# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MNRL MNDL FFL

Introduction

The landlord seeks $2,250.00 in unpaid rent, $1,398.75 in compensation for "Damage repair, clean and junk removal fee plus strata move out fee $150 unpaid," and recovery of the $100.00 application filing fee, pursuant to sections 26, 67, and 72(1), respectively, of the *Residential Tenancy Act* (the "Act"). The landlord also seeks to apply the tenant's security deposit against any monetary award, pursuant to section 38(4) of the Act.

A hearing was held on November 7, 2022 and in attendance were two agents for the landlord (hereafter the "landlord" or "landlords" for brevity), the tenant, and the tenant's partner (and witness). The parties were affirmed and there were no service issues.

Issue

Is the landlord entitled to the amount sought?

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 issues of this dispute, and to explain the decision, is reproduced below.

The tenancy began on August 1, 2021 and ended on August 24, 2022. Monthly rent was $2,250.00 and this was due on the first day of the month. The tenant paid a $1,125.00 security deposit which the landlord currently holds in trust. A copy of a written tenancy agreement was in evidence.

The landlord testified that they seek compensation for a cleaning fee because the rental unit was not left in a clean condition at the end the tenancy, and there were damages to the wall. They also seek a move out fee that the strata charges in the amount of $150.00. Last, they seek $2,250.00 in unpaid rent for August 2022.

The landlord testified that they did not receive any sort of notice to end the tenancy from the tenant but did receive an email from her in mid-August saying that they would be surrendering the keys and were moving elsewhere.

The tenant testified that on July 6, 2022, the tenant and her partner were returning home from a maternity appointment (the tenant was seven months pregnant at this time), when they discovered that their building access fobs would not allow them to access the building or the parking garage. The tenant sent emails to the landlord and called them, letting them know that they could not access the building. They were effectively locked out of the building and had to call the on-site building manager to let them in.

The fobs—which had been deactivated by the building's strata manager Mr. Poon—allow a tenant to access the building into the lobby, access the parking garage, access a fitness gym, and, to allow one to use the elevator. There were a separate set of brass keys for the rental unit itself which was located on the 30th floor.

Between July 6 and July 8 there was no resolution to the fob issue, and the tenant spent the weekend holed up in the rental unit. By Monday, July 11, the landlords' agents did not check in with the tenant or provide any sort of follow up to the fob problem. Eventually, the tenant emailed the landlord advising them that they were looking for somewhere else to live. The tenant considers this email to be her notice to end the tenancy.

It was not until August 4 that the landlord sent a 10 Day Notice to End Tenancy for Unpaid Rent to the tenants. By then, the tenant was for all intents and purposes moved out, albeit the move out was stressful, given that she had no working fob. A number of items were left behind after they difficult move out. The tenant further testified that the landlord did not provide her with two opportunities to attend the move out inspection. By August 18 the keys to the rental unit had been returned to the landlord by registered mail.

According to the landlord and the tenant, the fobs were under the control of the strata manager. He had sole control over the fobs and whether they would allow access to the building and so forth. Despite attempts by the tenant and her partner to engage Mr. Poon in a discussion or resolution of the fob fiasco, Mr. Poon refused to engage. He instead reacted with "a lot of attitude" and rage, and indicated that because the tenant was not a property owner that he, on behalf of strata, did not need to speak with them.

Analysis

*Claim for Unpaid Rent*

A tenancy may only and ordinarily come to end in a manner consistent with one or more of the subsections listed in section 44(1) of the Act.

At the outset, I do not consider the tenant's email of July 11, 2022, in which she states, "Please accept this as a notice that we will be moving out as soon as a new unit become available" to be a valid notice under sections 44(1) or 45 of the Act. There is, *inter alia,* no stated effective date of the notice on which the tenancy would end, which is required under section 52 of the Act.

However, it is neither the tenant's actions nor the landlord's actions (or inaction) which brought this tenancy to a rapid and unexpected end. Rather, it was due to the actions of a third party—Mr. Poon and the strata—which ended the tenancy through frustration.

At the outset, it is worth noting that section 92 of the Act states that the "*Frustrated Contract Act* and the doctrine of frustration of contract apply to tenancy agreements." Tenancy agreements are, after all, contracts, subject to the principles of contract law, including frustration.

"Frustration" is defined within *Residential Tenancy Policy Guideline 34* as follows:

> 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.
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> 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 guideline reflects the decision in the Supreme Court of Canada's leading case on frustration, *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001 SCC 58, at para. 58 (and discussed more recently in *Wilkie v. Jeong,* 2017 BCSC 2131) in which the court explained that

> The purpose of the doctrine of frustration is to relieve a contracting party from its bargain by bringing the contract to an end. The doctrine applies "when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'a thing radically different from that which was undertaken by the contract.'"

Broadly stated, there are two elements to the test:

1. a qualifying supervening event (one for which the contract makes no provision, which is not the fault of either party, which was not self-induced, and which was not foreseeable), which

2. caused a radical change in the nature of a fundamental contractual obligation.

In this rather bizarre case, the qualifying supervening event was the strata manager's decision to deactivate the tenant's fob. The tenancy agreement makes no provision for such an event, the strata manager's decision was not the fault of either the tenant or the landlord, the strata manager's decision was made for reasons known only to himself, and the shutting off of the fobs was certainly not foreseeable. For these reasons, it is my finding that the qualifying supervening event elements of the test of frustration is met.

Second, the strata manager's decision to shut off the tenant's fobs caused, in my opinion, a radical change in the nature of a fundamental contractual obligation. Indeed, the landlord was not able to provide the tenant with access to the building in which she was paying rent on a rental unit. This lack of exclusive possession (a right under section 28(c) of the Act) was not a one-time occurrence but was never resolved.

In the end, the tenant was effectively forced to vacate the rental unit because the strata manager prevented their access to the building in which the rental unit was located. It is the strata manager's decision which is, I find, a frustrating event that relieved the tenant from her obligation to remain in the rental unit and continue with the tenancy.

I therefore consider July 31, 2022, the last date on which she had paid rent for a rental unit she could barely access, to be the last date of the tenancy.

Accordingly, based on my finding that the doctrine of frustration applies to this tenancy, the tenant is not liable for rent for August. That aspect of the landlord's claim for compensation is therefore dismissed without leave to reapply.

*Claim for Compensation for Cleaning and Repairs*

The landlord seeks $1,248.75 in compensation for cleaning fees and repair costs.

Section 7 of the Act states that if a landlord or tenant does not comply with the Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Further, a party claiming compensation must do whatever is reasonable to minimize their loss. Section 67 of the Act permits an arbitrator to determine the amount of, and order a party to pay, compensation to another party if damage or loss results from a party not complying with the Act, the regulations, or a tenancy agreement.

Section 37(2)(a) of the Act requires that a tenant "leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear" when they vacate.

However, as is the case with the claim for unpaid rent, it is my finding that the doctrine of frustration relieves the tenant from having to be held liable for a breach of section 37(2)(a) of the Act. From the evidence before me, accessing the building proved near-impossible except when the tenant could get the building manager to escort them up to their rental unit. I am not persuaded that the tenant was ever provided with a reasonable opportunity to clean the rental unit or to make any repairs.

Certainly, if the tenant had been provided with proper access through a working fob, then I would expect efforts to have been made. In this case, it is not surprising that the tenant's move out was less-than-satisfactory to either party.

For this reason, I do not find that the tenant breached the Act from which the landlord may claim any compensation. Accordingly, this aspect of the landlord's claim is dismissed without leave to reapply.

*Claim for Strata Moving Fee*

To be frank, I find it rather absurd that a strata corporation should seek to levy a $150.00 move-out fee for a forced move out that was both caused and perpetuated by the actions of its manager. While I appreciate that the landlord and his agents are simply making this claim on behalf of the property owner, the evidence does not persuade me to find that the tenant ought to be liable to pay a move-out fee resulting from a third party's frustration of the tenancy agreement.

In any event, I find no supporting documentary evidence submitted by the landlord which establishes a $150.00 fee to be charged, and I find no breach of the Act, the regulations, or the tenancy agreement for that matter by which any compensation may flow. Thus, this aspect of the application is dismissed, without leave to reapply.

*Claim for Application Filing Fee*

I am not satisfied that the landlord is entitled to recover any of the cost of this application and accordingly this aspect of the application is dismissed without leave.

*Order for Return of Tenant's Security Deposit*

Pursuant to sections 38 and 67 of the Act, the landlord is ordered to return the tenant's security deposit in the amount of $1,125.0 within 15 days of receiving a copy of this Decision. A monetary Order in this amount is granted to the tenant.

Conclusion

**The application is hereby dismissed, without leave to reapply.**

This decision is made on delegated authority under section 9.1(1) of the Act.

Dated: November 8, 2022

Residential Tenancy Branch