Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant: ERP
Landlord: OFL, OL, FFL

Introduction

The Tenant filed an Application for Dispute Resolution on January 9, 2023 seeking emergency repairs to the rental unit. The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*") on March 22, 2022.

Both parties attended the conference call hearing. I explained the process and both parties had the opportunity to ask questions and present oral testimony during the hearing. The Landlord confirmed they received the Notice of Dispute Resolution Proceeding from the Tenant, as well as the Tenant's prepared documentary evidence. Reciprocally, the Landlord provided their prepared evidence to the Tenant via email, as well as attaching it to the door of the rental unit, and the Tenant confirmed they received these pieces from the Landlord.

Preliminary Matter – Landlord's Application for an order of possession

The Landlord applied for an order of possession for the rental unit, concerning the same tenancy, on January 25, 2023. This was not crossed to the Tenant's Application because of the expedited hearing process. The Landlord presented that they informed the Tenant of this upcoming hearing, and served the Notice of Dispute Resolution Proceeding and associated evidence to the Tenant on the rental unit door on January 26, 2023. They also sent this to the Tenant via amil on January 26, 2023.

With the parties' consent, I am joining the Landlord's Application for an order of possession – by what they submit is a frustrated tenancy agreement – for this same hearing. I heard fully from both parties' on the Landlord's position in this matter, and the Tenant's response.

Issue to be Decided

Is the Landlord obligated by s. 32 of the *Act* to make emergency repairs to the rental unit as requested by the Tenant?

Is the Landlord entitled to an order of possession, by reason of the tenancy agreement being frustrated?

Is the Landlord entitled to reimbursement of the Application filing fee, pursuant to s. 72 of the *Act*?

Background and Evidence

Both parties verified the basic details of the tenancy agreement at the start of the hearing. The Tenant pays $2,180 in this agreement that started on January 1, 2018. The Tenant indicated they are a current tenant on their Application. The Tenant lives in the rental unit with their five children.

Tenant's submissions and evidence

On December 24, 2022 the unit was subject to a flood. The Tenant described the flood as being chiefly attributed to a drain cap that was replaced incorrectly by a tech who earlier visited to drain the pipes at the rental unit property. This was verified (via email on January 24, 2023) by their contact who had working knowledge of the drainage sump system in place at the rental unit property. On December 24, there was inclement weather as well as snow melting that entered the rental unit causing damage.

At the time of the flood, the Tenant was messaging the Landlord instantly, and seeking their input with the immediate steps to take in this emergency situation. The Tenant on their own removed all of their items out from the rental unit, including their personal property. This required a storage unit that they had to temporarily store outside the rental unit on the driveway.

The messages that the Tenant provided in their evidence show their queries and concerns to the Landlord about removing carpet and flooring in order to prevent further damage in the rental unit, and the Tenant was drawing on their own contacts who advised this was urgent and necessary to avoid further damage in the rental unit. The Tenant also noted the strong odour, being an issue that could potentially affect their children's health because of further accumulating moisture in the rental unit. The Tenant also requested that the Landlord acquire larger fans to remove moisture, as well as other measures to remove the water that had entered to the rental unit.

In these messages, the Landlord advised they were communicating with their insurer. The messages show the Tenant inquiring on more information about the Landlord's insurance, and asking for direct contact with the restoration company the Landlord retained to manage the issue. This was at the point where the Landlord conveyed the message to the Tenant that all furniture must be removed from the rental unit; however, this would have been further work and cost to the Tenant to get all remaining furniture items out of the rental unit. In the video in their evidence, the Tenant showed remaining items in the rental unit placed high onto existing shelving units/cabinets, empty closets, empty rooms, with appliances and smaller shelving units remaining.

On January 11, the Tenant sent a longer email to the Landlord to set out their position:

- they could not find alternative living arrangements such as another rental unit
- they pay $750 per month for the storage unit, leaving $1,450 remaining to cover their rent
- they stated their need for the Landlord to not end the current tenancy agreement, repair the damage in the rental unit "as quickly as possible", and "maintain communication of on going progress of the suite's repairs", and "supply some financial support for moving costs/storage . . . and return one week of rent from December 2022."
- they cited the Landlord's mention of not having insurance coverage because they had not indicated that they have tenants in the rental unit property, and asked for clarification on whether insurance would cover the required work – if not, then the Landlord could hire a restoration company
- by the time of this message there were still no fans placed in the rental unit, and no other progress on restoration
- the Tenant stated they would need to order another portable storage unit for the remainder of their items, citing the Landlord's refusal to allow the previous portable storage unit to be in place on the rental unit property for 2-3 days,

leading to conflict with the Landlord's brother and sister who also used the property – a portable storage unit was the less expensive option rather than a moving van to move items to an off-site storage site.

Both parties provided a document of all text messages between them from the time of the flood through to approximately mid-January, showing the following with reference to dates:

- 24 Dec: the Tenant inquires on the Landlord's "flood insurance" who would help with "clean up and get[ting] industrial fans going"
- 25 Dec: the Tenant had "people lined up to take out the flooring", and requested dehumidifiers, for $60 per day – the Landlord responded to say that a plumber said to touch nothing until the inspector arrived – the Tenant stated floor removal would not "ruin the inspector" and "Not doing it will cause more problems."
- 25 Dec: the Tenant explained that because insurance was taking three days (at that time) it was a larger amount of damage not to remove the carpet and flooring – the Landlord reiterated that insurance stated only fans should be used with no removal
- 26 Dec: the Landlord clarified that the insurer said "don't touch anything", so the Tenant advised they were packing up their personal property from the rental unit
- 28 Dec: the Landlord advised a restoration team may arrive by Friday to install dehumidifiers
- 28 Dec: the Tenant states "loss of rental income doesn't fall on me", and states they cleaned up the entire flood, and tried to pack as much as they could – they requested the Landlord's assistance in helping to pay for temporary storage of their items, and having to pay for a different suite until this is finished
- 28 Dec: the Tenant queried directly on insurance coverage for their storage/moving costs and how much they have to remove as instructed by the restoration firm
- 29 Dec: the Tenant advised their storage unit will arrive to the rental unit property the following day, to be loaded up over the next few days
- 29 Dec: the Landlord advised the restoration company would not arrive the next day ("Honestly speaking, we don't know when it will be our turn for the restoration people to come"), and instructed the Tenant to not use the driveway for storage unit space
- 29 Dec: the Landlord stated "It maybe easier for both you and us if we frustrate the lease and that you can find a new place. Instead of keeping you waiting and waiting." – in response to this the Tenant reiterated that they could not find a rental unit elsewhere, and the church lent them money for the immediate cost of

a storage unit rental – the basic options for the Tenant were to take out the carpet and dehumidify the rental unit, or get their items out and into the storage unit

- 3 Jan: the Tenant inquired on when the restoration team would attend, and how much they should pack up of their remaining items – this would entail renting another storage unit – the Tenant requested to speak to the restoration company directly for directions, clarifying that they don't have to remove everything only to be evicted
- 5 Jan: the Tenant requested a written proposal by the restoration company, and again queried on how much to remove
- 7 Jan: the Tenant reports that the rental unit is empty, stating that they have temporary housing with a friend, asking for when the work will start and finish

In the hearing, the Tenant stated they did not pay rent for January or February, 2023. They are wanting to be able to move back into the rental unit, maintaining that they did not need to move out, and the Landlord should have repaired the issues as soon as possible. They have been staying with friends since December 25 and paying money for the storage of their personal property. The Landlord tried to end the tenancy, though the Tenant stated the Landlord never presented a proper documented notice to end the tenancy. The Landlord also tried to return the Tenant's security deposit to them. The Tenant refused to remove the remaining items until there is an actual start date for the work.

Because they were not hearing from the Landlord about any restoration team that would attend, the Tenant proposed taking out the carpet, and it was at this point that the Landlord stated that they would have to break the lease. The Tenant refused to remove the remaining items until there is an actual start date for the work.

the Landlord's submissions and evidence

In response to the Tenant's claims, in the hearing the Landlord stated plainly that, from their perspective, the contract is frustrated, with no one to be blamed for the flood event. They are under no obligation to make the rental unit available again to the Tenant.

The Landlord also reviewed the communication immediately after the flood event:

- they searched for a restoration company to assist with the flood event, and their family members attended at the rental unit to help bail water out – they utilized a

pump from neighbours that was not strong enough, then rented a stronger pump that was more successful in removing water

- they started contact with their insurance company, and the insurer instructed the Landlord to not remove the carpet, instead using a fan – this was the Landlord's response to the Tenant's proposed action to remove the carpets immediately
- they continued communication with the Tenant for the next two days (as appears in their own evidence and that of the Tenant, summarized above)
- the insurance company could not establish a timeline with the Landlord
- they know that the Tenant wants to have this settled; however, they just can't do it, and they have "no timeline, and no idea when the basement will come back into its proper condition"
- on January 3 they informed the Tenant that the insurer stated there cannot be tenants in the rental unit
- they withdrew the claim for insurance, and asked a restoration company for a quote but this particular restoration company did not respond
- they phoned several different restoration companies, and one company provided a summary report and quote, as appears in the Landlord's evidence.

The Landlord obtained a report from a restoration firm, sent to them on January 24, from the firm's inspection at the rental unit on January 19, 2023. This 5-page report sums up the firm's room-by-room inspection at the rental unit, noting particular damage therein. The firm quoted mitigation repair costs at $20,000 to $25,000 and repair costs at $75,000 to $80,000.

The Landlord included several other images of the flood damage in the rental unit, as well as images of the Tenant's storage unit rental in the driveway.

The Landlord also presented that items of furniture remain in the rental unit. This was a separate ground listed on their Application. The restoration company informed the Landlord that all furniture must be removed before work can start. The Landlord's position is that work cannot begin until these items are removed; however, the Tenant stated the Landlord cannot enter the rental unit on their own. Reciprocally, in the hearing the Tenant stated that they refused to remove the actual items until they have an actual start date for the work from the restoration company, via the Landlord.

Analysis

The *Act* s. 33(2) sets out “emergency repairs” as a special category: those that are urgent, necessary for the health or safety of anyone or for the preservation or use of residential property, and made for the purpose of repairing:

- major leaks in pipes or the roof;
- damaged or blocked water or sewer pipes or plumbing fixtures;
- the primary heating system;
- damaged or defective locks that give access to a rental unit; or
- the electrical systems.

What the Tenant presented here, as verified in their evidence and that of the Landlord, is a situation requiring repairs, on an urgent basis, because of the flooded basement unit. I concur this is an urgent situation; however, with reference to the categories as set in the legislation, I find this is not for the purpose of repairing any of the items this particular piece of the *Act* provides for.

The *Act* s. 64(3) is authority for me to amend an application for dispute resolution. Given that the Tenant described the urgent situation in the rental unit, I amend their Application to address their rights and the Landlord’s obligation concerning repairs in the rental unit.

The *Act* s. 32 clearly sets out a landlord’s obligations for repairs to a rental unit. This is to “provide and maintain residential property in a state of decoration and repair that

> (a) complies with the health, safety and housing standards required by law, and
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

I find what the Tenant presented in this hearing is sufficient to establish that they are facing a significant barrier to their use of the rental unit as set out in their tenancy agreement.

As of the date of the hearing, I find the Landlord is not fulfilling their mandated obligation to provide and maintain the rental unit in compliance with housing standards, suitable for occupation by the Tenant.

The Landlord submitted that it is impossible for them to do so, making the tenancy agreement frustrated by events beyond anyone’s control. As set out in s. 44(1)(e) of the *Act*, a tenancy may end if “the tenancy agreement is frustrated”. As a statement of the

policy intent of the *Act*, the *Residential Tenancy Branch Policy Guideline 34. Frustration* sets out a fulsome description of the concept. This states: "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." Further: "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."

In the hearing, the Landlord presented that there were barriers to their completion of restoration and repairs of the damage in the rental unit: they dropped their insurance claim, and they could not contact a restoration company. The Tenant presented that the Landlord's insurer directed the Landlord not to take immediate measures, and in the Tenant's viewpoint this exacerbated the damage in the rental unit when they could have taken immediate measures on their own. More importantly, the Tenant presented that the Landlord's insurer was not aware of a tenancy situation at the rental unit property. On this distinct point, I find the Tenant credibly on this point, and find that amounts to a negligent omission by the Landlord in not having the rental unit property adequately insured. I find either the lack of insurance, or inadequate insurance, does not absolve the Landlord from their obligation to make repairs in the rental unit. Moreover, that definitely does not stand as grounds to find the tenancy agreement was frustrated.

To be clear, my finding is not that the Landlord was negligent in any cause of the flood; rather, I find the Landlord's inadequate insurance is the reason they are not fulfilling their statutory s. 32 obligation to provide a habitable rental unit to the Tenant. That responsibility rests with the Landlord in this instance.

Additionally, the Landlord presented that they were not able to contact a suitable restoration company, based on such companies' limited availability and the timeline involved. I find, however, the evidence shows the Landlord did have a company visit on January 19, and secured a quote that set out the scope of the work involved, as well as its cost.

I find the Landlord is also presenting that this cost for restoration, as set out in the quote they provided in their evidence, also acts as a barrier to them completing the work of restoring and repairing the rental unit. I find the cost involved does not absolve the Landlord from completing their mandated statutory duty in providing the rental unit to the Tenant, in compliance with s. 32(a) and (b).

I dismiss the Landlord's Application for an order of possession based on a frustrated tenancy agreement. I find what the Landlord presents are financial factors that are

preventing them from complying with the tenancy agreement and the *Act*. Those factors do not constitute a frustrated tenancy agreement.

From what the Tenant presented on their immediate living situation, I find this is a situation that is urgent for them in terms of not having an adequate housing situation in this interim period. There is no question that the Tenant has the right to return to the rental unit after the Landlord has completed repairs and restoration.

The Tenant presents that they are not obligated to move out remaining items from the unit until they are aware of the firm plan for restoration work; the Landlord countered this to say that a restoration team will not begin work (or be able to) until the rental unit is completely empty. In comparison to the scope of entire work involved in restoring the rental unit, this is a relatively minor point, yet I take the Tenant's position that they completely emptied their belongings from the rental unit in a very short timeframe and have been paying for offsite storage of their personal property.

I find the Tenant simply has no extra resources in place to accommodate these extra items. Given that these items are still in the rental unit and not being used, I deem them disposable. The evidence in the record of the amount of items involved is the restoration firm's report they provided to the Landlord – I find that is an objective measure of what amount of items are in place that would possibly prevent work. In general, I find this is a thin pretext for the Landlord not hiring a firm to begin the restoration work. I grant the Landlord unfettered access to the rental unit at any time to dispose of the items, and I leave this relatively small amount of work with the Landlord to complete. I find this is in the best interests of the Landlord to save their rental unit property. Should the Tenant wish to salvage these items, the Tenant must arrange for that with no delay; however, the items shall not remain in the rental unit, and I order the Landlord to remove and/or dispose of the items by Wednesday, February 15, 2023.

Overall, I grant the Landlord an exception to the normal restrictions on their entry, pursuant to s. 29(1)(d) of the *Act*. I order the Tenant to grant the Landlord unfettered access to the rental unit, and this decision is a standing order authorizing the Landlord to enter the rental unit without the Tenant's permission each time. This standing order ends once restoration work is completed and the Tenant has moved back into the rental unit.

I order the Landlord to complete the restoration and repair work in the rental unit, to restore it to a state complying with s. 32 so that the Tenant may move back into the rental unit. The Landlord must ensure this work begins forthwith.

A very important element to the work being completed is communication on all aspects of the work with the Tenant.

Specifically:

- I order that the Landlord must retain a restoration company, by February 20, 2023. The Landlord must notify the Tenant in writing/email that this step has been completed.

- The Landlord must notify the Tenant of dates of restoration in writing/email as soon as possible.

- The restoration work, to comply with s. 32, must begin as soon as possible. The Landlord must advise the Tenant in writing/email of all work progress and the project starting date. The Landlord must notify the Tenant by March 15, 2023.

The Landlord is not permitted to end the tenancy or urge the Tenant to move elsewhere because of any difficulty associated with completing this task.

I authorize the Tenant to withhold rent for the time period involved in the restoration of the rental unit. The Tenant has had no use of the rental unit since the flood date of December 24, 2022. The complete reduction in rent shall continue as long as the Tenant does not have full access to the rental unit where the Landlord does not comply with s. 32. I find the Tenant was fair-minded throughout this process, even from the immediate messaging they provided to the Landlord on the day of the flood. I trust the Tenant's desire is to only return their and their family's life back to normal in the rental unit.

The Tenant did not specify a claim for monetary loss due to the incidental costs of their move out from the rental unit, including costs of storage. That is properly the subject of a claim for compensation, which would be another separate Application for dispute resolution.

In sum, I dismiss the Landlord's Application for an order of possession. The Landlord was not successful in their Application; therefore, I grant no reimbursement of the Application filing fee.

Conclusion

The Tenant's Application for repairs is granted, as set out above. I made orders on specific dates that the Landlord must follow. Should either party require clarification on any point in this decision, s. 78(1)(b) of the *Act* applies and the party must make a formal request for clarification. I note that clarification is not a process by which a party may re-submit or make further claims on any point of this dispute.

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

Dated: February 11, 2023

Residential Tenancy Branch