



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, MNDC, FF

Introduction

This hearing was convened by way of conference call concerning an application made by the tenant for an order cancelling a notice to end tenancy for unpaid rent or utilities; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; and to recover the filing fee from the landlord for the cost of the application.

The landlord and the tenant both attended, each gave affirmed testimony, and each provided evidentiary material to the Residential Tenancy Branch and to each other prior to the commencement of the hearing. The parties were given the opportunity to cross examine each other on the evidence and testimony provided, all of which has been reviewed and is considered in this Decision.

No issues with respect to service or delivery of documents or evidence were raised.

Issue(s) to be Decided

- Has the landlord established that the notice to end tenancy was issued in accordance with the *Residential Tenancy Act*?
- Has the tenant established a monetary claim as against the landlord for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for compensation for shared utilities?

Background and Evidence

The landlord testified that this fixed term tenancy began on June 15, 2011 and expired on May 31, 2012, after which the tenancy continued on a month-to-month basis, and the tenant still resides in the rental unit. Rent in the amount of \$2,500.00 per month is

payable in advance on the 1st day of each month and currently there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenant in the amount of \$1,250.00 which is still held in trust by the landlord and no pet damage deposit was collected. A copy of the tenancy agreement has been provided and it specifies that at the end of the fixed term, the tenant will vacate the rental premises, however the tenancy continued.

The landlord further testified that rental arrears accumulated for the months of July, August and September, 2014, and on September 8, 2014 the landlord served the tenant personally with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. A copy of the notice has been provided and it is dated September 8, 2014 and contains an expected date of vacancy, for \$5,500.00 in unpaid rent that was due on September 1, 2014. The landlord testified that on September 30, 2014 the tenant paid all of the rental arrears, and during the first week of October, 2014 the tenant paid rent in full for October. No receipts were given to the tenant.

The landlord further testified that the tenant claims a monetary amount for utilities, however the tenancy agreement specifies that the tenant is responsible for cable, phone, hydro and gas for the building. Another tenant lives in the basement suite, but that is a small bachelor suite comprising of about 10% of the building, and the basement suite was vacant for 9 months. The tenant in the basement suite pays for her own cable and phone, and is a single person who works full time 12 hours per day, so very little power and gas would be used. The landlord testified that he looked at the bills provided by the tenant and compared them to when the basement suite was vacant, and the amounts are very similar. The portion of the house that the tenant has is 4 bedrooms. The landlord has also driven past the rental unit on several occasions and noticed lights on in the hall of the upper level of the rental house even though the tenant isn't home. The tenant in the basement suite isn't home much, and leaves the lights off. The thermostat for both suites is controlled by the tenant in the upper level, and the hot water tank runs on natural gas. The basement suite does not have a dishwasher.

The tenant signed a tenancy agreement agreeing to pay all of the power and gas, and the landlord does not agree that any compensation is justified. There has never been a rent increase, and the landlord has been very accommodating to the tenant with respect to late rent.

The tenant testified that when he first moved in he raised the issue of the utilities as written in the tenancy agreement and the landlord verbally told the tenant he would provide compensation but never mentioned an amount and didn't put it in the tenancy

agreement. The landlord told the tenant again later that he'd be reimbursed but again no dollar amount was discussed. The tenant gave the landlord the bills to look at, and asked for them back at a later date.

The landlord had another tenancy agreement for the tenant to sign earlier this year, but the tenant asked for the compensation and the landlord refused to put it in the agreement so the tenant refused to sign the new agreement.

The tenant also testified that although the basement suite is a bachelor apartment, it is larger than 10%, and is about 20% of the building. The tenant also lives alone.

The tenant also testified that he doesn't shower often at home because of his exercise program and showers either at the gym or the pool mostly. The tenant in the basement suite and guests shower significantly more. The tenant also eats mostly raw food, so cooking appliances are used less. However, the tenant does leave the hall lights on when not at home for security reasons. The landlord has not provided any compensation during the tenancy for the utility bills. Copies of numerous hydro and gas bills have been provided by the tenant for which the tenant claims 20% of the gas bills from July 22, 2011 to present, totalling \$757.16 as well as 50% of electricity bills from August 24, 2011 to present in the amount of \$1,248.50, and recovery of the filing fee, for a total claim of \$2,055.66.

The tenant further testified that rent is paid by post-dated cheques and the landlord has a cheque for November, which will clear the bank.

Analysis

Firstly, I have reviewed the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, and I find that it is in the approved form and contains information required by the *Act*. The *Residential Tenancy Act* states that once a tenant is served with such a notice, the tenant must pay the rent in full or dispute it within 5 days of receipt. If the tenant does neither, the tenant is conclusively presumed to have accepted the end of the tenancy. In this case, the landlord testified that the notice was served to the tenant personally on September 8, 2014, and the tenant filed the application for dispute resolution on September 15, 2014. The landlord also testified that the tenant paid the outstanding arrears on September 30, 2014. Both dates are clearly beyond 5 days.

I refer to the Residential Tenancy Branch website which contains useful information for landlords and tenants. It states:

The landlord should be clear if they don't want the tenancy to continue.

If the tenant pays the overdue rent or utilities **after** the five day deadline, the landlord should clearly tell the tenant in writing that:

- The payment for rent or utilities is being accepted for **use and occupancy only** – it does not cancel the 10 Day Notice to End Tenancy
- The tenant must still move out

Note: The “use and occupancy” arrangement is very short-term – it allows a tenant to stay only for the rest of the month in which they received the Notice to End Tenancy and made a payment. A landlord should not continue accepting rent or utility payments under this arrangement otherwise they run the risk of reinstating the tenancy.

In this case, it is clear that the landlord did not provide a receipt or any other writing that indicated to the tenant that the money received on September 30, 2014 did not serve to reinstate the tenancy, and therefore I find that the landlord has in fact reinstated it by collecting rent on September 30, 2014 as well as in October and November, and the notice to end tenancy is hereby cancelled and the tenancy continues.

With respect to the tenant's application for a monetary order, I have reviewed the utility bills provided, and I have heard the landlord's testimony that he compared them to the time the basement suite was vacant and when it was not vacant, and noticed very little change. No one has provided me with the dates that the basement suite was tenanted or vacant, so I can't make that comparison.

Where a party makes an application for a monetary order for damage or loss, the onus is on the claiming party to satisfy the 4-part test:

1. That the damage or loss exists;
2. That the damage or loss exists as a result of the other party's failure to comply with the *Act* or the tenancy agreement;
3. The amount of such damage or loss; and
4. What efforts the claiming party made to mitigate such damage or loss.

With respect to element 2, I refer to Residential Tenancy Branch Policy Guideline 1 - Landlord & Tenant – Responsibility for Residential Premises:

SHARED UTILITY SERVICE

A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable as defined in the Regulations.

If the tenancy agreement requires one of the tenants to have utilities (such as electricity, gas, water etc.) in his or her name, and if the other tenants under a different tenancy agreement do not pay their share, the tenant whose name is on the bill, or his or her agent, may claim against the landlord for the other tenants' share of the unpaid utility bills.

The landlord testified that the tenant signed the tenancy agreement agreeing to pay the utilities, however the tenant testified that on more than one occasion the landlord verbally promised some compensation but never gave a dollar amount and didn't provide any compensation. He further testified that the landlord had a new tenancy agreement for the parties to sign but the tenant refused to sign it because the landlord refused to include in the agreement any compensation. I find that the testimony is corroborated in that the tenancy agreement signed on May 25, 2011 states that at the end of the fixed term, May 31, 2012 the premises will be vacated by the tenant, but the tenant did not vacate and the tenancy has continued. In the circumstances, I find that the term in the tenancy agreement which specifies that the tenant pays utilities for another rental unit is unconscionable.

With respect to element 3, however, the landlord testified that the basement suite was vacant for 9 months, and I find that for that period of time at the least, the tenant should be responsible for the gas and hydro bills because he is the only tenant who used the utilities during that time.

Further, the tenant admitted to leaving lights on in the hall when he's not home, and the landlord testified that driving past the rental home the basement suite tenant does not leave lights on when not home.

In the circumstances, I am not satisfied that the tenant has established that 20% of the gas bills and 50% of the hydro bills for the entire tenancy is justified, or that the tenant has done what is reasonable to mitigate the cost of utilities by leaving lights on when he's not using them. However, having found that the term in the tenancy agreement is unconscionable, I find that the tenant is entitled to some compensation, and the lower amount, being 10% as described by the landlord of the bills is justified. I have calculated 10% and divided the number of months over the tenancy and reduced 9 of those months to arrive at the figure of \$479.46:

<u>Gas</u>		<u>Hydro</u>		<u>Total</u>		<u>Months</u>	
\$3,785.80	+	\$2,496.99	=	\$6,282.79	/	38	= \$165.33/mon

38 months – 9 months = 29 X \$165.33 = \$4,794.57 X 10% = \$479.46

Since the tenant has been partially successful with the application, the tenant is also entitled to recovery of the \$50.00 filing fee, and I order that the tenant be permitted to deduct \$529.46 from rent for a future month.

Conclusion

For the reasons set out above, the notice to end tenancy issued by the landlord on September 8, 2014 is hereby cancelled and the tenancy continues.

I order that the tenant be permitted to deduct \$529.46 from rent for a future month.

This order is final and binding and may be enforced.

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: November 03, 2014

Residential Tenancy Branch

