



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNECT MNDCT FFT

Introduction

This hearing dealt with the tenant's application pursuant to section 67 of the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing by the attending parties. Both parties confirmed that they understood.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing. In accordance with section 89 of the *Act*, I find that the landlord duly served with the tenant's application. As all parties confirmed receipt of each other's evidentiary materials, I find that these were duly served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Is the tenant entitled to a monetary order for compensation for money owed under the *Act*, regulation, or tenancy agreement?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

The tenant testified that they had entered into an agreement on November 24, 2020 for a tenancy to begin on December 1, 2020. Although no written tenancy agreement was signed, the tenant believes that the two parties had entered into a tenancy agreement after a deposit of \$500.00 was paid on November 24, 2020. The tenant submitted an email conversation between the parties which began with the landlord thanking the tenant for stopping by the night before, and requesting a deposit of \$500.00 to hold the unit. The landlord stated that the rental unit would be available by "Dec 15th at the latest", and confirmed that rent would be set at \$1,050.00 per month, which includes hydro, internet, and covered parking.

The tenant received an email on December 1, 2020 at 1:02 p.m. from the landlord that they were no longer able to rent the studio anymore. The landlord informed the tenant that a contractor had attended the rental unit, and that "there appears to be some issues that need addressing behind the bathroom wall", and that they had no idea when they would be able to get it looked after. The landlord informed the tenant that they would be returning the \$500.00 to them.

The tenant testified that they attempted to find a new place to live, but due to the short notice they were unable to find a place to live for the month of December 2020. The tenant subsequently had to purchase a flight back to reside with their parents. The tenant submitted a receipt in the amount of \$856.93 for the flight. The tenant is requesting reimbursement of the flight, as well as compensation equivalent to one month's rent for inadequate notice. The tenant argued that normally the landlord would have been required to serve the tenant with a 2 Month Notice to End Tenancy to perform repairs, and provide one month's compensation.

The landlord testified that they truly had wanted to rent the unit out to the tenant, but due to unanticipated and extenuating circumstances, they were unable to do so for health reasons. The landlord provided confirmation from their contractor that they were contracted to do renovations in the rental unit, and on November 30, 2020 the contractor had "discovered an abundant amount of black mold behind the cabinet and inside the wall". The contractor stated that they had advised the landlord against renting out the unit until the damage was properly diagnosed as "black mold can be very dangerous if not dealt with properly". The landlord argued that they did not intend to displace or cause hardship on the tenant, but that to mitigate any potential harm to the tenant, they had no choice but to not continue with the tenancy.

Analysis

The definition of a “tenancy agreement” is outlined in the following terms in section 1 of the *Act*:

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

Section 16 of the *Act* states the following about when a tenancy agreement takes effect.

Start of rights and obligations under tenancy agreement

16 The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

A tenancy can exist in the absence of a written tenancy agreement. I find that in this case, it was undisputed by both parties that the tenant had paid the landlord a security deposit on November 24, 2020, and the monthly rent was discussed between both parties. Furthermore, the landlord also confirmed in the email that the tenant would be able to move in by December 15, 2020 at the latest. I find that these actions, alone, already imply that a tenancy was agreed upon. The landlord does not dispute that they had to cancel the agreement on December 1, 2020, after consulting with their contractor about required repairs, and returned the tenant’s deposit to them immediately.

In light of the undisputed facts before me, I find that the both parties had entered into a tenancy agreement on November 24, 2020, the date when the details of the tenancy were discussed and agreed upon, and the date the tenant had sent the security deposit of \$500.00. I find that the landlord had clearly communicated to the tenant that they could move in by December 15, 2020. I find it reasonable at this point for the tenant to assume that they had found a place to live for December 15, 2020, and could make arrangements accordingly.

It is also undisputed that on December 1, 2020 the landlord had informed the tenant that they were unable to proceed with the tenancy, and the tenant’s deposit was returned to them. The tenant testified that they were unable to find a place to live on short notice, and subsequently had to purchase a flight ticket in order to reside with their parents in another province.

The landlord is disputing the tenant's monetary claims as they felt that they had no choice but to not continue with the tenancy. The landlord argued that they had acted in the tenant's best interests by not proceeding with the tenancy.

Section 44 of the *Act* states how a tenancy may be ended:

How a tenancy ends

- 44** (1) A tenancy ends only if one or more of the following applies:
- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
 - (i) section 45 [*tenant's notice*];
 - (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];
 - (ii) section 46 [*landlord's notice: non-payment of rent*];
 - (iii) section 47 [*landlord's notice: cause*];
 - (iv) section 48 [*landlord's notice: end of employment*];
 - (v) section 49 [*landlord's notice: landlord's use of property*];
 - (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];
 - (vii) section 50 [*tenant may end tenancy early*];
 - (b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
 - (c) the landlord and tenant agree in writing to end the tenancy;
 - (d) the tenant vacates or abandons the rental unit;
 - (e) the tenancy agreement is frustrated;
 - (f) the director orders that the tenancy is ended;
 - (g) the tenancy agreement is a sublease agreement.
- (2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Residential Tenancy Policy Guideline 34 states the following about a Frustrated Tenancy:

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.

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.

In consideration of the evidence and testimony before me, I am not satisfied that this tenancy meets the definition of a Frustrated Tenancy as clarified by RTB Policy Guideline 34. Despite the fact that the landlord and their contractor had concerns about mould in the rental unit, I find that the landlord has provided insufficient evidence to

support that the rental unit was truly uninhabitable, or could not be repaired in a manner that would allow the tenant to move in. Other than the statement from the contractor, the landlord did not provide any photos, reports, or documents supporting an analysis to show the extent of the mould issue, and that the mould would have posed a significant issue for the tenant.

Although I find that the landlord may have acted with the best intentions, I am not satisfied that tenancy qualifies as a Frustrated Tenancy. I find that both parties had agreed to enter into a tenancy agreement that was to begin on December 15, 2020 at the latest. Both parties, as stated in Section 16 of the *Act*, were therefore bound by the rights and obligations required by this tenancy agreement and *Act*. I find that the landlord had unilaterally decided to end this tenancy 14 days before the tenant was supposed to move in. Neither party had signed any Mutual Agreements to end tenancy, nor did the landlord formally serve the tenant with any Notices to End Tenancy for repairs. The landlord did not have an Order of Possession, nor do I find that the tenant abandoned this tenancy. Based on these facts, I find that the landlord failed to comply with section 44(1) of the *Act* in ending this tenancy.

I accept the tenant's evidence that as a result of the revocation of this tenancy agreement, the tenant had difficulty finding new housing on such short notice. I find that the tenant provided sufficient and detailed evidence to support the value of the monetary loss claimed by the tenant, and the hardship they had faced due to the manner that this tenancy was revoked. I am satisfied that the tenant had made an effort to mitigate the landlord's exposure to the tenant's monetary losses as is required by section 7(2) of the *Act* by moving in with their family. I also find that the tenant's monetary claim for the reimbursement equivalent to one month's rent to be reasonable considering that the landlord ended the tenancy before the tenancy was to begin, in a manner that contravened the *Act*. If the tenant was given a proper Notice to End Tenancy for Landlord's Use or for Repairs, the tenant would have been afforded at least two month's notice to find a new place, and compensation equivalent to one month's rent. Accordingly, I find that the tenant is entitled to a monetary order in the amount of \$1,906.93 in satisfaction of the monetary losses suffered by the tenant due to the landlord's failure to comply with section 44(1) of the *Act*.

As the tenant was successful in their application, I allow the tenant to recover the filing fee for this application.

Conclusion

I find that the tenant is entitled to a monetary order in the amount of \$1,906.93 plus the cost of the filing fee for this application. I issue a monetary order in the tenant's favour in the amount of \$2,006.93.

The tenant is provided with a monetary order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that 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: June 02, 2022

Residential Tenancy Branch