



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT, FF

Introduction

The Application for Dispute Resolution filed by the Tenant seeks

- a. A Tenant's Order of Possession;
- b. An order to recover the cost of the filing fee.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing was served on the landlord by mailing, by registered mail to where the landlord resides on December 4, 2016 or shortly thereafter.

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the tenant is entitled to a Tenant's Order of Possession?
- b. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence

The tenancy began on October 1, 2016 when the parties entered into a one year fixed term tenancy agreement ending October 1, 2017. The tenancy agreement provided that the tenant(s) would pay rent of \$876 per month payable in advance on the first day of each month. The tenant(s) did not pay a security deposit.

There is a mold problem in the rental property. The landlord takes the position that significant remediation is necessary and that vacant possession is necessary for an extensive period of time.. The tenant disagrees. On December 1, 2016 the landlord served a letter on the Tenant advising the Tenant that the landlord takes the position that the tenancy agreement has been frustrated and purporting to end the tenancy on December 7, 2016.

The Law::

The following provisions of the Residential Tenancy Act are relevant

Order of possession for the tenant

54 (1) A tenant who has entered into a tenancy agreement with a landlord may request an order of possession of the rental unit by making an application for dispute resolution.

(2) The director may grant an order of possession to a tenant under this section before or after the date on which the tenant is entitled to occupy the rental unit under the tenancy agreement, and the order is effective on the date specified by the director.

(3) The date specified under subsection (2) may not be earlier than the date the tenant is entitled to occupy the rental unit.

Order of possession: tenancy frustrated

56.1 (1) 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, and

(b) granting the landlord an order of possession of the rental unit.

(2) If the director 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.

Analysis:

This is an unusual case. The tenant has applied for a Tenant's Order of Possession. However, the tenant is in possession of the rental unit. The tenant testified he took the letter of December 1, 2016 as being equivalent to an eviction notice requiring him to apply for an order that the tenancy agreement has not been frustrated. The landlord testified they thought that the letter amounts to applying to end the tenancy because the tenancy agreement has been frustrated.

An arbitrator is limited to the powers given to him by the Act and Regulations. The landlord has not filed an Application for Dispute Resolution as required under section 56.1 of the Act. The delivery of a letter alleging the tenancy agreement has been frustrated is not the same as making an application for dispute resolution. I determined that in the absence of such an application I would not be able to determine whether frustration has occurred or the power to make an Order of Possession should the landlord's submission be accepted.

The tenant is entitled to remain in the rental unit unless and until the tenancy is brought to an end in accordance with the Act. However, it was not necessary for the tenant to apply for a Tenant's Order of Possession as the tenant was always in possession. .

Determination and Orders:

I ordered that the tenant is entitled to remain in possession of the rental unit unless and until the tenancy is ended in accordance with the Act. Both parties made errors in way in which the matter was brought to arbitration making it impossible for an arbitrator to make a determination on whether the tenancy has ended under section 56.1 of the Act. I determined the tenant should not bear the full cost of the filing fee. I ordered that the landlord pay to the Tenant the sum of \$50 which is one half of the cost of the filing fee such sum may be deducted from future rent.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

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: January 03, 2017

Residential Tenancy Branch