

REVIEW HEARING DECISION AND REASONS

Dispute Codes: CNR; MNDC; OLC; RP; LRE; RR; FF

Introduction

The Hearing of this application was originally conducted on June 6 and June 28, 2011 by telephone conference. The Tenant sought to cancel a Notice to End Tenancy for Unpaid Rent; for a compensation for damage or loss under the Residential Tenancy Act (the "Act"), regulation or tenancy agreement; for an Order that the Landlord comply with the Act, regulation or tenancy agreement; for an Order that the Landlord make repairs to the rental unit and property; for an Order suspending or setting conditions on the Landlord's right to enter the rental unit; to allow the Tenant to reduce rent for repairs, services or facilities agreed upon but not provided; and to recover the cost of the filing fee from the Landlord.

Both parties signed into the telephone conference on June 6, 2010, and the matter was adjourned to a date to be advised because the Landlord testified that she did not receive copies of the Tenant's evidence package. The Hearing was reconvened on June 28, 2011. The Tenant did not sign into the telephone conference on June 28, 2011, and the Tenant's application was dismissed without leave to reapply.

On July 7, 2011, the Tenant applied for a Review Consideration, stating that she did not receive notification of the date of the reconvened Hearing from the Residential Tenancy Branch until July 5, 2011, due to a postal strike. The Tenant's application for a Review Consideration was granted on July 13, 2011. The Reviewing Officer suspended the Decision issued on June 28, 2011, pending a Review Hearing.

Section 82 of the Act provides:

82 (1) Unless the director dismisses or refuses to consider an application for a review under section 81, the director must review the decision or order.

(2) The director may conduct a review

- (a) based solely on the record of the original dispute resolution proceeding and the written submissions of the parties, if any,
- (b) by reconvening the original hearing, or
- (c) by holding a new hearing.

(3) Following the review, the director may confirm, vary or set aside the original decision or order.

This Review Hearing is a new hearing, pursuant to the provisions of Section 82(2)(c) of the Act.

Both parties attended and provided affirmed testimony. I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant to the Tenants' application** and the issues and findings in this matter are described in this Decision.

Preliminary Matters

The Tenant testified that she served the Landlord with copies of her evidence by registered mail to the address provided by the Landlord, on May 27, 2011. The Tenant provided the tracking number.

The Landlord received copies of the Tenant's evidence on June 13, 2011, but submitted that this was a new Hearing and therefore all evidence had to be served again. I do not find this. For the purposes of this Review Hearing, I find that the Landlord was sufficiently served with copies of the Tenant's evidence on June 13, 2011, pursuant to the provisions of Section 71(2)(b) of the Act.

Issue(s) to be Decided

1. Should the Notice to End Tenancy issued May 11, 2011, be cancelled?
2. Is the Tenant entitled to compensation pursuant to the provisions of Section 67 of the Act?
3. Should the Landlord be ordered to comply with the Act and make regular repairs to the rental unit and rental property pursuant to the provisions of Sections 62(3) and 32(1) of the Act?
4. Should the Landlord's right to access the rental unit be restricted or suspended pursuant to the provisions of Section 70(1) of the Act?
5. Are the Tenants entitled to a reduction in rent pursuant to the provisions of Section 65(1)(f) of the Act?
6. Is the Tenant entitled to recover the cost of the filing fee from the Landlord pursuant to the provisions of Section 72(1) of the Act?

Background and Evidence

This tenancy began on July 10, 2007. At the beginning of the tenancy, monthly rent was \$1,800.00. Rent is due on the first day of each month. Monthly rent does not include utilities. A copy of the tenancy agreement was provided in evidence.

On January 13, 2011, the Landlord issued a Notice of Rent Increase, increasing the monthly rent from \$1,864.80 to \$1,907.70 effective February 1, 2011. A copy of the Notice of Rent Increase was provided in evidence.

The Landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "Notice") on May 11, 2011. The Landlord e-mailed the Notice to the Tenants on May 11, 2011, and hand delivered the Notice to the Tenants on May 14, 2011. A copy of the Notice was provided in evidence.

The Notice alleges that the Tenants owe rent in the amount of \$1,907.70 that was due on May 1, 2011. The Tenants have paid rent in the amount of \$1864.80 for the month of May, 2011. The Notice also alleges that the Tenants failed to pay utilities in the amount of \$239.80, following written demand that was provided on May 1, 2011. The Landlord testified that the cost of utilities had increased and the Tenants were not paying their share. The Tenant testified that she has not been provided with copies of the utility bills in order to confirm the accuracy of the amount claimed.

In July, 2010, the Tenant made application to cancel a Notice to End Tenancy for Cause, and for other relief including an Order that the Landlord comply with the Act and make repairs to the rental unit and property. This matter was heard on September 17, November 1, November 30 and December 17, 2010. A copy of the Decision, dated December 30, 2010 was provided in evidence. The Notice to End Tenancy was set aside and the Landlord was ordered to make certain repairs, as follows: "the landlord must ensure that the fence and gate, kitchen stove knobs, the door to the outside deck and the tile around the toilet are inspected and repaired as necessary no later than January 31, 2011."

The Tenant testified that the fence had been repaired, but two months late. She stated that the gate has not been repaired or replaced and that raccoons and vagrants were gaining access into the yard and going through her garbage. The Tenant stated that the stove was replaced in May, but that only 2 elements were functional from the beginning of the tenancy until the stove was replaced (four years). The Tenant testified that the tile around the toilet has been replaced, but that there was no grouting done. The Tenant seeks compensation in the amount of \$200.00 per month for four months because of the devaluation of the tenancy.

The Landlord testified that the gate was broken by the Tenants and that it was an ornamental one-of-a-kind gate that could not be replaced. She stated that she was not

going to replace the gate and that it would not have stopped raccoons or vagrants from entering the yard because when it was installed, it was open about 2 feet off the ground. The Landlord agreed that the stove had been replaced in May and that the fence was not repaired by January 31, 2011. The Landlord testified that there was grout around the tiles.

The Tenant testified that the Landlord has performed 3 inspections since the Decision of December 30, 2010. She submitted that these “command” inspections were unnecessary and were a form of intimidation by the Landlord.

The Landlord testified that she had performed inspections on January 15, 2011, to repair the tile; on May 14, 2011; and on June 18, 2011, to inspect the pool and gardens. She submitted that these inspections were necessary to ensure the upkeep of her property.

Analysis

A landlord must not increase rent except in accordance with the provisions of Part 3 of the Act. A notice of rent increase must be in the approved form and must be provided to the tenant at least three months before the effective date of the increase. Unless the landlord has an Order of the director, or the tenant agrees in writing to the amount of the increase, the increase cannot be more than the amount allowed by the regulations.

The allowable increase under the regulations for 2011 is 2.3%. In this case the maximum allowable rent after applying the allowable increase would be \$1,907.69. There is no provision in the Act or the regulations for rounding up. Therefore, I find the Notice of Rent Increase issued January 13, 2011, to be invalid. The Landlord is at liberty to provide the Tenants with another Notice of Rent Increase, but must provide it to the Tenants at least three months prior to the effective date of the increase.

Section 46(6) of the Act provides that if utility charges are unpaid **more than 30 days after the tenant is given written demand for payment**, the landlord may treat the unpaid utility charges as unpaid rent and give notice under Section 46 to end the tenancy. In this case, the Notice indicates that the Tenants were provided written notice of the outstanding utilities on May 1, 2011. The Notice was issued on May 11, 2011, which is only 11 days after demand for payment. Furthermore, the Tenant testified that she has not been provided with copies of the utility bills on which the Landlord bases her calculations. The Tenants paid rent for May in the amount of \$1,864.00. The Landlord has not established that the Tenants were provided 30 days’ written notice of bona fide utility charges. For these reasons, I find that the Notice to End Tenancy for Unpaid Rent is not a valid notice and is cancelled. The tenancy remains in full force and effect until it is ended in accordance with the provisions of the Act.

The Tenants seek compensation under the provisions of Section 67 of the Act, which states:

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

In order to be successful in this portion of the Tenants' claim, the onus is on the Tenants to establish that damage or loss occurred as a result of the actions or inactions of the Landlord contrary to the provisions of the Act, regulations or tenancy agreement. The Tenants submit that the value of the tenancy was diminished because the Landlord failed to comply with the director's Order issued December 30, 2010. It is not disputed that the Landlord did not comply with the Order and repair the fence, gate or stove by January 31, 2011. The fence was repaired in or about March, the stove was replaced in May, and the gate remains unrepaired. I find that the Tenants did not provide sufficient evidence that the tiles around the base of the toilet were not repaired sufficiently.

I accept the Tenant's testimony that two of the burners on the stove were inoperable and that the Landlord did not repair or replace the stove within the time frame provided in the December 30th Decision. I find that the tenancy was devalued as a result of the Landlord's failure to comply with the Order and award the Tenants the sum of **\$100.00** (\$50.00 per month for two months) for this portion of their claim.

Residential Tenancy Guideline 1 includes fences and gates as fixtures that the Landlord is responsible to maintain. The Tenant submitted that the loss of the gate was encouraging raccoons and vagrants to enter the rental property and that the raccoons and vagrants were going through her garbage. I do not accept that an ornamental gate, as described, would deter raccoons or people from entering the back yard. However, I do find that the tenancy is devalued to a nominal amount because of the loss of the gate. I determine that nominal amount to be \$20.00 per month from February 2011 to August 2011, and award the Tenants **\$160.00** (\$20.00 x 8 months).

I accept that the ornamental gate may not be duplicated, but the Landlord was ordered to repair the gate. The Landlord is hereby ordered to replace the gate with a gate of similar size and function by October 31, 2011. **Commencing September 1, 2011, rent will remain reduced by \$20.00 per month until such time as the gate is replaced.**

Section 29(2) of the Act provides that a Landlord may inspect a rental unit monthly in accordance with subsection 29(1)(b) of the Act. Therefore, I dismiss the Tenants' application to restrict or suspend the Landlord's right to access the rental unit. The Landlord is entitled to make regular inspections as long as she complies with the provisions of Section 29 of the Act.

The Tenants have been partially successful in their application and are entitled to recover the cost of the **\$50.00** filing fee from the Landlord.

Pursuant to the provisions of Section 72(2)(a) of the Act, the Tenants may deduct **\$310.00** (\$100.00 + \$160.00 + \$50.00) from future rent due to the Landlord in satisfaction of their monetary award.

Conclusion

The Notice of Rent Increase issued January 13, 2011 is invalid and of no force or effect.

The Notice to End Tenancy issued May 11, 2011, is cancelled. The tenancy remains in full force and effect until it is ended in accordance with the provisions of the Act.

Pursuant to the provisions of Section 72(2)(a) of the Act, the Tenants may deduct **\$310.00** from future rent due to the Landlord.

The Landlord is hereby ordered to replace the ornamental gate with a gate of similar size and function by October 31, 2011. In addition to the \$310.00 award provided above, commencing September 1, 2011, and continuing until such time as the gate is replaced, I order that monthly rent is reduced by **\$20.00** per month.

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: August 18, 2011.

Residential Tenancy Branch