Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, OPC, MND, MNR, MNSD, MNDC, CNR, CNC, RP, O, FF

Introduction

This hearing was scheduled to deal with cross applications. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

This hearing was originally scheduled to deal with a tenant's Application for Dispute Resolution filed on June 14, 2013 for monetary compensation with respect to hydro consumed by another tenant on the property. This Application for Dispute Resolution was sent to the landlord via registered mail on June 17, 2013 which the landlord confirmed receiving.

On August 20, 2013 the landlord filed an amended Application for Dispute Resolution seeking an Order of Possession for unpaid rent and cause; and, monetary compensation for unpaid rent, among other things. The landlord's amended Application was sent to the tenants via registered mail on August 23, 2013 which the tenants confirmed receiving. The tenants also confirmed receiving the landlord's evidence which was served on multiple dates.

On September 10, 2013 the tenants served an evidence package to the Residential Tenancy Branch and the landlord. Included in that evidence package was a copy of their Application for Dispute Resolution which was altered to indicate the tenants were seeking to dispute two Notices to End Tenancy for Unpaid Rent and a Notice to End Tenancy for Cause. The tenants also sought to request repair orders among other things.

Rule 2.3 of the Rules of Procedure authorizes me to dismiss unrelated disputes contained in a single application. Given the multiple issues identified by the parties in

their respective Applications, I advised the parties that the issues would be prioritized so that the matters of utmost importance or urgency are dealt with during the hearing time allotted on this date. Both parties confirmed that the enforceability of the Notices to End Tenancy and the future of this tenancy were the most important and urgent matters to determine. I continued to hear from the parties with respect to Notices to End Tenancy and the tenants' entitlement to deduct $50.00 from rent payable to the landlord. The issues I have not dealt with by way of this decision are dismissed with leave to reapply.

Issue(s) to be Decided

1. Has the tenancy ended or is there a basis to cancel the Notices to End Tenancy?
2. Is the landlord entitled to an Order of Possession?
3. Were the tenants entitled to withhold $50.00 from rent starting August 1, 2013?

Background and Evidence

The tenancy commenced March 1, 2013 and the tenancy agreement provides that the tenants would pay rent of $1,800.00 on the 1st day of every month for a fixed term set to expire February 28, 2014. The tenants paid a security deposit of $900.00 and a pet damage deposit of $900.00.

The parties have been to dispute resolution on two previous occasions. Previous dispute resolution decisions were issued on May 16, 2013 (herein referred to as the May 16, 2013 decision) and June 20, 2013 (herein referred to as the June 20, 2013 decision).

The tenants paid $1,700.00 for August 2013 rent and it was agreed that the tenants were entitled to deduct $50.00 to recover the filing fee they paid for the June 20, 2013 dispute. The parties were in dispute as to whether the tenants were entitled to deduct a further $50.00 from August 2013 rent.

Upon receiving $1,700.00 from the tenants, the landlord had issued a receipt to acknowledge the partial payment and communicating that she considered the payment short by $50.00 which was unacceptable and due to her immediately. The tenants did not come forth with the $50.00 payment and the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent on August 8, 2013 (herein referred to as the August 8, 2013 Notice). The Notice was posted on the tenants' door on August 9, 2013. The Notice indicates rent of $50.00 was outstanding and has a stated effective date of August 31, 2013.

Upon receiving the 10 Day Notice issued August 8, 2013 the tenants did not pay the $50.00 as indicated on the Notice. Rather, the tenants submitted that they faxed a copy of the August 8, 2013 Notice to the Residential Tenancy Branch on August 10, 2013. The tenants acknowledged that they did not amend their existing Application for Dispute Resolution or serve the landlord with any documentation prior to serving their evidence package on September 10, 2013. The tenants requested that I permit an amendment to their Application for Dispute Resolution so that the August 8, 2013 Notice would be considered as a disputed Notice to End Tenancy.

The landlord objected to permitting the tenants to amend their Application to include the August 8, 2013 Notice as : 1) in the absence of any indication from the tenants that they intended to dispute the August 8, 2013 Notice the landlord proceeded to file her Application for Dispute Resolution on the basis the Notice was undisputed; and, 2) it is unjust to permit the tenants to amend their Application outside of the requirements of the Act and Rules of Procedure when the landlord suffered consequences of a procedural error in a previous dispute resolution proceeding.

With respect to deducting $50.00 from rent payable, both parties pointed to the May 16, 2013 decision and in particular the following statements made by the Arbitrator in the conclusion section of the decision:

> "I HEREBY ORDER THAT THE LANDLORD ... REPLACE THE INSULATION AND DRYWALL THAT IS IN THE STORAGE ROOM... IF THE LANDLORD DOES NOT COMPLY WITH THIS ORDER, I HEREBY ORDER THAT THE TENANT MAY REDUCE THEIR RENT PAYMENT BY $50.00 FOR AUGUST 1, 2013 AND SUBSEQUENT MONTHS UNTIL THESE ITEMS ARE COMPLETED."

The tenants were of the position the landlord had failed to comply with the above order, thus entitling the tenants to deduct $50.00 from the rent owed for August 2013 and subsequent months. The landlord was of the position she fulfilled the above order in early June 2013 when insulation and drywall were installed on the wall in the storage room. The tenants acknowledged that the landlord did install insulation and drywall on the wall but were of the position the landlord was also required to install insulation and drywall on the ceiling of the storage room. The landlord disagreed with the tenant's position with respect to the ceiling.

The landlord emphasised that she was ordered to "replace" the drywall and insulation in the storage room as these materials had been taken down to perform electrical work in the wall. The landlord submitted that insulation and drywall had not been on the ceiling in the storage room as this room had previously been used to store firewood only.

Since insulation and drywall was not taken down from the storage room ceiling the order to “replace” the insulation and drywall did not apply to the ceiling.

The tenants acknowledged that they had not seen insulation or drywall on the ceiling of the storage room previously but, to them, it appears as though these materials had been there at one time. Further, there is a pile of discarded drywall on the property. The tenants stated the room above the storage room is cold and the tenants fear the pipes that run along the ceiling of the storage room will freeze.

The landlord acknowledged that the storage room is unheated and photographs depict water supply lines in the ceiling joist pockets but the landlord asserted that the pipes never froze during the several years she lived in the house. The landlord also responded by stating the pile of discarded drywall is not from the storage room ceiling.

Both parties provided testimony that a 1 Month Notice to End Tenancy for Cause was issued in July 2013 which would be effective on August 31, 2013. I informed the parties that I did not appear to have a copy of a 1 Month Notice issued in July 2013 but that I did have a copy of a 1 Month Notice issued June 5, 2013 with an effective date of July 31, 2013. Both parties were in agreement that the June 5, 2013 1 Month Notice had been decided upon during the June 20, 2013 proceeding. I did not hear any further submissions with respect to a 1 Month Notice issued in July 2013.

The tenants did not vacate the rental unit by August 31, 2013 and have continued to reside in the rental unit. The tenants paid $1,750.00 to the landlord for the month of September 2013 which the landlord accepted for “use and occupancy only” as stated on a receipt she issued September 1, 2013. The landlord also issued a 10 Day Notice to End Tenancy for Unpaid Rent on September 6, 2013 with an effective date of September 30, 2013 indicating $50.00 was outstanding. The tenants confirmed that they withheld $50.00 from the amount they paid for September 2013 payment for the same reason they withheld $50.00 from August 2013 rent.

In summary, the tenants are of the position they are entitled to withhold $50.00 from rent starting August 1, 2013 and seek to cancel the August 8, 2013 Notice, among other Notices to End Tenancy by way of an amended Application for Dispute Resolution. Whereas, the landlord seeks to end the tenancy on the basis the tenants did not have a right to withhold $50.00 from rent payable and did not file to dispute the August 8, 2013 Notice within the time limit permitted under the Act.

Analysis

Upon consideration of everything presented to me, I provide the following findings and reasons.

When a tenant receives a 10 Day Notice to End Tenancy for Unpaid Rent, the tenant has five (5) days to either pay the outstanding rent or file an Application for Dispute Resolution to dispute the Notice. The Act requires that the tenant's Application for Dispute Resolution be served upon the landlord within three days of making it. The Rules of Procedure permit a party to amend an Application for Dispute Resolution but require that the amended Application for Dispute Resolution be served upon the other party.

Dispute resolution proceedings are based on the principles of natural justice. Natural justice requires that a respondent be informed of the nature of the dispute or claim being made against them. This is the primary purpose of serving the Application for Dispute Resolution, or amended Application, upon the other party.

The purpose of serving a tenant's Application for Dispute Resolution, or amended Application, with respect to a Notice to End Tenancy is to put the landlord on notice that the tenant intends to dispute the Notice. In doing so, the tenants do not have to vacate the rental unit by the effective date of the Notice and the landlord is made aware of this in receiving the tenant's Application for Dispute Resolution. Where a tenant does not file an Application for Dispute Resolution or amend an existing one and serve the landlord, within the time limits set by the Act, the landlord would be reasonable in proceeding on the basis the tenancy would be ending and the tenants vacating the rental unit. To permit the tenants to amend an Application for Dispute Resolution after the effective date of the Notice is prejudicial to the landlord as reflect in section 66(3) of the Act.

Section 66 of the Act does permit me, as a delegated authority for the Director, the ability to extend time limits otherwise imposed by the Act in "exceptional circumstances"; however, I cannot extend a time limit for filing an Application for Dispute Resolution (or an amended Application for Dispute Resolution) to dispute a Notice to End Tenancy where the effective date of the Notice has already passed pursuant to section 66(3) of the Act. Section 66(3) provides:

> (3) The director must not extend the time limit to make an application for dispute resolution to dispute a notice to end a tenancy beyond the effective date of the notice.

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When the tenants received the August 8, 2013 Notice the tenants in this case already had an Application for Dispute Resolution waiting to be heard on an unrelated matter. Their option would be to file another Application for Dispute Resolution to dispute the August 8, 2013 Notice or amend the existing Application to indicate they were disputing the August 8, 2013 Notice. The tenants would then have to serve the landlord with the Application for Dispute Resolution or the amended Application for Dispute Resolution. The procedure for filing and serving an amended Application is contained in Rule 2.5 of the Rules of Procedure.

Although the tenants stated that they sent a copy of the August 8, 2013 Notice to the Branch, sending a copy of a Notice to End Tenancy to the Branch is not the same as serving an amended Application for Dispute Resolution upon the Branch and without serving the landlord with an amended application I find the landlord was reasonable in concluding and acted appropriately in proceeding with her Application for Dispute Resolution on the basis the Notice was undisputed.

I am satisfied the tenant's made a reasonable attempt to amend their Application by serving the Branch and landlord with an amended Application on September 10, 2013; however, on this date the time limit to dispute the August 8, 2013 had long passed.

In light of section 66(3) I find I cannot grant the tenants an extension of time to consider the August 8, 2013 Notice as disputed based upon the September 10, 2013 amended application.

Section 46(5) of the Act provides for what happens if a tenant does not pay the outstanding rent or file an Application for Dispute Resolution to dispute the Notice within the time limits stipulated by the Act. It states:

> (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
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> > (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
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> > (b) must vacate the rental unit to which the notice relates by that date.

Since the tenants did not pay the outstanding rent indicated on the Notice or file to dispute the Notice within the time limits provided under the Act and an extension of time

to permit the tenants to dispute the Notice is not permissible, I find the tenants are conclusively presumed to have accepted that the tenancy would end on the effective date of the Notice. Accordingly, I find the tenancy ended on August 31, 2013 – the effective date of the August 8, 2013 Notice.

As I have concluded that the tenancy ended August 31, 2013 based upon the August 8, 2013 Notice I find it unnecessary to further consider any other Notice to End Tenancy issued to the tenants. Although I heard the landlord issued a 10 Day Notice on September 6, 2013, as provided in Residential Tenancy Policy Guideline 11, giving another Notice to End Tenancy does not operate as a waiver of a Notice already given.

Although the tenants paid $1,750.00 for the month of September 2013 I find the landlord did not waive the August 8, 2013 Notice or reinstate the tenancy as the landlord clearly communicated that she wanted to end the tenancy as evidenced by 1) filing an Application for Dispute Resolution seeking an Order of Possession; and 2) indicating acceptance of $1,750.00 for “use and occupancy” for September 2013.

As I have concluded that the tenancy has legally ended but the tenants remain in possession of the rental unit, I find the landlord entitled to an Order of Possession as requested. I provide the landlord with an Order of Possession effective at 1:00 p.m. on September 30, 2013 to reflect her acceptance of monies for use and occupancy for the month of September 2013.

With respect to unpaid and/or loss of rent for August 2013 and September 2013 I find the landlord entitled to recover the $50.00 the tenants withheld from the landlord each month. I make this finding based upon the following considerations.

The order authorizing the tenants to withhold $50.00 in rent in the conclusion of May 16, 2013 was condition upon the landlord failing to “replace the insulation and drywall that is in the storage room” by July 15, 2013. The parties were in dispute as to what the above order required of the landlord. I turn to the analysis section of the May 16, 2013 decision as this section provides the basis for the order issued to the landlord. In the analysis, the Arbitrator makes the following findings:

- I find that there are some safety concerns about the electrical wiring and this is to be fixed to code by June 30, 2013.
- I find the photographs and evidence credible that there was insulation and drywall on certain places in the storage room and that the electrical wiring requires work; this is supported by the hand written notes on the back of the lease.

- Therefore the landlord will be ordered to have the insulation and drywall replaced by July 15, 2013 or as soon after the electrical work is completed as possible.

I find the above statements concerning replacement of insulation and drywall clearly related to the electrical work that had to be performed in the storage area. I note that the Arbitrator does not include any statements concerning cold floors as a basis for ordering the replacement of insulation and drywall even though she recorded the tenant's allegations of such in the Background and Evidence section of her decision. In reading her analysis, I find the Arbitrator relied upon the hand written notes on the back of the lease in making her decision, and as such, so do I in determining whether the landlord complied with the Arbitrator's order.

The landlord submitted during the hearing before me that the insulation and drywall that she was to replace was in the wall only, due to the electrical work required in the wall cavity. Furthermore, the notes on the back of the lease include the following statement: "Insulate back wall in basement after finish electrical". I find I was provided insufficient evidence that electrical work needed to be done in the ceiling of the storage room. Since electrical work was not required in the ceiling I find the Arbitrator's order did not require the landlord to install insulation and drywall in the ceiling. Therefore, I am satisfied the landlord complied with the Arbitrator's order of May 16, 2013 and the tenants not entitled to withhold $50.00 from rent payable to the landlord.

In light of the above, I find the landlord entitled to recover the two $50.00 deductions the tenants withheld from the landlord for August and September 2013. I further award the landlord the $50.00 filing fee paid for her Application for Dispute Resolution as the landlord was largely successful in this dispute. The landlord is authorized to deduct a total of $150.00 from the tenants' security deposit in satisfaction of these awards.

As the tenancy has ended the tenant's requests for repairs and certain other specific performance are moot.

The remainder of the parties' monetary claims have been severed from these Applications under Rule 2.3 and are dismissed with leave to reapply.

Conclusion

The tenancy has ended and the landlord has been provided an Order of Possession effective at 1:00 p.m. on September 30, 2013.

The landlord is entitled to recover unpaid and/or loss of rent in the amount of $100.00 plus the filing fee the landlord paid for her Application. The landlord has been authorized to deduct a total of $150.00 from the tenants' security deposit in satisfaction of these awards.

The balance of the issues raised on the Applications but not addressed by way of this decision have been dismissed with 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: September 27, 2013

Residential Tenancy Branch