Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Bastion Westpoint Properties Ltd. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL, FFL

Introduction

In this dispute, the landlord seeks compensation for loss of rent under section 67 of the *Residential Tenancy Act* (the "Act"), and recovery of the filing fee under section 72 of the Act, against their former tenants.

On April 14, 2020 the landlord applied for dispute resolution, and a dispute resolution hearing was held on June 1, 2020. The landlord's agent (the "landlord") and both tenants attended the hearing, and they were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The parties did not raise any issues regarding the service of evidence.

I have only considered evidence that was submitted in compliance with the *Rules of Procedure,* to which I was referred, and which was relevant to the issues of this application. Further, only relevant portions of the parties' testimony will appear here.

Issues

1. Is the landlord entitled to $1,947.50 in compensation for unpaid rent?
2. Is the landlord entitled to $100.00 in compensation for the filing fee?

Background and Evidence

By way of background, the tenancy started on September 1, 2018, and monthly rent was $1,900.00, later increased to $1,947.50. Initially, the tenancy was a fixed term tenancy, which became a month-to-month tenancy in September 2019. The tenant paid a security deposit of $950.00, of which $625.00 was retained for cleaning and painting costs at the end of the tenancy. A copy of the written tenancy agreement was submitted into evidence. I note that the tenancy agreement – that is, the contract between the landlord and the tenants – is a standard agreement.

(It is my understanding based on comments by the tenants at the start of the hearing that the tenants disputed the above-noted deduction, but, as I explained to the parties, this hearing would not address that issue. This is an application by the landlord against the tenants for compensation; a disagreement by the tenants with the landlord's deductions for matters unrelated to the rent would be subject to a separate application.)

The two tenants are co-tenants, with one tenant (J.I.) being an undergraduate student in a pharmacy program at university; the rental unit is in a building located within close proximity to that university. The other tenant (I.A.) is J.I.'s father and was essentially the guarantor on the tenancy agreement. He did not reside with his daughter in the rental unit but lives in another province, which is where the family ordinarily resides.

In March of 2020, the pandemic arrived. While the first case of coronavirus was reported in BC on January 28, 2020, the number of new cases rapidly increased after March 14. A provincial state of emergency was declared March 18, 2020.

The tenant testified that, on March 16, the pharmacy faculty notified its students that all courses were moving online, and the faculty was advising students to go home. The tenants testified that, the notification from the faculty, in conjunction with the ever-changing travel and pandemic conditions, necessitated the daughter's return.

On March 18, 2020, the tenant (J.I.) sent an email to the landlord, advising her that they would like to end the tenancy on March 31, 2020 and that she intended to move out on March 23, 2020. A copy of the email was submitted into evidence, which reads as follows (excerpt):

> I hope you are well. Due to the escalating situation with the COVID virus, and with the university encouraging students to return home, I wanted to let you know that I will need to vacate this apartment. As there have been an increasing number [of] travel restrictions, I was worried I would not be able to get back home to my family if things continue to progress as they have been.
>
> I'm planning to return back to Calgary this Monday (March 23rd). I need to leave around 2:30pm at the latest so please let me know if there is sometime in the morning or afternoon I can handover the keys.

On March 19, 2020, the landlord responded to the tenant, and wrote that "you are month-to-month so while you will be responsible for April 1st's rental payment, I will post notice for move-out April 30th." The tenant responds as follows (emphasis in original):

> Thank you for your reply. It is very strange and disappointing to receive a response from you under the current situation demanding the rent for the month of April. Almost all of Canada is in a state of emergency. As you know, universities across Canada (including UBC) have ceased all activities and moved online. In the current situation, it is very risky for me to stick around away from my family. I need to get to [another province] immediately without losing time as there is a risk of airlines cancelling routes (Air Canada has already announced route closures between many routes within Canada). In this time of economic distress and the very serious health risks, it is really unreasonable for you to demand the rent for the month of April. Despite being less than 30 days, it is still a reasonable notice under the **current situation**.

The tenant's father testified that, while the notice to end tenancy was short, and acknowledged an understanding of the usual requirement to give 30 days' notice, March 18, 2020 was when the pandemic really started getting underway. It was "getting really bad," he said, and there was "panic and fear everywhere." International travel restrictions started going into effect, though the tenant admitted that at that point in time, nothing pertaining to interprovincial travel had yet occurred. It was for these reasons that the daughter returned home to Calgary as quickly as possible.

Tenant I.A. further argued that these were "very, very, very unusual circumstances" and that the situation was an emergency necessitating the late notice and termination of the tenancy. The tenant's primary argument was that due to the circumstances of the pandemic that the doctrine of frustration applies in this case. He referred to the policy guideline on the subject and argued that the pandemic and that the situation arising from the pandemic was an event beyond anyone's expectations.

The landlord testified that they took immediate steps to find a new tenant, and started showings right away, and advertising the rental unit online. They were able to find a new tenant for May 1, 2020.

On this specific issue, tenant I.A. commented that "I think that they did not" mitigate their losses and questioned whether the landlord had advertised the rental unit for availability of April 1, 2020. During her rebuttal and final submissions, the landlord testified that "yes, we advertised for April 1," and that they had a showing on March 20, 2020. The tenant did not comment or dispute this response further.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. In this case, it is the landlord that must prove that the tenants breached the Act, which resulted in a loss of rent, and must therefore compensate the landlord.

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria before compensation may be awarded:

1. has the respondent party to a tenancy agreement failed to comply with the Act, regulations, or the tenancy agreement?
2. if yes, did the loss or damage result from the non-compliance?
3. has the applicant proven the amount or value of their damage or loss?
4. has the applicant done whatever is reasonable to minimize the loss?

The above-noted criteria are based on sections 7 and 67 of the Act, which state:

> 7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
>
> (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.
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> . . .
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> 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.

Before turning to an analysis of whether the tenants are liable, however, I must first address the defense of frustration, which the tenants raise.

Doctrine of Frustration

At the outset, it is worth noting that section 92 of the Act states that the "*Frustrated Contract Act* and the doctrine of frustration of contract apply to tenancy agreements." Tenancy agreements are, after all, contracts, subject to the principles of contract law, including frustration.

"Frustration" is defined within *Residential Tenancy Policy Guideline 34* 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.
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> 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 guideline reflects the decision in the Supreme Court of Canada's leading case on frustration, *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001 SCC 58, at para. 58 (and discussed in detail more recently in *Wilkie v. Jeong,* 2017 BCSC 2131) in which the court explained that

> The purpose of the doctrine of frustration is to relieve a contracting party from its bargain by bringing the contract to an end. The doctrine applies "when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'a thing radically different from that which was undertaken by the contract.'"

Broadly stated, there are two elements to the test:

1. a qualifying supervening event (one for which the contract makes no provision, which is not the fault of either party, which was not self-induced, and which was not foreseeable), which

2. caused a radical change in the nature of a fundamental contractual obligation.

The onus is on the relying party to establish both elements of the test.

The tenants argued that the arrival of the pandemic in British Columbia meets both elements. Specifically, they argue that the pandemic was unforeseen and that the escalating restrictions potentially being enacted necessitated her return.

That the pandemic was a qualifying supervening event is undisputed. The landlord did not dispute this aspect of the tenants' argument, the tenancy agreement makes no provision for such an event, the pandemic is not the fault of either party, it was not self-induced, and it was not foreseeable.

On the second element of the test, a fact-specific analysis is essential because it is crucial to make findings concerning the foundation, or fundamental purpose, of the tenancy agreement. This is because frustration arises where the supervening event alters the parties' obligations such that performance of the tenancy agreement would result in something different from that contracted for.

The tenancy agreement was a standard residential tenancy agreement. While it is not the "Residential Tenancy Agreement #RTB-1" form that is usually used by landlords and tenants in the province, the agreement (here called a "Residential Lease Agreement") nevertheless contains the standard terms used in such contracts. It names the landlord, the tenants, the address of the rental unit to be "leased" to the tenants, and the rent to be paid. The introductory clause speaks to the fundamental purpose of the agreement:

> In consideration of the rent reserved and the covenants and agreements herein contained on the part of the Tenant to be paid, observed and performed, the Landlord hereby leases to the Tenant, subject to the present Tenant vacating the Apartment/Townhouse known as [address of rental unit] for the use and occupation as a residential Premises only [. . .]

The tenants' obligations under the agreement are not subject to the tenants' ability to attend university, her ability to travel, or any other subject to requirements.

Based on the terms of the tenancy agreement itself, I conclude that its fundamental purpose was the provision of a rental unit: the landlord was obliged to provide exclusive possession of the rental unit to the tenants and the tenants were obliged to pay the rent. There is no evidence to suggest that when the tenancy agreement was entered into there was any different, or ancillary purpose. The question, then, is whether the effect of the pandemic was of such a nature that performance of the tenancy agreement would result in something radically different from that contracted for.

As a result of the pandemic, the tenants argued that J.I. needed to return home. Health and safety concerns were at the forefront of their minds, and they feared further travel restrictions that might, they speculated, prevent the daughter from returning home. There is no doubt that the situation made for a rather frightening time, and I can empathize with the family's desire for the daughter to return home. However, the heightened concern for health and safety, and the fear of travel restrictions did not make it impossible for the tenants to perform their obligations under the tenancy agreement.

Moreover, at the time of the tenant giving her notice to end tenancy, there were no interprovincial travel restrictions. Yet, even if there were travel restrictions (which there was not), such restrictions are completely unrelated to the fundamental purpose of the agreement. In other words, the pandemic and its effects did not cause a radical change in the nature of a fundamental contractual obligation that put the tenants into a position where they were unable to fulfill the terms of the tenancy agreement.

In the end, the tenants simply chose to end the tenancy because the family did not want the daughter to remain in the rental unit in another city. This choice, based on fear and anxiety over health and travel, while understandable, is not a frustrating event that relieved the tenants from their obligations under the tenancy agreement.

In summary, it is without dispute that the pandemic was not the fault of the parties and was not self-induced. In these circumstances, the pandemic is a qualifying supervening event.

However, the pandemic did not destroy the basis for the tenancy agreement. It did not radically change the nature of the parties' contractual obligations and performance of the contract would not result in something different from that which was undertaken by the parties. To the contrary, the fundamental purpose of the tenancy agreement, namely, the provision of the rental unit in exchange for rent, was entirely unaffected. The supervening event caused stress, fear, and concerns to the tenants because there was a possibility of travel restrictions and health and safety concerns, but it did not

change the nature of their fundamental contractual obligations or undermine the foundation of the tenancy agreement.

For these reasons, I find that the tenancy agreement was not frustrated.

As an aside, I note that the provincial government deliberately, through issuing a ministerial order – *Residential Tenancy (COVID-19) Order,* MO 73/2020 – considered the effects of the pandemic and reasons for ending tenancies. The order prevents landlords from ending tenancies in accordance with the Act, but it does not change, or suspend, the requirements for a tenant to end a tenancy.

Criteria 1: Did the tenants breach the tenancy agreement or the Act?

Having found that the tenants are not entitled to the defense of frustration, I now turn to determining whether the landlord has a case against the tenants for compensation.

In this case, the tenancy was a month-to-month, or periodic, tenancy. Section 45(1) of the Act states the following about a tenant's legal obligations pertaining to notices for end of tenancy:

> A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice, and
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> (b) is 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.

This was a periodic tenancy, and the tenant gave notice on March 18, 2020 to end the tenancy thirteen days later. In other words, notice was given to end the tenancy slightly less than two weeks after the date the landlord received the notice. The tenants did not dispute that they provided notice much less than what is required under the Act. As such, I find that the tenants breached the Act.

Criteria 2: Did the landlord's loss result from the tenants' breach of the Act?

Having found that the tenants breached the Act, I must next determine whether the landlord's loss resulted from that breach. This is known as *cause-in-fact,* and which focusses on the factual issue of the sufficiency of the connection between the

respondents' wrongful act and the applicant's loss. It is this connection that justifies the imposition of responsibility on the tenants.

The conventional test to determine cause-in-fact is the *but for* test: would the applicant's loss or damage have occurred *but for* the respondent's negligence or breach? If the answer is "no," the respondent's breach of the Act is a cause-in-fact of the loss or damage. If the answer is "yes," indicating that the loss or damage would have occurred whether or not the respondent breached the Act, their breach is not a cause-in-fact.

In this case, the landlord would not have suffered the loss of rent for April 2020 but for the tenants' breach of section 45(1) of the Act. The loss of rent cannot be attributed to any other factor. Thus, I find that the landlord has proven that their loss resulted from the tenants' breach of the Act.

Criteria 3: Has the landlord proven the amount of the loss?

The monthly rent was $1,947.50, and that is the amount of the landlord's loss. Neither party disputes this amount.

Criteria 4: Did the landlord do whatever was reasonable to minimize the loss?

While the tenants argued that "I think that they did not," take steps to minimize their loss, they did ask the landlord "did [you] advertise for April 1?". The landlord responded that they did, and that they advertised immediately and that they also went through their waitlist. They further said that they had a showing on March 20, two days after the tenants gave their notice, which strongly suggests that the landlord did, in fact, advertise the rental unit's April 1st availability.

Based on this evidence, and the tenant's acceptance of the landlord's testimony in response to his question, I find that the landlord did whatever was reasonable to minimize its loss.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has met the onus of proving their claim for compensation for loss of rent in the amount of $1,947.50.

Claim for Filing Fee

Section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee.

As the landlord was successful, I grant their claim for reimbursement of the filing fee for $100.00, for a total award of $2,047.50.

Conclusion

The landlord's application is granted.

I grant the landlord a monetary order in the amount of $2,047.50, which may be served on the tenants. Should the tenants fail to pay the landlord the amount owed, the landlord must serve a copy of the order on the tenants and file the order in the Provincial Court of British Columbia (Small Claims Court) for enforcement and collection.

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: June 4, 2020

Residential Tenancy Branch