



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNSD, MNDC, FF

Introduction:

This hearing was convened in response to an Application for Dispute Resolution filed by the Tenants in which the Tenants applied for a monetary Order for money owed or compensation for damage or loss, for the return of the security deposit, and to recover the fee for filing this Application for Dispute Resolution.

The female Tenant stated that on January 05, 2016 the Application for Dispute Resolution, the Notice of Hearing, and 10 pages of evidence the Tenants submitted with the Application were sent to the Landlords, via registered mail. The Agent for the Landlord stated that these documents were personally served to her sometime in January of 2016. As the Agent for the Landlord acknowledged receiving these documents, they were accepted as evidence for these proceedings.

On July 18, 2016 the Landlord submitted 51 pages of evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was served to the Tenants, by courier, on July 12, 2016. The Tenant acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

During the hearing the parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Preliminary Matter

The male Landlord stated that on July 05, 2016 the Landlord filed an Application for Dispute Resolution, which is to be considered at a hearing scheduled for January 03, 2017. The male Landlord asked that his Application for Dispute Resolution be joined with the Tenants' Application for Dispute Resolution and be heard on July 26, 2016. The parties were advised that I did not have the ability to access to the Landlord's Application for Dispute Resolution and that I could not, therefore, consider both matters at the hearing on July 26, 2016.

The male Landlord asked that his Application for Dispute Resolution be joined with the Tenants' Application for Dispute Resolution and be jointly heard at the hearing scheduled for January 03, 2017. The female Tenant opposed this request because she did not wish to wait until January 03, 2017 to have her claims considered.

The Landlord's application to have his Application for Dispute Resolution joined with the Tenants' Application for Dispute Resolution and be jointly heard at the hearing scheduled for January 03, 2017 was denied. In denying the request I was influenced, in part, by my conclusion that a delay of more than five months would be unfair to the Tenants, who filed their Application for Dispute Resolution on December 14, 2015. In denying the request I was influenced, in part, by that fact the Landlord was made aware of the Tenants' Application for Dispute Resolution in January of 2015 and he should have filed his Application for Dispute Resolution well before July 05, 2016 if he wanted the matters to be considered at the same time.

Issue(s) to be Decided:

Are the Tenants entitled to the return of security deposit?

Are the Tenants entitled to compensation for expenses arising from a flood in the rental unit?

Background and Evidence:

The Landlord and the Tenants agree that:

- the tenancy began in 2014;
- the Tenants agreed to pay rent of \$795.00 by the first day of each month;
- a security deposit of \$397.50 was paid;
- there is a clause in the tenancy agreement that requires the Tenants to carry insurance;
- the Tenants did not obtain tenant's insurance;
- the Landlord returned the entire security deposit, by e-transfer, on December 21, 2015 plus \$795.00 in rent for November of 2015;
- the Landlord has not returned \$100.00 that the Tenant paid in rent for December of 2015;
- on November 13, 2015 there was a flood in the rental unit as a result of heavy rainfall;
- after the flood the Tenants stayed with relatives for a few days;
- the Landlord repaired the water damage and advised the Tenants they could return to the rental unit on November 15, 2015;
- on November 16/17, 2015 there was a second flood in the rental unit as a result of heavy rainfall;
- the rental unit sustained significant damage after the second flood, which rendered the unit uninhabitable;

- repairs to the rental unit began on November 17, 2015 or November 18, 2015; and
- neither party served notice to end the tenancy.

The Agent for the Tenants stated that:

- the Tenants were asked to move their property from the rental unit in late November or early December of 2015;
- sometime in early December of 2015 the Tenants realized that they could no longer live in the rental unit;
- he thinks there may have been previous floods in the rental unit as he detected a smell of mould;
- the Tenants moved into a new residence on December 12, 2015;
- all of the Tenants' property was removed on December 12, 2015;
- a forwarding address was first provided, in writing, on December 20, 2015; and
- even if the Tenants had obtained tenant's insurance he does not believe their policy would have covered the costs of moving and staying in a hotel.

The Landlord stated that:

- on November 18, 2015 the Tenants were told they would no longer be able to live in the unit;
- on November 23, 2015 the Tenants were sent an email in which they were advised they would no longer be able to live in the unit;
- the Tenants were asked to move their property from the rental unit on November 25, 2015;
- on December 03, 2015 the Tenants were informed, via email, that they could no longer live in the unit and that their property should be removed from the rental unit;
- repairs to the rental unit as a result of the second flood were completed on March 15, 2016;
- there were no previous floods since the rental unit was purchased in 2006;
- he is not aware of any previous floods in the unit;
- the Tenants should have obtained tenant's insurance, as required by the tenancy agreement; and
- had the Tenants obtained tenant's insurance the costs of moving and staying in a hotel would likely have been covered.

The Agent for the Landlord stated that:

- a forwarding address was provided, in writing, although she cannot recall the date of service; and
- all of the Tenants' valuable property was removed on December 12, 2015.

Copies of numerous emails that were exchanged between the parties after the flood were submitted in evidence. The emails I consider highly relevant to the end of this tenancy are:

- an email dated November 23, 2015 in which the Landlord told the Agent for the Tenant that the Tenants will need to find a new place to live;
- an email dated November 23, 2015 in which the Agent for Tenant told the Landlord the Tenants would be looking for alternate accommodations;
- an email dated December 01, 2015 in which the Agent for Tenant told the Landlord the Tenants have found new accommodations for January 01, 2016;
- an email dated December 03, 2015 in which the Landlord told the Tenants he considered the tenancy agreement to be “frustrated”; and
- an email dated December 04, 2015 in which the Agent for Tenant told the Landlord the Tenants had found a new apartment, pending reference checks.

The Tenants are seeking compensation for expenses they incurred while living in a hotel after the flood; for moving costs; and for lost wages.

Analysis:

Section 44(1)(e) the *Residential Tenancy Act (Act)* stipulates that a tenancy ends if the tenancy is frustrated.

Residential Tenancy Branch Policy Guideline #34, with which I concur, reads:

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. 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 Frustrated Contract Act deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

On the basis of the undisputed evidence I find that this tenancy agreement was

frustrated on November 17, 2015 when the rental unit was flooded, which rendered the rental unit uninhabitable for an extended period of time. In determining that the agreement was frustrated I was influenced by:

- the undisputed evidence that the flood was the result of heavy rainfall, which is neither the fault of the Landlord nor the Tenant;
- the undisputed evidence that the rental unit was uninhabitable after November 17, 2015 for an extended period of time, as a result of the need to repair the flood damage;
- the absence of evidence to show that the flood was the result of neglect or inaction on the part of the Landlord; and
- the emails exchanged on November 23, 2015 that indicate both parties understood the Tenants could not continue to live in the rental unit.

As the tenancy agreement was frustrated on November 17, 2015 I find the tenancy ended that day, pursuant to section 44(1)(e) of the *Act*. As the tenancy ended pursuant to section 44(1)(e) of the *Act*, I find that neither party was required to serve notice to end the tenancy.

Section 67 of the *Act* authorizes me to order a landlord to pay compensation to a tenant if the tenant suffers a loss as a result of the landlord breaching the *Act*. I find there is insufficient evidence to conclude that this flood occurred as a result of the Landlord breaching the *Act* and I therefore cannot conclude that the Landlord must compensate the Tenants for any losses they incurred as a result of the flood. I therefore dismiss the Tenants' claim for expenses they incurred while living in a hotel after the flood; for moving costs; and for lost wages.

In adjudicating this matter I considered section 32 of the *Act*, which requires landlords to provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant. As there is no evidence that the flood was the direct result of neglect on the part of the Landlord, and the Landlord made reasonable efforts to repair the rental unit after the flood, I cannot conclude that he failed to comply with section 32 of the *Act*.

In adjudicating this matter I was guided by Residential Tenancy Branch Policy Guideline #34, which stipulates that when a tenancy agreement is frustrated "the parties to the contract are discharged or relieved from fulfilling their obligations under the contract". I interpret this to mean that once this tenancy agreement was frustrated the Tenants were no longer obligated to pay rent and the Landlord was no longer obligated to provide the Tenants with accommodations or access to their rental unit.

In adjudicating this matter I was guided by section 7(2) of the *Act*, which requires a tenant who claims compensation for damage or loss to do whatever is reasonable to minimize the damage or loss. Even if I concluded that the Landlord was partially

responsible for the floor I would have dismissed the claim for compensation because the Tenants did not mitigate their potential losses by obtaining tenant's insurance.

I find that it is possible that the costs of moving from the rental unit and staying in a hotel would have been covered by their insurance policy, in which case, the Tenants would not have suffered a loss. In reaching this conclusion I was heavily influenced by the absence of any evidence from the Tenants to corroborate the Agent for the Tenant's testimony that tenant's insurance would not compensate a tenant who is displaced as a result of a flood. Conversely the email dated November 26, 2015 which the Landlord submitted in evidence contains an excerpt that is allegedly from a company that provides tenant's insurance, which indicates "living expenses" and moving costs" are included in the policy.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or file an Application for Dispute Resolution claiming against the deposits.

On the basis of the undisputed evidence I find that the Landlord complied with section 38(1) of the *Act*, as the Landlord repaid the security deposit shortly after receiving the Tenants' forwarding address, in writing. I therefore dismiss the Tenants' claim for the return of the security deposit.

I find that the Tenants' have failed to establish the merits of their Application for Dispute Resolution and I dismiss their application to recover the fee paid to file this Application.

Conclusion:

The Tenants' Application for Dispute Resolution is dismissed in its entirety.

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: July 27, 2016

Residential Tenancy Branch