



# Dispute Resolution Services

Residential Tenancy Branch  
Ministry of Housing and Social Development

## Decision

### Dispute Codes:

OPT

FF

### Introduction

This Dispute Resolution hearing was convened to deal with the tenant's application seeking an order of possession for the tenant under section 54 of the Act.

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

### Issue(s) to be Decided

- Has the tenant established that the tenant is currently in a tenancy relationship with the landlord?
- Has the tenant proven entitlement to possession under the Act?

OR

- Was the tenancy agreement previously ended by either party?

### Background and Evidence

The tenancy began on April 1, 2004 and the rent is \$478.00. The tenant testified that after a fire in November 2009, the unit was undergoing renovation and repair work and during this period, the tenant was in contact with the landlord in regards to when he could return to reside in the unit. The tenant testified that the landlord issued a Notice of Rent Increase and a letter dated February 10, 2010 stating that he was valued as a tenant. The tenant submitted copies of this correspondence and the Notice. The tenant testified that the landlord made representations to the tenant that as soon as the repairs were completed, he could return and in fact the

landlord left a telephone message on March 19, 2010 advising the tenant that the suite was “looking like it’s ready” and asking the tenant to confirm when he was moving back in. The tenant submitted a written transcript of this message. The tenant testified that he was recently told that he was no longer welcome as a tenant and informed that he would not be permitted to move back in. The tenant was seeking an order of possession.

The landlord argued that the tenant was not entitled to 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 including frustration. The landlord testified that the tenant had caused a serious fire in the unit by falling asleep while smoking rendering it unfit for habitation and the tenant was hospitalized. The landlord stated that since November 2009, when the incident occurred, the landlord was involved in restoring the unit and it still has not been fully completed. The landlord testified that the damage for the fire rendered the unit unfit for habitation and this would therefore fit the definition to end the tenancy through frustration. The landlord’s position was that the tenancy had ended through frustration of contract and all of the representations made were in anticipation of a possible new tenancy that would commence when the unit was fully restored. The landlord testified that the owner is now not interested in negotiating a new tenancy and in fact will be seeking damages from the tenant for the significant costs of \$36,000.00 caused by the tenant.

### **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 found that the landlord was required to make an application if it sought to terminate the tenancy. I found that, while the principle of frustration would likely have been applicable to the situation, no application was ever made by the landlord. As a result, the original tenancy relationship has remained intact. I found it was not possible to apply the concept of frustration retroactively on the landlord's behalf given that the landlord did not make an application to end this tenancy under section 56.1 and in light of the fact that the hearing before me was on the *tenant's* application. I found that my authority was restricted to a determination of whether or not the tenant was entitled to an order of possession.

In regards to the possibility that the tenancy may have ended through the tenant having abandoned the unit, I find that the criteria to support any conclusion that the tenant had abandoned the suite was not met.

In any case, I find that, not only did the landlord and the tenant both fail to pursue the legal termination of this tenancy, the actions of the parties confirmed the continuance of the original tenancy agreement between the parties. In particular I note the landlord's actions in issuing a Notice of Rent Increase to the tenant in February 2010 and the mutual participation in ongoing communications to arrange for a date that the tenant would return. I find that the landlord's position that a new tenancy was being contemplated would have to be based on the erroneous presumption that the old tenancy had already ended.

Under the Act, I find that I would have no reason to deny a tenant an order of possession since the original tenancy still exists and nothing has occurred to legally change that state of affairs. I find that the tenancy agreement would prevail. I must point out that the Act defines tenancy agreement as:

**"tenancy"** means a tenant's right to possession of a rental unit under a tenancy agreement;

In this instance, however, the suite is still not ready and the parties have agreed that the rental unit will be available to the tenant on May 1, 2010.

## **Conclusion**

Based on the evidence and testimony, I hereby order that the tenant is entitled to be granted an order of possession effective at 1:00 p.m. on Saturday May 1, 2010. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

I also find that the tenant is entitled to be reimbursed for the \$50.00 cost of filing this application and I order that the tenant deduct \$50.00 as a one-time abatement off of the rent due on May 1, 2010.

I make no other findings in regards to this tenancy.

April 2010

Date of Decision

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Dispute Resolution Officer