Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Whistler Property Services (Agent)
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, OPB, OPR, MNDC, MNSD, FF

Introduction

These two hearings dealt with an application by the Landlord for an order of possession based on unpaid rent or breach of an agreement with the Landlord, for monetary orders for unpaid rent, for losses arising from the Tenant allegedly breaking a fixed term lease early, to retain the security deposit in partial satisfaction of the claim, and to recover the filing fee for the Application.

At the first hearing in this matter, the two Agents for the Landlord appeared and agreed to an adjournment of this matter at the written request of the Tenant. The Tenant had to travel to another country for a family matter and had requested this adjournment in writing to the branch and to the Applicant. The hearing was adjourned and rescheduled, and the parties received an Interim Decision explaining the adjournment. The Tenant acknowledged receipt of the Interim Decision in the hearing on May 14, 2013.

Both parties appeared at the second scheduled hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant facts and issues in this decision.

Preliminary Issue

At the time of the hearing of this matter, the Tenant had vacated the rental unit. Therefore, an order of possession is no longer required and that portion of the Landlord's Application is dismissed.

Issues(s) to be Decided

Did the Tenant breach the term lease, entitling the Landlord to monetary compensation?

If the Landlord is entitled to compensation what amount should be awarded?

Background and Evidence

On August 31, 2012, the parties signed a standard form tenancy agreement, for a fixed term of one year, to run from September 1, 2012 to August 31, 2013; the monthly rent was $4,000.00 payable on the first day of the month; and the Tenant paid a security deposit of $2,000.00 and a pet damage deposit of $2,000.00 (the "Tenancy Agreement").

There was a two page addendum attached to the Tenancy Agreement, which contained 14 different terms and conditions, such as a clause prohibiting smoking in the rental unit (the "Addendum").

There are two clauses in the Addendum relevant to the issues in dispute.

Clause 13 of the Addendum contains a list of more than 20 items that the Landlord agreed to leave at the rental unit for the use of the Tenant, such as a washer and dryer, and patio furniture. One of these items is identified as, "Gym system downstairs", which was a stationary exercise machine, comprised of pulleys and weights to be moved during various exercise routines (the "Gym").

Paragraph 14 of the Addendum is a liquidated damages clause, requiring the Tenant to pay $2,000.00 if the Tenant ends the fixed term agreement before the end of the original term.

On or about February 12, 2013, the Tenant sent the Landlord's Agents a written notice that she was ending the tenancy. The Agent for the Landlord testified that the Tenant did not pay the rent due for February 2013.

The main point of contention of the Tenant is her allegation that the Gym the Landlord provided did not function and she argues the Gym was a material term of the Tenancy Agreement. The Tenant testified and submitted in her written arguments that she would not have entered into the Tenancy Agreement without the Gym working correctly.

The Landlord now claims for losses that arose from the Tenant breaching the fixed term Tenancy Agreement.

The Agent for the Landlord testified that the Gym was functioning correctly at the time of the incoming condition inspection report. The Agent testified that sometime after the start of the tenancy a wheel and a bolt went missing from the Gym. He testified that the Tenant could still have performed many different exercises using the Gym. He testified that 20 of the 21 potential exercises could be performed without these missing parts.

The Agent for the Landlord alleged that the Tenant wanted to end the tenancy as she simply could not afford the rent.

The Agent for the Landlord testified that the rental unit has been re-rented for August 1, 2013. The Landlord is claiming for loss of rent for February to July 2013, in the amount of $24,000.00, liquidated damages of $2,000.00 and the filing fee. The Landlord has abandoned any amount over the $25,000.00 limit imposed by the legislation.

The Tenant submitted in evidence emails she had sent to the Agent for the Landlord prior to the Tenancy Agreement being entered into, during the tenancy and following her ending the tenancy.

The Tenant wrote to the Agent on July 30, 2012, following what appears to be the initial viewing of the rental unit. The Tenant explains she is moving from another country and in one paragraph of this email, the Tenant writes,

> "We would be very interested in any non personal item, furniture, gym equipment, to be left. We are most happy for any of it. As advised we have a King size mattress already so that is great." [Reproduced as written.]

The Tenant also advises in this email that she is a qualified real estate agent in Australia with commercial and residential experience.

In a July 31, 2012, email to the Agent, the Tenant writes and requests that the lease shows the, "... fridge, washer and dryer, gym set, couches upstairs, dining table and chairs, desks and everything that is non personal items left in the house." [Reproduced as written.]

The Agent for the Landlord explained in a subsequent email that these articles, "... will be itemized on an inventory sheet with the move-in condition report." [Reproduced as written.]

The parties agreed during the hearing that the Landlord was vacating the property and leaving certain items behind for the Tenant to use, and that some items were being sold off by the Landlord.

The Tenant alleged that the Gym did not work correctly from the beginning of the tenancy. The Tenant did not put her complaint in writing to the Landlord until January 10, 2013, in an email sent to the Agent for the Landlord. I note that one of the Agents for the Landlord acknowledged that the Tenant had complained about the Gym not working earlier than January of 2013, and explained the Tenant had called her on the phone about the Gym not working. The Agents were of the opinion that there were no local repairs available for the Gym.

In the written complaint of January 10, 2013, the Tenant states that the Gym and some other items, "... were relied upon for us to make a offer to lease the property at the rate of $4000pm that it was agreed in the lease." [Reproduced as written.]

The Tenant continues in the letter to describe other perceived shortcomings with the rental unit and alleges these have been complained about for five months. The Tenant then requests a rent reduction for the time already spent in the rental unit and that the lease rent amount be reduced to $800.00 per week. The Tenant concludes the email by stating, "As expressed to you we are happy to continue live here, but feel this matter needs to be addressed. We require to get an answer about this within 7 days." [Reproduced as written.]

On January 14, 2013, the Agent for the Landlord replied that the Landlord was not willing to renegotiate the lease. The Agent suggests that if the financial burden of the rental unit is too much for the Tenant, she is able to sublet the rental unit to an approved renter. The Tenant replied in a later email that she had no idea where the Agent got the idea that she was suffering financially. The Tenant also testified during the hearing that financial difficulties had nothing to do with her ending the fixed term lease early.

On February 2, 2013, the Tenant wrote the Agent for the Landlord and alleged the Landlord had breached section 27 of the Act by terminating or restricting a service or facility, and alleged this entitled the Tenant to end the Tenancy Agreement. The Tenant copied a portion of the Act containing section 27 into the letter. The Tenant informed the Landlord she would return the keys on or before February 28, 2013.

The Agent for the Landlord testified that he had some difficulty arranging for a meeting to do the final condition inspection report. He testified that this was because the Tenant had told him that she was leaving on a flight to Poland and it was difficult for her to meet

the Agent at the desired time. In evidence the Agent submitted an email from the Tenant providing a forwarding address for her mail to be forwarded to Poland. The Agent was adamant throughout the hearing that the Tenant informed him she was moving to Poland.

During the course of the hearing I asked the Tenant if she had not been moving to Poland if she would have stayed in the rental unit. The Tenant replied that she never moved to Poland, and was in fact still living in the same locality where the rental unit was located. The Tenant explained she gave the Agent for the Landlord the forwarding address in Poland and talked about a flight to Poland because she did not trust the Agent for the Landlord, and did not want him to know she was still living in the area.

The Tenant testified that she did not seek out or use another gym facility. The Tenant also testified that she did not attempt to sub-lease the rental unit because in her opinion the Landlord was not able to withdraw services or facilities, and this gave her the ability to terminate the fixed term lease.

The Tenant submitted an email dated February 15, 2013, in which she advises that 24 hours after her notice of ending the tenancy had been given to the Agent, that the Landlord had not yet begun to advertise the rental unit. The Tenant argues that the Landlord did not begin to advertise the rental unit for six weeks after her notice.

The Agent for the Landlord submitted in evidence copies of the advertising for the rental unit, following the February 2, letter from the Tenant. There are copies of ads placed on the Internet website Craigslist on February 15, 2013, the Agent's website on February 15, 2013, and in the local newspaper on March 7, 2013.

The Agent for the Landlord testified that the rental unit has been re-rented for August 1, 2013, on a two year lease. The Agent testified that this offer was accepted toward the end of March 2013, and the Agents ceased advertising the rental unit around the beginning of April 2013.

Analysis

Based on the above, the evidence and testimony, and on a balance of probabilities, I find that the Tenant breached the Tenancy Agreement and the Act by ending the fixed term tenancy without authority to do so, and by failing to pay rent when due.

In British Columbia a tenancy may only end if done so in accordance with the Act.

Under section 45(3) of the Act the Tenant could not end the tenancy earlier than the fixed term date of August 31, 2013, unless there was some authority under the Act for her to do so, such as an order from an Arbitrator. For example, the Tenant could have made an Application requesting an end to the tenancy based on the Tenant's allegation the Landlord was in breach of a material term of the tenancy agreement. In that instance the Tenant would have had to prove the supply of a Gym was a material term of the contract.

Instead, the Tenant unilaterally ended the tenancy, incorrectly citing section 27 of the Act as her grounds to do so.

In fact, section 27(1) of the Act has nothing to do with ending a tenancy. This portion of the Act prohibits the Landlord from terminating or restricting a facility if these are, "… essential to the tenant's use of the rental unit as living accommodation", or if, "…providing the service or facility was a material term of the tenancy agreement."

In this instance I do not find that the Gym was essential to the Tenant's use of the rental unit. The Tenant was able to live in other portions of the rental unit and the Agent for the Landlord testified that in any event, the Gym would perform most of its expected functions. Furthermore, the Tenant testified that she did not seek alternate exercise facilities. This leads me to conclude the Tenant had insufficient evidence to prove use of the Gym was essential to her living in the rental unit.

I also do not find the supply of a Gym was a material term of the Tenancy Agreement. The Tenant has attempted to characterise the Gym as a material term to justify ending the tenancy. However, based on the written exchanges between the parties prior to the Tenancy Agreement being signed, it is clear the Gym was being supplied along with a list of many other items. At no time during this exchange do the parties agree that supply of a Gym would be so important to the Tenancy Agreement that failure to supply the Gym would cause the Tenancy Agreement to come to an end. Likewise, at no time prior to signing the lease does the Tenant write that lack of the Gym would cause her not to enter into the Tenancy Agreement.

I also find there was a certain lack of credibility with the Tenant's evidence. I found several of her responses to be evasive or equivocal during the hearing. I also found the Tenant's admission of falsely telling the Agent she was moving to Poland and providing a Polish address for the forwarding of her mail as an example an attempt to evade the Agent or the Landlord.

Even if I were to find the supply of the Gym was a material term (which I do not), the Tenant was required under the Act, and as explained in policy guideline #8, to give the Landlord the following information in writing, prior to ending the tenancy:

1. that there is a problem with the rental unit;
2. that the Tenant believes the problem is a breach of a material term of the tenancy agreement;
3. that the problem must be fixed by a deadline included in the letter, and that the deadline provided be reasonable; and
4. that if the problem is not fixed by the deadline, the Tenant will end the tenancy.

In this instance the Tenant wrote to the Landlord and expressed that she thought the Gym and the other items complained of were material or fundamental terms of the Tenancy Agreement, although what she sought from the Landlord was a reduction in rent. There is no warning to the Landlord that failure to address her concerns would cause the Tenant to end the tenancy. In fact, the Tenant expressed she was happy to continue to live in the rental unit, but wanted her concerns addressed via a rent reduction.

I note that rather than incorrectly using section 27 to terminate the tenancy, the Tenant should have used this section of the Act for the purpose it was intended. The Tenant should have made an Application under section 27(2) to compel the Landlord to reduce the rent in, "… an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility."

The Tenant would have been required to prove the reduction in value of the tenancy due to the loss of the Gym, although that *likely* would have been difficult given she did not use alternate facilities, and therefore, lacked evidence of a loss.

I also find that the Tenant breached section 26 of the Act, by failing to pay rent for February of 2013. Under this section of the Act, the Tenant was not allowed to withhold rent, even if the Landlord was in breach of the Tenancy Agreement. Instead, the Tenant informed the Landlord in an email that they could keep the security and pet deposits for February rent, so long as they waived any right to claim further rent from the Tenant for ending the Tenancy Agreement. The evidence also indicates the Agent had served the Tenant with a 10 day Notice to End Tenancy for non-payment of the February rent, although this was after the Tenant had already breached the fixed term Tenancy Agreement.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], 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.

I have found the Tenant breached the Act by failing to pay rent and by ending a fixed term tenancy without authority to do so, and I find the Landlord is entitled to compensation, pursuant to sections 67 and 7 of the Act.

Section 7 of the Act requires a non-complying party to compensate the other for damage or loss that results from the non-compliance. However, section 7 also contains a mitigation component, which required the Landlord to, "… do whatever is reasonable to minimize the damage or loss", that the Tenant must compensate the Landlord for.

In this instance, I find the Landlord began to mitigate the loss, as required by the Act, by advertising the rental unit quickly after the Tenant's breach. The Landlord continued to advertise the rental unit and market it until the end of March or early April of 2013, at which time they agreed to a new lease to begin in August of 2013, with a new renter. However, once the August 2013 agreement was in place the Landlord ceased offering the rental unit.

I find the Landlord should not have stopped attempting to re-rent the unit for the period between April and August of 2013, or that they acted too quickly in accepting the August renter. The locality where the rental unit is located often has short term rentals, and the Landlord has provided no evidence that seasonal or other factors prevented them for having a renter occupy earlier than August, or for a portion of those four months.

This leads me to find the Landlord has proven they are entitled to unpaid rent for February 2013, and to a loss of rent for March 2013, due to the Tenant's breach, in the total amount of $8,000.00.

I also find the Landlord is entitled to the liquidated damages of $2,000.00 as set out in the Tenancy Agreement. I find that the liquidated damages were not a penalty. The amount is in keeping with the greatest loss that could occur, particularly in a rental unit charging out at $4,000.00 per month.

Furthermore, I find that the Tenant shall pay the $100.00 application fee for the filing of this claim.

Therefore, I find that the Landlord has established a total monetary claim of **$10,100.00**, comprised of $8,000.00 for unpaid rent for February and loss of rent for March, $2,000.00 for liquidated damages as found in the Tenancy Agreement, and for the $100.00 fee paid by the Landlord for this application.

Pursuant to section 72 of the Act, I allow the Landlord to retain the security and pet deposits totaling **$4,000.00** in partial satisfaction of the claim, and I grant the Landlord an order under section 67 for the balance due of **$6,100.00.** This order must be served on the Tenant and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court

Conclusion

The Tenant breached the Act and Tenancy Agreement, by failing to pay rent when due, and by ending a fixed term tenancy without authority to do so. The Landlord is entitled to compensation in the amount of two months' rent, liquidated damages and the filing fee for the Application. The Landlord may keep the deposits in partial satisfaction of the award, and is granted and issued an order for the balance due from the Tenant.

This decision is final and binding on the parties, except as otherwise provided under the Act, and 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: May 30, 2013

Residential Tenancy Branch