Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VEDA 800 KELOWNA STUDENT HOUSING LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, MNDCT

Introduction

The tenant is foreign student suffering the circumstances imposed on foreigners and students as a result of the current Covid pandemic. He signed a one year lease to start September, 1, 2020 but his courses at the local university are no longer being held in person. He seeks the ending of this tenancy and applies for a monetary award for return of a $500.00 security deposit and a $2200.00 “guarantee fund.”

Both parties attended the hearing by their representatives and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Has this tenancy come to an end as a result of circumstances created by the Covid pandemic? Is the tenant entitle to the return of his security deposit or the “guarantee fund?”

Background and Evidence

The rental unit is a bachelor apartment in a 188 unit building. It is not on university grounds nor is the university connected with its ownership or operation.

In January 2020 the tenant signed a tenancy agreement whereunder he agreed to rent the unit for three years commencing September 1, 2020 at a monthly rent of $1100.00. The agreement provides the tenant may cancel the agreement each year by giving approximately eight months’ notice.

The tenant lives on another continent. The courses he planned to take at the university have all been cancelled and converted to online courses. Thus, he has no need to be present in the community surrounding the university. He seeks to end the tenancy on that basis.

It is agreed that the tenant paid a $2200.00 “guarantee fund” at the start of the tenancy. As an alternative he could have provided an acceptable person to guarantee payment of rent.

The tenancy agreement does not describe the guarantee fund, however an email from the landlord states,

> “IF YOU DO NOT HAVE A GUARANTOR: there is the Guarantor Fund option. The Guarantor Fund is where you pay 2 months’ of rent up front, within the 5 days that your lease package is due. This rent covers your last 2 months of rent (July and August). If you pay the Guarantor Fund, you do not need a Guarantor to sign for you.

Ms. CW states that this rental accommodation is designed for students but the landlord also rents suites in the building to non-students.

It is apparent that the parties have been attempted to resolve the matter since August but no settlement has been reached. There was discussion at this hearing in an attempt to resolve the dispute but it was not successful.

Analysis

Ending the Tenancy

The essence of the tenant’s claim is that the tenancy has been “frustrated” and that the agreement is thereby ended. The landlord has contemplated that argument and submitted material regarding “frustration.”

The landlord’s representatives point out that the tenancy agreement does not contain a “force majeure” clause but I don’t think the tenant’s position is a claim of force majeure, which refers to an external event materially affecting the ability of one party to perform their contractual obligations. In this case the tenant can certainly perform his obligations under the tenancy agreement despite the pandemic and so can the landlord.

Residential Tenancy Policy Guideline 34, “Frustration” deals with the equitable doctrine of frustration. It provides:

> 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 doctrine was more fully described by Coady, J., in *McDonald Aviation Company* v. *Airlines Limited*, 1950 CanLII 215 (BC SC), a case involving the lease of an airplane destroyed in a crash during the lease period.

> The first matter for consideration, therefore, is the contract itself. The basis for the application of the doctrine is set out by Blackburn J. in Taylor v. Caldwell (1863), 3 B. & S. 826 at pp. 833-4, 122 E.R. 309, where the learned Judge said: "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified, thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

> And at p. 839: "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."
>
> In the case of Joseph Constantine SS. Line Ltd. v. Imperial Smelting Corp. Ltd., The "Kingswood", [1941] 2 All. E.R. 165 at p. 171 Viscount Simon L.C. reviews the authorities relating to this doctrine and in conclusion says :
> "Every case in this branch of the law can be stated as turning on the question of whether, from the express terms of the particular contract, a further term should be implied which, when its conditions are fulfilled, puts an end to the contract.
> "If the matter is regarded in this way, the question, therefore, is as to the construction of a contract, taking into consideration its express and implied terms."
>
> In the same case Lord Russell of Killowen at p. 180 says : "My Lords, as a general rule, impossibility of performance does not release from liability the person who has promised the performance. An exception, however, exists in the case of contracts the performance of which is necessarily dependent on the continued existence, or the continued existence in a sound condition, of a person or thing. In the case of such a contract, the cesser of that existence may release the promisor from liability on the ground of what has been termed frustration of the contract."

In normal circumstances the plight of the tenant, caused by the pandemic, would not allow him to withdraw from the agreement he has made. The need for his attendance in Canada or the availability of in-person classes is not material to his duty under the tenancy agreement. However, in this case the landlord is not what might be seen as a normal landlord of residential property. It is in the business of providing “student housing.”

The landlord’s representatives objected to this characterization, but the words “student housing” are in the landlord’s corporate name, which I consider to be virtually conclusive of the question.

I think it is fair to imply that the tenant secured this accommodation because he was required (or at least expected) to attend classes in person as has been the custom or practice at universities for a very long time. The landlord was providing this student

housing on the same unarticulated basis; students attending university from elsewhere were required to physically attend classes and so would need accommodation nearby. The physical attendance of a student at the university was an unspoken foundation of the tenancy agreement.

The Covid pandemic has resulted in the disappearance of the need for physical attendance at this university, an implied term of this tenancy and could give rise to the doctrine of frustration.

However, as stated in Fridman, *The Law of Contract* (3d ed.) 639-640:

> It is also necessary to differentiate a disruption that is permanent, *vis a vis* the contract (albeit that it may not be permanent in other respects) and one that is temporary or transient. The latter might add to the difficulties of performance. It might make performance less desirable, economically valuable, or more expensive to undertake. But it will not constitute frustration.

In this case, it has not been shown the disruption is permanent *vis a vis* the life of the tenancy agreement; that the Covid pandemic will prevent the university from conducting its classes in person for the entire three year life of this tenancy. The tenant cannot therefore summon the doctrine of frustration to end this tenancy.

His application in that regard is dismissed.

Return of Deposit Money and Guarantee Fund

The landlord holds a $500.00 payment from the tenant that is clearly noted in the tenancy agreement to be a security deposit. A landlord is generally not required to account for the deposit money until the end of tenancy (see s. 47 of the *Residential Tenancy Act* (the "*RTA*")).

As the tenancy is continuing, the tenant is not entitled to have the security deposit money back at this time.

The $2200.00 "guarantee fund" is a different matter. The *RTA* defines a security deposit as:

> "security deposit" means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any

> liability or obligation of the tenant respecting the residential property, but does not include any of the following:
> (a) post-dated cheques for rent;
> (b) a pet damage deposit;
> (c) a fee prescribed under section 97 (2) (k) [regulations in relation to fees];

The “guarantee fund” is money being held as security for the payment of the last two months rent according to the landlord’s email. It is a security deposit whether it bears that name or not.

Section 19 of the *RTA* limits a security deposit to half a month’s rent and provides that at tenant may recover any amount greater. In this case the maximum deposit permitted by law would be $550.00; one half the monthly rent.

I find the tenant is entitled to recover the total deposit money of $2700.00, less the maximum permitted deposit amount of $550.00, leaving a remainder of $2150.00. He will have a monetary order against the landlord in that amount, which he may offset against rent as it comes due.

Conclusion

The tenant is entitled to recover $2150.00 of overpaid security deposit money. The claim to end the tenancy is dismissed.

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: November 05, 2020

Residential Tenancy Branch