Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ET, FF

Introduction

This hearing convened to deal with the landlord's application for dispute resolution (application) seeking remedy under the Residential Tenancy Act (Act). The landlord applied on August 4, 2022 for an order ending the tenancy earlier than the tenancy would end if a notice to end the tenancy were given under section 47 of the Act and to recover the cost of the filing fee.

The landlord was provided the Application for Dispute Resolution and Notice of Hearing (application package) to serve the tenants on August 19, 2022.

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

The parties were informed at the start of the hearing that recording of the dispute resolution hearing is prohibited.

Thereafter the 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.

Following is a summary of those submissions and includes only that which is relevant to the matters before me.

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

Preliminary and Procedural Matters-

After reading the landlord's evidence, and hearing from the landlord's representatives, it became obvious that the landlord's application was made on an incorrect claim, or issue. The RTB scheduled this matter according to the issue that the landlord listed, which suggested that the matters were urgent, and that the landlord was entitled to an expedited hearing, under section 56 of the Act.

My review of the evidence shows that the landlord should have applied under section 56.1 of the Act, requesting an order of possession of the rental unit due to their claim that the tenancy was frustrated, which is not scheduled as an expedited hearing. The landlord did not provide any evidence or statements regarding the requirements under section 56 of the Act, when offered the chance.

When asked to provide under what urgent circumstances had occurred which would lead to this application, the landlord's representatives said that the tenancy was frustrated, and the tenancy should end.

For this reason, using authority under section 62 of the Act, I have converted the landlord's application to an application seeking an order of possession of the rental unit due to a claim that the tenancy was frustrated.

As the landlord failed to provide any evidence under section 56(2) establishing the tenancy should end earlier than the tenancy would end if a notice to end the tenancy were given under section 47 *[landlord's notice: cause]*, I **dismiss** the landlord's application for an order of possession of the rental unit on this basis.

The hearing proceeded on the parties' testimony and evidence relating to the landlord's claim that the tenancy is frustrated.

I have made this decision as all the submitted evidence related to this claim, and find it was not prejudicial to the tenants as a result. Rather, I find it more fair to the parties to

have these matters resolved sooner rather than the landlord having the ability to bring forth another application for dispute resolution under section 56.1 of the Act for the same reasons.

Issue(s) to be Decided

Is the landlord entitled to an order of possession of the rental unit based upon a frustrated tenancy and to recover the cost of the filing fee?

Background and Evidence

The tenancy began on June 1, 2016, for a monthly rent of $1,480, and the tenants paid a security deposit and pet damage deposit of $740 each. The current monthly rent was disputed, but that matter was not at issue in this dispute.

In support of their application, the landlord wrote the following:

> *Tenants lease is frustrated due to water ingress into her suite that requires immediate remediation and the tenant refuses to acknowledge the frustration of her lease as well as respond with any plans of leaving the suite*

[Reproduced as written]

The landlord said that the residential property is currently undergoing water proofing, with a water membrane. This work has been ongoing for some time. The residential property has 49 rental units and the tenants' suite is on the ground level. The water proofing on the residential property has been deteriorating over the last 10 years, and on July 4, 2022, the work caused water ingress into the tenants' unit.

The landlord said that the mirror unit to the tenants' unit directly on the other side of the building required remediation work of around 4 months in 2021. The landlord submitted that it is believed that the tenants' rental unit would require the same. The landlord submitted that the tenants denied entry in 2021, when the work on the other side occurred.

The landlord submitted that the tenants' suite did not look habitable. The landlord said that the flooring, carpet and underlay had extreme moisture, and that there could be possible mold.

The landlord was unsure of how long the remediation would take in the tenants' rental unit, as they have been given no scope of work, but it could take months. The landlord submitted that a hazmat team would be needed. The landlord said there could be asbestos.

The landlord said they would like to work with the tenants, but could offer no timeline of their return.

The landlord said that the water ingress was not due to one event, but has occurred as a result of the deterioration of the water proofing over the last 10 years. The landlord said they had a report that recommended that the rental unit be vacant to allow for repairs, due to the possibility of mold.

The landlord filed a copy of a report from a company who inspected the property on July 4, 2022, indicating that the "cause of loss was the result of water ingress", letters to the tenants, an incident report, photographs, and a suite report from a remediation company, recommending the rental unit be vacant during repairs.

Tenants' response –

The tenant said they said they could not allow entry at the time of the landlord's request last year, as tenant KH was undergoing medical treatment while awaiting surgery. For this reason, she had to be careful. The tenant said that this was communicated to the landlord's representative at the time.

The tenant said that they do have tenant insurance, but their insurance will not cover a claim unless there was an actual major flood, and the expenses related to this matter would not be covered.

The tenant said the testimony of the landlord about asbestos was the first time they are hearing anything about it, as it was in none of the evidence or application.

The tenant said they had another restoration company attend the rental unit for an inspection, and they were informed that the work outlined would take 10-12 days. The tenants submitted a copy of the report, which mentioned cutting out sections of the wall, replacing the carpet underlay, perform a biowash, installing a dehumidifier for 3 days, building a new subfloor, installing drywall, etc.

The tenants submitted that the humidity level at the time of the incident on July 4, 2022, was quite high, but a subsequent reading shows a dramatic decrease in humidity levels. The tenants submitted photos with the readings from a hand-held moisture meter.

In the documentary evidence, the tenants wrote they disagreed that the tenancy was frustrated because when the company hired by the landlord first attended, the project manager informed them the work was remedial. The project manager spoke of them staying while they made repairs and they offered to move furniture as the repairs were being done. The tenants said they had offered to move out for the month of August 2022, but they came to no agreement.

Tenant TJ said that the landlord was not prevented from waterproofing the outside of the building.

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 required immediate remediation.

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 water ingress from the building waterproofing project into the rental unit caused the rental unit to require remediation, causing the tenancy to be frustrated. I disagree. While a report from the landlord's remediation company indicated the recommendation is that the rental unit be vacated to allow for repairs, the undated report did not provide for any length of time for the repairs. The tenants submitted a report from another company indicating the work will take between 10-12 days.

After reviewing the evidence, I find the landlord submitted insufficient evidence to support their application that the tenancy agreement was frustrated. I find the landlord submitted insufficient evidence to show that the contract became incapable of being performed because of an unforeseeable event. I do not find the water ingress has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible.

In considering whether or not the tenancy agreement was frustrated, I would expect the landlord to have provided a scope of work for the remediation service. However, this evidence was not provided as there is no scope of work, according to the landlord.

Overall, when reviewing the photographic and oral evidence, I find that the landlord submitted insufficient evidence that the entire rental unit was completely uninhabitable, without a full scope of work.

I find the issue in this application related to a repair issue, not in anyway a frustration of the tenancy.

The tenants offered to vacate for the month of August, but did not, as there was no acceptance of the offer. I therefore do not find it unreasonable that the tenants did not vacate, as the landlord's letters attempted to declare that the tenancy was frustrated rather than have the tenants vacate to arrange for the repairs to be made.

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 and recovery of the cost of the filing fee, without leave to reapply.

Orders –

Additionally, as the repairs have not been made as of the date of the hearing, I find it appropriate for the landlord to arrange to make any necessary repairs and/or remediation that are a result of the water ingress. From the evidence presented from the landlord, I find it was not clear if the tenants were required to vacate the rental unit. The statements and reports from the different companies were inconsistent as to whether the rental unit needed to be vacant.

Under section 62(3) of the Act, I **order** the landlord to submit a true copy of the remediation company's report, or scope of work, containing their recommendations as how the rental unit must be prepared to the tenants.

If the tenants temporarily vacate the rental unit to accommodate the repairs needed, the tenants should provide the landlords with their new contact information, including address, in order to facilitate communication with the tenants as it is expected that the landlord keep the tenants informed when they may return to their rental unit. If or when the tenants vacate to accommodate the repairs, the landlords are informed this does not mean the tenancy ends.

I find the tenants provided a reasonable offer to the landlord that they would vacate the rental unit during the month of August 2022, but did not, as there was no evidence from the landlord that they accepted the offer. It is quite possible the work could have been done during the month of August had the landlord taken the appropriate steps to do so. For this reason, I **order** the landlord to have the work done as quickly and expeditiously as possible and cooperate and assist the tenants in moving furniture and/or relocating temporarily.

Conclusion

The landlord's application for an order of possession of the rental unit due to the tenancy agreement being frustrated and for recovery of the filing fee is **dismissed, without leave to reapply**.

Orders have been issued to the landlord.

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(3) of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: August 31, 2022

Residential Tenancy Branch