



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes OPT, FFT

Introduction

On February 12, 2022, the Tenant applied for a Dispute Resolution proceeding seeking an Order of Possession pursuant to Section 54 of the *Residential Tenancy Act* (the “Act”) and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Tenant attended the hearing, with S.C. and R.T. attending as counsel for the Tenant. J.H. attended the hearing as an agent for the Landlord, with V.R. attending as counsel for the Landlord. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited and they were reminded to refrain from doing so. All parties acknowledged these terms. As well, all parties in attendance, with the exception of S.C., R.T., and V.R., provided a solemn affirmation.

S.C. advised that the Notice of Hearing and evidence package was served to the Landlord by registered mail on February 25, 2022. J.H. confirmed that this package was received, but he did not remember exactly the date. Regardless, he did not have any position with respect to the manner with which this package was served. As such, I am satisfied that the Landlord was sufficiently served with the Tenant’s Notice of Hearing and evidence package. Consequently, I have accepted this evidence and will consider it when rendering this Decision.

V.R. advised that the Landlord’s evidence was posted to the Tenant’s door on March 4, 2022. The Tenant confirmed that he received this evidence on that date. As such, I have accepted this evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written 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 of Possession?
- Is the Tenant entitled to recover the filing fee?

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.

All parties agreed that the tenancy started on May 4, 2007, that rent was established at \$927.00 per month, and that it was due on the first day of each month. A security deposit of \$355.00 was also paid. A signed copy of the tenancy agreement was submitted as documentary evidence.

S.C. advised that there was a fire in the building on January 11, 2022, which minimally affected the rental unit, with the exception of the loss of the Tenant's balcony. He referenced the pictures provided as documentary evidence to support this position. He submitted that the Landlord determined that the tenancy was frustrated due to this fire and that the eight-month to one year remediation timeframe was not reasonable. He stated that the Landlord proposed a mutual agreement to end the tenancy, but when the Tenant refused to agree to this, the Landlord threatened to end the tenancy "unilaterally" as per J.H.'s email dated February 10, 2022.

He submitted that it is the Landlord's position that the tenancy was frustrated due to the fire; however, it is the Tenant's position that the tenancy was not frustrated. S.C. stated that the Landlord did not give any written notice to end the tenancy by way of frustration, that the Landlord changed the locks of the rental unit, that the Landlord stored the Tenant's property, and that the Landlord returned a pro-rated amount of rent and the security deposit. All of this was done contrary to the *Act* as the Landlord must first apply for an Order of Possession of the rental unit.

The Tenant advised that he called the fire department on the morning of the fire and that he was barred from entering the building for approximately nine hours. Later that day when the fire department allowed him into the building, he returned to the rental unit and retrieved some personal belongings. There were no issues related to the fire that

prevented him from accessing the rental unit. It was his understanding that the fire was caused by a sofa being placed next to the heater in a unit below him.

He confirmed that he later went into the rental unit on February 13, 2022 to remove any high value items as the Landlord had threatened to move them. He was unsure of when the Landlord changed the locks and stored the remainder of the Tenant's property, but it was likely on or around February 18, 2022.

V.R. advised that the fire affected the majority of the building and he referred to a report of February 10, 2022 which indicated that the building was uninhabitable due to extensive repairs and remediation that was necessary due to the fire damage. He submitted that the Landlord was informed, by the contractor dealing with the restoration, that the repairs would take between eight to twelve months to complete. As the rental unit was uninhabitable, the tenancy was frustrated. He stated that the rental unit was not taken by force as the Tenant did not live there primarily, and the Tenant's property was stored at the Landlord's expense.

He referred to the J.H.'s email of February 10, 2022 as notification to the Tenant that the tenancy was frustrated, and he noted that the Tenant's response was confirmation of acknowledgement. It is his position that the Landlord did not need to apply for an Order of Possession as vacant possession was necessary to complete emergency work. As well, the Landlord could not fulfil the obligation to provide the rental unit to the Tenant anyways as it was uninhabitable. He referenced documentary evidence submitted to support the state of the rental unit. As well, he referenced past Decisions of the Residential Tenancy Branch that he believed were prescriptive to this situation.

J.H. advised that the Landlord took possession of the rental unit between February 14 to 25, 2022 and changed the locks. He stated that it was necessary to store the Tenant's property and the rental unit needed to be empty in order to initiate repairs. He testified that the Landlord did not apply for an Order of Possession because this was an emergency situation. He noted that applying for a Decision would have taken too long and it would have subsequently delayed the commencement of repairs, which would have possibly led to increased costs from insurance. He stated that other residents had cooperated by signing mutual agreements to end their tenancy.

Analysis

Upon consideration of the evidence 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 44(e) of the *Act* states that the tenancy can end if the tenancy agreement is frustrated.

Policy Guideline # 34 outlines the doctrine of frustration as “without the fault of either party, a contract [that] 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.”

When reviewing the totality of the evidence before me, the consistent and undisputed evidence is that the origin of the fire was likely due to the negligence of other residents of the building, that the cause of the fire was not a fault of the Landlord or the Tenant, and that this was an unforeseen event. Furthermore, I accept the architect’s report of February 10, 2022 which indicated that the effects of the fire impacted the rental unit to the point that rendered it uninhabitable for a substantial amount of time. Moreover, I accept that the Tenant understood that the Landlord’s position was that the tenancy was frustrated, even though the Tenant’s counsel objected to this position in a letter dated February 11, 2022.

Given that the circumstances of this situation appear to meet the policy guideline regarding frustration, I am satisfied that the tenancy was frustrated and that the Landlord declared it so effective February 14, 2022. However, I disagree that the Landlord was not required to apply for an Order of Possession ending the tenancy due to frustration if there was a clear dispute over the status of the tenancy. If it was the Landlord’s belief that the tenancy was frustrated on February 14, 2022, the Tenant would become an overholding Tenant after this date if it was the Tenant’s belief that the tenancy was not frustrated and did not give up vacant possession of the rental unit. Section 57 of the *Act* specifically states that “The landlord must not take actual possession of a rental unit that is occupied by an overholding tenant unless the landlord has a writ of possession issued under the Supreme Court Civil Rules.”

In my view, if it was the Landlord’s belief that he could declare a tenancy frustrated and then simply take over a rental unit, then it is not clear to me why he would have signed mutual agreements to end tenancy with other residents of the building, as opposed to declaring their tenancies frustrated as well and unilaterally taken over their units in the same manner that he did to the Tenant. I find that this demonstrates that the Landlord was aware that there was a clear distinction in how tenancies could end. I do not accept the Landlord’s position that he was permitted to take possession of the rental unit without being granted an Order of Possession first, and I reject his excuse of not applying for one because it was his belief that it was an emergency and that it would have taken too long to receive a Decision.

Based on my analysis of the circumstances surrounding this tenancy, I accept that the tenancy was frustrated as of February 14, 2022 and that the tenancy had ended. However, I find that the Landlord took possession of the rental unit without first receiving a Decision permitting him to do so. Clearly, the Landlord was aware that the Tenant disagreed with the Landlord’s declaration of frustration, and it was up to the Landlord to

apply for an Order of Possession to have a Decision rendered regarding whether or not the tenancy was in fact frustrated. As the Landlord evidently took it upon his own volition to contravene the *Act* by seizing the rental unit and storing the Tenant's property without first obtaining an Order of Possession, it is possible that the Landlord could be responsible for a claim of monetary compensation.

As the Tenant was not successful in these claims, I find that the Tenant is not entitled to recover the \$100.00 filing fee paid for this Application.

Conclusion

The Tenant's Application is dismissed.

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: March 15, 2022

Residential Tenancy Branch