



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT, FF

Introduction

This hearing was convened as a result of the tenant's application for dispute resolution under the Residential Tenancy Act ("Act"). The tenant applied for order of possession for the rental unit and for recovery of the filing fee paid for this application.

The listed tenant, his spouse/co-tenant, the landlord's agent and the landlord/owner attended, the hearing process was explained and they were given an opportunity to ask questions about the hearing process.

At the outset of the hearing, each party confirmed that they had received the other party's evidence. Neither party raised any issues regarding service of the application or the evidence.

Thereafter all participants were provided the opportunity to present their evidence orally and to refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me.

I have reviewed all oral and documentary evidence before me that met the requirements of the Dispute Resolution Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Words utilizing the singular shall also include the plural and vice versa where the context requires.

Issue(s) to be Decided

Is the tenant entitled to an order of possession for the rental unit and to recovery of the filing fee paid for this application?

Background and Evidence

The evidence supports that this tenancy began 18-20 years ago. The rental unit is in one-half of a duplex.

In support of their request for an order of possession, the tenant submitted that their son left some oil burning on the stove, which caused a fire in the rental unit, on or about April 10, 2015. The tenant submitted that the fire was accidental, but that the resulting damage caused them to lose everything in the main floor of the rental unit.

The tenant submitted further that they were instructed by the restoration company hired by the landlord's insurance company to remove all their belongings from the rental unit, and were subsequently informed that asbestos was discovered in the drywall of the rental unit, which was necessary to remediate.

The tenant agreed that they vacated the rental unit on April 11, 2015, that all their belongings were removed by April 18, 2015, and have been unable to return to the rental unit due to the condition.

The tenant argued that the tenancy is not over, as they have not been served a notice to end the tenancy by the landlord and that the landlord has refused to return their telephone calls.

The tenant submitted that they should be allowed to return to the rental unit when the rental unit is fully restored and inhabitable.

Landlord's response-

The landlord's agent submitted that the rental unit became uninhabitable due to the tenants' son causing a fire, which spread from the kitchen, to the main part of the rental unit and to the upper floors. The landlord submitted further that a fire marshal ordered that the tenants vacate and that a restoration company has been hired by the landlord's insurance company.

The landlord's agent submitted that the duplex has now been taken down to the studs and there is not confirmable time frame for the restoration to be completed, only guessing that the work could possibly be finished within 3-6 months; however, the restoration company has not been able to determine the amount of time left to restore the property.

The landlord's agent argued that due to the fire, the landlord has lost rent revenue since April, from both sides of the duplex and that the landlord has had to pay an insurance deductible. The landlord's agent submitted that the tenancy is now frustrated, due to the state of the rental unit.

The landlord's agent denied not returning the calls of the tenant and submitted further that they had no registered address to serve the tenant with any documents, as the only address given by the tenant was the rental unit address.

In response to my question, the tenant stated they agreed with the landlord that the rental unit is down to the studs of the frame and that it could take the amount of months as stated by the landlord's agent to restore the rental unit.

Analysis

Section 54 of the Act states a tenant may make an application requesting an order of possession if the tenant, under the terms of a tenancy agreement, is entitled to occupy the rental unit. In this case, I find the evidence does not support that the landlord has prevented the tenants from occupying the rental unit; the undisputed evidence shows rather the tenants are unable to occupy the rental unit due to the damage caused by the unforeseen fire started by the tenants' son.

Section 44(1)(e) of the Act provides that a tenancy will end, among other things, when a tenancy agreement is frustrated.

Residential Tenancy Branch Policy Guideline 34 provides that a contract is frustrated when it 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.

I agree with this Policy and find that due to circumstances beyond the control of either the tenants or the landlord, the rental unit became uninhabitable for an indefinite amount of time on or about April 10, 2015, such that the tenancy agreement could not be performed. In other words, by the tenant's own undisputed evidence, the rental unit as agreed upon in the tenancy agreement could not continue to be provided to them. I find the fire rendering the rental unit uninhabitable was unforeseen by either party.

The landlord could not say as of the day of the hearing, which was 4 months post fire, when the rental unit would again be livable.

Due to the above I therefore find that the tenancy agreement became frustrated as of April 10, 2015, and the landlord and tenants were discharged from fulfilling their obligations under that tenancy agreement as of that date.

As I have found that the tenancy was frustrated and therefore ended by operation of the Act as noted above, I dismiss the tenant's application for an order of possession for the rental unit as the landlord was discharged from their obligation of providing a rental unit under the tenancy agreement.

As I have dismissed the tenant's application, I likewise dismiss their request to recover the filing fee.

Conclusion

The tenant's application is dismissed, as I have found the tenancy agreement was frustrated and the tenancy ended as a result.

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: August 13, 2015

Residential Tenancy Branch

