



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes CNR, MNDC

Introduction

This was an application by the tenant to cancel a Ten Day Notice to End Tenancy for Unpaid Rent . the tenant was also seeking a monetary order for compensation or damages due to alleged overcharging of utilities during the tenancy.

Both parties appeared and gave testimony during the conference call.

Preliminary Matter

The landlord submitted that the tenant's application for monetary compensation for overcharged utilities was already heard and determined. The landlord's position was that this matter had been disputed and a determination made, and therefore a second hearing and decision on the same matter could not proceed.

The tenants testified that, although they had disputed the utility charges before, this was based on the landlord's failure to repair deficiencies in the building and the fact that they were told at the start of the tenancy that the expenses for hydro would amount to about \$250.00 every two months. The tenants stated that they were given a choice to pay \$1,250.00 per month including utilities, or \$1,150.00 and pay their own utilities. The tenant testified that they opted to pay for their own utilities and rent was set at \$1,150.00.

I find that a previous hearing was held on the tenant's application on July 13, 2012 in which the tenants had applied an order cancelling a notice to end tenancy for cause, which was successful. The tenants had also applied;

- for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement;
- for an order that the landlords comply with the *Act*, regulation or tenancy agreement;
- for an order that the landlords make repairs to the unit, site or property

I find that the above 3 issues were dismissed. The officer also found that the tenants "*failed to establish what portion of the power bills the landlord ought to be responsible*

for” and concluded that, “*I further find that the tenants have not established that the landlords ought to pay \$800.00 for power.*”

I find that the tenant’s application for monetary compensation was based on excessive utility charges due to alleged deficiencies in the house infrastructure and the request for compensation founded on this testimony was dismissed by the dispute resolution officer. Therefore, I find that I will not consider any testimony regarding alleged deficiencies in the building that may allegedly impact the issue of utility costs as the has been dealt with and ruled upon, and I therefore do not have the authority to reconsider a previous finding or decision.

Although the fact that the tenant paid utilities for their own suite and second suite in the building occupied by a different individual was mentioned in the testimony at the original hearing as noted in the decision, I find that the Dispute Resolution Officer made no findings, analysis nor determination with respect to what the tenancy agreement terms respecting utilities were and whether or not these were in compliance with the Act.

Issues(s) to be Decided

- Should the Ten Day Notice to End Tenancy for Unpaid Rent be cancelled?
- Is the tenant entitled to be reimbursed for the excessive utility charges?

Background and Evidence

The tenancy began on October 1, 2011 and the rent was set at \$1,150.00. A security deposit of \$575.00 was paid.

Evidence Notice to end Tenancy

The landlord testified that the tenant’s had failed to pay rent owed for August 2012 and submitted the landlord’s bank records verifying that a cheque for \$1,150.00 had been deposited in the landlord’s “powerchequing” account on August 1, 2012, but was returned for nonsufficient funds on August 2, 2012. The landlord testified that the landlord had another account, but the “powerchequing” account was the one that their mortgage was paid out of and the one that the original cheque had been deposited to. The landlord testified that the tenants were issued with a Ten Day Notice to End Tenancy for Unpaid Rent on August 7, 2012 and a copy of the first page of this Notice is in evidence. The landlord testified that the Notice was served by registered mail sent on the same date. The landlord feels that the Notice was warranted and should be enforced.

The tenant testified that the rent was paid in full to the landlord on August 1, 2012, and that this occurred by the tenant depositing the funds directly into the landlord’s other

bank account. The tenants stated that this account was the same bank account into which they had previously deposited the rent. The tenant submitted into evidence receipts from the bank showing that the August funds were deposited into the landlord's account and that this account number was previously used by the tenants to deposit rent directly into the landlord's bank account. The tenant testified that this account number was used as it was the one that was provided to them by the landlord. The tenant stated that there was no basis on which the landlord could justify issuing their Ten Day Notice to End Tenancy for Unpaid Rent, because no rent was owed at the time it was issued. The tenant is requesting that the Notice be cancelled.

Evidence - Monetary Claim

According to the landlord, the parties had verbally agreed that the tenant would be responsible for their own electricity and that of the other suite. The landlord stated that the parties agreed that the utilities were to be placed in the tenant's name. It was the landlord's position that the tenant had freely entered into the agreement and that the tenant was already being compensated for their extra costs in paying hydro for both units through a reduced rental rate that had taken into account the costs.

Submitted into evidence was a copy of the tenancy agreement which indicated: "electricity not included". None of the other complex terms described above were detailed in the agreement.

The tenant testified that, while they had agreed to put the hydro in their name, they did not anticipate the enormous costs that this would entail, particularly with the other suite. The tenant testified that, although the other suite is smaller and there is only one person residing in it, it still includes major appliances such as a washer and dryer and still uses its proportionate share of the heat. The tenant's position is that the extra suite is responsible for a substantial level of the usage and that 30% would be a conservative estimate.

The tenants testified that the utility bills paid to date add up to \$2,587.08 and another bill of approximately \$260.00 is pending and will likely be sent before the end of September, making a total of \$2,847.00. The tenant feels entitled to be reimbursed \$854.12.

Analysis Notice to End Tenancy

As it was proven that the tenant did not owe any rent when the Ten Day Notice to End Tenancy for Unpaid Rent was issued on August 7, 2012, I find that the notice has no merit and must be cancelled.

Analysis Monetary Compensation

Section 6 of the Act states that a party can make an application for dispute resolution seeking enforcement of the rights, obligations and prohibitions established under the Act or the tenancy agreement and section 58 of the Act also states that, except as restricted under the Act, a person may make an application for dispute resolution in relation to a conflict dealing with: (a) rights, obligations and prohibitions under the Act; OR (b) *rights and obligations under the terms of a tenancy agreement*. (My emphasis).

Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if

- (a) the term is inconsistent with this Act or the regulations,
- (b) the term is unconscionable, or
- (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Firstly, I find that the existing tenancy agreement does not state that the tenant agreed to pay utilities for another unit. Nor does the agreement specify how much credit or rent reduction has been allocated to the tenant in recognition of the additional costs of paying for the other unit's hydro. For this reason, I find that the term is not enforceable because it is unclear under section 6(3)(c) of the Act.

However, even if the terms were abundantly clear, and even if all parties consented to this arrangement, I find that, a term that requires one tenant to pay for utilities being used by another unit is not an enforceable term because it would be unconscionable pursuant to section 6(3)(b) of the Act.

As the term in question has been found to be unconscionable, the secondary issue that must now be considered is whether or not monetary compensation to the tenant for loss or damages is warranted and if so, how much.

Given that the upper rental unit is larger and houses two adults and a baby and the lower unit is a studio with one occupant, I find that the estimated proportion of usage by the lower unit would not be more than 30% of the total.

An Applicant's right to claim damages from another party is dealt with under section 7 of the Act which states that if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find it important to note that in a claim for damage or loss under the Act, the party making the claim bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the amount to compensate for the claimed loss
4. Proof that the claimant followed section 7(2) of the Act by taking reasonable steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the tenant to prove the existence and value of the damage/loss stemming directly from a violation of the agreement or a contravention of the Act by the respondent and to verify that a reasonable attempt was made to mitigate the damage.

I find that the tenant's monetary claim has met all elements of the test for damages as the term in the tenancy agreement was not in compliance with the Act, and the tenant suffered a quantifiable loss as a result. I find that the tenant has proven entitlement for monetary compensation of \$904.12, comprised of \$854.12 for the excess utility charges and the \$50.00 for the cost of the application.

During the proceedings the parties advised that the tenant will vacate the rental unit at the end of September. Although the landlord has already issued another Ten Day Notice to End Tenancy for Unpaid Rent in September, which the tenant has evidently filed to dispute, the parties have consented to my issuing an Order of Possession to the landlord effective September 30, 2011.

Conclusion

I hereby grant the tenant monetary compensation in the amount of \$904.12 and order that any rent owed to the landlord for September 2012 be reduced by this amount.

I hereby grant the landlord an Order of Possession effective September 30, 2012 at 1:00 p.m. This order must be served on the tenant and, if necessary can be enforced through an application to the Supreme Court.

The tenant's security deposit must be administered in accordance with section 38 of the Act.

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: September 06, 2012.

Residential Tenancy Branch