



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

OPN, FFL

Introduction

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for an Order of Possession and to recover the fee for filing this Application for Dispute Resolution. Although the Application for Dispute Resolution declares that the Landlord is seeking an Order of Possession because the Tenants gave notice to end the tenancy, it is readily apparent from information on the Application for Dispute Resolution that the Landlord is seeking an Order of Possession on the basis that the Landlord believes the tenancy is frustrated.

The Landlord stated that on April 07, 2020 the Dispute Resolution Package and the ten pages of evidence the Landlord submitted to the Residential Tenancy Branch on April 02, 2020 were sent to the both Tenants with the initials "AM", via email. The Director has authorized service of documents via email during the current COVID-19 pandemic. On the basis of the undisputed testimony, I find that these documents have been served to these two parties by email.

The Landlord stated that on April 07, 2020 the Dispute Resolution Package and the ten pages of evidence the Landlord submitted to the Residential Tenancy Branch on April 02, 2020 were mailed to the Tenant with the initials "HM". On the basis of the undisputed testimony, I find that these documents have been served to this party by mail.

The Landlord stated that on April 09, 2020 the Dispute Resolution Package and the ten pages of evidence the Landlord submitted to the Residential Tenancy Branch on April 02, 2020 were personally served to the Tenant with the initials "RS". On the basis of the

undisputed testimony, I find that these documents have been personally served to this party.

As the aforementioned documents have been served to each party, I find that the hearing should proceed in the absence of the tenants, and that the ten pages of evidence should be accepted as evidence for these proceedings.

The Agent for the Landlord affirmed that she would speak the truth, the whole truth, and nothing but the truth at these proceedings.

Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession because the tenancy is frustrated?

Background and Evidence

The Agent for the Landlord stated that:

- this tenancy began on July 01, 2019;
- in November and December of 2019 water began leaking through the foundation of the residential property;
- as a result of the leaking water, mold is growing throughout the residential property, including on the Tenants' clothing;
- the Tenants have been complaining about mold accumulation;
- the Landlord does not believe the rental unit is safe to occupy due to the presence of mold;
- no evidence was submitted from a health inspector or similar body that establishes the rental unit is uninhabitable;
- in January of 2020 the Landlord was able to offer the Tenants alternate accommodation, which was declined by the Tenants;
- she does not know why the Tenants have not vacated the rental unit;
- the rental unit is an older home which was purchased by the Landlord as an investment property;
- she does not know what the Landlord intends to do with the building once the rental unit is vacated;
- the Landlord may tear the building down and rebuild;
- the rental unit would need to be vacant, even if the Landlord intended to repair the rental unit;
- the Landlord was provided an estimate of \$125,000.00 for repairing the rental unit.

Analysis

Section 44(1)(e) of the *Residential Tenancy Act (Act)* stipulates that a tenancy ends if the tenancy agreement is frustrated.

Residential Tenancy Branch Policy Guideline #34, with which I concur, reads, 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.

On the basis of the undisputed evidence, I find that water has entered the rental unit and, as a result, there is a significant amount of mold growth within the unit.

On the basis of the information provided by the Landlord, I cannot conclude that this tenancy agreement is frustrated. In reaching this conclusion I was heavily influenced by the Agent for the Landlord's testimony that the Landlord was provided with an estimate of \$125,000.00 for repairing the rental unit. As the rental unit can be repaired, albeit at significant cost to the Landlord, I find that the Landlord is still capable of fulfilling the terms of the contract.

On the basis of the information provided by the Landlord, I cannot conclude that the rental unit is uninhabitable. In reaching this conclusion I was heavily influenced by the absence of evidence from a qualified health, a building inspector, or a similarly qualified professional, which establishes the mold in the rental unit renders the unit uninhabitable.

Section 56.1(1) of the *Act* authorizes me to grant an Order of Possession to a landlord if the rental unit is uninhabitable, or the tenancy agreement is otherwise frustrated. As the Landlord has submitted insufficient to establish that the rental unit is uninhabitable or that the tenancy agreement is frustrated, I dismiss the Landlord's application for an Order of Possession.

In the event the Landlord wishes to end this tenancy because the Landlord intends to demolish the rental unit, the Landlord is at liberty to serve the Tenants with a Notice to End Tenancy, pursuant to section 49(6)(a) of the *Act*.

In the event the Landlord wishes to end this tenancy because the Landlord intends to make repairs to the rental unit and the rental unit needs to be vacant to complete those repairs, the Landlord is at liberty to serve the Tenants with a Notice to End Tenancy, pursuant to section 49(6)(b) of the *Act*.

I find that the Landlord has failed to establish the merit of this Application for Dispute Resolution and I therefore dismiss the application to recover the fee for filing this Application for Dispute Resolution.

Conclusion

The Application for Dispute Resolution is dismissed, without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: May 07, 2020

Residential Tenancy Branch