



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

OPF

FF

Introduction

This Dispute Resolution hearing was convened to deal with the landlord's application seeking an order to end the tenancy early for frustration under section 56.1 of the Act without notice to the tenant.

Both the landlord and the tenant appeared and each gave testimony in turn.

Issue(s) to be Decided

The landlord is seeking an Order of Possession based on section 56.1 of the *Residential Tenancy Act*, (the *Act*), which permits the landlord to end a tenancy without notice to a tenant in certain restricted and compelling circumstances. In making a determination on this matter, the following issue must be to be decided based on the testimony and the evidence presented during the proceedings:

- Has the landlord established that the criteria contained in section 56.1 has been met by proving:
 - (i) the rental unit is uninhabitable, or;
 - (ii) the tenancy agreement is otherwise frustrated.

Background and Evidence

Submitted into evidence by the landlord was a written statement explaining the reasons for the landlord's request to end the tenancy early without notice, copies of correspondence between the parties, copies of correspondence involving the

insurance company and contractors, documents relating to finding new accommodation for the tenants, An asbestos analysis report and repair estimates. Late evidence received from the landlord included an information package from Worksafe B.C. discussing removing and handling asbestos in demolition or renovation.

The landlord testified that the tenant had been living in the rental unit for approximately 7 years. On October 14, 2009 a motor vehicle crashed into the building causing substantial damage to part of the home and the heating system. The landlord testified that the damaged area was sealed off and that the tenant was permitted to return to live in the unit with space heaters provided as a temporary measure. The landlord testified that it was clear that the tenant's would need to move as soon as the renovations were underway. However, in the course of assessing the damage the presence of asbestos was discovered. The landlord referred to the documentary evidence from (XCompany) dated October 30, 2009, which contained an analysis of asbestos which was found in one of the two samples taken. The report indicated that the vermiculite contained 2% and that none was detected in the drywall/mud. According to the landlord the "plaster in this house contained asbestos" as stated in the letter from (Ycontractor) dated December 10, 2009.

The landlord's position was that the accident had disturbed the asbestos with the likelihood that it has become airborne and the landlord was adamant that the disturbed asbestos currently poses a serious hazard to the occupants at the present time.

In addition, the landlord feels that the continued use of space heaters also presents a high risk but the heating system cannot be repaired because of the asbestos issue. The landlord testified that, in fact, no renovation work of any kind can progress until the asbestos has been removed and Worksafe BC will not permit any people to reside in a building while asbestos abatement is underway. Therefore, no repairs can be contemplated to restore the heat. The landlord testified that the presence of asbestos and the lack of heat renders the rental unit unfit for habitation. The landlord stated that the tenancy has been frustrated both

because the building is uninhabitable and also because the tenancy agreement is otherwise frustrated by the fact that performance of the tenancy agreement became impossible. This situation, according to the landlord justifies a finding of frustration and an immediate Order of Possession in favour of the landlord.

The tenant disputed the landlord's position that there was asbestos in the plaster and argued that the asbestos was not found in the plaster as incorrectly indicated by (YContractor). The tenant pointed out that the asbestos report from (XCompany) dated October 28, 2009 indicated that of the two samples, asbestos was only found in the vermiculite insulation which was taken from another area of the house and that no asbestos was found in the plaster or drywall mud. The tenant argued against the landlord's allegation that he tenant is now at risk because the accident "disturbed" the asbestos making it airborne. The tenant testified that there was no danger of airborne asbestos at the present time because the damaged area of the home was totally sealed off and the asbestos was mostly present in the furnace area. The tenant also refuted the landlord's claim that use of space heaters is dangerous and argued that this was working well as a temporary measure. In regards to the landlord's assertion that the heating system cannot undergo temporary restoration without disturbing the asbestos, the tenant stated that a heating specialist advised them that the heating system can be temporarily restored without disturbing any of the asbestos-laden areas.

The tenant acknowledged that the future of the tenancy has been impacted by the fact that at some point they must leave, and indicated that they are trying to find new accommodation. However, the tenant does not consider that the tenancy agreement has been frustrated warranting an immediate termination of the tenancy and feels that the landlord's application should be dismissed.

Analysis

Section 44 of the Act specifies that a tenancy can be ended only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

- (i) section 45 [*tenant's notice*];
- (ii) section 46 [*landlord's notice: non-payment of rent*];
- (iii) section 47 [*landlord's notice: cause*];
- (iv) section 48 [*landlord's notice: end of employment*];
- (v) section 49 [*landlord's notice: landlord's use of property*];
- (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];
- (vii) section 50 [*tenant may end tenancy early*];

(b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;

(c) the landlord and tenant agree in writing to end the tenancy;

(d) the tenant vacates or abandons the rental unit;

(e) the tenancy agreement is frustrated; (my emphasis)

(f) the director orders that the tenancy is ended.

The Act provides a process for ending the tenancy when it is frustrated. Section 56.1 states that a landlord may make an application for dispute resolution requesting an order (a) ending a tenancy because: (i) the rental unit is uninhabitable, or (ii) the tenancy agreement is otherwise frustrated.

If the dispute resolution officer is satisfied that a rental unit is uninhabitable or the tenancy agreement is otherwise frustrated, the director may make an order:

(a) deeming the tenancy agreement ended on the date the director considers that performance of the tenancy agreement became impossible, and (b) specifying the effective date of the order of possession.

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.

A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into and 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.

In this instance I find that the accident was never contemplated and that it occurred through no fault of either party.

However, 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.

I find that ending a tenancy without notice for frustration, should only be considered as a last resort. It was not clear whether the landlord gave any consideration to ending the tenancy under section 49(6)(b) or section 47(1)(k) of the Act.

I note that, although the landlord submitted a complete list of proposed repairs to the unit, the description of the damage was not detailed. I find that the letter from the contractor dated same day that the landlord's application was submitted did not specifically indicate that the unit was currently unfit for habitation, it merely stated that Worksafe BC would not allow anyone to remain during the "*asbestos abatement process*". I note that the abatement process is not yet underway.

In regards to the asbestos, the landlord's position that asbestos was found in the plaster was rebutted by the tenant and I find that the asbestos report from (XCompany) dated October 28, 2009 seems to support the tenant's position as it indicated that asbestos was found only in the vermiculite insulation evidently taken from the utility area. I also find that the landlord's allegation that the accident "disturbed" the asbestos making it airborne, was not supported by any independent evidence. Both parties had testified that the damaged area of the home was totally

sealed off. I find the landlord's claim that prolonged use of space heaters is risky may be true and I find that space heaters would logically be considered as a temporary measure. I find that it was not established whether or not the heating system could be temporarily repaired without disturbing the asbestos. In any case, even if that was true it would still constitute nothing more than an interim measure and would not resolve the impact of the incident on the future of this tenancy.

I find that landlord has not sufficiently proven that the unit was rendered completely unfit for temporary habitation at present. I find that the structural integrity was not of foremost concern as evidenced by the fact that over one month has passed while the estimates and insurance claims have been sorted out while the landlord permitted the tenant to stay. I find it likely that, in a situation where a building has been severely damaged and has lost its structural integrity, the municipality would normally issue a "no habitation notice" of its own volition which evidently did not occur. Even so, if it was the landlord's opinion that the rental unit was not safe or fit for habitation, I find it incumbent upon the landlord to have initiated contact with a municipal building inspector and provide the resulting report or order as evidence to support this contention. I do not accept the landlord's explanation that this was over-looked because the landlord left the matter to the contractor to pursue. I find that if there was a genuine concern, it would have been taken care of.

However, I find that while the landlord has fallen short of sufficiently proving that the rental unit is currently uninhabitable, I find merit in the landlord's argument that no repair work of any kind can be commenced without endangering the tenant. Even if I accepted the tenant's stand that the asbestos did not and still does not currently present any danger, the fact is that asbestos is present and remedial work cannot be initiated due to the tenant's continued occupation of the unit which is functioning to delay the landlord.

It is evident that the accident and accompanying inconveniences, including the discovery of the need for asbestos abatement in the repair work, did significantly impact the nature of this tenancy in several respects. I find as a fact that:

- A portion of the building cannot be used at all by the tenant.

- The continued use of space heaters is a temporary interim measure and does not properly heat the damaged area that is sealed off.
- The landlord is entitled to protect the landlord's investment
- No significant repairs can be commenced until the tenant vacates
- A substantial delay may seriously jeopardize and compromise the building.

Given the above, I find that the future of this tenancy is clearly frustrated and the relationship cannot continue. I therefore find that the landlord is entitled to an Order of Possession for frustrated tenancy under section 56.1 of the Act.

Conclusion

Accordingly, I hereby order that this tenancy is ended and grant the Landlord an Order of Possession effective at 1:00 p.m. on Monday February 1, 2010. I further order that the tenant is at liberty to vacate at any time prior to this date if alternate accommodation has been obtained. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

December 2009

Date of Decision

Dispute Resolution Officer