



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OFL

Introduction

This hearing convened to hear the landlord's application for dispute resolution (application) seeking remedy under the Residential Tenancy Act (Act) for:

- an order of possession of the rental unit based upon a frustrated tenancy.

The landlord and the listed tenants attended, the hearing process was explained, and they were given an opportunity to ask questions about the hearing process.

The parties were informed at the start of the hearing that recording of the dispute resolution hearing is prohibited. All parties affirmed they were not recording the hearing.

The parties confirmed receiving the other's evidence, with the exception of one document submitted by the landlord. The tenants confirmed receipt of the landlord's application.

Thereafter all parties were provided the opportunity to present their evidence orally and to refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch (RTB) Rules of Procedure (Rules). However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Words utilizing the singular shall also include the plural and vice versa where the context requires.

Issue(s) to be Decided

Is the landlord entitled to an order of possession of the rental unit based upon a frustrated tenancy?

Background and Evidence

The evidence showed that a tenancy formed between a landlord who has the same surname as the attending landlord and two tenants, one of whom, NW, was listed in the landlord's application. The evidence was that the other two tenants moved into the rental unit during the tenancy and the tenants asserted they became tenants.

The rental unit is one side of a duplex, with the rental unit being on two levels.

In support of their application, the landlord submitted that on November 15, 2021, flooding occurred in the town due to all the severe weather, resulting in a flood to the rental unit. The flooding resulted in the municipality issuing evacuation orders for many residences, including the residential property.

The landlord submitted that all electrical and gas service to the rental unit was cut off by the utility companies, rendering the rental unit uninhabitable.

In their documentary evidence, the landlord submitted that substantive restoration work would be required in the rental unit and that the restoration company would need to winterize the rental unit in order to deal with the moisture before the heat is turned back on.

The landlord said that the matter of whether the tenancy was frustrated was "up in the air", but explained that they filed the application because of what was occurring at the time. Since that time, circumstances have been ever-changing, for instance, the electricity and gas services have been restored and the rental unit was no longer on the evacuation list.

The landlord confirmed there was not a scope of work for the restoration of the rental unit, but suggested that the lower floor still needed to be winterized. The landlord

confirmed that the upper floor contained a full kitchen, bathroom, and bedrooms, and was not impacted by the flood.

Tenants' response –

The tenants provided a comprehensive written response, but confirmed they are currently displaced while waiting to return to the rental unit. The evidence included photographs of the interior of the rental unit.

The tenants seek to move back into the second floor of the rental unit, as it is self-contained with the necessary rooms, services and facilities and has a separate access point.

The tenants submitted they are paying the monthly rent to the landlord and would like to return as quickly as possible. The tenants submitted that the restoration company could still winterize the lower level, without impact to their tenancy.

Analysis

Based on the relevant oral and written evidence, and on a balance of probabilities, I find as follows:

The burden of proof is on the party making the claim, on a balance of probabilities.

Section 56.1 of the Act states, "A landlord may make an application for dispute resolution requesting an order ending a tenancy because the unit is uninhabitable, or the tenancy agreement is otherwise frustrated."

In this case, the landlord sought to have the tenancy agreement declared frustrated as the rental unit is uninhabitable.

Residential Tenancy Policy Guideline #34 notes, "A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because of an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible.

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.”

The landlord presented that a flood occurred on November 15, 2021, throughout the town, which caused extensive damage to the rental unit, requiring restoration work.

After reviewing the evidence, I find the landlord submitted insufficient evidence to support their application that the tenancy agreement was frustrated. For instance, only the first floor suffered water damage, and the upper floor had full bathroom and kitchen facilities for the tenants’ use, with electrical and gas service restored. The landlord confirmed that the lower floor did not have a full kitchen.

The tenants not only are willing to temporarily live only in the upper unit, they seek to return and live on the second floor. The tenants have been paying rent while they are temporarily displaced and acknowledge that restoration work will still be required on the first floor.

In considering whether or not the tenancy agreement was frustrated, I would expect the landlord to have provided a scope of work for the restoration service. However, this evidence was not provided.

I acknowledge that the landlord made this application under different circumstances occurring at the time, but the evidence supports that these circumstances have improved since the date of the application. I do not find the change in circumstances affected the nature, meaning, purpose, effect, and consequences of the contract.

Overall, when reviewing the photographic and oral evidence, I find that the main, second floor of the rental unit is fully habitable and that the lower floor is temporarily uninhabitable. Without a documented scope of work, I was unable to determine how long the first floor would be uninhabitable. However, the tenants are able to live on the second floor until the restoration work is completed.

For these reasons, I find that the tenancy agreement is not frustrated. I therefore **dismiss** the landlord’s application seeking an order of possession of the rental unit, without leave to reapply.

Conclusion

The landlord's application for an order of possession of the rental unit due to the tenancy agreement being frustrated 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 *Residential Tenancy Act*. Pursuant to section 77 of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: January 11, 2022

Residential Tenancy Branch