Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding REALSTAR MANAGEMENT - 819 YATES HOLDINGS LTD and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT OLC PSF FFT

Introduction

This hearing was convened as a result of the tenant's Application for Dispute Resolution (application) seeking remedy under the *Residential Tenancy Act* (the Act). The tenant has applied for a monetary order in the amount of $1,450.00 for the return of September 2019 rent.

The tenant and three agents for the landlord BW, GM and AK (agents) attended the teleconference hearing. The tenant and the agents gave affirmed testimony, and all participants were provided the opportunity to present their documentary evidence prior to the hearing. Words utilizing the singular shall also include the plural and vice versa where the context requires.

The landlords confirmed that they had received the tenant's documentary evidence prior to the hearing and that they had the opportunity to review that evidence prior to the hearing. I find the parties were sufficiently served in accordance with the Act.

Preliminary and Procedural Matters

At the outset of the hearing, the parties confirmed that the tenant vacated the rental unit on September 30, 2019. As a result, I find the tenant's application for an order directing the landlord to comply with the Act and to provide services or facilities agreed upon but not provided to now be moot as the tenancy has ended. As a result, I dismiss the tenant's application for an order directing the landlord to comply with the Act and to provide services or facilities agreed upon but not provided to now be moot as the tenancy has ended, without leave to reapply.

In addition to the above, the parties confirmed their email addresses at the outset of the hearing and stated that they understood that the decision would be emailed to them.

Issues to be Decided

- Has the tenant provided sufficient evidence to support a monetary claim under the Act?
- Is the tenant entitled to the recovery of the cost of the filing fee under the Act?

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A fixed-term tenancy began on July 1, 2018 and was scheduled to revert to a month to month tenancy after June 30, 2019. Monthly rent was originally $1,415.00 per month and due on the first day of each month. As of July 1, 2019, the monthly rent increased to $1,450.00 per month.

The tenant is seeking the return of September 2019 rent of $1,450.00 plus the $100.00 filing fee, due to what the tenant claims was a frustrated tenancy as of August 26, 2019. The agents deny that the tenancy was frustrated and state that the tenant is not entitled to any compensation under the Act.

The tenant writes in their application that on August 26, 2019 that the tenant provided their 30 day notice to vacate the rental unit, effective September 30, 2019 (1 Month Notice). The tenant also writes that on August 26, 2019, the tenant requested to book one of the two building elevators for August 31, 2019 as the tenant was able to move into a new home earlier than the September 30, 2019 date provided on the tenant's 1 Month Notice. The tenant writes that they were moving some of their belongings ahead of time and that as the tenant was flying out of the province on September 2, their partner (occupant) needed to have the belongings moved ahead of time to live in their new building. The tenant claims that the landlord refused to accommodate the tenant for September 2 and proposed different days, August 28, 2019 and September 2, 2019. The tenant writes that August 28 was not possible due to extremely short notice and that the tenant worked Monday to Friday and that September 2, 2019 was not possible as the tenant was flying out that day.

The tenant suggested to use the second elevator, which the tenant stated was denied by the landlord as that was for the use of tenants and not to be used for moving purposes and that there was fire department bylaw which required one elevator available at all times. The tenant then claims that the landlord threatened to call the fire department if the tenant used the second elevator without permission and that the

tenant would be charged the callout fee for the fire department to attend and a repair bill. The tenant then claims they were stressed and felt stuck inside their apartment.

The tenant writes that the plane ticket was later changed from a Sunday to the Monday due to no seat availability. The tenant later writes that agent BW later approved the tenant's request for the elevator for 10:00 a.m. on August 31, 2019 as the tenant originally had asked but not before the tenant had been significantly stressed, lost a night of sleep and having to unnecessarily take a day off of work.

The landlord's response was that the tenant was being very unreasonable and that no other times proposed by the landlord were acceptable for the tenant, which is not reasonable given how late of notice the tenant was providing. The agents also referred to the tenant's written notice that stated September 30, 2019 as the date the tenancy was ending and not August 31, 2019. The agents stated that they manage 209 units and that there was a lot of activity and elevator bookings and that only one elevator can be booked for moving in or out of the rental building. The agent also stated that they tried to negotiate with other tenants to accommodate the tenant and that none of the other tenants were able to accommodate the agents' request. The agents deny that they denied the tenant use of the moving elevator and that they attempted to accommodate him on several dates and that it was the tenant that was being unreasonable, not the landlord.

The agents also testified that the tenant gave notice to vacate for September 30, 2019 and then instead of arranging an elevator for that time period, requested an elevator for August 31, 2019, which was just five days after giving notice to vacate for September 30, 2019. The tenant stated that it was true the tenant could have vacated at the end of September 2019; however, it was the occupant living with the tenant that required their belongings to be moved out sooner at the end of August 2019. The agents deny that the Act was violated in any way, and that the tenancy agreement was also not violated in any way.

The tenant alleges that the landlord violated section 45(3) of the Act by the landlord breaching a material term of the tenancy agreement and not correcting the situation within a reasonable time period, given the circumstances.

Analysis

Based on the above and the evidence submitted and presented, and on a balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what is reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the tenant to prove the existence of the damage/loss and that it stemmed directly from a violation of the Act, regulation, or tenancy agreement on the part of the landlord. Once that has been established, the tenant must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the tenant did what is reasonable to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Firstly, I will deal with the tenant's assertion that the tenancy was frustrated as of August 26, 2019. Residential Tenancy Branch (RTB) Policy Guideline 34 deals with Frustration (policy guideline) and states in part:

> 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.
>
> [Emphasis added]

Based on the above, I find the tenant has applied the literal meaning of the term frustration and while the tenant may have been frustrated, the tenancy agreement was not frustrated. Mere hardship related to the booking of an elevator does meet the high test of frustration of contract.

In addition, the tenant has cited section 45(3) of the Act, which states:

> (3) If a landlord has failed to comply with a material term of the tenancy agreement and **has not corrected the situation within a reasonable period after the tenant gives written notice of the failure,** the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.
>
> [Emphasis added]

I find the tenant has failed to provide insufficient evidence to support that they waited a reasonable time as required by section 45(3) of the Act. In addition, I find the tenant failed to wait a reasonable time to be accommodated for the elevator and that the tenant's expectations were unreasonable. After considering the evidence of both parties, I find the tenant's application to be completely without merit and to be frivolous under section 62(4) of the Act, which applies and states:

> **Director's authority respecting dispute resolution proceedings**
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> **62**(4) **The director may dismiss all or part of an application for dispute resolution if**
>
> (c) **the application or part is frivolous** or an abuse of the dispute resolution process.

[Emphasis added]

The tenant provided notice to end the tenancy with an effective vacancy date of September 30, 2019, and then only five days later was upset at the fact that the tenant could not have the elevator on the day requested. With 209 units in the building, I find the tenant's demands to be completely unreasonable and that the landlord was reasonable in their attempts to accommodate the tenant. Therefore, I find the tenant has failed to meet all four parts of the test for damages and loss under the Act described above.

As the tenant's claim has no merit and has found to be frivolous, I do not grant the filing fee.

Conclusion

The tenant's application is dismissed in its entirety.

The tenant's application is both frivolous and without merit. The filing is not granted as a result.

This decision will be emailed to the parties as described above.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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 4, 2019

Residential Tenancy Branch