Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFL MNRL-S OPR (landlord);**
CNR ERP FFT LAT LRE MNDCT OLC RP RR (tenant)

Introduction

This hearing also dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- Cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities ("Ten-Day Notice") pursuant to section 46;
- An order requiring the landlord to carry out emergency repairs pursuant to section 33;
- An order requiring the landlord to carry out repairs pursuant to section 33;
- An order requiring the landlord to provide services or facilities as required by the tenancy agreement or the *Act* pursuant to section 62;
- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;
- An order to restrict or suspend the landlord's right of entry pursuant to section 70;
- An order to reduce the rent for repairs, services or facilities agreed upon but not provided pursuant to section 65;
- An order requiring the landlord to reimburse the tenant for the filing fee.

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

- An order for possession under a 10-Day Notice to End Tenancy for Unpaid Rent (Ten-Day Notice) pursuant to sections 46 and 55;
- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;
- Authorization to recover the filing fee for this application pursuant to section 72.

Both parties attended the hearing. Each party had the opportunity to call witnesses and present affirmed testimony and written evidence. Each party acknowledged receipt of the other party's Notice of Hearing and evidentiary materials. No issues of service were raised. I find each party served the other in accordance with the *Act*.

Preliminary Matter

At the outset of the hearing, the parties stated the tenant had vacated the unit. Accordingly, the landlord withdrew his applications under sections 46 and 55. The tenant withdrew her applications under sections 46, 33, 62, 70 and 65.

Issue(s) to be Decided

Is the landlord entitled to:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

Is the tenant entitled to:

- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

Is either party entitled to reimbursement of the filing fee?

Background and Evidence

The parties testified they entered into a one-year fixed term tenancy agreement beginning March 1, 2019. The unit was a 2-bedroom, 2-bath new condo in which the tenant resided with her daughter. Rent was $3,100.00 payable on the first of the month. At the beginning of the tenancy, the tenant provided a security deposit of $1,550.00

which the landlord holds; the tenant has not given the landlord authorization to withhold any of the security deposit. The tenant submitted a copy of the agreement.

The parties agreed that on March 12, 2019, the tenant reported a stopped toilet to the landlord. The landlord testified that he, in turn, notified the building manager who denied responsibility. No repair action was taken. The tenant stated the toilet was not fixed and was unusable from that date until she vacated the unit.

On March 27, 2019, the tenant testified she discovered substantial water damage in the wall of the master bedroom closet; the drywall was bubbling out and the carpet in the closet and adjacent bedroom was wet. There was a substance she assumed was mould on the baseboard, walls and bathroom floor tiles. The tenant submitted photographs in support of her observations.

The tenant testified that she reported the situation to the landlord who requested that she report the problem to the building manager.

The tenant testified that the developer came with a plumber the next day (March 28, 2019) and removed part of the drywall in the closet and some of the affected, wet carpets. The tenant stated the wet drywall was substantially covered with mould and that the smell of mould and rot immediately penetrated the unit when the wall was opened. The tenant submitted pictures of the wet removed drywall on the inside of which was a brownish, mottled substance.

In her written submission, the tenant stated, as written:

The mould spread very fast and the moulding area became much larger than the day before. The rental unit was filled with the smell of mould and stench. I started getting symptoms from the mould which include constant headaches, sore throat, and allergies. I went to a walk-in clinic and was told that the symptoms will not go away because the mould will continuously spread even if a mould killer is used. Since then, the rental windows also need to be open 24 hours a day, causing me to catch colds.

The tenant testified that large, noisy drying fans were immediately moved in to the unit to start the restoration project. All her clothes and boxes of storage items in the closet and master bedroom were moved in to the living room. The tenant submitted photographs showing the living room furniture heaped with clothing and stacked boxes.

The tenant testified that she and her daughter spent the night of March 29, 2019 in a hotel as there was no place to sleep in the unit and the sound of the fans made rest impossible.

The tenant testified that the landlord promised quick repairs and one-month free rent (April 2019) and a possible a second month (May 2019) if the repairs took longer than a month. Based on these promises, the tenant testified they returned to the unit the following day.

The tenant claimed that the situation quickly worsened. A shower became clogged. Then, on April 1, 2019, the developer attended at the unit and said the developer would not fix the toilet.

On April 5, 2019 the leaking resumed in the original location causing further water damage.

On April 9, 2019, the landlord sent an email to the tenant, a copy of which was submitted in evidence, which stated in part as follows (as written, emphasis added):

*At the mean time, following up with our phone conversation, although I disagree your choice of not paying rent and still continue to occupy my property**, I am ok to waive you the rent for the month of April in regard of the inconvenience that may have caused you, and willing to settle with you, also, I am willing to waive you the rent for the day or days that the restoration is not complete in may,** but only under one condition, you must meet our appointment date request for the insurance adjuster, restoration worker and the developer worker to enter the suite for the repair, I am willing to be on sight at the appointment date if your schedule is not allowed.*

On April 10, 2019, the landlord posted on the door of the unit a Ten-Day Notice because the tenant did not pay rent on April 1, 2019. The tenant said this step was taken without notice to her; she was shocked and felt betrayed by the landlord. The tenant testified that at no time did the landlord say he wanted rent for April 2019 and the tenant relied on his promise that no rent would be paid during restoration of the unit. The tenant testified she had cancelled her rent payment for April 1, 2019 based on the agreement that she would not pay rent.

On April 10, 2019, the tenant sent the landlord an email, a copy of which was submitted as evidence, complaining about the “smell of mould and stench”, the effects on her

health, the failure of the landlord to obtain a work permit for the restoration, the spread of mould through the unit, and her lost income in dealing with the restoration and chaos. The tenant stated in the email that “you are preparing to sell this apartment and requested me to move out”. The tenant told the landlord that he was never to enter the unit without her permission, failing which she would call the police.

The tenant testified that she observed the repairs were progressing slowly and workers were coming to the unit without regard to the inconvenience to her and her daughter.

The tenant testified that the landlord hired an “unlicensed handyman” to do the work who seemed inept and slow; the handyman had a day job, hence could only come and do the repairs at night.

Further, the tenant testified that she observed that the landlord was committed to cosmetic repairs only; she believed he intended to do the least repairs possible as he was planning to sell the unit as it was poorly constructed. The tenant testified, for example, that the landlord refused her request to replace the tiles in the bathroom’s floor and walls which the tenant believed had mould from the water damage.

The tenant testified that she became convinced that it was not possible to predict with any certainty when the repairs would be finished.

The tenant testified that she became afraid of the landlord. She believed that he was pressuring her to remain in the unit and pay rent even though the unit was uninhabitable and chaotic. The tenant testified that on April 15, 2019, while parked at the building in which the unit is located, the tires of her car were punctured; while without proof, she suspects the landlord of being responsible for this vandalism. Also, she testified that on April 15, 2019, the landlord attempted to enter the unit without her permission and he engaged in harassing her by texts and emails.

The tenant testified that the repairs completely disrupted their life. The noise of the blowers to dry the unit “made living in the apartment unbearable”. The shower would not drain. The frequent coming and going of people doing repairs was invasive and upsetting. There was no end in sight for the repairs and the tenant gave up on the unit being returned to the condition it was in when she moved in. The tenant said it was impossible for her and her daughter to continue living in the unit.

In her written submissions, the tenant stated:

Overall, the damages of the rental unit and frequent visits [of the landlord and repair persons] without my permission have caused harm to my health and career. It has taken time away from my ability to engage with clients and attend work-related meetings. I have not felt safe for a single day in the apartment since this incident occurred due to the landlord entering my apartment and having access to the keys he was supposed to have given me.

On April 16, 2019, the tenant decided to vacate the unit. She sent a letter to the landlord, a copy of which was submitted as evidence, in which she claimed the landlord had breached a material term of the tenancy because of the damaged condition of the unit and she was vacating the unit.

The tenant testified that she sought and rented a temporary apartment elsewhere, where she paid rent for both April and May 2019.

The tenant claimed that, on April 22, 2019, another incident of vandalism to her car occurred. The tenant suspected the landlord of terrorizing her; she reported the matter to the police, submitting a police report number at the hearing.

The tenant testified she informed the landlord in a text exchange that she was unavailable on April 23, 2019 for the landlord and workers to attend at the unit. In response, the landlord called the police who attended at the unit with the developer; the landlord submitted the police file number.

The developer sent the landlord an email, a copy of which was submitted, stating that the unit appeared to be dry and restoration would continue after the tenant vacated.

The tenant stated that she owns a piano, among other possessions, which could not be moved out until the end of April 2019. She stated she made all reasonable efforts to move her possessions out in a timely manner, and finally had everything out by April 30, 2019. She submitted a copy of correspondence to the landlord dated May 1, 2019 returning her keys and informing him she had vacated.

In her Application filed April 12, 2019, the tenant claimed compensation from the landlord for $35,000.00 However, the tenant clarified her claim during the hearing as follows:

ITEM	AMOUNT
Rent for April 2019 (new location)	$3,750.00
Rent for May 2019 (new location)	$3,750.00
Window repair	$100.00
Replacement 2 pairs boots (one-half purchase price)	$950.00
Hotel one night	$410.00
Moving expenses	$1,100.00
Reimbursement of the filing fee	$100.00
Plus, security deposit	$1,550.00
Total Monetary Award Requested by tenant	**$11,710.00**

Each of the tenant's claims are considered.

Rent for April and May 2019 (new location)

The tenant claimed reimbursement of $3,750.00 for each of the months of April and May 2019. She stated that because of the landlord's slow and inept handling of the water damage issue and repairs, she was compelled to search quickly for temporary accommodations and rent another place to stay.

The tenant acknowledged that she paid rent to only one landlord for April and May 2019 and did not pay the landlord rent for those months.

The tenant stated that she cooperated with the landlord and the developer every time they asked to enter the unit and that they came at least 8 times from March 28 to April 8, 2019. The tenant submitted copies of my texts and emails in support of her assertion.

The landlord replied that the repairs were not sufficiently serious to warrant the tenant vacating the unit. He stated he made all reasonable efforts to carry out repairs in a timely manner. The landlord, in turn, submitted copious documentary and oral evidence of his efforts to carry out timely, proper remediation.

The landlord submitted an internal email among the property managers dated April 4, 2019 when the wall began to leak for a second time, as evidence of his reporting to the building mangers, the email stating in part:

[Landlord] reporting a leak from the wall in the bathroom causing drywall mould along with wet insulation and the carpet is soaked – was told it was from clogged toilet but it was never a problem with the toilet. Not reporting emergency. He filed an insurance claim….

The landlord stated that any delay was caused by the tenant not letting workers in to the unit. He claimed the tenant should pay him rent until the end of the fixed term tenancy although his claim at the hearing was for rent for the month of April 2019 only.

Replacement 2 pairs boots (one-half new value) – ruined by water damage

The tenant claimed that because of the water damage, two expensive pairs of boots were ruined which were stored in the closet of the master bedroom. While the tenant did not submit a receipt for the purchases, she recalled the total purchase price and requested reimbursement of half that amount, being $950.00.

The landlord denied that he is responsible for compensating the tenant for the damage to her personal possessions. He testified that the unit was new, he was not responsible for the water damage, the tenant should have her own insurance, and he did everything reasonable to minimize the effect of the water damage on the tenant.

Window repair

The tenant stated that on February 28, 2019, she reported to the landlord that a bedroom window would not close. The landlord did not respond, and the tenant paid for the repairs at a cost of $100.00. The tenant submitted a copy of the receipt.

The landlord denied that the tenant reported this issue. He also stated that the repair was a simple matter and the tenant should not have paid anyone to carry out the work. The landlord denied responsibility for the repair.

Hotel - one night

As referenced above, the tenant claimed that because of the water damage, she was required to vacate the unit and spend a night in a hotel.

The tenant did not submit a receipt for the hotel as she used a gift certificate she had. The tenant claimed she checked the cost of the hotel room and that the value of the overnight stay was $410.00.

The landlord denied that the tenant was required to vacate the unit and that he should not be compelled to reimburse the tenant for this expense, particularly as it did not cost her anything.

Moving expenses

The tenant stated that because of the situation described above, she was required to move and incurred moving expenses of $1,100.00 for which she submitted receipts.

The landlord stated that the tenant had an obligation to remain in the unit under the fixed term agreement, that the unit was habitable, and the tenant behaved unreasonably in moving. The landlord denied that he is responsible to reimburse the tenant for any moving expenses.

Security deposit

The tenant provided her forwarding address to the landlord in writing on May 1, 2019, a copy of the letter being submitted as evidence.

Landlord's Claim

The landlord filed an Application on May 2, 2019. The landlord's stated monetary claim is for $35,000.00. However, the landlord's monetary order worksheet stated that his only claim is for rent for the month of April 2019 in the amount of $3,100.00. The landlord

confirmed at the hearing that his only claim was for reimbursement of rent for April 2019.

The landlord stated that he has brought another Application under a file number referenced on the first page of this decision. In that Application, the landlord claimed a monetary order against this tenant for rent for the balance of the fixed term tenancy.

The landlord submitted substantial documentary evidence including email exchanges/threads, photographs, an affidavit, FOI requests, chat history, a timeline and digital evidence.

The landlord testified that he made efforts to have the developer and insurer respond to the clogged plumbing and water damage in the unit in a timely manner. The landlord submitted many emails and letters reporting on the damage and clarifying the claims. The landlord submitted many emails recording scheduling repairs among the tenant, landlord and restoration workers; these emails detailed the status of the restoration.

The landlord denied that he ever agreed that the tenant could live in the unit during April and May 2019 without payment rent.

The parties agreed the landlord served a Ten-Day Notice on the tenant on April 10, 2019 by posting to the unit's door, thereby effecting service on April 13, 2019 pursuant to section 90. The tenant disputed the Notice on April 12, 2019.

Analysis

I have considered all the submissions and evidence presented. I will only refer to certain aspects of the submissions and evidence in my findings.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy agreement or the *Act*, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. The purpose of compensation is to put the claimant who suffered the damage or loss in the same position as if the damage or loss had not occurred. Therefore, the claimant bears the burden of proof to provide enough evidence to establish **all** of the following four points:

1. The existence of the damage or loss;

2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the *Act*.

In this case, the onus is on each party to prove entitlement to a claim for a monetary award. The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

I will consider the issue of the frustration of the contract first.

Frustration

Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event. This event must have drastically changed the circumstances of the tenancy. As a result, the tenancy agreement as planned cannot be carried out.

Residential Tenancy Act Policy Guideline 34: Frustration provides guidance on when contracts are frustrated and the liabilities of each party thereafter. The Guideline states in part as follows:

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 landlord submitted substantial evidence in support of his assertion that the damage was not sufficiently serious to warrant the tenant vacating the unit and that he made diligent effort to assure restoration in a timely and reasonable manner. While the landlord insisted the tenant could live in the unit in April 2019, I prefer the tenant's version of events as she lived there with her daughter. I find her evidence reliable and credible as it was supported by photographs that show a unit in chaos and disarray after the water damage. I find the removal of wet drywall, portions of the wall and the flooring, as well as the reported plumbing problems (clogged toilet and shower) as portrayed in the tenant's evidence and photographs, to establish that the unit was uninhabitable after March 27, 2019.

I accept the tenant's evidence based upon her testimony and supported by correspondence with the landlord, that she returned to the unit on the understanding she did not have to pay rent while the repairs were being conducted as both parties acknowledged that it would be difficult and inconvenient for the tenant to remain in the unit. I find the tenant's evidence is supported by the landlord's correspondence to her of April 9, 2019 in which he stated as follows (emphasis added):

I am ok to waive you the rent for the month of April in regard of the inconvenience that may have caused you, and willing to settle with you, also, I am willing to waive you the rent for the day or days that the restoration is not complete in may

I accept the tenant's testimony that she did not expect the restoration to take so long and that she did not anticipate the intolerable disruption to her quiet occupation of the unit with her daughter. I accept her evidence that as soon as the reality of the situation became clear to her, she notified the landlord on April 16, 2019 that she was moving. I find it is reasonable that the tenant would arrange for moving her possessions, including heavy furniture, at the end of the month.

Based on the testimony and evidence before me, on a balance of probabilities, I find that the tenancy agreement between the landlord and the tenant to be frustrated on March 27, 2019, and as such, the parties to the tenancy agreement are discharged from fulfilling their obligations under the tenancy agreement after that date. I find that the water damage was an unforeseeable event. I find there is no evidence before me that either the landlord or the tenant is at fault regarding the water damage. I find this event drastically changed the circumstances of the tenancy. As a result, the tenancy agreement as planned could not be carried out after this day and to unit was, to all

intents and purposes, uninhabitable, although the tenant's possessions remained in the unit until the end of April 2019.

Tenant's claim for window repairs

With respect to the tenant's claim for reimbursement of the $100.00 repair bill for the bathroom window, I have considered sections 32(1) and (2) which outline the obligation of the landlord to repair and maintain a rental property. I have considered the testimony of the parties, and I am not satisfied that the tenant has provided enough evidence to support a finding that the landlord has failed to fulfill their obligation under the *Act*. I find that the delay with repairing the window can be attributed to the actions of both parties including a failure of communication. I dismiss the tenant's monetary claim in this regard without leave to reapply.

Tenant's claim – security deposit

The tenant is entitled to return of her security deposit of $1,550.00 and I grant her a monetary award in this amount.

Remainder of tenant's claims

The tenant has failed to establish responsibility of the landlord for the balance of her claims, as required under the four-part test above. I have found that the agreement was frustration due to an event (water damage) that was not caused by either party. As the landlord is not responsible for the damage to the unit making it uninhabitable, I therefore dismiss the remainder of the tenant's claims without leave to reapply.

Landlord's claim – rent April 2019

Based on the evidence submitted by the parties, I find that the landlord has failed on a balance of probabilities to meet the burden of proof that he is entitled to any rent for the month of April 2019.

I have discussed my findings earlier that the agreement was frustrated on March 27, 2019; I found that the unforeseen event, the water damage, was not caused by either party, I find the unit was uninhabitable from that date forward. I find that the tenant continued to stay in the unit based on a miscomprehension of the extent of the damage, the time involved in the restoration, and the inconvenience and disruption to herself and

her daughter. I find the landlord is not entitled to any compensation for the month of April 2019.

For greater clarity, I find the contract between the parties was terminated on March 27, 2019 and the landlord is not entitled to rent from April 1, 2019 to the end of the fixed term.

I dismiss the landlord's application for outstanding rent for the month of April 2019 without leave to reapply.

Filing fee

As the tenant has been partially successful in her claim, I grant her reimbursement of the filing fee of $100.00.

Conclusion

I grant the tenant a monetary order in the amount of $1,650.00. This order must be served on the landlord. If the landlord fails to pay this amount, the tenant may enforce this order in the Supreme Court of British Columbia, Small Claims Division as an order 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: July 17, 2019

Residential Tenancy Branch