



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes RPP

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for an Order for the landlord to return the tenants' personal property, pursuant to section 65.

Tenant P.A. and the landlord attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties agree that the landlord was served with the tenants' application for dispute resolution via registered mail. I find that the landlord was served with the tenants' application in accordance with section 89 of the *Act*.

Preliminary Issue- Evidence

The landlord testified that she has not received any evidence for this application for dispute resolution. Tenant P.A. testified that tenant K.M. said she served the landlord with the tenants' evidence. No proof of service documents were entered into evidence.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that 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.

I find that the tenants have not proved that the landlord was served with their evidence. I therefore do not admit the tenants' evidence for consideration.

The landlord testified that she served the tenants with her evidence via registered mail. Tenant P.A. testified that he received the landlord's evidence two days ago but had time to review and respond to it.

Section 3.15 of the Residential Tenancy Branch Rules of Procedure (the "*Rules*") states that the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

In determining whether the delay of a party serving her evidence package on the other party qualifies as unreasonable delay I must determine if the acceptance of the evidence would unreasonably prejudice a party or result in a breach of the principles of natural justice and the right to a fair hearing. The principals of natural justice regarding the submission of evidence are based on two factors:

1. a party has the right to be informed of the case against them; and
2. a party has the right to reply to the claims being made against them.

In this case, tenant P.A. testified that he had time to review and respond to the evidence contained in the landlord's evidence package. I find that the tenants were informed of the case against them and were able to review and respond to the evidence provided by the landlord. I accept the landlord's evidence package into evidence and find that the tenants were served with the landlord's evidence package in accordance with section 88 of the *Act*.

Issue to be Decided

1. Are the tenants entitled to an Order for the landlord to return the tenant's personal property, pursuant to section 65 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenants' and landlord's claims and my findings are set out below.

Both parties agreed to the following facts:

- This fixed term tenancy began on June 14, 2019 and was originally set to end on December 31, 2019.
- The parties agreed that if the tenancy was going well, the tenants could sign a new tenancy agreement starting January 1, 2020.
- The first tenancy agreement was intended as a probationary period and that a new tenancy agreement would not be signed if the tenancy did not go well.
- A new tenancy agreement was not signed.
- Monthly rent in the amount of \$1,250.00 was payable on the first day of each month.
- A security deposit of \$625.00 was paid by the tenants to the landlord.

Tenant P.A. testified that he and tenant K.C. visited family in a different city at the end of December 2019 and that they were unable to come back to the city the subject rental property was in for January 1, 2020 because of bad weather. Tenant P.A. testified that sometime in the beginning of January 2020 he and tenant K.C. contacted the landlord via phone and text message to inform her that they were unable to immediately return due to bad weather and that they had decided to move back in with family as they could not afford rent.

Tenant P.A. testified that the landlord made a verbal agreement to allow the tenants to retrieve their belongings from the subject rental property on January 21, 2020. Tenant P.A. testified that the next day the landlord sent a text to them saying that they abandoned their personal possessions and that the landlord was charging them \$40.00 per day for storage. Tenant P.A. testified that the landlord refused to allow the tenants to pick up their possessions on January 21, 2020.

The landlord testified that she posted a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") on the tenants' door on January 2, 2020 because the tenants did not pay January 2020's rent. The 10 Day Notice was not entered into evidence. A proof of service document was not entered into evidence. Tenant P.A. did not dispute that January 2020's rent was not paid.

Tenant P.A. testified that he did not receive the 10 Day Notice as he was not at the subject rental property in January 2020. Tenant P.A. testified that tenant K.C.'s sister attended at the subject rental property on January 6-7, 2020 to pack, but she was denied entry by the landlord. Tenant P.A. testified that there wasn't a 10 Day Notice on the door when the sister attended.

The landlord testified that on or around January 8, 2020 the tenants messaged her to say that they were no longer living at the subject rental property. The landlord testified that “the place was ours after they said they were not coming back”. In support of this testimony the landlord identified the following text message entered into evidence:

- Tenants: We are still in [city name]... waiting for the snow to ease up and get money to get back to [city name]. Will let you know as soon as I do.
- Tenants: Hey [landlord] we are no longer going to be staying there. We have moved to Cranbrook and staying with my mom for free until we figure things out...if you can let us know if we can get our stuff on the 20th that would be greatly appreciated.
- Landlord: Kind of figured that. U will be here on the 20th then? Are u coming to grab everything like big stiff too? Or will u just be coming to take this and that?
- Tenant: Everything we are leaving [city name] on the 20th and we will be on the first ferry on the 21st...if there is anything anybody needs can you ask around and see because we have lots of stuff
- Landlord:
 - Ok like what then?
 - Like couch dressers [illegible] kitchen stuff
 - [illegible] bringing a truck I'm assuming
- Tenant: Pallister bedroom set, wooden end tables, glass coffee table tv stand, DVD stand, baby clothes, bar stools, 2 strollers, some jackets, shoes, Christmas tree lol and yes if [tenant P.A.] can he'll have a truck we need to downsize to a small storage:(

The landlord testified that after receiving the above text message she entered the subject rental property, gave away the items requested by the tenants and packed up the tenants' belongings and put them in storage.

The landlord testified that she considered the tenants possessions as abandoned. The landlord testified that she allowed the tenants to pick up their items on January 21, 2020 but they did not show up. The landlord testified that she also allowed the tenants to pick up their items on February 6, 2020 but they did not show up. Tenant P.A. refutes the above testimony.

The landlord did not refute tenant P.A.'s testimony that the landlord would not release the tenants' personal possessions without the tenants paying the \$40.00 per day storage fee.

Analysis

Based on the testimony of both parties, I find that the parties entered into a fixed term tenancy agreement from June 14, 2019 to December 31, 2019. Pursuant to section 44(3) of the *Act*, the fixed term tenancy agreement reverted to a month to month tenancy agreement at the end of the fixed term.

I find that the landlord has not proved, on a balance of probabilities, that a 10 Day Notice was served on the tenants as no prove of service documents were entered into evidence and the tenants testified that they did not receive it. I find that the tenancy did not end by way of a 10 Day Notice.

I find that on or around January 8, 2020 the tenants provided the landlord with their notice to end the tenancy via text message. While text it not a method of service approved under section 88 of the *Act*, I find that the landlord was sufficiently served with the tenants' notice to end tenancy, for the purposes of this *Act*, pursuant to section 71 of this *Act*, as the landlord confirmed receipt.

Section 45 of the *Act* states:

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

I find that the earliest date the notice to end tenancy could have been effective was February 29, 2020. I find that the tenant's notice to end tenancy did not give the landlord authorization to immediately enter the subject rental property and pack up the tenants' personal possessions.

After reviewing the landlord's evidence and the testimony of both parties, I find, on a balance of probabilities, that the landlord refused to release the tenants' person property unless the tenants paid her an abandonment storage fee of \$40.00 per day.

Section 24 of the *Act Regulation* (the "*Regulation*") states:

- 24** (1)A landlord may consider that a tenant has abandoned personal property if
- (a)the tenant leaves the personal property on residential property that he or she has vacated after the tenancy agreement has ended, or
 - (b)subject to subsection (2), the tenant leaves the personal property on residential property
 - (i)that, for a continuous period of one month, the tenant has not ordinarily occupied and for which he or she has not paid rent, or
 - (ii)from which the tenant has removed substantially all of his or her personal property.
- (2)The landlord is entitled to consider the circumstances described in paragraph (1) (b) as abandonment only if
- (a)the landlord receives an express oral or written notice of the tenant's intention not to return to the residential property, or
 - (b)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.
- (3)If personal property is abandoned as described in subsections (1) and (2), the landlord may remove the personal property from the residential property, and on removal must deal with it in accordance with this Part.
- (4)Subsection (3) does not apply if a landlord and tenant have made an express agreement to the contrary respecting the storage of personal property.

I find that the landlord was not permitted under section 24(1)(a) of the *Regulation* to consider the tenants' personal property as abandoned in January of 2020 because the tenancy had not ended at that point in time. As found above, the earliest the tenants could have ended the tenancy was February 29, 2020.

I find that pursuant to sections 24(2)(a) and 24(2)(b) of the *Regulation*, the landlord could not have considered the tenants' personal property abandoned because the

landlord did not receive an express oral or written notice of the tenants' intention not to return to the residential property. In fact, the tenants made it clear that they intended on returning on January 21, 2020 to pick up their personal possessions. Therefore, the landlord was not permitted to move the tenants' personal property to storage.

Section 65 of the *Act* states:

65 (1) Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if the director finds that a landlord or tenant has not complied with the *Act*, the regulations or a tenancy agreement, the director may make any of the following orders:

(e) that personal property seized or received by a landlord contrary to this *Act* or a tenancy agreement must be returned;

I find that the landlord improperly seized the tenants' personal property, contrary to this *Act* and *Regulation*. I find that the landlord is not entitled to storage fees for the landlord's improper seizure of the tenants' personal property. I find that the tenants are entitled to the return of their personal property.

Conclusion

Pursuant to section 65 of the *Act*, I Order the landlord to return the tenants' personal property to them.

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: September 28, 2020

Residential Tenancy Branch