



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DELANEY PROPERTIES LTD. and [tenant
name suppressed to protect privacy]

DECISION

Dispute Codes ET FFL

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution, seeking an order to end the tenancy early and to receive an order of possession and to recover the cost of the filing fee.

An agent for the landlord, MG (agent), the owners of the property, SD (owner), a witness for the landlord, NB (witness), the tenant, a tenant advocate, TL (advocate) and a witness for the tenant, CB (tenant witness) attended the teleconference hearing. The parties were affirmed and were provided the opportunity to provide testimony and were provided the opportunity to present evidence submitted in accordance with the Residential Tenancy Branch (RTB) Rules of Procedure (Rules) and makes submissions to me.

In terms of documentary evidence, the advocate took exception to the second evidence package served on or about March 1, 2021, as the application was filed on February 12, 2021 and relied on RTB Rule 10.2, which applies to this expedited hearing and states:

10.2 Applicant's evidence for an expedited hearing

An applicant **must submit all evidence that the applicant intends to rely on at the hearing with the Application** for Dispute Resolution.

[emphasis added]

Based on the above, I exclude the second documentary evidence package from the landlord as it was not filed at the same time as the application and this matter relates to an expedited hearing. Given the above, I have only considered the first documentary evidence package from the landlord and the tenants documentary evidence.

Preliminary and Procedural Matters

Firstly, the agent claims that they made their application pursuant to section 56.1 of the Act, to argue that the tenancy has been frustrated due to the rental unit being uninhabitable. The parties were advised that the landlord did not file their application pursuant to section 56.1 of the Act, and instead applied for an order of possession based on section 56 of the Act, which I will address in further detail later in this decision.

Secondly, the parties confirmed their respective email addresses at the outset of the hearing and stated that they understood that the decision and any applicable orders would be emailed to them.

Issues to be Decided

- Has the landlord provided sufficient evidence to end the tenancy early and obtain an order of possession pursuant to section 56 of the Act?
- If yes, is the landlord 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 in January 2018 and reverted to a month to month tenancy after July 31, 2018.

The landlord has applied for an order of possession to end the tenancy early based on the following:

Leak into #3 from unit above. Leak is ongoing in the ceiling and cannot be repaired until the soaking wet drywall is removed and we can get access to the plumbing. Also, found the bathroom floor is completely rotten and needs to be removed to be remediated.

At the outset of the hearing, the agent confirmed that the tenant has not been issued a 1 Month Notice related to this matter. The agent testified that on February 1, 2020 the tenant first noted water coming through the light fixture in the ceiling and the agent was notified, and called T, from a plumbing company, who attended and could not determine the cause of the water leak.

On February 2, 2020, there is no dispute that NB, a branch manager with a restoration company (NB), was called in to inspect the rental unit. There is no dispute that NB determined that the ceiling was soaking wet and in addition there was a water leak behind the toilet in the bathroom. The agent referred to a bathroom floor photo that the agent stated was taken on December 31, 2020. There is water ingress showing on the photo, which the agent stated was taken from the crawlspace area. On January 12, 2021, an inspection took place in several units including the rental unit and according to the agent the tenant replied that there was no leak issue in the rental unit.

There is no dispute that the first time the agent discovered the water leak behind the tenant's toilet in the bathroom was as the start of February 2021. The agent referred to an email dated February 8, 2021, which is from NB to the agent and reads in part in relation to the rental unit:

...We attended this unit to find a number of concerns
A prevailing odor of dampness
Significant wet in the ceilings of the bedroom and bathroom which also goes across to the kitchen
The bathroom wall and flooring is soft and wet
For any work to be done the tenant and her contents would need to be out of the unit
Drywall and insulation will need removals in at least both areas
Toilet will need removals in the bathroom as will baseboards flooring and some drywall to the walls
This suite will net (sic) be habitable while emergency work is carried out
Once dry an estimate can be put together for the repairs which will also have an impact regarding the unit being able to be occupied...
[reproduced as written]

The owner testified that they are very responsible and very concerned. The owner stated that due to the smell of mould the entire ceiling has to come down and the rental unit needs to be vacant for this work. The owner stated that the mould growth can impact other tenants in the building.

The advocate stated that the early end of tenancy provisions under section 56 of the Act have not been met in this matter and that the tenancy does not have to end leak repairs to be completed. The advocate also stated that the tenant is willing to accommodate the leak repairs. In addition, the advocate stated that no fans have been installed to dry the wet ceiling, floors, etc. and that there has been no mitigation by the landlord to repair

the leak to date. The advocate stated that they could not see discolouration (of water ingress) in the bathroom photo. The advocate stated that the upstairs tenant has not had water restrictions, which is causing the leak to continue.

The tenant claims that they noticed moisture in an inspection on December 8, 2020, to which the agent and owner stated there was no inspection on December 8, 2020, so were confused at the tenant's statement.

The owner stated that installing fans would spread mould spores and that is why fans were not installed. The owner asked the advocate if they had attended the rental unit, to which the advocate confirmed they had not attended the rental unit as it is not a usual part of an advocate's role. The agent stated that the upstairs tenant has been asked to and has agreed to only shower and do dishes once per week until the leak is repaired.

Landlord witness NB was called. The agent or owner asked NB the following questions (Q), to which I have included the NB's answers (A).

Q: You attended the rental unit on February 1 and 19, 2021, what did you find?

A: Off the scale wet, the moisture readings were off the scale of the moisture-reader.

Q: Would a fan fix it?

A: No, the ceiling is painted and is textured so the paint seals the drywall which holds the moisture in. Also, there is insulation in the ceiling which will be wet.

Q: Can mould spores travel?

A: I am not a biologist but after 72 hours the mould would have the food, moisture and darkness to grow and will grow.

Q: Is an Asbestos test needed?

A: Prior to 1991, yes (discussion about age of building being 1991) and as a result, yes there will be a need to test for asbestos due to the age of the building.

Q: Was your equipment working both times when you attended rental unit?

A: Yes, I had an IR (Infrared) camera and a moisture-reader, and they were both working on both visits.

Q: What are the concerns if the leak is not repaired, regarding health?

A: There are a few things, the cause is not known yet, so we are not sure if the water is dirty water and what gross things could be growing. Because it was wet 2 weeks after the first inspection, the leak has not gone away, and the wetness has not dried.

Q: Is there any way to fix the ceiling and floor with the tenant there?

A: Not really, it is not really feasible as the toilet has to be removed and the ceiling and all of the work is accessed through the one front door so the living area and bathrooms would be impacted.

Cross-examination by advocate

Q: Has anything been done to fix the leak?

A: No, we have not been asked to repair the leak.

Witness excused

The agent stated after the witness was excused that they have not tried to repair the leak as the ceiling has to come down and we can barely step into the room due to all of the tenant's personal belongings.

The advocate concluded by stating that the tenant did not cause the leak and does not believe the landlord has met their obligation to prove a successful application under section 56 of the Act.

Analysis

Based on the documentary evidence and the testimony during the hearing and on a balance of probabilities, I find the following.

As noted above, as this application before me was not made pursuant to section 56.1 of the Act, I find that section 56 of the Act applies and states:

56 (1) A landlord may make an application for dispute resolution to request an order

(a) ending a tenancy on a date that is earlier than the tenancy would end if notice to end the tenancy were given under section 47 [*landlord's notice: cause*], and

(b) granting the landlord an order of possession in respect of the rental unit.

(2) The director may make an order specifying an earlier date on which a tenancy ends and the effective date of the order of possession **only if satisfied, in the case of a landlord's application,**

(a) the tenant or a person permitted on the residential property by the tenant **has done any of the following:**

(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property;

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant;

(iii) put the landlord's property at significant risk;

(iv) engaged in illegal activity that

(A) has caused or is likely to cause damage to the landlord's property,

(B) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or

(C) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;

(v) caused extraordinary damage to the residential property, **and**

(b) it would be unreasonable, or unfair to the landlord or other occupants of the residential property, to wait for a notice to end the tenancy under section 47 [landlord's notice: cause] to take effect.

[emphasis added]

The burden of proof is on the landlord to prove that it would be unreasonable, or unfair to the landlord or other occupants of the residential property, to wait for a notice to end tenancy under section 47 to take effect. In the matter before me, the agent confirmed that the tenant has not been served with a 1 Month Notice to End Tenancy for Cause (1 Month Notice). I also have no evidence before me that the tenant has been served with

a Four Month Notice to End Tenancy for Demolition, Renovation, Repair or Conversion of Rental Unit (4 Month Notice), which includes a reason as stated:

Perform renovations or repairs that are so extensive that the rental unit must be vacant. Indicate how many anticipated weeks/months (please circle one) the unit is required to be vacant.

After carefully considering the evidence before me, **I find** that the landlord has failed to meet the burden of proof in proving that the tenancy should end early, and that it would be unreasonable and unfair to the landlord or the other occupants to wait for a notice to end tenancy under section 47 of the Act.

In reaching this finding, I have considered that there is insufficient evidence before me that the tenant was the cause of the leak as the water appears to be leaking from the unit above, according to the evidence before me. Furthermore, I find there is insufficient evidence before me that the tenant has been asked to remove their personal belongings so that the landlord can begin the process to determine the source of the water leak. I find that it is premature to request that the rental unit must be vacant, without first knowing the exact cause and nature of the leak.

Furthermore, given that the photo of the crawlspace water ingress was taken on December 31, 2020, I find that an application submitted on February 12, 2021 does not support this application, as either a 4 Month Notice or 1 Month Notice could have been served and neither have been served by the landlord.

Therefore, **I dismiss** the landlord's application due to insufficient evidence, without leave to reapply.

The tenancy shall continue until ended in accordance with the Act.

I do not grant the filing fee as the application has failed.

Conclusion

The landlord's application fails due to insufficient evidence and is dismissed without leave to reapply as a result.

The tenancy shall continue until ended in accordance with the Act.

The filing fee is not granted as the application fails.

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: March 5, 2021

Residential Tenancy Branch