



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL MNR MNDC MNSD FF CNL OLC PSF

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

Landlord:

- an order of possession for landlord’s use of property pursuant to section 55;
- a monetary order for unpaid rent or utilities and compensation for damage or loss pursuant to section 67;
- authorization to retain all or a portion of the tenant’s security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Tenant:

- cancellation of the landlord’s 2 Month Notice to End Tenancy for Landlord’s Use of Property (the 2 Month Notice) pursuant to section 49;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to provide services or facilities required by law pursuant to section 65;

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. No issues were raised with respect to the service of evidence on file.

Issues

Is the landlord entitled to an order of possession pursuant to a 2 Month Notice or should the Notice be cancelled?

Is the tenant and/or landlord entitled to a monetary award for unpaid rent and/or compensation for damage or loss?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Is the landlord entitled to retain the security deposit or is the tenant entitled to return of all or a portion of the security deposit pursuant to section 38?

Should the landlord be ordered to comply with the Act and provide services or facilities?

Background and Evidence

The tenancy for this one bedroom apartment unit began approximately 3 years ago. The monthly rent is \$900.00. A security deposit of \$450.00 was paid at the start of the tenancy which the landlord continues to retain. In July 2017 as the result of a flood from an upper unit in the building, the rental unit was deemed uninhabitable. Neither party disputes that the rental unit was deemed uninhabitable. On July 21, 2017 the tenant was advised that he was required to evacuate the premises with all his belongings immediately. The tenant testified he vacated the rental unit in the beginning of August 2017 but the majority of his belongings were stored in the bedroom of the apartment. He has not been able to reside in the apartment since and recently there was another flood which further affected this unit.

On July 25, 2017 the landlord issued the tenant with a 2 Month Notice for landlord's use of property with an effective date of September 30, 2017. The tenant had filed to dispute this 2 Month Notice but acknowledged in the hearing he no longer wishes to continue the tenancy in this rental unit which has been uninhabitable since July 21, 2017 and has since also been subject to another flooding.

The landlord's application is for compensation for 3 month's rent although the application does not specify which 3 months. The landlord acknowledged receiving rent for the month of July 2017. The landlord argues that as she served the tenant with a 2 Month Notice, she was still expecting to receive some rent as the tenant still stored his belongings in the rental unit. The landlord argues that she has been unable to rent the apartment since the flood and has lost out on insurance for loss of rent as the tenant refused to vacate the rental unit.

The tenants' application is for monetary compensation for return of partial rent for the month of July 2017, moving and storage expenses, return of the security deposit and compensation equivalent to two month's rent.

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.

Pursuant to section 56.1(2) of the Act, if the director is satisfied that a rental unit is uninhabitable or the tenancy agreement is otherwise frustrated, the director may make an order deeming the tenancy agreement ended on the date the director considers that performance of the tenancy agreement became impossible and specifying the effective date of the order of possession.

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.

There is no dispute that this rental unit became uninhabitable on July 21, 2017 as the result of a flood, without the fault of either party. As such, I find this tenancy was frustrated as of July 21, 2017 and the obligations of both the tenant and landlord under the tenancy agreement ended on this date.

The landlord is awarded an order of possession.

I dismiss the landlord's claim for unpaid rent for the three month period during which the rental unit was uninhabitable. As the tenancy was frustrated both parties were discharged or relieved from fulfilling their obligations under the tenancy agreement which would include the payment of rent. Further, the landlord failed to provide any evidence in support of her claim that she lost out on loss of rent insurance because of the tenants refusal to remove all his belongings. The landlord could also have mitigated any alleged loss by filing an application to request an order of possession for a frustrated tenancy rather than issuing the tenant a 2 Month Notice to End Tenancy.

As the landlord was not successful in his application, I find that the landlord is not entitled to recover the filing fee paid for his application.

As I have found this tenancy ended by way of frustration, through no fault of either party, the tenants claim for moving and storage expenses and compensation for two month's rent is dismissed. Under normal circumstances, the tenant would be entitled to reimbursement for the pro-rated rent paid for the balance of the month of July 2017; however, as the tenant did not fully vacate the rental unit and also testified that he himself vacated in the beginning of August, I dismiss the tenant's claim for return of pro-rated July rent. The tenant has also not provided any receipts to show he rented other accommodation for the balance of July 2017.

The security deposit will need to be dealt with in accordance with section 38 of the Act after the tenant fully vacates the rental unit.

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

Conclusion

I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant. Should the tenant(s) fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: October 13, 2017

Residential Tenancy Branch