Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

The landlord applies to recover rent due under a fixed term tenancy agreement repudiated by the tenants before the end of its term. She also seeks to recover costs alleged to be related to finding replacement tenants and for some minor cleaning and light bulb replacement.

The tenants argue that the rental unit was infested with vermin and the landlord would not take the necessary steps to abate the problem thus entitling them to end the tenancy early.

Issue(s) to be Decided

Does the relevant evidence presented at hearing show, on a balance of probabilities, that the tenants were entitled to repudiate the tenancy agreement? If not, to what compensation is the landlord entitled? In any event, is the landlord entitled to the cleaning and light bulb costs it claims?

Background and Evidence

The rental unit is an older, single level building, formerly a family store. It was a store of the type where the front of the building contained the store and the rear contained the owner's living quarters. It has been converted into a three bedroom house.

This tenancy started in April 2012 for a fixed term ending March 31, 2014. The monthly rent was $2350.00. The landlord holds a $1100.00 security deposit and a $1100.00 pet damage deposit.

It appears uncontested that between about October 2012 and January 2013, the tenants experienced a vermin problem; rats for the most part, gaining entry to the house. The landlord attended to the issue by retaining a pest control company, CPC. CPC set up an eradication program of baiting and traps. The tenants themselves filled

many entry holes with steel wool and expandable foam recommended by CPC. The tenant Mr. D. testified that it took a couple of months and then one emergency visit but the "infestation" was resolved.

Unfortunately, a few months later the problem arose again. The landlord was informed and she again retained CPC. It started a program of trapping and poisoning (outside the house). It conducted weekly visits to assess the infestation. Its reports or some of the visits were filed and referred to at hearing by both the landlord and the tenants.

According to the tenants, the problem was worse this time. The rats were more frequent and in larger numbers. They could be heard in the walls at night. The tenants actually saw the rats in the house as opposed to merely seeing evidence of the rats having been there. Cleaning up rat feces and bleaching fouled areas became a daily chore for Mr. B., who was pregnant at the time. She estimated she was spending an hour a day cleaning during the months of July, August and September. She says her doctor and her midwife "ordered" her to move. It is not clear whether the "orders" were due to health concerns or stress concerns, though she tendered a letter from the midwife averring to health risks arising from rodent feces in the home.

The tenants provided photographs attempting to show rat feces in various places in the home. The rats would eat food left out, including fruit and dog food and were digging in a potted plant. The tenants produced a photo of Ms. B.'s make-up case showing it to have been chewed, allegedly by a rat. Mr. D. described it as a "rampant infestation."

The parties negotiated a rent reduction of $300.00 for each of July and August in order to compensate the tenants for the daily cleaning work they were doing.

At the end of August the tenants notified the landlord by email dated August 29th that they were leaving September 30th. According to the email:

> We are in the 3rd month (this time around – we also dealt with this, you will recall, back in Jan/Feb of last year) of dealing with rodents and it has become an unsafe living environment.
>
> Nothing has been done to deal with ~~construction~~ repair of this structure and there are numerous points of entry for the rodents. Apparently, according to CARE Pest, there is no foundation to this house and this allows rats and mice to gain entry basically through almost anywhere. There is proof of years worth of pest activity in this house and there is no end in site [*sic*].
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> We are still cleaning up rodent feces on a daily basis, throughout the whole house. Which is unsafe for me to deal with and I have to everyday. From feces on the kitchen counter, to hiding all our food, to bleaching the floors and vacuuming twice daily. We find feces on pillows, and in

> our 6 year olds [*sic*] room. We get to go to sleep every night hearing them scratch in the walls. This is unacceptable to live with.
>
> We have gone thru [*sic*] two vacuums, numerous bottles of bleach, not to mention time and effort.
>
> This is just too dangerous and stressful to live in for anyone, especially someone who is pregnant. According to the Vancouver coastal health authority rats and mice carry numerous diseases which can cause one to miscarry. This is not a chance we can take, as I miscarried already this year.

The tenant Mr. D. testified that CPC's eradication efforts were seriously hampered by the fact that the house did not have a foundation. He says, and the documentation from CPC appears to confirm, that it was CPC's view that to properly deal with the ongoing infestation problems the building needed to be "screened" off at ground level to prevent rodents from getting under and then into the house. It appears that the old building did not have a significant foundation, nothing like a conventional concrete wall on a concrete footing, and thus vermin could gain access much easier. Mr. D. testified that he requested "many times" that the landlord attend to this "outside sealing."

CPC had given the landlord a quote for the screening work, an amount of about $1200.00. Given that the landlord was spending hundred dollars on CPC's monitoring program, the expense might have seemed within reason. However, for CPC to do the screening it would have been necessary for the landlord to prepare the site; to excavate around the house and to remove a very large deck attached to the home. The landlord's agent Mr. Q. indicated that the total cost would be thousands of dollars and not economically feasible for the landlord. As well, he says it was tough to find contractors to go to this location and do the preparatory work. He felt that the CPC eradication program would ultimately take care of the problem. He claims that after October 2013 there has been no further report of rodents in the house.

In response to the tenants' August 29th notice, Mr. Q. issued to the tenants a breach letter dated September 5th, informing them their move out notice was a breach of the fixed term tenancy and that they would be held responsible for the cost of finding a new tenant and if the premises were not rented they would be responsible for unpaid rent..

Nevertheless, the tenants moved. Mr. D. testified that they did not have a place to move to when they gave their notice. At the end of September they moved to a temporary accommodation in a trailer park.

The landlord proceeded to try to find new tenants. According to the landlord's agents, the premises are close to a beach and are difficult to rent other than in the summer

time. After continuous effort, a new tenant was found for December 15th at a reduced rent of $2150.00. The landlord claims unpaid rent for October to mid-December. She does not claim compensation for having to rent at a lower rent than the tenants were paying.

Mr. Q., who is an employee management company that manages the property, provided a list of his efforts and expenses in locating new tenants.

Analysis

The landlord's agent Mr. O'H.asserts that the tenants or at least Ms. B. were embellishing their recollection of how bad the rodent problem really was. Obviously that is a significant concern for a trier of fact in a dispute of this nature.

After reviewing the material presented at this hearing I conclude that it is unlikely that either tenant was embellishing on the serious infestation each describes. Indeed, the landlord reduced rent by $300.00 for each of July and August to take into account the cleaning the tenants were doing because of that infestation. Telling is Mr. O'H's email of August 9 to CPC wherein he reports having attended the premises and finding rodent activity in variety of locations and pointing out a number of entry point concerns. He notes that the exterminator who was last there "expressed a general concern of all the access openings I the floor and walls in that area (base of door frame) and around the house." He noted "a lot of evidence of activity on a child's car seat" sitting on a change table in the home. "Evidence of activity" means rodent feces, and, in the case of the car seat, a dead rat under it.

The landlord 's agents note that the landlord "did not create the problem." They submit that in all the circumstances the landlord acted prudently over the summer of 2013 and the tenants did not have cause to break the lease. They argue that the midwife testimony about rodents and related health issues is not a medical opinion and has little weight. They argue that the tenants were familiar with the seaside neighbourhood and should have known there would be vermin issues.

I have considered each of these objections and have determined that none of them are an answer to the tenants' complaint.

The landlord did not create the problem and it would appear that the landlord was acting prudently by retaining CPC and paying for a fairly intense eradication program. However, the issue is not whether the landlord was negligent or in breach of some duty she owed to the tenants or that she failed to take reasonable care.

The issue is whether or not the landlord was in breach of her contractual obligation to provide reasonably habitable premises. Section 32(1) of the *Residential Tenancy Act* (the "*Act*") provides:

> **32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
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> (a) complies with the health, safety and housing standards required by law, and
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> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Indeed, the obligation goes beyond a contractual one. It is a statutory obligation (see *Ganitano* v. *Metro Vancouver Housing Corporation,* 2014 BCCA 10). The obligation to provide a habitable rental unit goes to the very root of the agreement between a landlord and tenant. A party to a contract may act reasonably and prudently and still find herself in breach of a term of it.

I agree with the landlord's agents that the midwife testimony is not expert testimony about the health risks of a rodent infestation and I give it the appropriate weight. Similarly I discount the landlord's agents' suggestion about what people living in that area, near water, should know about mice and rats.

The tenants have not shown that the state of the premises violated any health, safety or housing standards required by law. Though not stated by them in so many words, the tenants' essential argument is that the premises were not suitable for occupancy because of the infestation.

In order to justify the termination of a tenancy, the breach by one party must be a fundamental breach, nowadays referred to as the breach of a "material term" of the tenancy agreement, that is, a term so essential to the bargain that, had the parties contemplated it at the time the bargain was made, they would have agreed that a breach of it would justify ending the agreement.

Residential Tenancy Policy Guideline 8: "Unconscionable and Material Terms" provides, in part:

> **Material Terms**
> A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.
> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement,

> as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.
> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
> • that there is a problem; • that they believe the problem is a breach of a material term of the tenancy
> agreement;
> • that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
> • that if the problem is not fixed by the deadline, the party will end the tenancy.
> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I find that during the months of July and August 2013 the tenants were facing what appeared to be a major but temporary inconvenience as the result of a rodent infestation. The landlord was attending to the problem and the tenants' loss could be and was satisfied by an adjustment of rent for the two months of inconvenience. I find that by the end of August the infestation was not abating and, with the landlord's decision not to attend to the recommended screening work, there was no certainty or, indeed, any reasonable outlook that it would abate. I find that the premises, suffering a continuing infestation at the level described by the tenants, corroborated by the CPC reports and by the landlord' s agent's own correspondence, with no reasonable end in site, were unsuitable for occupation, whether as a result of health concerns, stress concerns or the continuing need to daily clean and disinfect the living area.

For these reasons I find that the landlord was in breach of a material term, the obligation to provide premises reasonably suitable for occupation, and that the tenants were entitled at common law to end the tenancy.

That is not the end of the matter however. Though at common law a tenant might simply consider the tenancy to be an end in such circumstances, the *Act* imposes a written warning requirement, alluded to in the Policy Guideline extract, above. Section 45(3) provides:

> (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the

> situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Unfortunately, the subsection is not as clear as perhaps it could be. In particular, must the "written notice of the failure" that the tenant gives to the landlord state that the "failure" is a failure to "comply with a material term of the tenancy agreement…?" Must a tenant use that precise legal terminology? Must the tenant somehow reach the legal conclusion that a "material term" of the tenancy has been breached?

I find it unlikely that the legislators intended to impose such a high standard, require the invocation of such a particular legal incantation, on a tenant in a law that is designed to be consumer protection legislation. Rather, I consider the essential purpose of the section to be to give a landlord fair warning of a major problem.

Section 45(3) and Policy Guideline 8, above, may be open to the interpretation that a tenant must use that particular language but I find it more reasonable to interpret them to mean that a tenant must notify his or her landlord that there is problem and that the tenant considers the problem significant enough to be "tenancy-ender." For example, a written warning in the vein "if you don't fix this I'm leaving" would suffice to comply with s. 45(3) and the Policy Guideline.

In this case, the tenants gave exactly that sort of warning with their email of July 31, 2013, addressed to Mr. O'H. In that email the tenant Ms. B stated:

> Things are very much not settling down. It's getting worse.
>
> I've sent you photos from today, Take in mind that I clean the house every single day. So this is 1 days worth of mess.
>
> They have found themselves in all rooms in the house now.
>
> Please come and inspect the property. Come now, before I clean it all up once again. Better yet come in the morning when you can find rat shit on your kitchen counter. Come in the morning to wake your daughter up to find chewed up paper and rat shit in her side of the bedroom door. Come after being at work for 8 hours to find rat shit on your pillow. Come and check the traps every day for dead rodents.
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> So I don't care what the residency tenancy act [*sic*] has to say, you will not be receiving a rent check [*sic*] until this is taken care of, and cleaned up after.

In my view, the tenant's statement that because of the infestation she didn't consider herself obliged to pay rent, was sufficient warning that the landlord was in fundamental

breach of the tenancy agreement and satisfied the requirements of s.45(3) of the *Act* and Policy Guideline 8.

For these reasons I find the tenants were entitled to end the tenancy agreement and the landlord's claims for unpaid rent and loss or loss of rental income and for recovery of expenses incurred in finding a replacement tenant all must be dismissed.

The landlord also claims for the replacement of light bulbs and removal of food and compost containers. The landlord' agents did not address these claims directly in their evidence. However, Mr. Q. adduced and swore to the contents of a "Mitigation Actions and Costs" document which indicates he spent half an hour attending to removal of the two containers left by the tenants. At hearing the tenants did not respond to that evidence. On Mr. Q.'s uncontradicted evidence I award the landlord $12.50, as claimed, for this minor clean up work after the tenants vacated.

Conclusion

The landlord's claim is dismissed but for an award of $12.50 for clean up work. I decline to award recovery of any filing fee. I authorize the landlord to retain the amount of $12.50 from the security deposit she holds. The tenants are entitled to recover the remainder of the security deposit and pet damage deposit. There will be a monetary order against the landlord for the $2187.50 remainder.

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: January 20, 2014

Residential Tenancy Branch