



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

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DECISION

Dispute Codes: MNRL-S FFL

Introduction

A dispute resolution hearing was convened under section 61 of the *Residential Tenancy Act*, SBC 2002, c. 78 (the “Act”) on April 22 and September 2, 2022, in respect of an application for dispute resolution made by the applicant landlord.

Pursuant to sections 26 and 67 of the *Residential Tenancy Act* (the “Act”), the landlord seeks compensation against their former tenant for \$32,500.00 in unpaid rent. In addition, the landlord seeks to recover \$100.00 for the application filing fee.

A dispute resolution proceeding was first convened on April 22, 2022. The proceeding was adjourned to September 2, 2022. An Interim Decision was issued after the first proceeding. Attending the second dispute resolution proceeding on September 2 was the landlord, his agent (and interpreter), the tenant, and the tenant’s legal advocate.

The parties were reminded that their affirmations, made at the first dispute resolution proceeding, would continue into the second proceeding.

Issue

Is the landlord entitled to compensation?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure*, was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the issue of this dispute, and to explain the decision, is reproduced below.

The tenancy began on July 1, 2019 and ended on August 31, 2021. Monthly rent was, as indicated on the written Residential Tenancy Agreement, \$1,300.00. Rent was due on the first day of the month. The tenant paid a \$650.00 security deposit (which is being held in trust by the landlord pending the resolution of this dispute).

Rent, however, was only paid once (on the first month of the tenancy) throughout the entire 25-month-long tenancy. The landlord seeks \$32,500.00 in compensation from the tenant for unpaid rent. The tenant, however, argues that the legal principle of promissory estoppel bars the landlord from pursuing this claim.

The landlord provided the following, additional, testimony:

- The landlord had an agent, “Maggie,” take care of the rental unit and the management of the tenancy; the first month’s rent was paid to Maggie. It appears that the landlord was residing in China for much of the tenancy.
- Maggie then left the employ of the landlord shortly thereafter; “she was only there at the beginning [of the tenancy]” the landlord testified.
- The landlord then waited for the tenant to contact him; the landlord apparently did not have any contact information for the tenant, though the landlord believed that Maggie had asked the tenant for his contact information.
- The landlord subsequently asked someone to approach the tenant, but they were unable to reach the tenant.

Under cross-examination from the advocate, the landlord gave the following testimony:

- The landlord has no idea who this Jack person is; the tenant or their advocate had submitted that there was an individual by the name of Jack who appeared to either reside on the property or at least attend to the property on a semi-regular basis; the tenant’s position is that Jack was either the landlord or someone who purportedly represented the landlord.
- The landlord reiterated that he never had the tenant’s contact information and that the tenant never contacted the landlord; the tenant “avoided” contact with the landlord, he explained.
- On one occasion, the landlord “tried approaching [the tenant] but he ran away.”
- The landlord testified that the property has “always” been occupied, and that he never needed anyone on the property (such as the tenant) in order to claim exemption from the vacant occupancy tax (which is an argument posited by the tenant as to why the landlord never pursued payment of rent).
- The landlord confirmed that the first month’s rent was e-transferred from the tenant to Maggie; however, the landlord had “no idea” of the email used, and they never received any e-transfers. The landlord later testified that he was unable to access his banking information online when he was in China.

Under direct examination, the tenant provided the following testimony:

- When the tenant moved into the rental unit at the beginning of the tenancy the entire property was vacant.
- The tenant paid the first month's rent to Maggie by way of email by e-transfer.
- The tenant made three subsequent attempts to pay rent (by e-transfer), but all three e-transfers expired after 30 days.
- The landlord never reached out or attempted to contact the tenant.
- After close to a year, when the tenancy was due to expire or renew, the tenant testified that the "homeowner" asked the tenant to renew the tenancy.
- During the tenancy, the tenant occasionally texted with the "landlord," who was another person residing or occasionally residing in the main house; this other person, as noted above, was "Jack," and who the tenant believed at the time to be the landlord's son.
- The only other person the tenant observed around the property was the maid.
- After a few months of not being in contact with anyone, and with the non-accepted rent, the tenant believed that the landlord (or whomever owned the "luxury property", as described by the tenant) "just wanted someone there [...] to be a presence."
- It was the tenant's theory that because the property appeared to be mostly empty, that the owners wanted someone on the property so that they would not have to pay the vacancy tax (that is, the City of Vancouver, By-Law No. 11674, *Vacancy Tax*); hence, the tenant believed that no effort was made to collect rent – and ultimately why he did not pay any rent – because the landlord or owner simply needed a person to occupy the property.
- The tenant later testified that there was no kitchen in the rental unit, that the nearest bust stop "was a mile away," and that he never would have continued to stay in the rental unit had he been required to start paying rent.
- Because the tenant was not paying rent, he kept quiet during the tenancy, did not have any friends over, and "never bothered the landlord with anything."
- The tenant reiterated during redirect examination that "Jack" is the landlord's son, and is the person who offered the second, renewed tenancy agreement to the tenant; the landlord reiterated that he does not know who Jack is and has no idea who this person is.

The tenant's closing submissions may be summarized as follows:

- The property was valued \$24,956,000 in 2022. (According to BC Assessment the property is valued at \$26,684,000.)

- Had no one lived on the property then the landlord would have had to pay approximately \$800,000 and \$700,000 as per the 3% vacancy tax (see page 54 of tenant's evidence).
- For the first three months the tenant paid directly to real estate agent.
- On all occasions money was returned (other than to agent).
- There was no communication between tenant and landlord's agent, except for renewal of tenancy agreement.
- No *10 Day Notice to End Tenancy for Unpaid Rent* was ever issued, and no communication at all regarding rent occurred during the tenancy.
- On June 2, 2021, the tenant received a text message from "Jack" (who the tenant thought was acting on the landlord's behalf) to renew tenancy; Jack lived on property and was only person tenant had communication with during his stay.
- The tenant did not request a renewal, rather, Jack offered to renew the tenancy.
- In the text message, the landlord's agent (that is, Jack) said yes, we'd be happy to continue leasing, but there is no rush for now.
- The landlord disputed the existence of Jack, and that the second lease was fake. The tenant submits that this is absurd: he had multiple interactions with Jack.
- The lease that is "fake" was submitted into evidence by the landlord, not the tenant (see page 12 and 26 of tenant's evidence). Signatures are almost identical, and it would make no sense for landlord to enter into evidence that they argue is fake. The more reasonable interpretation is that the landlord is trying to change their story, due to possible implications of estoppel.
- The landlord claims that did not seek payment because they did not know how to serve the tenant properly. Regardless of whether this is absurd, the landlord was aware that rent was not being paid, and aware of this when it was time to renew the tenancy agreement. (Renewal was not totally necessary, as it would have simply continued as a periodic tenancy.)
- The advocate argued that promissory estoppel applies. The landlord could have just let tenancy continue but took steps to renew it. The tenant did rely on rep of no rent being owed.
- The tenant continued to take care of landlord's property, security issues, alarms, and take steps above and beyond what an ordinary tenant would do.
- Regardless of promissory estoppel for the second term of the tenancy, the landlord should also forgo first three months of rent because the tenant did pay that rent. Something is paid is when something has been received. What they chose to do with it is up to them, and no effect on whether it has been paid. In this case the e-transfer declining is analogous to sending cash and landlord chose to return the mail. Tenant has still paid the rent, it was argued.

The landlord's final submissions were provided as follows:

- The tenant has claimed that nobody lived there. But there was in fact lots going on. Interactions and communications with Jack, therefore, the property was fully occupied. The tenant has given contradictory testimony, and therefore it is hard to tell what is true and what is made up.
- Why did the tenant not take the initiative to contact the landlord? Contact information is specifically written in the tenancy agreement. Instead, the tenant tried to talk to Jack.
- The landlord had a housekeeper in the property. There is a security system. The landlord had trusted the licensed agent to take care of business. The landlord was in China and unable to access online banking. It was only when he was finally back in Canada that he found out about the tenant not paying rent. He trusted the tenant to make rent payments. The landlord told the tenant, and the tenant agreed to pay one-time payment. However, the next day the tenant wrapped up all his things in a black plastic bag and ran away.
- Regarding the individual named Jack, he is the resident in the property. The tenant presumably believed that Jack is the owner. But the tenant never reached out for verification.
- The vacancy home tax has nothing to do with this case, the landlord argued. "We have Jack. We have a housekeeper," he added.
- Re the first three months of rent, the first month was paid and accepted by the landlord's then-employed agent. However, the second- and third months' transfers were not returned. Rather, they expired. The landlord was unable to accept payment because he could not access online banking whilst in China. He assumed that rent would be accepted into his account, however.
- It is both atypical and abnormal for a tenant who finds rent returned for that tenant to then believe that they are exempt from paying rent.
- The tenant himself after three months could have at least tried to contact the landlord using contact information. But the tenant never once tried.

The tenant's advocate responded, following the landlord's final submissions (irrelevant submissions omitted):

1. To clarify who was living there, the tenant testified under oath that he lived there alone, and Jack (who ordinarily lived in New York) only occasionally returned.
2. The housekeeper did not live on property. She drove to the property.

Analysis

Section 26 of the Act states that a tenant “must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.”

The tenancy agreement stated that rent was \$1,300.00, due on the first day of the month. The tenant paid the first month’s rent to the landlord’s agent. It was paid by e-transfer and was accepted. However, agent Maggie, for reasons that are not entirely clear, left the picture. Maggie did not attend the hearing.

The tenant sent payment to the one email address given by Maggie on July 1, and two further payments to the email given for the landlord on August 1 and September 1.

On the two occasions when rent was e-transfer to the landlord the money was returned after being unclaimed for more than 30 days. After this, the tenant ceased the attempts to make payments. Further, there was no communication between the landlord or his agents and the tenant until near the end of the fixed term, and the landlord never raised the issue of any outstanding rent until at the end. The tenancy ended in August 2021.

The tenant argues that promissory estoppel should bar the claim. Estoppel occurs when one party to a legal claim is stopped from taking legal action that is inconsistent with that party’s previous words, claims, or conduct. Estoppel is a legal doctrine which holds that one party may be prevented from strictly enforcing a legal right to the detriment of the other party, if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and has acted accordingly. In order to return to a strict enforcement of their right, the first party must give the second party notice (in writing) that they are changing their conduct and are going to strictly enforce the right previously waived or not enforced. (See *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47.)

In this case, the landlord failed to, or did not make any effort to, over a period of 24 months and 20 days (beginning on August 1, 2019, when the second rent payment attempt was made and ending on August 20, 2021 when the landlord finally asked for the rent) accept or collect rent. It was not until the landlord finally mentioned rent in a text message of August 20, 2021—more than two years after the tenancy had begun—that any effort was made to collect rent. It was only at that point that the landlord asked for \$32,500.00 in back rent.

It is my finding that the landlord's two-plus years' of not making any effort to collect rent, including the few e-transfer payments which expired due to inaction on the landlord's part, was akin to silence and implied consent for the tenant not to pay rent. The landlord's silence further provided implied consent for the tenant to reside in the property. Further, while the tenant was required under the Act to pay rent, the landlord made absolutely no effort to communicate with the tenant about where rent was to be sent. It was therefore reasonable for the tenant to infer from the landlord's conduct that the landlord was waiving his right to collect rent.

Despite the landlord's position that the tenant ought to have made efforts to contact or communicate with the landlord about rent, the tenant was in fact provided with a means to pay rent at the start of the tenancy. That the landlord did not take steps to accept rent—or take steps to hire someone to replace Maggie—cannot be a fault that lay with the tenant.

The landlord did not appear to know who a person by the name of "Jack" was; though they later said he was some sort of resident in the main house. I find this perplexing. The landlord appeared to have a maid or housekeeper attend to the house. In viewing the evidence in its entirety, it appears that the landlord simply did not give much attention to his multi-million-dollar property, and that he either forgot that he had a tenant or simply did not care. While the landlord may not have had access to his online banking while in China, the landlord did not appear to take any meaningful action to determine whether the tenant was paying rent. He simply let the situation lapse.

Turning briefly to the two payments that were made by e-transfer, but which expired, it is my finding that the tenant paid the rent. That the landlord did not accept the e-transfer (either due to his inability to approve acceptance, or by negligence) does not alter the fact that the tenant sent rent payments to the landlord. I would agree with the tenant's advocate's argument that it would be akin to mailing cash to the landlord, only for the mail to be returned. A landlord who does not accept rent in a manner previously permitted cannot then fault a tenant for somehow not paying or expect the tenant to make payment when the means for doing so do not exist.

For the reasons set out above it is my finding that the landlord is, on the basis of promissory estoppel, estopped from making a claim for compensation for unpaid rent. As such, the landlord's application, including a claim to recover the cost of the filing fee, is dismissed in its entirety without leave to reapply.

Conclusion

The application is hereby dismissed, without leave to reapply.

The landlord is ordered to return the entire amount of the security deposit to the tenant within 15 days of receiving a copy of this decision.

This decision is final, binding, and is made on delegated authority under section 9.1(1) of the Act. A party's right to review or appeal this decision is limited to grounds provided under section 79 of the Act or by way of an application for judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

Dated: September 7, 2022

Residential Tenancy Branch