



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OPR-DR, MNR-DR, FFL,**

Introduction

The Landlord made an application under the *Residential Tenancy Act* (the “Act”) for:

- an Order of Possession for non-payment of rent pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent pursuant to section 67; and
- authorization to recover the filing fee for its application from the Tenant pursuant to section 72.

A hearing of the Landlord’s application was held on December 2, 2021 (“Original Hearing”). The arbitrator (“Original Arbitrator”) who presided over that hearing issued a decision (“Original Decision”), an order of possession (“Original Order of Possession”) requiring the Tenants to vacate the rental unit and a monetary order (“Original Monetary Order”) requiring the Tenants pay the Landlord for \$2,200.00 for rental arrears, all of which were dated December 2, 2021.

The Tenants made an application for a review consideration (“Review Application”) under section 79 of the Act. An arbitrator (“Review Arbitrator”) considered the Review Application. Pursuant to a decision dated December 15, 2021 (“Review Decision”), the Review Arbitrator found that, under section 79(2) of the Act, a hearing (“Review Hearing”) was warranted. In the Review Decision, the Review Arbitrator suspended the Original Decision, Original Order of Possession and Original Monetary Order until the Review Hearing. This Review Hearing was scheduled by the Residential Tenancy Branch (“RTB”) and it came on for hearing on January 11, 2022.

A Notice of Review Hearing (“NRH”) was provided to the Tenants by the RTB and they were instructed to serve the NRH, and a copy of the Review Decision, on the Landlord

within three days of receiving NRH them from the Residential Tenancy Branch, in accordance with section 89 of the Act.

Purpose of Review Hearing

The purpose of this Review Hearing is to review the Original Decision and Orders made by the Original Arbitrator and then for me to confirm, vary or set aside the Original Decision and/or Orders pursuant to section 82(3) of the Act.

The Landlord and each of the two Tenants ("SL", "GG" and collectively the "Tenants") attended the hearing. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

SL stated that the Tenants did not serve the NRH and Review Decision on the Landlord as instructed by the RTB. However, the Landlord acknowledged that he obtained a copy of the NRH and Review Decision from the RTB. The Landlord consented to this hearing proceeding notwithstanding the irregularity in service of the NRH and Review Decision on him. I find the Landlord was sufficiently served with the NRH and Review Decision pursuant to section 71(2)(b) of the Act.

Issue to be Decided

Following the Review Hearing, should the Original Decision, Original Order of Possession and/or Original Monetary Order be confirmed, varied or set aside pursuant to section 82(3)?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of this Review Hearing and my findings are set out below.

The Landlord submitted a copy of the tenancy agreement between the Landlord and the Tenants. The Landlord testified the tenancy commenced April 1, 2021 with rent of \$1,800.00 per month payable on the last day of each month. The Tenants were to pay a security deposit of \$900.00 on April 1, 2021. The Landlord acknowledged payment of the security deposit and confirmed he was holding the security deposit in trust for the Tenants.

The Landlord testified he served the Tenants with the 10 Day Notice for Unpaid Rent and/or Utilities dated July 2, 2021 ("10 Day Notice") by serving it personally on SL on July 2, 2021. The Landlord submitted a signed Proof of Service on Form RTB-34 to corroborate his testimony. SH acknowledged receipt of the 10 Day Notice on July 2, 2021. I find that the Tenants were served with the 10 Day Notice pursuant to section 88 of the Act and find the Tenants were deemed to have been served with the 10 Day Notice on July 2, 2021.

The 10 Day Notice stated the Tenants owed \$1,800.00 for rental arrears as of June 30, 2021. The Landlord testified the Tenants did not pay the rent for July 2021 when it became due on June 30, 2021 and that he served the Tenants with the 10 Day Notice. The Landlord stated that Tenants did not pay the rent for August 2021 but paid the rent for September, October and November 2021. The Landlord acknowledged that he had received a payment of \$2,400.00 from the Tenants on September 10, 2021.

SH testified the Tenants sent an e-transfer of \$2,400.00 for payment of the rent in July 2021. SH stated that the Landlord's email had been hacked and, as a result, payment of the \$2,400.00 had not been received by the Landlord. SH stated that investigations were performed by the Tenant's financial institution and the RCMP but were inconclusive. SH stated the Tenant's financial institution eventually refunded the \$2,400.00 and the Tenants then paid the Landlord \$2,400.00 on or about September 10, 2021.

SH testified that due to catastrophic flooding, the municipal government in which the rental unit is located issued a mandatory order around November 15, 2021 ("Evacuation Order") for residents to evacuate the entire city. SH stated the Tenants vacated the rental unit on December 5, 2021.

The Landlord acknowledged that the Tenants had vacated the rental unit as a result of the Evacuation Order and he was in possession of the rental unit from December 5, 2021. The Landlord did not dispute SH's claim that the Tenants were required, pursuant to the Evacuation Order, to vacate the rental unit or that the rental unit had been damaged by flooding after the Tenants vacated the rental unit.

SH submitted that the Tenants should not be required to pay rent for the period December 6 to 31, 2021 as they were required to evacuate the rental unit pursuant to the Evacuation Order and it was not habitable due to damages sustained from flooding

that occurred after the Tenants evacuated the rental unit. SH admitted the Tenants had not made an application for dispute resolution to dispute the 10 Day Notice.

Analysis

A. Order of Possession:

At the time the Original Arbitrator heard the Landlord's application, the Tenants were still in possession of the rental unit. The Original Arbitrator considered whether to end the tenancy pursuant to the 10 Day Notice under section 46 of the Act. As the Tenants did not dispute the 10 Day Notice and the Original Arbitrator found that the Landlord was entitled to an Order of Possession pursuant section 55 of the Act.

As noted above, after the Original Arbitrator issued his decision and Orders, the Tenants made a sequent application for the Review Consideration. The Reviewing Arbitrator found there were grounds for a Review Hearing on the basis the Tenants were unable to attend the Original Hearing. The Reviewing Arbitrator issued her Review Decision which, in part, states:

I order that a new hearing of the original application take place and *the decision and orders issued on December 2, 2021 are suspended until that hearing is completed*

[emphasis in italics added].

Section 92 of the Act states:

92 The *Frustrated Contract Act* and the doctrine of frustration of contract apply to tenancy agreements.

Residential Tenancy Branch Policy Guideline 34 ("PG 34") provides guidance on the legal concept of frustration. PG 34 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.

The Evacuation Order and the damage to the rental unit were beyond the control of the Landlord and Tenants and circumstances changed such that fulfillment of the tenancy agreement became impossible. As a result, the Tenants vacated the rental unit and returned possession of the rental unit to the Landlord on December 5, 2021. I find that the tenancy agreement was frustrated on December 5, 2021.

As the Tenants have vacated the rental unit, the Landlord no longer requires an order of possession. Pursuant to section 68(2)(a) of the Act, I find the tenancy ended on December 5, 2021. Based on above, I set aside the Original Order of Possession pursuant to section 82(3) of the Act,

B. Rental Arrears:

Sections 26 and 67 of the Act states:

- 26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.
- 67 Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

The Original Arbitrator found the Tenants owed a total of \$10,800.00 for the months of June through December 2021 inclusive, less rental payments made by the Tenants of \$7,800.00, leaving rental arrears of \$3,000.00 pursuant to section 67 of the Act. Based on this finding, the Original Arbitrator issued the Original Monetary Order requiring the Tenants pay the Landlord \$3,000.00.

PG 34 states in part:

The *Frustrated Contract Act* deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

Section 5 of the *Frustrated Contract Act* ("FCA") states:

Adjustment of rights and liabilities

- 5 (1) In this section, "benefit" means something done in the fulfillment of contractual obligations, whether or not the person for whose benefit it was done received the benefit.
- (2) Subject to section 6, every party to a contract to which this Act applies is entitled to restitution from the other party or parties to the contract for benefits created by the party's performance or part performance of the contract.
- (3) Every party to a contract to which this Act applies is relieved from fulfilling obligations under the contract that were required to be performed before the frustration or avoidance but were not performed, except insofar as some other party to the contract has become entitled to damages for consequential loss as a result of the failure to fulfill those obligations.
- (4) If the circumstances giving rise to the frustration or avoidance cause a total or partial loss in value of a benefit to a party required to make restitution under subsection (2), *that loss must be apportioned equally between the party required to make restitution and the party to whom the restitution is required to be made.*

[emphasis in italics added]

The Landlord testified the Tenants are required to pay rent of \$1,800.00 on the last day of each month. The Tenants did not dispute the amount of monthly rent payable by them pursuant to the terms of the tenancy agreement or the \$7,800.00 the Original

Arbitrator found the Tenants paid the Landlord from June 30 to the date of the Original Hearing on December 2, 2021.

As I have found that the tenancy ended on December 5, 2021 due to frustration, I find the premise upon which the Original Arbitrator calculated the rental arrears for the month of December 2021 no longer applies. Pursuant to section 5(4) of the FCA, it is necessary to calculate the rent owed by the Tenants for the month of December on the basis on the number of days the Tenants actually occupied the rental unit. As the Tenants vacated the rental unit on December 5, 2021, they are responsible for payment of rent for five days rent for the period December 1 to 5, 2021 or \$290.32 calculated as follows:

$$\$1,800.00 \div 31 \text{ days} = \$58.06 \text{ per day} \times 5 \text{ days} = \$290.32$$

Based on the above, I calculate the Tenants owe rental arrears totalling \$1,490.32 calculated as follows:

Date	Owed	Paid	Balance	Description
30-Jun-21	\$1,800.00	\$0.00	\$1,800.00	July Rent Due
30-Jul-21	\$1,800.00	\$0.00	\$3,600.00	August Rent Due
30-Aug-21	\$1,800.00	\$0.00	\$5,400.00	September Rent Due
30-Aug-21	\$0.00	\$1,800.00	\$3,600.00	September Rent Paid
10-Sep-21	\$0.00	\$2,400.00	\$1,200.00	Partial Arrears Payment
30-Sep-21	\$1,800.00	\$0.00	\$3,000.00	October Rent Due
30-Sep-21	\$0.00	\$1,800.00	\$1,200.00	October Rent Paid
30-Oct-21	\$1,800.00	\$0.00	\$3,000.00	November Rent Due
30-Oct-21	\$0.00	\$1,800.00	\$1,200.00	November Rent Paid
30-Nov-21	\$290.32	\$0.00	\$1,490.32	December Rent Due
Total	\$9,290.32	\$7,800.00	\$1,490.32	

The Tenants must compensate the Landlord \$1,490.32 for the rental arrears calculated above. Pursuant to section 67 of the Act, I order the Tenants to pay the Landlord \$1,490.32 in satisfaction of the arrears. Pursuant to section 72(2)(b) of the Act, the Landlord is authorized to deduct the Tenants' security deposit of \$900.00 in partial satisfaction of the rental arrears.

As the Landlord was successful in his application and this Review Hearing in respect of his claim to recover unpaid rent, I affirm the Original Arbitrator's finding that the

Landlord may recover her \$100.00 filing fee from the Tenants pursuant to section 72(1) of the Act.

I find the Tenants owe the Landlord a total of \$690.32 calculated as follows:

Description	Amount
Rental Arrears	\$1,490.32
Filing Fee of Application	\$100.00
Security Deposit Credit	-\$900.00
Total	\$690.32

Conclusion

Pursuant to section 82(3) of the Act:

1. I find the Tenants have vacated the rental unit and the Landlord is now in possession of the rental unit. As an order for the Tenants to vacate the rental unit is no longer required, I set aside the Original Order of Possession.
2. I vary the Original Decision to find the Tenants owe the Landlord \$1,490.32 for rental arrears.
3. I confirm the Original Decision that the Landlord may recover his \$100.00 filing fee for his application;
4. I set aside the Original Monetary Order and, in its place, I order the Tenants pay the Landlord \$690.32 calculated as follows:

Description	Amount
Rental Arrears	\$1,490.32
Filing Fee of Application	\$100.00
Security Deposit Credit	-\$900.00
Total	\$690.32

This Monetary Order must be served by the Landlord on the Tenant and may be enforced in Provincial Court.

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: January 19, 2022

Residential Tenancy Branch