for loss grossly exceed the actual amount of the items claimed and contradictory documents were provided to refute the amounts the Tenant was seeking. He stated that it would be mere speculation to award damages to the Tenant.

The Tenant stated that she was advised by the restoration company that they would secure the rental unit, but this happened in August 2018 when the windows were

boarded up. However, the break and enter prior to this rendered the rental unit a crime scene.

The Tenant advised that she attempted to communicate with the Landlord about how to proceed regarding her property, but she received no communication from him with respect to any remediation. It is her belief that the Landlord is not intending to restore the property as it was his desire to demolish the property when he served her a notice to end her tenancy in 2017.

The Landlord reiterated that the restoration company did attend the rental unit and secured the property, but it is unfortunate that the robbery occurred.

Finally, the Tenant submitted that she is seeking compensation in the amount of **$889.35** for the cost of impoundment of one of her vehicles up until August 28, 2018. She advised that arrangements were not made with the Landlord for parking at her new rental unit, so she was unable to move her vehicles there.

As well, she stated that she did not move the vehicles prior to the robbery as she did not want to appear to be moving from the rental unit. Due to the robbery, her vehicles were stolen, and one was recovered; however, it was impounded.

She stated that she communicated with the Landlord to arrange to have this vehicle towed to her new rental unit but there was a dispute over the availability of parking there. Furthermore, she was unable to afford to pay for the towing. As a result, she left the vehicle in impound and it was eventually auctioned off to cover the impound fees. She stated that she does not know what happened to the proceeds of the sale of her vehicle other than a portion of it paid for the impound and storage costs.

It is the Landlord's belief that this situation is not related to the tenancy. As well, the Tenant could have negotiated with the Landlord to secure parking at the new rental unit or paid to have the vehicle moved out of impound to mitigate her loss. He also questioned why this is not an insurance issue through ICBC if she owned the vehicle and it was properly insured.

The Tenant confirmed that she is the registered owner of the vehicle and stated that if it was the Landlord's belief that the rental unit was abandoned, the Landlord is required to handle abandonment of personal property in accordance with the *Residential Tenancy Regulations*.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this decision are below.

Section 29 of the *Act* outlines the Landlord's right to enter the rental unit and states that as long as the Landlord provides the proper written notice in accordance with this Section, the Landlord may enter the rental unit despite the Tenant's belief that they are not permitted to.

Section 32 of the *Act* describes the Landlord's obligations and responsibilities with respect to making the necessary repairs to the rental unit to ensure that they provide a premises that meets housing, health, and safety standards.

Section 44(d) of the *Act* states that the tenancy is determined to have ended when the Tenant vacates or abandons the rental unit. In addition, subsection (e) states that the tenancy can also end if the tenancy agreement is frustrated.

Policy Guideline # 34 outlines the doctrine of frustration as "without the fault of either party, a contract [that] 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."

Policy Guideline # 16 outlines that the purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred, and that it is up to the party claiming compensation to provide evidence to establish that compensation is warranted. In essence, to determine whether compensation is due, the following four-part test is applied:

- Did the Landlord fail to comply with the *Act*, regulation or tenancy agreement?
- Did the loss or damage result from this non-compliance?
- Did the Tenant prove the amount of or value of the damage or loss?
- Did the Tenant act reasonably to minimize that damage or loss?

The undisputed evidence before me is that there was a fire on June 27, 2018 and the email dated August 30, 2018 from the fire investigation company determined that the fire originated from within the dryer housing.

However, fault for this fire has not been established. As the location of the fire has been officially determined, but the cause of the fire has not been ascertained, I am not satisfied that the contract meets the definition of frustration. Consequently, I do not find that the tenancy ended at any point due to frustration.

As per Section 32 of the *Act*, the Landlord has an obligation to take the necessary steps to address the first fire. There is consistent evidence that a restoration company was hired immediately to investigate and assess the damage, and the appropriate notice for entry was provided.

However, the undisputed evidence is that the Tenant had the only keys, that she impeded the Landlord's access to have the rental unit assessed by the restoration company, and that she finally returned the keys in the third week of July 2018. She subsequently maintained that she still had possession of the rental unit and advised the Landlord inasmuch by making an Application through the Residential Tenancy Branch and advising the Landlord that entering the rental unit was illegal.

Based on the Tenant's stance, the Landlord was unable to commence remediation and in turn, filed for Dispute Resolution to determine which party had rightful possession of the rental unit. In my view, as the Tenant failed to return the keys until the third week of July 2018, this indicates to me that the Tenant still believed she maintained possession of the rental unit and is further evidence that the tenancy was not frustrated.

Pursuant to Section 44(d) of the *Act*, I am satisfied that the day she returned the keys would be the date that she gave up vacant possession of the rental unit and is the date that the tenancy officially ended.

Furthermore, this would also be the date that the Landlord was required to secure the rental unit and take steps to remediate the damage. While this may potentially substantiate the Tenant's claims for compensation for loss after this date, I find it important to note that a component of the test for establishing a claim for damages is mitigation.

Firstly, as the Tenant maintained possession of the rental unit, I find that she was responsible for what happened in the rental unit up until she returned the keys. Secondly, despite the Tenant's belief, I do not find that there is any direct evidence submitted corroborating that the fire department or the police department ordered that entry into the rental unit be prohibited. Thirdly, when the Tenant returned the keys to give up possession of the rental unit, it is not clear to me why she did not remove her

remaining valuables and property before doing so. I find that these factors directly impact her claims of compensation for loss.

The Tenant also suggested that the Landlord did not manage her personal property in accordance with Section 24 of the *Residential Tenancy Regulations*; however, subsection 2 states that the Landlord cannot consider the rental unit abandoned unless the Landlord "receives 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 reasonably be expected to return to the residential property."

Even though the Tenant returned the keys, there is no evidence before me that the Tenant gave oral or written notice not to return to the rental unit. Moreover, by informing the Landlord that she was applying for dispute resolution to determine the status of the tenancy, I find it reasonable to conclude that it was the Landlord's belief that she could reasonably be expected to return to the residential property. Consequently, I do not find that the abandonment regulations apply in this instance.

The other factor that I find important to note with respect to the Tenant not mitigating her losses is in regards to her lack of tenant's insurance. While she stated that the reason she did not have insurance was due to the fact that her insurance company would not provide her with insurance unless she produced a copy of a tenancy agreement proving that she had rental accommodation, there is no documentary evidence before me substantiating that her insurance company would not provide her with insurance unless a tenancy agreement was produced.

Furthermore, the Tenant alleged that the issue with respect to the Landlord attempting to end her tenancy occurred in 2017. While the Tenant stated that she attempted unsuccessfully to acquire a copy of her tenancy agreement, I am still doubtful that she could not purchase insurance without producing a tenancy agreement.

As such, I find that there was a significant amount of time between this apparent incident and the fire in June 2018 where the Tenant could have mitigated her losses by obtaining the appropriate tenant's insurance to cover her in case of any liability. In reviewing the Tenant's submissions with respect to not being able to purchase insurance, I do not find her submissions to be logical or credible. As such, I give these submissions little weight.

When weighing the totality of the evidence before me, it is apparent that the Tenant made direct efforts to impede the Landlord's ability to access the rental unit and commence restoration. As the Tenant retained the keys for approximately a month after the June 27, 2018 fire, I am satisfied that the Landlord was not negligent for failing to secure the rental unit prior to her returning the keys.

Moreover, as the Tenant did not secure her property during the time she retained the rental unit, as she did not remove her property prior to giving up the keys, and as she did not have the appropriate insurance to cover her in case of such an event, I do not find that the Tenant has met the grounds of the four part test to establish a claim for compensation. I find that the Tenant bears the burden of being responsible for any losses that she suffered and that compensation for those lost items would have been appropriately recoverable through any insurance she may have had.

Ultimately, I am not satisfied when reviewing the evidence before me that the Tenant has sufficiently established her claims for relief under the *Act*. As a result, I dismiss the Tenant's Application in its entirety.

Conclusion

I dismiss the Tenant's Application for Dispute Resolution without leave to reapply.

Furthermore, with respect to the Landlord's Application, I dismiss this without leave to reapply and an Order of Possession is not awarded as the Landlord had possession of the rental unit once the Tenant returned the keys.

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: February 13, 2019

Residential Tenancy Branch