



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FF, LRE, MNR, OLC OPT, O, OPN

The Application for Dispute Resolution filed by the Tenant makes the following claims:

- a. An order to cancel a two month Notice to End Tenancy for landlord use of property
- b. A monetary order in the sum of \$19,985
- c. An order to suspend or set conditions on the landlord's right to enter the rental unit.
- d. An order for compensation for the cost of emergency repairs.
- e. An order that the landlord comply with the Act, regulation and/or the tenancy agreement.
- f. A tenant's order of possession.

The Application for Dispute Resolution filed by the landlord an Order for Possession

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. The parties acknowledged they had received the documents of the other party.

I find that the two month Notice to End Tenancy was sufficiently served on the Tenant by posting on September 30, 2017. The tenant acknowledged receipt on that date. I find that the Application for Dispute Resolution filed by was served by mailing, by registered mail on September 30, 2017. I find that the Application for Dispute Resolution filed by the landlord was served on the Tenant by mailing, by registered mail to where the tenant resides on October 25 2017.

Issue(s) to be Decided:

The issues to be decided are as follows:

- a. Whether the tenant is entitled to an order cancelling the two month Notice to End Tenancy dated September 27, 2017.
- b. Whether the tenant is entitled to a monetary order and if so how much?
- c. Whether the tenant is entitled to an order to suspend or set conditions on the landlord's right to enter the rental unit.
- d. An order for compensation for the cost of emergency repairs.
- e. An order that the landlord comply with the Act, regulation and/or the tenancy agreement.
- f. A tenant's order of possession.
- g. Whether the landlord is entitled to an Order for Possession?

Background and Evidence:

In the middle of August 2017 the parties entered into a one year fixed term tenancy agreement that provided that the tenancy would start on October 1, 2017, end on September 30, 2018 and become month to month after that. The rent was \$1800 per month payable in advance on the first day of each month. The parties agreed the tenant was not required to pay a security deposit and a pet damage deposit

The parties had been involved in a romantic relationship for the last two years. However, on September 16, 2017 the parties had a significant dispute leading to the calling of the police.

On September 21, 2017 the landlord wrote to the Tenant stating that the fixed term tenancy agreement could no longer be fulfilled and that the tenant would have to remove all of her belongings by September 30, 2017. It further stated the landlord would be moving in.

On September 21, 2017 the tenant obtained a Protection Order in the absence of the landlord that required among other provisions that the landlord was not to have any contact or communication with the tenant or her children. .

The landlord posted a 2 month Notice to End Tenancy dated September 27, 2017 on September 30, 2017 to the door of the rental unit that provided that "all of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing to give the Notice because the purchaser or a close family member intends in good faith to occupy the rental unit." The Notice to End Tenancy sets the end of tenancy for December 1, 2017.

The landlord proved a copy of a letter dated September 25, 2017 from SJ that the purchaser has requested the landlord to give notice "The new owner intention is to occupy the property as his personal residence and requests vacant possession by December 15, 2017."

The tenant took possession of the rental unit prior to September 30, 2017.

Analysis:

The landlord submits the contract cannot be fulfilled and the tenancy agreement has been frustrated for the following reasons:

- The relationship between the parties has deteriorated to such an extent that it is toxic and is not a basis for commencing a landlord-tenant relationship.
- His personal circumstances have changed. He lost his job in September and needs to return to live in the rental property. He has since found a buyer of the property and wishes to proceed with the sale.
- The Protection Order obtained by the tenant was based on misinformation. It has since been set aside.

Section 56.1 of the Residential Tenancy Act provides as follows:

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.

Policy Guideline #34 includes the following:

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.

I do not accept the submissions of the landlord that the tenancy agreement has been frustrated. The Policy Guideline provides that the test to establish frustration is high. I do not accept the submission of the landlord that the change in circumstances he has identified are such as to affect the nature, meaning purpose, effector consequences of the contract. While it may create a hardship for the landlord this is not a ground to determine the contract has come to an end because of frustration.

Tenant's Application to Cancel the 2 month Notice to End Tenancy:

I do not accept the submission of the landlord that the tenant's application should be dismissed as she failed to file an Amendment to her Application seeking to cancel the 2 month Notice to End Tenancy after she received the Notice that the landlord had purported to sell the property. The Application for Dispute Resolution sets out she is seeking to cancel a 2 month Notice to End Tenancy given by the landlord. The

landlord was fully aware she disputed the landlord's right to end the tenancy on the basis that she had a fixed term tenancy agreement.

The two month Notice to End Tenancy identifies the following grounds: "all of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing to give the Notice because the purchaser or a close family member intends in good faith to occupy the rental unit."

Section 49(2) of the Residential Tenancy Act provides as follows

49(2) Subject to section 51 [tenant's compensation: section 49 notice], a landlord may end a tenancy for a purpose referred to in subsection (3), (4), (5) or (6) by giving notice to end the tenancy effective on a date that must be

...

(c) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy.

Policy Guideline 33 includes the following:

"C. ENDING A FIXED TERM TENANCY

...

A landlord cannot give notice for landlord's use of property that will end a fixed term tenancy before the end of the fixed term. If a landlord wishes to end the tenancy for landlord's use of property, which may include use by the purchaser of the property, the landlord must serve a proper Two Month Notice to End Tenancy for Landlord's Use of Property (form RTB-32) on the tenant. Before a landlord can serve notice for the purchaser's use of the property, the landlord must have an agreement in good faith to sell the property, all conditions of the sale must have been satisfied and the purchaser must ask the landlord, in writing, to give notice to end the tenancy. The effective date of that Notice will be two months from the end of the month in which the Notice was served but in any case not **before the end of the fixed term (my emphasis)** The tenant may not, during the fixed term, give the landlord a minimum 10 day notice to end the tenancy¹ on a date that is earlier than the effective date of the landlord's notice.

I ordered that the 2 month Notice to End Tenancy be cancelled for the following reasons:

- The law does not permit a landlord to set the end of tenancy date for a date earlier than the end of the fixed term.
- The landlord failed to include a copy of the purchase and sale agreement and it is not possible to determine whether all of the conditions for sale of the rental property have been satisfied.

The tenancy shall continue with the rights and obligations of the parties remaining unchanged.

I dismissed the tenant's claim for a monetary order including her claim for compensation for emergency repairs. Most of the claim for a monetary order dealt with the tenant's claim for reimbursement of the rent she would have paid had the tenancy come to an end. For the reasons set out above the tenancy is

ongoing. Further, I do not accept the tenant's submission that the claim for the cost of trimming the trees amounts to an emergency repair as defined by the Residential Tenancy Act. The tenant failed to give the landlord a quotation prior to doing the work and failed to obtain the landlord's agreement to pay for the work. This claim is dismissed.

I dismissed the claim for setting conditions on the landlord's right to enter the rental unit. The tenant failed to provide sufficient evidence to prove this is an appropriate order.

I dismissed the tenant's application for an tenant's Order of Possession as the tenant is already in possession of the rental unit. I dismissed the remaining claims in the application as the tenant failed to present sufficient proof to establish these claims.

Conclusion:

In conclusion I ordered that the two month Notice to End Tenancy dated September 27, 2017 be cancelled. The tenancy shall continue with the rights and obligations of the parties remaining unchanged. I dismissed the landlord's application for an Order of Possession. I dismissed the Tenant's application for a monetary order, an order to set conditions on the landlord's right to enter and the remaining claims in the tenant's application.

This decision is final and binding on the parties.

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 06, 2017

Residential Tenancy Branch