Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Decision Codes: MNDCT, FFT

Introduction

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

a. A monetary order in the sum of $27,474
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 July 21, 2018.

The Applicant Tenants delayed in sending their documents to the landlord. The landlord gave evidence it was sent by mail to her on November 6, 2018. The documents were not uploaded to the Branch's website until November 7, 2018.

Issues to be Decided

The issues to be decided are as follows:

a. Whether the tenants are entitled to a monetary order for the reduced value of the tenancy and if so how much?
b. Whether the tenants are entitled to recover the cost of the filing fee?

Background and Evidence:

The tenants lived in Calgary were relocating to B.C. as they had found jobs.

In late January the Tenants responded to the advertisement for the rental unit. There was lengthy discussions between the parties. In early February the parties entered into a tenancy agreement in writing that provided that the tenancy was to begin on March 1, 2018 and end on August 31, 2018. The rent was $2490 per month payable in advance on the first day of each month. The Tenants paid a security deposit of $1245. The Tenants signed the tenancy

agreement on February 3, 2018 and the landlord signed the tenancy agreement on February 4, 2018. The rental unit was furnished.

On February 15, 2018 the Tenants received a text message from the landlord advising that the suite had been flooded. The landlord immediately returned the security deposit.

The tenants later discovered that the flood occurred around the middle of December. The flood originated a suite two stories above the rental unit.

The tenants testified the landlord breached the tenancy agreement by refusing to allow them to continue with the tenancy. They testified that had the landlord advised them of the flood they would have not entered into a tenancy agreement with the landlord and would have looked elsewhere. The female tenant testified she previously experience a flood and she did not wish to go through that experience again.

The tenants testified they were able to rent a furnished rental unit starting March 1, 2018 that provided accommodation for one month only. The rent for that rental unit was $2500. They subsequently rented another unfurnished rental unit for a one year fixed term that provided the tenancy was to start on April 15, 2018. The rent was $2300 per month plus utilities. The utilities included $90 per month for cablevision and $268 per month for hydro.

The tenants' application claims the sum of $27,474 including $14,940 for breach of contract, $9147 for the cost of purchase new furniture and houseware, $1525 in dining expenses, $1200 in transportation expenses and additional expenses.

The landlord provided the following evidence relating to the reason why the tenancy agreement was cancelled:

- In mid December H, the landlord's tenant called her advising that there had been a flood in the building but that it did not appear her unit was badly damage. The restoration people had come in and told him they were lucky. The flood occurred in a unit two stories above them.
- On January 22, 2018 she received a notice from the Property Management Company stating they had impressed upon the insurance adjuster that urgency of getting repairs done as quickly as possible.
- The landlord decided to advertise the rental unit in late January as H's tenancy was coming to an end of February 28, 2018.
- The landlord went to the rental unit on February 2, 2018 to show the rental unit to a prospective tenant and discovered that the elevator was not working and the carpeting in the lobby had been removed. She assumed this was evidence of the restoration work in progress.
- She did not expect that the flood would have an impact on her unit.

- On February 13, 2018 H, the present tenant texted her that the restoration company was back to do more tests and they found water damage in multiple areas of the condo. The unit next to theirs has been completely gutted.
- The landlord telephoned H and he advised the restoration company has made multiple holes in the drywall, removed most of the baseboard and moved most of the furniture/wall pictures to test for water. H. sent her photos showing the fans.
- On February 14, 2018 she was finally able to reach the restoration company. They advised her that the repairs were not likely to begin for another month and that once they began it was likely to take 4-6 months to complete. He also advised that her unit was not likely to be dealt with first as they intended to start work in the units that were higher. He also advised the flood occurred as a result of some tenants trying to mount a TV on the wall. Many people had moved out of their units because of the extent of the damage.
- On March 15, 2018 she received a notice from the management company confirming repairs were likely to take approximately 5 months.
- On April 10, 2018, May 1, 2018 and June 12 2018 she received minutes from the strata counsel that the repairs had started on the 5th floor and the contractors were working their way down. The June set of minutes stated that it expected that repairs would be completed in late summer and early fall.
- On June 1, 2018 after 3 months of no rental income she decided to sell the condo. A contract of purchase and sale was entered into in late June and the sale completed around the middle of July. At the time of sale the repairs had not been completed.

The landlord gave the following evidence about the tenant's various claims and their failure to properly mitigate. :

- The tenants were able to secure another furnished apartment for one month that was comparable in size, location, price and level of finishing within 24 hours after the tenancy agreement with the landlord was cancelled.
- The landlord produced an e-mail from the agent who rented the Tenants the unit for one month that included the following:
    - The tenants contacted her on February 16, 2018 and she was able to rent them a condo the month of March 2018. She mentioned to them that the condo was available staring June 1, 2018 but they never followed up on this.
    - She e-mail the tenants on February 17, 2018 that she had another furnished rental for April, May and June but the tenants never followed up on it.
    - On March 16, 2018 the tenant e-mailed her that they were still looking for another place and she advised them that the unit they were in was available on March 1, 2018.
    - On March 28, 2018 the tenant e-mail her advising that they had found another place.

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<u>The Law:</u>

The Residential Tenancy Act provides that a tenancy can end if the tenancy agreement is frustrated. Section 44(1)(e) provides as follows:

> How a tenancy ends
> 44 (1) A tenancy ends only if one or more of the following applies:
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> (e) the tenancy agreement is frustrated;

Section 56 provides:

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

In the case Crown Point Hotel (1981) Ltd. v. British Columbia (Public Safety and Solicitor General), 2007 BCSC 1048 (CanLII), <http://canlii.ca/t/1s37p>, retrieved on 2018-11-22 the court held that the closure of a rental property because of an order from the Fire Commissioner's office amounted to frustration. The Court stated:

> "[64] The B.C. Court of Appeal in KBK No. 138 Ventures Ltd. v. Canada Safeway Ltd., 2000 BCCA 295 (CanLII) at para. 12, adopted the following definition of frustration from Lord Simon of Glaisdale in National Carriers Ltd. v. Panalpina Ltd., [1981] 1 All E.R. 161 at 175 (Eng. H.L.):
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> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes that nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it

> would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance. [Emphasis added.]

[65] The Court of Appeal went on at para. 13 of KBK No. 138 to confirm the "radical change in the obligation" test for frustration, from Davis Contractors Ltd. v. Fareham U.D.C., [1956] A.C. 696, [1956] 2 All E.R. 145 (H.L.), per Lord Radcliffe at p. 728-29 (A.C.):

> So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do. [Emphasis added.]

Analysis:

I determined as follows::

- The flood which originated in a rental unit two stories above the rental unit was not the fault of either the Tenant or the landlord. It was outside of their control.
- I determined the rental unit was uninhabitable because of this flood, the dangers of moisture damage including mould and the extensive repairs that were required. The repairs took over 5 months to complete from the date the tenancy was to start
- The result of the flood and the damage that it caused to the building and the rental unit was extensive it made the rental unit uninhabitable. As a result the contractual obligations of the parties became incapable of being performed. Section 32(1) of the Residential Tenancy Act provides as follows:

  > Landlord and tenant obligations to repair and maintain
  > 32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that
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  > (a) complies with the health, safety and housing standards required by law, and
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  > (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

- Performance of the tenancy agreement would render it radically different from that which was undertaken in the contract as it would require the Tenants to pay rent for living in a rental unit that failed to comply with the Act.
- The tenant testified at the start of the hearing that she would not have been interested in renting the rental unit had she been made aware of the flood.

- The issue of frustration was put to the tenant(s) during the hearing. I do not accept the testimony of the tenant when she stated she thought she might have moved in if given a change. This is contrary to her earlier testimony where she stated would not have been interested in moving in had she been aware of the flood.

I determined the contract was frustrated as a result of an event outside of the control of the parties that made in which performance would render it a thing radically different from that which was undertaken by the contract. **As a result I ordered that the Application for Dispute Resolution filed by the Tenants be dismissed without leave to re-apply. On that basis alone the claim should be dismissed.**

Further I determined the Tenants failed to prove that they were entitled to the claims made.

Policy Guideline #16 includes the following:

> **16. Compensation for Damage or Loss**
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> **C. COMPENSATION**
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> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
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> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Section 7(2) of the Residential Tenancy Act provides as follows:

> Liability for not complying with this Act or a tenancy agreement
> 7 (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Analysis of Claims:
The tenants failed to prove even if the landlord breached the tenancy agreement (which has not been established) the tenants are entitled to the claims they are making:

a. I do not accept the submission of the tenants that they are entitled to $14,940 for breach of contract. The landlord is not responsible to reimburse you for rent the tenants have not paid the landlord or rent that tenants have paid to a third party if it is a comparable amount. This amounts to an attempt to impose a penalty on the landlord for allegedly breaching the contract. The law does not permit the recovery of a penalty. The tenants testified the cost of living in the unfurnished suite was more expensive because they were responsible to pay the hydro and cable but failed to provide sufficient documentary evidence to prove these costs.
b. I do not accept the submission of the tenant that they are entitled to $9147 for the cost of purchase new furniture and houseware goods. This is not an expense that flow from the allege breach of contract but rather an expense that you have chosen to occur. This is not a foreseeable loss.
c. I do not accept the submission of the tenants that they are entitled to $1525 in dining expenses. The tenants found a furnished apartment to move into commencing the same day had they moved in this rental unit. There is no basis for the claim of $1525. The landlord is not responsible to pay the cost of eating out for the period of April 1, 2018 to April 15, 2018.
d. I do not accept the submission of the tenants $1200 in transportation expenses or the cost of storage as those items are part of the normal moving from Alberta to B.C.

I would have dismissed the tenants' application without leave to re-apply.

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: November 28, 2018

Residential Tenancy Branch