Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding METCAP LIVING
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNL-4M, MNDCT, OLC, ERP, PSF, AAT, FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 4 Month Notice to End Tenancy for Landlord's Use of Property (the 4 Month Notice) pursuant to section 49;
- an order to set aside the landlord's assertion that the landlord is entitled to end to this tenancy on the basis of this being a frustrated tenancy pursuant to paragraph 44(1)(e) of the *Act*;
- a monetary order for compensation for losses or other money owed 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;
- a monetary order for the cost of emergency repairs to the rental unit pursuant to section 33;
- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- an order to suspend or set conditions on the landlord's right to enter the rental
- an order to allow access to or from the rental unit or site for the tenant or the tenant's guests pursuant to section 70; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

At the commencement of the hearing, the tenant's advocate (the advocate) confirmed that no 4 Month Notice was issued to the tenant; the issue was instead whether the landlord was entitled to end this tenancy on the basis of a frustrated contract. The advocate agreed to withdraw the application to cancel the 4 Month Notice that was never issued.

As the landlord's property manager (the landlord) confirmed that their office received a copy of the tenant's dispute resolution hearing package handed to the landlord's building manager on November 15, 2018. Legal counsel for the landlord also confirmed receipt of a second copy of this package sent by the tenant by registered mail to the landlord. I find that the landlord was duly served with this package in accordance with section 89 of the *Act.* Since both parties confirmed that they had received one another's written evidence, I find that the written evidence was served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Is the landlord entitled to end this tenancy on the basis of a frustrated contract? Is the tenant entitled to a monetary award for losses or other monies owed arising out of this tenancy? Is the tenant entitled to a monetary award for emergency repairs conducted during this tenancy? Should any other orders be issued with respect to this tenancy? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This tenancy for a main floor one bedroom rental unit in a 93 unit rental building commenced on or about June 18, 2002. The tenant's original monthly rent of $750.00 has increased to $1,130.83 during the course of this tenancy, payable in advance on the first of each month. The landlord continues to hold a $400.00 security deposit paid by the tenant when this tenancy began.

The tenant's application for dispute resolution sought a monetary award of $1,150.00, the equivalent of one month's rent. The tenant supplied no evidence or testimony regarding any emergency repairs undertaken or expenses incurred by the tenant of this nature.

The landlord testified that there have been three significant flooding incidents affecting this main floor rental unit since October 2017. After the first flooding incident in October 2017, the landlord undertook minor repairs and restoration work. A second leak/flood occurred in December 2017, which affected this rental unit, the adjacent rental unit and locker spaces under these rental units. Following restoration work to these areas of the building and the placement of a pump outside the building walls, the restoration company hired to undertake the repair work installed a permanent membrane in January 2018, as a way of preventing future flooding incidents.

The landlord said that these measures were successful in preventing flooding or leakage problems until November 5, 2018, when a third episode of flooding occurred. This third flood affected the tenant's rental unit, the adjacent rental unit, the two locker rooms, a boiler room, a laundry room, and fire safety equipment. The restoration company was called to initiate measures to remove the water and repair the damage. While this happened the tenant was

relocated to a vacant rental unit in this building. However, when this suite was needed for new tenants, the tenant returned to the suite.

The landlord issued a letter to the tenant on November 13, 2018, advising the tenant that their Agreement had become a frustrated contract. This letter stated that the landlord was looking into a long-term solution to this flooding problem, and noted that these repairs would not be completed before the end of 2018. The letter read in part as follows:

Please be advised due to the continued water ingress into your suite your tenancy has now become a Frustrated Contract as outlined in the Residential Tenancy Act...

*We ask that you remove all your belongings from Unit #***, immediate as this suite is not livable. You may expect your November rent and your security deposit refunded in a timely fashion...*

At the hearing, the landlord confirmed the tenant's assertion that the tenant has continued paying monthly rent in full for November and December 2018. The landlord said that they had originally intended to return all of the tenant's November rent to the tenant, pending the outcome of this hearing. The tenant confirmed that the landlord made arrangements for him to stay in another rental unit in this building immediately following the flood. When the water was removed and the rental unit dry, the tenant said that he moved back into the rental unit for most of November, staying with friends for only a few days. The tenant testified that he returned to live in the suite on a full-time basis a few days prior to this hearing.

The landlord testified that their concern was that the tenant may be impacting his health by staying in this rental suite, which has not been disinfected and may be subject to mould as a result of this most recent significant flood. The landlord said that only recently has the restoration company commenced excavating around the walls of this building. Once this excavation work has been completed, the restoration company will give way to engineers who are planning to assess the problem and devise a remediation plan. The landlord said that they did not know how long it would take for the engineers to assess this situation or implement a plan to prevent future flooding.

The landlord entered into written evidence the following four sentence letter from the project manager for the restoration company:

...The unit has had water damage caused by outside grey water intrusion. Due to the damage caused by outside water it is unsafe to be occupied until all emergency service work and repairs can be completed. The walls need to be cut, carpet removed and area cleaned and disinfected before the unit is safe to occupy. Anyone occupying the unit before this work is completed is putting their health at risk...

During the hearing, the landlord confirmed that she was at the property when the initial restoration work and pumping of water was happening. The landlord confirmed that the pumps

were able to remove the flooded water from the tenant's rental unit. Although the rental premises are now dry, the landlord said that she thought it likely that the walls and some flooring would have to be replaced. Although the landlord testified that the restoration company's officials told her that the rental unit was unlivable, she stated that no one from the restoration company said that mould was present in the walls or under the flooring. When asked by the tenant's advocate, the landlord did not know the qualifications of the project manager to consider whether the rental unit was an unhealthy or unlivable place to reside. Similarly, the landlord had no information as to whether the project manager based their assessment of the rental unit on any moisture readings within the walls or the rental unit.

The tenant's advocate gave undisputed evidence that the tenant has co-operated fully on each of the occasions when there has been flooding affecting his rental unit. The tenant can make arrangements to stay elsewhere if any work needs to be done to disinfect the rental unit or replace walls and flooring that may present health problems. The advocate maintained that the landlord had presented little real evidence to support the assertion that this tenancy met the definition of a frustrated contract as outlined in Residential Tenancy Branch (RTB) Policy Guideline 34, a copy of which both parties entered into written evidence. The advocate asserted that the notice of a frustrated contract was a mechanism the landlord was using to attempt to circumvent the new provisions in the *Act* and received increased rent from this rental space. These provisions require the tenant to be given a first right of refusal should the landlord need to issue a 4 Month Notice to End Tenancy for Landlord's Use of Property to undertake repairs significant enough to require the tenant leaving the rental unit for a period of time. The advocate said the tenant wishes to remain in this rental unit, and will be as flexible as needed to enable the landlord to perform work that may become necessary there.

The tenant's advocate and the tenant's legal counsel also maintained that the landlord had not been diligent in seeking out a more lasting remedy to the flooding problems that started in October 2017. The tenant's advocate claimed that the flooding problems may very well be related to a major excavation for a 17-storey building that occurred next to this rental building in 2017. The tenant's advocate acknowledged that finding solutions may be difficult when there could be different reasons this flooding is occurring; however, the tenant's advocate maintained that RTB Policy Guideline 34 is not meant to apply when a landlord has been negligent, could have foreseen problems or has omitted taking proper measures to prevent problems from occurring that may lead to the frustration of the contract.

The landlord's legal counsel strongly objected to a characterization of the landlord's behaviours as being negligent or lacking in foresight. They maintained that each time the flooding occurred, the landlord has taken reasonable action to try to remedy this problem.

The landlord's legal counsel questioned the tenant's application for a monetary award. The tenant's advocate confirmed that no receipts had been presented in support of that application as the tenant lives on a fixed income and has been unable to pay anyone whose premises he has stayed at while the restoration work was happening in his rental unit.

The landlord's legal counsel also observed that there was nothing in the *Act* requiring the landlord to relocate the tenant elsewhere in this building in a situation where a tenancy Agreement had become a frustrated contract.

The landlord's legal counsel also asked for a ruling that in the event that the landlord's current attempt to end this tenancy as a frustrated contract were rejected, that leave to reapply be granted if the circumstances arose that justified such a determination in the future.

Analysis

While I have turned my mind to all the documentary evidence, including miscellaneous letters and documents, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

Section 44(1) of the *Act* outlines the ways that a tenancy may be ended. These ways include the following of relevance to the current application:

How a tenancy ends

> ***44*** *(1) A tenancy ends only if one or more of the following applies:*
>
> *(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:*
>
> *(v) section 49 [landlord's notice: landlord's use of property];...*
>
> *(c) the landlord and tenant agree in writing to end the tenancy;*
>
> *(d) the tenant vacates or abandons the rental unit;*
>
> *(e) the tenancy agreement is frustrated;...*

The parties have not signed a mutual agreement to end this tenancy and the tenant has not vacated or abandoned the rental unit. The remaining options for ending this tenancy in circumstances such as these would be by way of the landlord's issuance of a 4 Month Notice pursuant to the following provisions of section 49(6) of the *Act* or by way of a determination that the tenancy agreement is frustrated pursuant to paragraph 44(1)(e) of the *Act* as outlined above:

Section 49(6) of the *Act* reads in part as follows:

> *(6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:...*

(b)renovate or repair the rental unit in a manner that requires the rental unit to be vacant;...

I note that of the reasons cited in section 44(1) of the *Act* whereby a landlord may end a tenancy, those outlined in paragraph 44(1)(e) are the only ones where no Notice to End Tenancy on the prescribed RTB forms would be required. For this reason, the test to meet in ending a tenancy as a result of the tenancy agreement being frustrated is very high. Both parties understood this, as both referred to the wording of RTB Policy Guideline 34 in their written evidence and in their sworn testimony. I reproduce the relevant portion of Policy Guideline 34 as follows:

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...

Since the test for determining that a contract has been frustrated is high, the party declaring that the contract has been frustrated bears the burden of proving that this high test has been met. In this case, the landlord bears the burden of proving on a balance of probabilities that the tenancy agreement has been frustrated.

There is little doubt that the parties did not envision a series of flooding incidents occurring during the course of this tenancy. However, merely proving that a series of damaging floods have happened does not on its own mean that the tenancy has been frustrated.

In this case, the flooding incident occurred on or about the night of November 4, 2018. As the tenant could not stay in the rental unit immediately following the flood, during this initial period the landlord took action to release a vacant suite within the same building to the tenant for the tenant's use. Nine days passed before the landlord made the determination in their November 13, 2018 letter that the tenancy agreement was frustrated and the tenancy could not continue. During this time, the restoration company was busy pumping water out of the damaged rental unit within a relatively short period of time. The tenant gave undisputed sworn testimony that he was able to stay in the rental unit for much of November 2018, although he did stay some days with friends that month. There is also undisputed sworn testimony that the tenant has returned

to the rental unit, is aware of the landlord's concerns that remaining in the rental unit may be hazardous to his health, accepts that risk, and is prepared to accommodate any repair and restoration plans the landlord may make, as he has in the aftermath of previous bouts of flooding and leakage in this rental unit.

The landlord has engaged the restoration company to excavate the exterior area alongside the tenant's rental unit and will initiate further work once the premises are ready for the engineers associated with the restoration company.

While the landlord may very well be genuine in concern for the tenant's health, I find that the landlord has provided very little evidence to substantiate that the damage that has occurred to the tenant's rental unit is so substantial that the tenancy agreement has been frustrated. The landlord produced no photographs, videos, receipts, invoices, reports, building plans, or witnesses to substantiate the statement made in a four sentence statement by the restoration company's project manager. The landlord provided no evidence from the local municipality, the local fire department, local health officials or anyone other than herself and the restoration company's project manager who did not attend this hearing. The landlord produced no verification that the project manager is trained and qualified to assess whether the conditions in the tenant's rental unit are such that his health would be compromised by living there. The landlord's main health concern identified during the hearing was that the water damage has caused mould which presents a health risk to anyone living there. While this could very well prove to be the case, this is still speculative testimony. In fact, the landlord gave sworn testimony that the project manager never mentioned anything specific about mould in the rental unit to her, nor did she know whether any type of testing had been conducted following the most recent flooding incident to assess the presence of mould in the rental unit.

The tenant's advocate gave undisputed sworn testimony that the tenant has a proven record of being very accommodating and flexible with respect to making the rental unit available for repairs in the past when the landlord's restoration company has been involved in efforts to remediate his rental unit following past floods. There is no reason to believe that the tenant will be anything less than accommodating as the plans to restore and repair this rental unit emerge.

At the hearing, the tenant's legal counsel asserted that the landlord's November 13, 2018 declaration that the tenancy agreement was frustrated may have been premature at best. With all due respect, I find at this point in time that the situation has changed considerably. When the landlord issued the November 13, 2018 letter to the tenant, the landlord was not even certain as to any timetable for undertaking the repair work. By the time of this hearing, the landlord has engaged the restoration company to excavate the area along the side of this building and is poised to obtain an engineering solution to this problem once this excavation work enables the engineers to develop one. While the landlord was unable to identify a time frame for completing this work, the landlord is taking proper steps to ensure that tenants within this building do not suffer similar flooding problems, which also serves to protect the landlord's considerable investment in this large rental building.

As was noted in RTB Policy Guideline 34, the standard for establishing that a tenancy agreement has been frustrated is necessarily very high, as it can lead to the ending of a tenancy without the issuance of a written notice to end tenancy. In coming to this determination, I do not accept that the landlord was deliberately negligent in taking action regarding the flooding problem. The two previous bouts of flooding have raised questions as to whether the landlord's failure to take more comprehensive action following the December 2017 flood constituted an unreasonable omission by the landlord; however, I also note that a new membrane was installed in January 2018, which seemed to be working until November 2018.

Of more relevance to my decision is my failure to accept that the change in circumstances totally affected the nature, meaning, purpose, effect and consequences of the contract as far as the parties were concerned. The landlord continued to provide accommodation for the tenant following the flooding in early November and continued to cash and retain the tenant's rental payments. These actions and the fairly rapid return of the rental unit to a state whereby the tenant considers the premises habitable lead to my conclusion that this tenancy agreement has not been frustrated. I find that the landlord has fallen far short of demonstrating that this tenancy agreement has been frustrated. I should also note that based on the evidence presented, it is not even clear that had the landlord actually issued a 4 Month Notice, which was not the case, that it would have been necessary for the tenant to end this tenancy while repairs were undertaken.

Notices to end tenancy provide tenants with rights to dispute the reasons cited on these notices and, as is the case with Notices to End Tenancy for Landlord's Use of Property, contain monetary entitlements to tenants who receive such eviction notices. As was noted by the tenant's advocate at this hearing, 4 Month Notices also enable tenants a first right of refusal to return to their former premises once significant repairs and renovations have been completed. Unilateral declarations by landlords that there has been a frustration of a tenancy agreement are intended to be used in truly exceptional cases where there has been a radically changed set of circumstances and there is no possibility that a tenancy could be continued. In this case, the landlord has even continued to accept rent from the tenant after declaring that the tenancy agreement was frustrated. A frustrated tenancy agreement may occur when a building has been razed by fire, where a manufactured home park has been flooded to the extent where no one can access the site for an extended period of time, or where the only bridge accessing a rental property has prevented the only route to access the premises. I find that the landlord has provided insufficient evidence that would demonstrate that the current circumstances are of such magnitude that could lead to ending this tenancy because the tenancy agreement has been frustrated.

Turning to the monetary aspects of the tenant's claim, the landlord said that they were prepared to rebate the tenant his entire November 2018 rent payment, pending the outcome of this hearing. As the landlord did provide alternate accommodation within this rental building until at

least November 13, 2018 and the tenant testified that he did stay in the rental unit for some of the days following the flooding incident, I allow the tenant a monetary award of two thirds of his November 2018 rent. This leads to a monetary award of $753.89, which is partially as a result of the loss in value of his tenancy during November 2018, through no fault of his own.

At the hearing, I noted that landlords are only allowed to charge one-half of a month's rent as a security deposit. For this reason, I find that the tenant's $400.00 security deposit should only have been a maximum of $375.00. The *Act* allows me to order the return of the additional amount charged by the landlord for this security deposit with interest. In this case, this leads to my monetary award of $25.89 ($25.00 + $0.89 in interest = $25.89) for this overpayment of the security deposit for this tenancy.

As the tenant has been successful in this application, I allow the tenant to recover the $100.00 filing fee from the landlord.

As was noted above, the tenant's application to cancel a 4 Month Notice that was never issued is withdrawn.

The remainder of the tenant's application is dismissed without leave to reapply, as I find that the tenant has supplied insufficient evidence of any entitlement to the issuance of additional orders or an additional monetary award.

As there was no formal application for dispute resolution before me from the landlord, I am not at liberty to grant the request made by the landlord's legal counsel for "leave to reapply." I have interpreted this as a request for permission to allow the landlord to reissue another declaration that the tenancy agreement has been frustrated once more information is known about the extent to which the rental unit will need to be vacated to accommodate the landlord's repairs. Unless the situation changes significantly and another serious flooding incident occurs, the landlord is reminded that the standard mechanism for ending a tenancy for landlord's use of the property for major repairs to a rental unit is by way of a 4 Month Notice issued to the tenant and not by way of a unilateral declaration by the landlord that the landlord considers the tenancy agreement frustrated and of no continuing force or effect. A 4 Month Notice should only be issued after all necessary permits to undertake this work have been obtained. As new circumstances such as yet another flood could arise which could lead to a genuine frustration of the tenancy agreement, I can make no order preventing the landlord from attempting to use this mechanism to end this tenancy in the future.

Conclusion

I allow the tenant's application to dismiss the landlord's attempt to end this tenancy on the basis of a frustrated tenancy agreement. The landlord's November 13, 2018 is of no force or effect. This tenancy continues until ended in accordance with the *Act*.

I issue a monetary award in the tenant's favour in the amount of $879.78, which may be deducted from a future monthly rent payment. In the event that for whatever reason this remains unfeasible, I issue a monetary Order in the tenant's favour in that amount. The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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.

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 13, 2018

Residential Tenancy Branch