



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL MNDC RR FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant to cancel a notice to end tenancy for landlord's use of property, to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, to allow the Tenant reduced rent for repairs, services, or facilities agreed upon but not provided, and to recover the cost of the filing fee from the Landlord for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the Landlord and gave affirmed testimony.

Issue(s) to be Decided

1. Has a valid 2 Month Notice to End Tenancy been issued and served to the Tenant in accordance with sections 49 and 52 of the *Residential Tenancy Act* (the Act)?
2. If so, has the Landlord met the burden of proof to end this tenancy in accordance with section 49 of the Act?
3. Does the tenancy agreement require payment of rent plus a maintenance fee of \$25.00 per month?
4. Has the Tenant proven the Landlord has breached the Act, regulation or tenancy agreement in order for her to obtain a Monetary Order as a result of that breach, pursuant to sections 7 and 67 of the Act?

Background and Evidence

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, ask questions of each other and the witness, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

The parties agreed they entered into a written fixed term tenancy agreement that began on August 1, 2007 and switched to a month to month tenancy agreement after September 1, 2009. As per the written tenancy agreement rent was payable on the first of each month in the amount of \$650.00 plus \$25.00 as a maintenance fee. On August 1, 2007 the Tenant paid \$325.00 as the security deposit and \$320.00 as the pet deposit.

The parties further agreed the Landlord issued and served the Tenant a 2 Month Notice to End Tenancy for Landlord's use of the property (the Notice) on February 1, 2012 with an effective date of May 1, 2012.

After agreeing to the aforementioned the Tenant confirmed she signed that tenancy agreement and then stated: "I signed it under duress, I didn't know about the \$25.00 maintenance fee, and I didn't get a copy of the tenancy agreement which is illegal".

Upon review of the Tenant's application, Counsel requested to reduce the monetary claim to \$4,625.00 as they had erred in their original mathematical calculation.

The Landlord affirmed that the main reason she has issued the Notice is that she intends to occupy the unit during the period that her current home is being renovated. She referenced her written statement that was provided in evidence and advised that all of her reasons are in that statement. She confirmed the renovations on her current home include removal of all drywall, re-insulating, new floors, new heating system, new plumbing, and an addition to the top of their garage. The work is being performed by her husband after he finishes regular work which is currently seven days a week, ten hours per day. She estimates the renovations will take quite a while, at least a year or two.

The Landlord stated that she is currently residing between her current home and another rental house they own. She has issues with the dust in that other house so she decided she would like to live in the unit currently occupied by the Tenant.

Counsel posed questions directly to the Landlord. Following is a summary of the Landlord's responses:

I own two other rental homes in addition to the one occupied by the Tenant and my own home. These additional two homes are going to be rented by companies for \$1,800.00 to \$2, 000.00 per month once they are totally finished and furnished. I could move into one of these two homes but we lost so much financially in the last few years that we need to rent these out to the companies

at the higher rent. We do not have contracts signed for these two homes as of yet but they are pending.

The Landlord confirmed she prepared the written tenancy agreement prior to the Tenant's arrival on August 1, 2007. However, when the Tenant arrived at the rental unit she was "severely intoxicated" and arrived with the movers and more animals than what she had disclosed. The Landlord stated it was a mess the movers just dumped everything and left so she worked for days helping the Tenant move in and get set up. She stated that she even disposed of items that the Tenant decided not to have inside the unit. The items initialled by the Tenant on the tenancy agreement and condition inspection form items she made mistakes on.

The Landlord confirmed the \$25.00 maintenance fee was discussed with the Tenant and it was added to the agreement when the agreement was first written and not after the Tenant signed the agreement. The Landlord confirmed this fee was part of the agreement because she was concerned the Tenant would not be able to maintain the property and it would fall back on the Landlord to maintain. As it was the Landlord did some major clean ups and pruning of the trees and shrubs. The Landlord stated she did give the Tenant a copy of the tenancy agreement at the beginning, as she does with all her tenants, and she also gave a copy to the Public Trustee's Office.

The Landlord continued stating that she has been considering taking back this unit for some time; however she has never acted because she was being accommodating to the Tenant because the Tenant's husband recently passed away. Then in early January 2012 she received a call from the Tenant, demanding that the Landlord give her the money back for the maintenance claiming she had no idea she was paying this money and it was fraud. She stated that this was the first time the Tenant ever asked for money and that the Tenant became very upset and said she was going to hire a lawyer and hung up. The Landlord said that these calls came about three weeks before she decided to issue the Tenant the Notice. She advised that even though she issued the Notice she still gave the Tenant three months to pack up and leave instead of two months, even after the Tenant's behaviour.

The floor was turned to the Tenant to present her testimony at which time Counsel asked questions of the Tenant, during which the Tenant provided the following testimony:

The Tenant's husband had been suffering from dementia and was in the hospital in a neighbouring city at the time the Tenant entered into the tenancy agreement and during her move in. The Public Trustee's Office (PTO) was managing the Tenant's husband's finances and once he was released from hospital and moved into the rental unit the PTO began to pay the Landlord the monthly rent and maintenance fee. Then in approximately November 2010 her husband was placed in a care facility at which time the PTO continued to pay for the Tenant's rent and maintenance fee until her husband's funds were depleted, which was in approximately April 2011. The Tenant confirmed that it was at this time that she began to pay the \$650.00 rent out of her pension funds but was not paying the \$25.00 maintenance fee.

The Tenant confirmed her spouse passed away on September 14, 2011 and in January 2012 the Tenant received a report from the PTO which outlined all of the payments which had been made from her husband's money. It was while reading this report that the Tenant questioned the \$25.00 maintenance fee that had been paid to the Landlord and when she called the Landlord demanding that money back. She argues that the Landlord did not maintain the yard and did not provide snow removal and that the Landlord took all that money and that is all she had from her husband.

In closing, Counsel advised that the Tenant had nothing further to add.

The Landlord confirmed she has not collected the maintenance fee from the Tenant since she began paying the monthly rent back in either April or May. The Landlord stated that Counsel called her a few days before this hearing and told the Landlord that they would withdraw their monetary claim if the Landlord agreed to cancel the Notice. She stated that she has wanted the Tenant out of her house for over a year now and she kept putting it off. Then she advised "now I really want it back, I want my home back. Now only because of the way [the Tenant's name] behaved that is when I said I am not going to sacrifice my living any more".

I then confirmed with each party which address they wished to have my decision sent to and the Tenant requested that her decision be sent to her Counsel and not her.

Analysis

I have carefully considered the aforementioned, and the Landlord's documentary evidence which included, among other things a copy of the tenancy agreement and move in condition inspection report, the Landlord's written statement, and witness' written statements.

When a Tenant has filed to cancel a notice to end tenancy the onus lies on the Landlord to prove the “good faith” requirement. The Landlord must prove the two part test of “good faith” as follows:

- 1) The landlord must truly intend to use the premises for the purposes stated on the notice to end tenancy; and
- 2) The Landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the rental unit.

Only when the Landlord has met the burden of proof of both criteria listed above, will the “good faith” requirement be met.

(1) I accept the evidence before me that the Landlord’s current home is in a state of renovations, that the Landlord is currently residing between this home and another rental unit she owns, and that the Landlord has decided that she truly intends to occupy the Tenant’s rental unit, for at least six months which she indicates is the minimum amount of time required by the Act. Therefore I find the Landlord has met the burden of proof for the first part of the “good faith” test.

(2) The evidence indicates the Landlord has wanted the Tenant’s unit back for over a year now and has not previously taken action. The Landlord affirmed that it was not until the Tenant called her in January 2012, demanding the return of the maintenance fee that the Landlord decided she really wants her rental unit back, and **“only because of the way [the Tenant’s name] behaved”** [My emphasis added]. The Notice was issued three weeks after the Tenant’s first phone call where she demanded the Landlord return the maintenance money.

The Landlord owns two other rental homes that are currently vacant, one of which the Landlord has been occupying off and on. There are no signed tenancy agreements for either one of the two vacant houses. I find the Landlord’s argument that they are struggling financially and need to keep these other two units for proposed tenancies that may or may not occur and therefore must evict the only paying Tenant in order for the Landlord to continue her home renovations, to be improbable.

Based on the aforementioned, I find the Landlord has failed to prove she did not have an ulterior motive to issue the Notice. Rather, I find the evidence proves her issuance of the Notice was strictly retaliatory to the Tenant’s demand for money. Accordingly I find the Landlord has provided insufficient evidence to prove she did not have an ulterior motive when issuing the Notice and therefore the Landlord has failed to meet the burden of proof for the second part of the “good faith” test.

As per the aforementioned the Landlord has not met both criteria to prove the “good faith” requirement. Accordingly, I hereby cancel the Notice.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

After consideration of evidence presented during the hearing, I accept the evidence that the parties entered into a written tenancy agreement in August 2007 for a tenancy which required \$650.00 per month rent plus \$25.00 per month maintenance fee. I do not accept the Tenant’s argument that she was coerced into signing this agreement or that she was never provided a copy of the tenancy agreement. The evidence proves the PTO was provided a copy of the signed agreement and no issues were raised by the Tenant about the amount being paid to the Landlord until the final report was issued from the PTO and received by the Tenant in January 2012.

As per the aforementioned, I find there to be insufficient evidence to prove the Landlord was in breach of the Act, regulation or tenancy agreement. There is no evidence before me to indicate the Tenant made any attempt to reconcile or audit the payments being made by PTO to her Landlord. Therefore, I find there to be insufficient evidence to prove the Tenant did what was reasonable to minimize or mitigate her loss as required under section 7 of the Act. Therefore, I find there to be insufficient evidence to prove the four part test, as listed above. Accordingly I dismiss the Tenant’s monetary claim, without leave to reapply.

The Tenant withdrew her request for reduced rent as the current arrangement she has with the Landlord involves her paying only the rent portion of \$650.00 per month.

The Tenant has only been partially successful with her claim; therefore I award partial recovery of the filing fee in the amount of **\$25.00**.

Conclusion

The 2 Month Notice to End Tenancy issued February 1, 2012 is HEREBY CANCELLED and is of no force or effect.

The Tenant's monetary claim is HEREBY DISMISSED.

The Tenant may deduct the one time filing fee award of **\$25.00** from her next rent payment.

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: March 05, 2012.

Residential Tenancy Branch