



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Ministry of Housing

## **DECISION**

**Dispute Codes** OT FFT

### **Introduction**

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

- a finding on whether the tenancy is frustrated or not; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*.

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.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties confirmed that they understood.

At the outset of the hearing, both parties confirmed the legal name of the landlord. As neither party was opposed, the landlord's name was amended to reflect the legal name of the landlord.

As the landlord confirmed receipt of the tenant's application, I find that the landlord duly served with the tenant's application. Both parties confirmed receipt of each other's evidentiary materials, and that they were ready to proceed with the hearing.

### **Issues**

Is the tenancy frustrated?

Is the tenant entitled to recover the filing fee?

**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 was added as a tenant to the tenancy agreement in September 2018. Monthly rent is currently set at \$1,101.07 plus \$40.00 for parking. The landlord holds a security and pet damage deposit of \$457.50 each deposit.

On March 6, 2023, a fire broke out on the patio of an adjacent unit, spreading into the unit and into the tenant's unit. The landlord describes the damage as extensive, and affected the shared patio, the roof of the building, structural joists, patio door, ceilings, walls, floors, contents, and the air.

On March 7, 2023, the tenant was sent a letter informing the tenant that the tenancy became frustrated on March 6, 2023 due to the unit becoming uninhabitable.

The landlord submits that due to the extensive physical, structural, and environmental damage to the tenant's unit, the timeline is approximately twelve months to repair. The landlord submitted copies of the engineer report, restoration summary, and initial site report from the restoration company.

The summary is dated March 24, 2023. The project manager provided a "brief description of the fire loss related damages" to the two units, which stated that "the overall scope of work and procedures will be dictated by the hygienist due to the type of loss and environmental hazards associated with the loss". The project manager also stated that "a general project of this magnitude may take up to and or surpass a 12 month duration".

The landlord testified in the hearing that they were still waiting for the hazardous material survey to ensure there is no asbestos. The landlord testified that the process is a lengthy one, and referred to the documents that were submitted in evidence. The landlord testified that the insurance company is overseeing the repairs, and as noted in the summary, the estimate is at least twelve months, if not longer. The landlord testified that they have no ulterior motives as the fire was an unanticipated event that has cost the landlord significant financial hardship, which includes a \$125,000.00 deductible.

The tenant filed this application as they do not agree that the tenancy is frustrated. The tenant argued that landlord wanted to end the tenancy in order to re-rent the unit for higher rent. The tenant testified that they will lose so much, while the landlord gains. The tenant testified that they would be willing to wait up to two years and move back once the repairs are complete.

### **Analysis**

**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 15<sup>th</sup> 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 find that the tenancy became frustrated on March 6, 2023. I am satisfied that the landlord had provided sufficient evidence to support that the damage from the fire was so extensive that the rental unit is no longer inhabitable. Although eventual occupation is possible after restoration and repairs, I am satisfied that the work is so extensive that the landlord is

not able to verify, or guarantee, that the unit will be ready for a long period of time. The project is estimated to take approximately 12 months, if not longer. I find that there is no definite timeline for the completion of these repairs, and until completion, occupation of this rental unit is impossible. Although I recognize the extreme hardship this fire has caused the tenant, I find that the fire that took place was an unforeseeable event, and the resulting frustration of the tenancy is not due to the deliberate or negligent act or omission of the landlord. As noted in the policy guideline, *“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.”* In this case, I am satisfied that it is now currently impossible for the landlord to fulfill the contract according to its terms, and for the foreseeable future. The tenant’s willingness to move back into the rental unit does not change this fact.

I find that the landlord is no longer able to fulfill their obligations under this contract due to the extensive damage from the fire, and therefore the tenancy became frustrated on March 6, 2023. The only obligation of the landlord is to return the portion of the rent paid for March 7, 2023 to March 31, 2023, and deal with the tenant’s security and pet damage deposits in accordance with the *Act*. I note that the right of first refusal only applies when a tenant receives an order under section 49.2 of the *Act*, and does not apply to frustrated tenancies.

The tenant’s application is dismissed without leave to reapply.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the tenant was not successful with their application, the tenant must bear the cost of this filing fee.

### **Conclusion**

The tenant’s entire application is dismissed without leave to reapply.

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: April 12, 2023