



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CREIGHTON AND ASSOCIATES REALTY
DECISION

Dispute Codes OPT

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession of the rental unit pursuant to section 54;

The hearing was conducted by conference call. All named parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions.

Issues

Is the tenant an order of possession of the rental unit?

Background and Evidence

The rental unit is an apartment building in North Vancouver. The tenant rented unit #9 in the building. The tenancy began on June 1, 2013 with a monthly rent of \$1175.00 plus \$30 for parking payable on the 1st day of each month. A written tenancy agreement was signed and provided on file. The tenant paid a security deposit of \$587.50 at the start of the tenancy.

On June 23, 2015 there was a fire in the apartment building. This fact is not disputed by the parties. The cause of the fire has not been officially determined. The fire started on the roof of the three story building.

The tenant argues that after the fire they were evacuated from their apartment which was on the first floor of the building. The tenant submits that during an information meeting for tenants the day after the fire, a representative of the insurance company advised them that any tenants who want to come back may do so after the repairs are completed. They were advised by the residential manager that the repairs would take approximately 4 months. To confirm his intentions to return to the apartment, on June

29, 2015, the tenant sent a letter and enclosed a cheque for rent for the following month. In the letter, the tenant requests information on when they are able to return to the apartment. The tenant testified that they never received any communication from the landlord that they would not be able to continue their tenancy. In May 2016, upon seeing an ad for the apartment on Craigslist, the tenant sent another cheque to the landlord for payment of rent for the month of May 2016. These cheques were not cashed by the landlord. The tenant further argues that their belongings are still in storage in the building and they were never requested to return the keys for the apartment, nor has their security deposit been returned. The tenant argues that they have still been receiving their mail at the apartment building and as recently as April 29, 2016 received the evidence package sent by the landlord to this address in relation to this hearing. The tenant argues that the damage to their rental unit was minimal and mostly limited to minor water damage. The tenant provided pictures of the rental unit taken just weeks after the fire. The tenant argues that they were intentionally misled and the landlord used the opportunity to raise rent after competing repairs.

The landlord argues that the rental contract was frustrated as it was impossible to perform as a result of the fire. The landlord submits that there was extensive damage to the building and to five suites in particular, unit #9 being one of the three worst damaged units. Unit #9 was directly two levels below the area of the fire. There was extensive water damage to unit #9. The landlord submits that they were required to evacuate these five suites by the fire department until repairs could be done and occupancy permits could be obtained. The entire building was evacuated for approximately 1 week following the fire. At that time it was determined that five of the fifteen suites in the building could not be lived in and the other ten were re-occupied by their respective tenants. Of the five suites that were determined uninhabitable, suites #5 and #10 did not require complete demolition and were subsequently repaired and made ready for occupancy by October 2015. These two suites were rented to two new tenants at this time. As of April 25, 2016, the landlord still had not received occupancy permits for unit #9 or the other two units that required complete demolition. The landlord submitted an e-mail sent to the restoration company on April 11, 2016 asking if they could expect to receive an occupancy permit by May 1, 2016. In anticipation of receiving an occupancy permit, the landlord has entered into tenancy agreement with new tenants for the remaining three suites, including the suite in dispute. The landlord submitted photos to show the extent of the fire on June 23, 2015. The landlord also submitted photos to show the condition of the suite as of January 8, 2016 after the studs had been smoke sealed and the original floorboards had been replaced with new plywood. The landlord submits that these photos support their argument of the extensive renovation work required in the suite. The landlord also submitted a photo of the building permit for the ongoing work at the building including unit #9.

On June 25, 2015, the landlord issued a cheque to the tenant in the amount of \$322.19 as refund for 8 days rent for the period June 23 to June 30th. This cheque was never cashed by the tenant. On August 4, 2015 a cheque for the return of the security deposit was mailed to the tenant. This cheque was also not cashed by the tenant and the tenant did not acknowledge receipt of either of these cheques. The landlord submits that the tenant has provided a false address in his application as the address provided is of the apartment in dispute and the tenant has not lived there since June 2015. In either event, the landlord utilized this address for service of hearing documents and the cheques returned to the tenant were also mailed to this address as no other forwarding address was provided by the tenant. The tenant's letter dated June 29, 2015 in which he requested information on a possible move back date did not contain a forwarding address or any other contact information. In either event, the landlord argues that at this time, they were not in any position to provide any feedback to the tenant as they did not know the extent of the damage and repair work required. The landlord submits that they had no contact with the tenant until the filing of this application. The landlord attempted to contact the tenant to remove his belongings from the apartment but was not successful. The belongings were removed and put in storage so the demolition of the unit could take place.

Analysis

Section 44 of the Act contains provisions by which a tenancy may end. Under this section, a tenancy may end if the tenancy agreement is frustrated.

Residential Tenancy Policy Guideline 34 "Frustration" provides guidance in situations such as this case. As per this policy guideline, 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.

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.

In this case, the alleged frustrating event was a fire to the apartment building. The landlord testified that as a result of the fire the rental unit was uninhabitable. There is no dispute that a fire occurred in the apartment building on June 23, 2015. There is also no dispute that the rental unit in dispute has not been lived in since the date of the fire to the date of the hearing as result of the extensive repair work required. I accept the landlord's evidence that the rental unit was uninhabitable until renovation work was completed and occupancy permits obtained. The landlord submitted photos of the

extent of the fire and the work being performed on the rental unit which I find supports its position that the tenancy could not continue. I find the pictures of the rental unit provided by the tenant are not useful as the extent of the water damage to the unit would not be visible from the pictures alone.

Further, there is insufficient evidence that the landlord made any promises or arrangements to continue the tenancy after the renovation work was completed. The tenant provided a letter of intention to continue the tenancy and payment for rent for the month following the fire. However, the landlord did not accept this payment or provide any assurances to the tenant that the tenancy may continue. Rather, the landlord issued the tenant a cheque for the return of the pro-rated rent for the remainder of June 2015 and a cheque for the return of the tenant's security deposit which is consistent with the landlord's position that the tenancy had been frustrated.

As the rental unit was no longer fit for use as a rental unit, I find that the tenancy agreement was frustrated as of June 23, 2015 and the obligations of both the tenant and landlord under the tenancy agreement ended on this date.

The tenant's application for an order of possession is dismissed without leave to reapply.

Conclusion

The tenant's application is dismissed without leave to reapply.

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: May 04, 2016

Residential Tenancy Branch