



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL MNRL-S AAT CNR ERP FFT MNDCT OPT

Introduction

Pursuant to section 58 of the *Residential Tenancy Act* (the *Act*), I was designated to hear this matter. This hearing dealt applications from both parties:

The landlord applied for:

- an Order of Possession pursuant to section 55 of the *Act* for unpaid rent or utilities, and for breach of an agreement with the landlord; and
- a monetary order for unpaid rent pursuant to section 67 of the *Act*; and
- an Order allowing her to serve documents by way of substituted service pursuant to section 71 of the *Act*.

The tenants applied for:

- a cancellation of the landlord's notice to end tenancy pursuant to section 55 of the *Act*;
- a Monetary Award for damage or loss under the tenancy pursuant to section 67 of the *Act*;
- an order directing the landlord to perform emergency repairs for health or safety reasons pursuant to section 33 of the *Act*;
- an order allowing the tenants access to the unit or site pursuant to section 70 of the *Act*; and
- a return of the filing fee pursuant to section 72 of the *Act*.

Tenant O.L. (the "tenant") appeared at the hearing on behalf of the tenants, while S.B. (the "landlord") the Executrix of the estate and J.M. counsel for the estate, appeared at the hearing on behalf of the estate/landlord. All parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

At the hearing, tenant O.L. acknowledged receipt of the landlord's 10 Day Notice to End Tenancy in person on October 9, 2017. Pursuant to section 88 of the *Act* the tenants are found to have been duly served with the landlord's notice to end tenancy.

Preliminary Issue – Substituted Service

The landlord stated that she wished for an order be made allowing her to serve the tenants via email, a manner not prescribed by the *Act*, because she did not have a current address for the tenants, and tenant O.L. by his own admission had been staying in various locations.

Both parties attended the hearing and confirmed knowledge of the proceedings. The landlord's evidentiary package contained numerous Canada Post Registered Mail receipts that she explained were attempts on her part to serve the tenant with her application for dispute, along with her evidentiary packages. As both parties attended the hearing, the landlord's application for substituted service is moot. The landlord must re-apply for substituted service, should she wish to pursue further relief against the tenants.

The tenants sent their copy of their application for dispute, along with their evidentiary package to the landlord by way of Canada Post Registered Mail on November 10, 2017. A copy of the tenants' Canada Post tracking number and receipt were provided to the hearing.

Issue(s) to be Decided

Can the tenants cancel the landlord's notice to end tenancy? If not, is the landlord entitled to an Order of Possession?

Is either party entitled to a monetary award?

Is either party entitled to a return of the filing fee?

Should the landlord be directed to allow the tenant access to the rental unit?

Should the landlord be directed to make emergency repairs to the rental unit for health and safety reasons?

Background and Evidence

Testimony provided by tenant O.L. explained that this tenancy began in April 2015 and ended on October 9, 2017 when the locks to the rental unit were changed. Rent was \$400.00 per month, and no deposits were collected.

During the hearing the tenant acknowledged that he had failed to pay rent, but argued that he had grave concerns regarding the manner in which the rent payments were being used by the Estate. The tenant said that these apprehensions came to fruition after he was directed by the Executrix to pay rent via email transfer to a recently established email account. The tenant continued by explaining that his worries were further exacerbated by some errors he encountered at the bank regarding the account numbers associated with the account to which he paid rent.

The landlord said she was seeking an Order of Possession based on this unpaid rent, along with a monetary award for the rent which was not paid from April to September 2017.

The tenant is seeking a cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid rent, along with a monetary award of \$4,700.00.

Both parties agreed that a flood occurred in the premises and as a result of this flood, the rental unit had become inhabitable. While an exact date when the flood took place could not be identified by either party, a letter from the property manager of a restoration company dated October 6, 2017 stated, "in regards to the time frame of the basement suite being wet, it is in my opinion that due to the amount of mold growth in the suite it would have needed to have been wet for over 1 month." A second opinion on the state of the rental unit following an October 5, 2017 inspection of the unit by the project manager of a different restoration company noted, "my opinion is there has been a long term moisture issue which has contributed to the amount of mold growth I witnessed."

The tenant said he was seeking a monetary award to reflect the items that were lost in the rental unit. Specifically, the tenant described the following items as having been lost in the flood:

- Area Rug - \$650.00
- Sofa - \$750.00
- Cabinets - \$700.00

- Limited Edition Art - \$2,500.00
- Lost Clothing - \$100.00

= \$4,700.00

As a result of the severe nature of damage that resulted from the flooding, the landlord had been advised by the remediation company and her lawyer, that she should not allow anyone access to the rental unit, because of potential health, insurance and liability issues. Accordingly, the landlord acknowledged that the locks to the rental unit were changed on approximately October 9, 2017. The tenants are seeking an Order allowing them access to the rental unit following remediation of the rental unit.

At the hearing the landlord argued that the tenants had been given access to the suite in July 2017 and that no items remained in the rental unit, therefore, the tenants had no reason to request access to the suite. Furthermore, she argued that rent remained unpaid since April 2017 and that she was entitled to an Order of Possession based on this unpaid rent. The landlord noted that a metal bed, a dresser and a tall dresser have been moved from the rental suite into the garage of the main home, and that the tenants have been absent from the suite for some time, and had no real reason to once again occupy the suite.

Analysis

After considering the oral testimony and evidence provided to the hearing by both parties, and upon reviewing *Residential Tenancy Policy Guideline #34*, I find that this tenancy has become frustrated.

Policy Guideline #34 states, "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 are now impossible...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."

Evidence provided to the hearing by the landlord in the form of letters and emails from three different contractors described the extensive renovations that were required in the rental unit following its flooding. Furthermore, the tenants' evidentiary package

contained photos which showed that unit was covered in mould and suffered from a large amount of damage to the flooring and walls.

I find that the tenancy is frustrated because both parties acknowledged that the rental unit is uninhabitable due to the damage that occurred as a result of flood. I find that it would have been impossible for the landlord to offer the suite for rent and that the tenancy ceased to exist. For these reasons both the landlord's application for an Order of Possession and the tenants' application to cancel the landlord's Notice to End Tenancy are dismissed. I find that this tenancy ended by frustration on September 1, 2017, the approximate date when the flood occurred as provided by the contractors description of the damage cited in the landlord's evidence. I find that the tenants' application related to emergency repairs being made to the rental unit are moot, and are therefore dismissed.

I will now turn my attention to the landlord's and the tenants' applications for a monetary award, the tenants' application for an Order allowing them to access the rental unit and applications by both parties for a return of the filing fee.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on both the landlord and the tenants to prove their entitlement to a claim for a monetary award.

I will begin by analyzing the landlord's application for a monetary award, and then turn my attention to the tenants.

During the hearing tenant O.L. acknowledged not paying rent since April 2017. He testified that he received an address from the Executrix of the estate which directed him to pay rent to an email address with which he was not familiar. The tenant argued that he had grave concerns about the money he was paying for rent to the Estate and the manner in which it was being spent. Furthermore, he stated that he had discovered that the bank account previously associated with the rental unit was under investigation. While these concerns may be valid worries on the part of the tenants, they do not release them from the obligation of paying rent.

Section 26(1) states, "A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent." I find that rent was unpaid from April to September 2017 when the tenancy became frustrated, and that rent for this time period remains outstanding. Section 7 of the *Act* explains, "If a tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying tenant must compensate the other for damage or loss that results." I therefore find that the landlord is entitled to a monetary award of \$2,000.00.

The tenants have applied for a monetary award of \$4,700.00 related to items that tenant O.L. explained were ruined in the flood. Specifically, the tenants are seeking compensation for an Area Rug, a Sofa, Cabinets, Art and some lost clothing. While numerous photos of the damage that occurred in the rental unit were submitted as part of the tenants' evidentiary package, I find that little evidence was presented at the hearing or as part of the tenants' evidentiary package detailing how he arrived at the figures cited in his application for a monetary award. At the hearing the tenant explained that he was seeking \$2,500.00 for a limited edition print which had risen in value, but he was unable to accurately provide a reference indicating where this information originated.

Furthermore, as explained above, section 67 states, "The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party." Neither party was able to accurately identify a source of the flood, nor was any consensus reached on how the flood happened; however, both agreed that flooding had occurred and that great damage had resulted. For these reasons, I do not find that the tenants have demonstrated that their loss stemmed directly from an action of the landlord. For these reasons, the tenants' application for a monetary award is dismissed.

The final aspect of the tenants' application concerned an Order allowing access to the unit for the tenant. During the hearing tenant O.L. explained that he had returned the rental unit on October 9, 2017 to find that the locks had been changed by the landlord.

Section 31 of the *Act* states, "A landlord must not change locks or other means that give access to residential property unless the landlord provides each tenant with new keys or other means that give access to the residential property. A landlord must not change locks or other means of access to a rental unit unless the tenant agrees to the change,

and the landlord provides the tenant with new keys or other means of access to the rental unit.”

At the hearing the landlord argued that she was advised by her lawyer and the remediation company that she needed to prevent access to the rental unit due to insurance, liability and health concerns. The landlord went on to explain that the tenants’ belongings had been moved to a garage on the property.

While the landlord may have valid concerns regarding access to the suite, a landlord has an obligation to provide a tenant with access to the rental unit. I find that the landlord has failed to do this.

The landlord is ordered to arrange a date with the tenants prior to January 1, 2018 whereby the tenants will be provided access to the garage to collect their belongings.

I find that both parties were partially successful in their application, as such, they must both bear the cost of their own filing fee.

Conclusion

This tenancy ended by way of frustration on September 1, 2017.

The tenants’ application for a monetary award is dismissed.

I issue a monetary order in the landlord’s favour in the amount of \$2,000.00 as follows:

Item	Amount
Unpaid Rent for April 2017	\$400.00
Unpaid Rent for May 2017	400.00
Unpaid Rent for June 2017	400.00
Unpaid Rent for July 2017	400.00

Unpaid Rent for August 2017	400.00
Total =	\$2,000.00

The landlord is provided with these Orders in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

The tenants' application for emergency repairs to be made to the rental unit is dismissed.

The landlord is ordered to allow the tenants' access to the unit to the tenant to retrieve their belongings.

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: December 5, 2017

Residential Tenancy Branch