



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1017852 BC Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **OPM, OFL**

Introduction

This hearing dealt with the Landlord's emergency application pursuant to the *Residential Tenancy Act* (the "Act") for:

1. An Order of Possession because a mutual agreement to end the tenancy was signed pursuant to Sections 44(1)(c), 55(2)(d) and 62 of the Act; and,
2. An Order of Possession because the rental unit appears uninhabitable due to events out of either Parties' control, and the tenancy agreement is frustrated pursuant to Section 56.1 of the Act.

The hearing was conducted via teleconference. The Landlord's Property Manager, VL, the Landlord's Property Manager Assistant, MH, and one Tenant, LM, and Legal Counsel for the Tenants, MN, attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

VL testified that she served the Tenants with the Notice of Dispute Resolution Proceeding package and evidence for this hearing on February 25, 2022 by Canada Post registered mail (the "NoDRP package"). VL provided the Canada Post registered mail tracking numbers as proof of service. I noted the registered mail tracking numbers on the cover sheet of this decision. Legal Counsel for the Tenants admits receipt of the Landlord's NoDRP package. I find that the Tenants were deemed served with the

Landlord's NoDRP package five days after mailing them, on March 2, 2022, in accordance with Sections 89(1)(c) and 90(a) of the Act.

Issues to be Decided

1. Is the Landlord entitled to an Order of Possession because a mutual agreement to end the tenancy was signed?
2. Is the Landlord entitled to an Order of Possession because the rental unit appears uninhabitable due to events out of either Parties' control?
3. Is the tenancy agreement is frustrated?

Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this tenancy began as a fixed term tenancy on February 1, 2021. The fixed term ended on January 31, 2022, then the tenancy continued on a month-to-month basis. Monthly rent is \$1,500.00 payable on the first day of each month. A security deposit of \$750.00 was collected at the start of the tenancy and is still held by the Landlord.

The Landlord testifies that on February 5, 2022 at around 8 p.m., a vehicle impacted the side of the building where the rental unit is located and drove into the living room area of the Tenants' home. Tenant LM was home, but thankfully, no one was injured.

Both parties confirmed that no mutual agreement to end tenancy was signed in this matter. Instead VL states that RTB Information Officers instructed her to start the claim with the code for a mutual agreement to end the tenancy as the circumstances for this claim did not have a code that worked in the RTB online system.

Due to this accident, the Landlord's Property Manager states that their insurance company and the restoration company will not begin the repairs until the rental unit is vacant as the repairs will cause too much dust and too much noise. The Landlord testifies that the Tenants have moved most of their belongings out of the rental unit.

Legal Counsel for the Tenants states that the Tenants view this vacancy as only temporary and are seeking that this matter be treated similarly to a Section 49.2 of the Act situation. Once the repairs are completed, the Tenants request to receive the right of first refusal.

The Landlord testified that they no longer need an Order of Possession, and would agree to give the Tenants the right of first refusal.

Tenant LM confirmed that rent for February and March 2022 has been returned to them. The Tenants have a secondary claim for compensation for damage and loss which will be heard in the future.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

The Landlord had two claims starting this application, but the claim seeking an Order of Possession because a mutual agreement to end the tenancy was signed is a misnomer. Both parties confirmed that no mutual agreement to end tenancy was signed. This application code was used because, for the RTB online application system, the Landlord had difficulties tracking their claim for this matter and they went with the instructions from the RTB Information Officers. I dismiss the Landlord's claim for an Order of Possession because a mutual agreement to end the tenancy was signed, without leave to re-apply, as that is not what the Landlord is seeking.

The Landlord seeks an Order of Possession because the tenancy contract was frustrated without the fault of either party. RTB Policy Guideline #34 deals with Frustration, and it states:

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.

A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

Due to a car driving into the home of the Tenants, I find that this tenancy agreement is frustrated. Neither party is at fault, but the tenancy contract cannot be performed as the extreme circumstances of February 5, 2022 have totally affected the nature, meaning, purpose, effect and consequences of the contract. The Landlord has returned the Tenants rent payments for February and March 2022. I find that because of this unexpected event, the tenancy ended pursuant to Section 44(1)(e) of the Act.

The rental unit is mostly empty, and the Landlord stated they no longer need an Order of Possession.

I will not treat this matter as though it falls under Section 49.2 of the Act. I cannot order that the Landlord give the Tenants a right of first refusal, but in saying this, it is up to the parties to determine this.

Conclusion

This tenancy ended on February 5, 2022 pursuant to Section 44(1)(e) of the Act. I do not grant an Order of Possession to the Landlord as it is no longer needed.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: March 21, 2022

Residential Tenancy Branch