Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ATIRA WOMEN'S RESOURCE SOCIETY and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes AAT

Introduction

On April 11, 2020, the Tenant made an Application for Dispute Resolution seeking access to the rental unit pursuant to Section 30 of the *Residential Tenancy Act* (the "*Act*").

This Application was originally set down for a hearing on May 28, 2020 at 9:30 AM and was then subsequently adjourned twice, for reasons set forth in two Interim Decisions, with the final hearing scheduled to be heard on July 9, 2020 at 9:30 AM.

The Tenant attended the final reconvened hearing with S.K. attending as her advocate. As well, A.P. attended the final reconvened hearing as counsel for the Landlord, with S.A. assisting. In addition, J.D. attended the hearing as an agent for the Landlord. The Tenant, S.K., and J.D. all provided a solemn affirmation.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to an Order to allow access to the rental unit for her or her guests?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

Neither party knew when the tenancy started, but the Tenant believed it was on or around January 2019. All parties agreed that the subsidized rent was established in the amount of $375.00 per month and it was due on the first day of each month. Neither party could confirm if a security deposit was paid, but the Tenant believed that she paid $575.00. A tenancy agreement was not submitted as documentary evidence.

At the original hearing, the Tenant advised that she had been denied access to allow her guests to visit her rental unit. She stated that as she is 80% bedridden, she needs the assistance of her guests to ensure for her personal care. She stated that she receives no help from the staff that are employed by the Landlord and that she was receiving assistance from another tenant of the building until that person had been evicted.

She stated that the first letter she received from the Landlord was a warning letter, dated March 24, 2020, which indicated that her elevator access would be deactivated because she continues to bring guests into the building and her rental unit, despite the potential to spread COVID-19. She submitted that she has only had one guest in her rental unit, for a brief period of time, and that he exited the building through the stairwell. In addition, on March 29, 2020, she had a guest in the lobby of the building, but she was unaware that she was not permitted to have guests in this area. She contends that she does her best to take precautions to ensure that neither she, nor her guests have been exposed to COVID-19.

On April 1, 2020, contrary to her statement that she was mostly bedridden, she advised that she returned to the building at 2:00 to 3:00 AM in the morning and her key card access to the building did not work, so she had to bang on the door until a staff member could let her into the building. She stated that since this point, her access to the front door of the building has been deactivated. While the Landlord is of the belief that their staff and other residents of the building are put at risk by the Tenant’s behaviour, it is her position that her safety is at risk because she is often in front of the building late at night and she must wait for staff to let her into the building.

With respect to a warning letter that she received from the Landlord, dated April 14, 2020, which noted that she was observed on a security camera letting guests into the building through a stairwell door at the side of the building at 3:56 AM, she advised that this person was a good friend of hers that was “drugged and about to be robbed.” She noted that another tenant of the building assisted her in granting this person access to the building. Despite the warning letters from the Landlord reminding the Tenant that her behaviours could be detrimental to her health and the well-being of others in the building, she advised that she had been called a “stupid junkie” by staff and that she had yelled back at them.

A.P. advised that before making her submissions, she would like witness A.D. to first speak to her own health condition. A.D. is a resident of the building, she recounted the status of her health, and she stated that she was aware of the policy that the Landlord implemented regarding the restriction of guests in the building. It is her belief that these restrictions are beneficial and necessary for the safety of herself and other vulnerable people in the building. She stated that the use of the elevator is required to gain access to any of the residential floors, that guests visiting the building would be an unacceptable risk to the vulnerable population of the building, that she would not feel comfortable if guests were allowed to enter the building, and she commended the Landlord for taking these steps to restrict access to anyone other than the residents of the building.

The Tenant reiterated that she frequently goes out late at night and the deactivation of her front door key card poses a problem as she is often standing outside the building waiting to be let in. It should be noted that this statement was again contradictory to the Tenant’s earlier submissions that she was mostly bedridden.

A.D. responded that she had herself come home once at 11:45 PM, and once at 1:15 AM, and staff have let her into the building immediately.

A.P. then requested that testimony from a second witness be heard; however, she was reminded that this Application pertained to the Tenant’s request for access to the rental unit for her or her guests because she has now been prevented from having this right. She was advised that if the second witness was there to provide similar testimony to A.D. regarding her health and to hear about her support for the Landlord’s implemented guest restriction policy, then it would not be necessary to hear from this witness as it would simply be a reiteration of what has already been presented. As well, it was not entirely pertinent to the Tenant’s Application. A.P. submitted that the second witness would be providing similar testimony. As such, this second witness was not called into

the hearing.

J.D. provided inconsistent testimony with respect to how a resident gained access to the building and to each rental unit. After much questioning, it was determined that each resident would have a scan card to access the front door of the building. They would then need to access an elevator which would take them to a second-floor office where they would then be granted access for the elevator to take them to their respective floor. She stated that there are always staff members at this office, regardless of day or time, to buzz a resident into the building and to provide immediate access to each resident's floor.

She advised that due to the COVID-19 pandemic, the Landlord implemented a no guests policy that applies to all the residents of the building; however, the Tenant has not been denied access for her to access her floor. Contrary to the no guests policy that the Landlord effected, the Tenant has brought guests into the building and into her rental unit. Multiple warning letters have been served to the Tenant regarding this issue, and those letters have been submitted as documentary evidence.

While she stated that the Tenant claims to being targeted with these warning letters, she noted that if the Tenant was bedridden and in pain as she claimed, the Tenant had provided contradictory testimony that she would frequently leave the building. In addition, the Tenant had been observed going up and down the stairs and allowing access to the building to guests through a side door as a way to circumvent them being denied access through the front door.

She advised that the residents of the building can meet guests outside the building, but access to the building and to the rental units has been restricted for all residents. Regarding the Tenant's claim that her access card to the main door of the building was deactivated, J.D. stated that it had been deactivated at some point as a way to manage the Tenant bringing guests into the building, but she was unsure if the card was still currently deactivated.

A.P. referred to her written submissions explaining the nature of the housing community in that building. She noted that there are floors in the building that provide care for people with "chronic, life limiting health issues" and that there are many residents that would fall into the "vulnerable" population category if exposed to COVID-19. She submitted that the elevator and narrow stairwell are the only means of access to any of the residents, guests, or staff.

On average per month, 511 guests visit the building. She quoted an excerpt from the Provincial Health Officer to support the Landlord's position that guest visits should not permitted. She stated that the Landlord has actively taken steps to ensure the safety of all residents and staff by implementing recommended COVID-19 protocols and communicating those to everyone. As of March 13, 2020, the Landlord "made the decision to restrict guests…" and that this is a reasonable step to take because the entry points to the building do not allow for the necessary social distancing guidelines to be adhered with. Despite these restrictions, the Tenant has had guests visit.

It is the Landlord's position that the restriction of guests is reasonable based on the State of Emergency Order M089, enacted on March 30, 2020. As the nature of the building will not allow proper social distancing guidelines to be complied with, the allowance of 511 guests on average into the building monthly during a public health emergency will endanger the lives of residents and/or staff. Due to the layout of the building, any exposure to the virus would be "devastating."

She submitted a previous Residential Tenancy Decision for consideration, and it is her belief that this similarly supports the Landlord's position that such a restriction of guests is warranted and allowable. This Decision pertained to a rental unit in a seemingly comparable housing complex and the matter before the Arbitrator related to the reasonableness of the restriction the Landlord placed on that tenant's access for guests. In this instance, the Arbitrator determined that the Landlord did not unreasonably restrict access to one specific guest of the tenant; however, it was established that this particular guest must always be accompanied by the tenant. Furthermore, the Landlord's practice of limiting one guest at a time to the tenant's rental unit was determined to be unreasonable.

Regarding the seven warning letters that the Landlord submitted as documentary evidence, the Tenant stated that this does not mean that there were seven separate incidents. She advised that there were only two occurrences where she had guests, and these were extenuating circumstances. She reiterated that it is not illegal for her to have guests in the building or in her rental unit.

In the final adjourned hearing on July 9, 2020, the Tenant advised that her access card to the building was restored; however, she had been subsequently evicted. As the ending of the tenancy would substantially affect whether or not the Tenant's right to

access would even need to be addressed still, the Landlord was asked to update the situation.

J.D. advised that the tenancy was ended based on frustration because the elevator was in need of serious repair. However, she could not elaborate on how this met the definition of a frustrated contract. She then stated that all the residents were given a notice to end their tenancy on May 29, 2020; however, she confirmed that no approved notice to end tenancy that complied with Section 52 of the *Act* was ever served to the Tenant. While she advised that the Tenant signed an agreement to move and a Tenant Notice: Exercising Right of First Refusal form on July 3, 2020, she could not confirm if the Tenant had signed a Mutual Agreement to End Tenancy.

She stated that the tenancy was ended due to frustration and the need to renovate the rental unit, that the renovations would take up to eight months, and that the Tenant was moved to a new rental unit operated by the same Landlord with the provision that she could move back when all the work at the original building was completed. A company was hired by the Landlord to move some of the Tenant's property to the new rental unit. She stated that the Tenant signed a "Relocation Allowance" form which entitled her to $250.00 for moving to the new rental unit. While she is not certain if the Tenant ever signed a new tenancy agreement for this new residence, it was her understanding that a new agreement needed to be signed.

The Tenant was "not sure" what documents she had signed, but she did not sign a new tenancy agreement. She confirmed that she was physically moved from the original rental unit; however, not all of her property was moved. When she went back to the original rental unit to collect her belongings, the locks had been changed and she was advised to leave. She stated that access to her new rental unit is the same as she still has an access card to the front door and she still needs to seek approval from the office to use the elevator to get to her floor. She advised that the same no guests policy has been implemented in this new building.

J.D. advised that the Tenant left the original rental unit on June 22, 2020, so the locks were changed. When the Tenant was discovered there on July 3, 2020, she was told to leave because that was not her residence anymore.

She stated that she cannot speak to whether the same access restrictions have been implemented in the new rental building. However, regarding the old rental building, she reiterated that the Tenant would continually bring guests into the building despite the Landlord's restriction based on the ongoing pandemic. She confirmed that staff would

not allow the Tenant to access her floor if she was accompanied by a guest. Regarding the Tenant's deactivated access card to the front of the old building, she stated that the Tenant had lost many cards and had been provided with replacements. All her cards had then been deactivated and she was provided with a new card which granted her access to the building. She advised that Head Office had implemented the restriction of guests policy and in her opinion, it was reasonable to restrict any resident from bringing guests into the building.

A.P. advised that the Tenant elected to move from the old rental unit to the new one. As well, she stated that the Tenant was served a One Month Notice to End Tenancy for Cause by Head Office. However, she was unable to elaborate on how this was done as the Emergency Order that she chose to rely on with respect to implementing the guest restriction policy specifically noted that the type of notice that she advised was served to the Tenant could not have been served during the current State of Emergency.

She advised that in light of the pandemic, the Landlord was permitted to restrict any tenant's access to have guests in common areas. Based on the number of guests that visit the building on average per month, given the dense population and vulnerable health issues of residents in this supportive housing building, and given that the front door is the main point of access to the building, it is her position that the Emergency Order permits the Landlord to restrict the Tenant's right to have guests in the "common area" lobby.

None of the documents that J.D. or A.P. referred to in the final reconvened hearing were before me as these events happened in between hearings. As I was unable to view these relevant documents to determine how or if these impacted the Application, in accordance with Rule 3.19 of the Rules of Procedure, I provided direction on requesting late evidence. Copies of these documents were requested to be provided, by the end of the day, as they were essential to the matter at hand. A copy of the documents that A.P. and J.D. referred to were provided by being uploaded into the Dispute Management System after the hearing concluded.

Submitted by the Landlord after the hearing were the following five documents:

1) A letter to the Tenant dated May 29, 2020, outlining that the building will be undergoing a major renovation to "replace the elevator, repair a leak in the building membrane and replace flooring, kitchen cabinets, etc." The project will commence July 1, 2020 for up to a year. This letter served as notice from the Landlord that the tenancy was ending due to "frustration of contract". In addition,

the Tenant will be provided with alternate accommodation in the meantime, that assistance with packing and moving will be provided, that the costs associated with the move will be covered, and that the Tenant will have a right of first refusal to return to the rental unit when the renovations are completed.

2) A letter from an elevator service company, dated June 16, 2020, indicating that some repairs were necessary to the elevator "to replace aging components and to upgrade to newer safety code standards", and that it would be out of service for an extended period of time. The timeframe to complete this work is estimated to take approximately 11 weeks.

3) A letter from BC Housing to the Landlord, dated June 19, 2020, outlining the required elevator repair as well as renovations to units in the building, including the Tenant's. Replacement of flooring, cabinets, and associated fixtures, as well as interior painting will be completed.

4) A *Tenant Notice: Exercising Right of First Refusal* form signed by the Tenant on July 3, 2020.

5) A relocation allowance letter, signed July 3, 2020, confirming that the Tenant received $250.00 as a relocation allowance to move to another rental unit at a different address.

Analysis

Upon consideration of the testimony before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 30 of the *Act* outlines the Tenant's right of access to the rental unit and states that, "A landlord must not unreasonably restrict access to residential property by (a) the tenant of a rental unit that is part of the residential property, or (b) a person permitted on the residential property by that tenant."

In response to the pandemic, a corresponding Emergency Order M089 was enacted on March 30, 2020, it was effective to June 23, 2020, and Section 30 of the *Act* was amended as follows:

> It is not unreasonable under section 30 (1) of the Residential Tenancy Act for a landlord to restrict access to common areas of the residential property by
>
> (a) a tenant of a rental unit that is part of the residential property, or
>
> (b) a person permitted on the residential property by a tenant,
>
> if the restriction is necessary
>
> (c) to protect the health, safety or welfare of the landlord, the tenant, an occupant or a guest of the residential property due to the COVID-19 pandemic,
>
> (d) to comply with an order of a federal, British Columbia, regional or municipal government authority, including orders made by the Provincial Health Officer or under the Emergency Program Act, or
>
> (e) to follow the guidelines of the British Columbia Centre for Disease Control or the Public Health Agency of Canada.
>
> (2) Despite subsection (1), a landlord must not prevent or interfere with the access of a tenant, another occupant of the rental unit or a tenant's guest to the tenant's rental unit.

On June 24, 2020, the above Ministerial Order M089 was repealed and replaced by M195, and further changes were made to Section 30 of the *Act*, but none of those changes were relevant to the purpose of the Tenant's Application.

Section 44 of the *Act* outlines the manner with which a tenancy can end and states the following:

> (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:
>
> (i) section 45 *[tenant's notice]*;

(i.1) section 45.1 *[tenant's notice: family violence or long-term care]*;
(ii) section 46 *[landlord's notice: non-payment of rent]*;
(iii) section 47 *[landlord's notice: cause]*;
(iv) section 48 *[landlord's notice: end of employment]*;
(v) section 49 *[landlord's notice: landlord's use of property]*;
(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;
(vii) section 50 *[tenant may end tenancy early]*;

(b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
(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;
(f) the director orders that the tenancy is ended;
(g) the tenancy agreement is a sublease agreement.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Before addressing the main purpose for the Tenant's Application of being denied access to the rental unit, contrary to Section 30 of the *Act*, as the Landlord has now made submissions with respect to the tenancy ending, these issues must be addressed first.

Firstly, the Landlord indicated that it is their belief that the tenancy ended due to "frustration of contract" because of major renovations and replacement of the elevator. I find it important to note that Policy Guideline #34 outlines what constitutes frustration and states that, "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." In addition, in the letter dated May 29, 2020, the Landlord

notes that, “a frustration of contract occurs when circumstances that are not the fault of either party make it impossible for the agreement to continue…”

When reviewing the Landlord’s submissions on a frustrated tenancy, I find the essential aspect to consider here is that an unforeseeable event would have had to have occurred to sufficiently support an end to the tenancy based on frustration. As the letter from the elevator service company, dated June 16, 2020, indicated that aging components needed replacement and that an upgrade was necessary, I do not find that there is sufficient evidence submitted by the Landlord that this was an unforeseen event. Furthermore, as Section 32 of the *Act* states that the Landlord is obligated to maintain the residential property in a state of decoration and repair that complies with health, safety, and housing standards required by law, I am satisfied that this repair would be an issue that the Landlord is not only responsible for correcting, but should have been alive to this being necessary at some point and therefore, should have planned for the possibility that the elevator would require these upgrades.

In the Landlord’s letter of May 29, 2020, it is also indicated that the tenancy will be ending because renovations will be conducted on the rental units and this would also justify their reason for ending the tenancy under frustration. However, I find it important to note that the renovations were chosen to be conducted by the Landlord, and as such, this would not be considered an unforeseeable event nor would I consider it to be a faultless endeavour. Furthermore, the letter dated June 19, 2020 states that “should tenants be occupying the building during Construction…” Clearly, this letter does not indicate that vacant possession is necessary to complete the renovations and it also does not satisfy the requirement that the renovation makes it “impossible for the agreement to continue”, as per the above policy guideline.

In addition, I find that even if I were to accept that the required repairs for the elevator constituted circumstances beyond the Landlord’s control, there is no evidence before me that the terms of the tenancy agreement could not be completed. There was substantial evidence before me that in addition to an elevator, the residential property has stairs by which the Tenant could access her rental unit.

When reviewing the totality of the evidence before me, it is clear that neither of these reasons cited by the Landlord would constitute frustration of a tenancy. Therefore, I am satisfied that this tenancy has not ended due to frustration.

I will now turn my attention to the Landlord’s service of the Tenant Notice: Exercising Right of First Refusal form supporting their position that the tenancy had ended. I find it

important to note that on the top of this form, it states that this form is applicable “upon completion of renovations or repairs for which the tenant’s previous tenancy was ended under section 49 (6) of the *Residential Tenancy Act*.” Clearly, a notice under Section 49 of the *Act* has never been served to the Tenant; therefore, I do not find that the Tenant has agreed to ending the tenancy by signing this form.

Based on the evidence provided with respect to the Landlord’s claims that the tenancy has ended, I do not find that there is evidence to support that the tenancy has ended pursuant to any of the manners with which a tenancy can end under Section 44 of the *Act*. Moreover, as the consistent evidence is that there is still some of Tenant’s property at the original rental unit, the tenancy has plainly not ended there. In my view, it is clear that the Landlord has attempted to circumvent the *Act* by whatever means they deemed necessary to achieve the desired outcome. I find that this is further supported by the fact that a One Month Notice to End Tenancy for Cause was also apparently served to the Tenant when the Landlord was not permitted to during the State of Emergency. Consequently, this causes me to be concerned with the manner in which the Landlord is choosing to manage this tenancy and blatantly disregarding any requirements to comply with the *Act*.

Ultimately, I am satisfied that this tenancy remains intact, despite the fact that the Landlord has assisted the Tenant in moving her to a new temporary rental unit. Furthermore, as the Tenant has been relocated into another facility that is owned and operated by the same Landlord, I find that the Landlord is still obligated to comply with the *Act* regarding the Tenant’s access to both rental units under Section 30 of the *Act*.

I will now turn my mind to the reason for this Application in the first place, which was a request by the Tenant for access to the rental unit for her and/or her guests. The consistent and undisputed evidence before me is that the Landlord has implemented a no guests policy on the property and that the Tenant has been prohibited from having guests enter the common areas of the building or having them access her rental unit. While the Landlord has justified this policy based on their interpretation of the effected Emergency Orders, I find it important to note that these Orders state that, “ (2) Despite subsection (1), a landlord must not prevent or interfere with the access of a tenant, another occupant of the rental unit or a tenant’s guest to the tenant’s rental unit.”

Furthermore, while counsel has cited a past Decision of the Residential Tenancy Branch to support the Landlord’s position, I do not find this Decision particularly instructive as the Landlord has entirely restricted guest access to the Tenant in this

Application. In addition, I note that I am not bound or obligated to follow past decisions of the Residential Tenancy Branch.

While I understand the Landlord's desire to restrict access to guests in the building in an effort to protect the health and safety of all residents and staff of the building during this pandemic, I do not find that the Landlord's interpretation on the effected Emergency Orders permits them to implement a blanket no guests policy. I acknowledge that the lobby and the stairwell are the only points of access for the rental building; however, I find that by employing this policy, the Landlord is effectively preventing the Tenant from her right to have guests in the rental unit. In conjunction with the Landlord's obvious attempts at circumventing the *Act* by illegally ending the Tenant's tenancy, I am satisfied that this is another apparent attempt to manipulate the effected Emergency Orders to an interpretation that justifies their actions.

As such, I find that the Landlord's no guests policy is unreasonable as the Emergency Orders still allow for the Landlord to enact suitable policies or procedures that the residents of the building must comply with to maintain proper social distancing protocols in common areas. It is up to the Landlord to enforce and manage these protocols while still maintaining the Tenant's right to access of the rental unit pursuant to Section 30 of the *Act*.

I therefore Order the Landlord to cease all scrutiny and restrictions on the Tenant's right to access the building or to have guests visit through the use of this blanket policy. Should the Landlord still wish to impose a guest policy, they must act in a reasonable manner to balance the Tenant's rights with the recommended guidelines established to ensure the proper social distancing. Should the Landlord fail to comply with this Order the Tenant has leave to reapply for compensation for any damages that may result from the Landlord's failure.

The Tenant is also cautioned that she has a social and moral responsibility to comply with the protocols issued not only by the appropriate government authorities to ensure the proper social distancing requirements are followed, but to abide by the Landlord's reasonable policies regarding guest access to the building. Should the Tenant disregard any of these polices with respect to her behaviour or that of her guests, she would be jeopardizing her tenancy.

Conclusion

Based on the above, I Order the Landlord to cease the use of its blanket policy in relation to guests. Furthermore, this Order for access applies to both of the rental units the Tenant has under the current circumstance.

If the Landlord has restricted the Tenant's access to front door of the building, I also Order the Landlord to return the Tenant's access.

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 21, 2020

Residential Tenancy Branch