Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes cnr, ff, o, rr, mnr, mnsd, opr, ff

Introduction
The tenants apply for dispute resolution, seeking an order cancelling a 10 day Notice to End Tenancy (for unpaid rent or utilities). The tenants also claim a reduction of rent for repairs, services or facilities agreed upon, but not provided. In their evidence, the tenants include a monetary order worksheet, implying that they have a monetary claim as against the landlord as well, although actual claim for a monetary order is included in their application.

As an introductory matter, I note that the inclusion in an evidence package of a monetary claim does not automatically permit that issue to be considered at a hearing. Rule 2.11, dealing with amending an application before the dispute resolution hearing, governs this issue. The rule provides that an applicant may amend their application without consent if the dispute resolution hearing has not yet commenced. In cases such as the present one, where the application had already been served to the landlord, a copy of the formally amended application must be served on each respondent so that they receive it at least 14 days before the scheduled date for dispute resolution hearing. An amended application must be clearly identified, and be provided separately from all other documents. All evidence to support an amended application must be served on the other party and submitted to the Residential Tenancy Branch at Residential Tenancy Branch.

No actual amendment to tenants' claim was ever formally made, and I therefore have no authority to consider any monetary claim by the tenants at this hearing. The tenants are granted liberty to reapply for any monetary claim they may have as against the landlords, related to their tenancy.

I further note that Rule 2.3 of the Rules of Procedure provides that claims made in the application must be related to each other, and that Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply. In this case, the tenants has applied for some unrelated matters. These included the claim to cancel the 10 day Notice to End Tenancy, as well as a claim to reduce future rent for repairs, services or

facilities agreed upon but not provided. This latter claim of the tenants is not related in law or fact to the issue of the ending of the tenancy. Given that the tenants are not willing to pay rent or move out at this point, the foundational issue in this claim relates to whether the Notice to End the tenancy would be cancelled and the tenancy continue. The landlord's claims are all related to that issue. Any other claimed by the tenant are all dismissed as unrelated, with liberty granted to reapply.

Issues to Be Decided

- Is the Notice to End Tenancy (the "Notice") served upon the tenants effective to end this tenancy, and entitle the landlord to an Order of Possession, or should the Notice be cancelled, and the tenancy continue?
- Is there rent money due and payable by the tenants to the landlords?
- If so, are the landlords entitled to retain the deposit in partial satisfaction of the amount owing?
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Background and Evidence

This tenancy began on April 1, 2014. Rent is due on the 1st day of each month in the amount of $1,300.00. A security deposit of $650.00 was paid at the start of the tenancy.

On January 27, 2015, the tenants reported to the landlords there was water of the floor of their rental unit, and mold on the walls. The landlords attended the premises, and arranged to return the following day with a technician to measure the moisture levels in the premises.

The tenants' written material indicates that a verbal agreement was struck that night that the tenants had to move out, with the tenants giving the landlords as much notice as possible, and the landlords would not cash the February rent cheque of $1,300.00. However, in testimony, the female tenant testified that no agreement to vacate was ever made, but rather the tenants just said that "maybe" they would move, but they had to think about it. The tenant also testified that the moisture readings confirmed excessive moisture in the premises.

The landlord submits that the moisture detected in the premises was limited to water under the mattress, which was placed directly on the floor. The landlord further contends that the agreement with the tenants struck on January 28, 2015 was that they would move out February 28, 2015, would pay no rent for February, and the landlord would retain their deposit. No work to the premises would occur until after the tenants had vacated. This agreement was conditional, however, upon the tenants providing a written notice to the landlords of the ending of the tenancy. The tenants first delayed

giving a notice, then avoided the landlord rather than give such a notice, as the tenants had changed their mind.. On February 1, the landlords considered the verbal agreement to have been breached, and attempted to cash the February rent cheque. When the cheque bounced, the landlords served the tenants with a 10 day Notice to End Tenancy. No further rent has been paid, and the tenants remain in the occupation of the premises.

Analysis

Given that the testimony of the parties varies, I must determine the credibility of the evidence before me. In that respect I have some concerns regarding the testimony of both the female tenant and the landlord.

Firstly I do not find credibility one aspect of the testimony given by the female tenant. Her testimony that no agreement was ever reached with the landlord on January 28, 2015 not only contradicts the testimony of the landlord, but also clearly contradicts the tenants' application and the written statement provided by the tenants that in fact there was an agreement made at the time. I therefore prefer and accept the testimony of the landlord regarding the agreement made on February 28, 2015. I find that there was an agreement that the tenants would move out February 28, 2015, would pay no rent for February, the landlords would retain their deposit, and no work to the premises would occur until after the tenants had vacated. I further find that it was reasonable that the landlord would require a written notice from the tenant prior to January 31, 2015 confirming they would vacate prior to the end of February. Clearly in the absence of a formal document such as this, any verbal agreement purporting to end the tenancy would have been unenforceable.

I also find not fully credible the tenant's testimony that the premises are in an unliveable condition. I note that the tenants continue to occupy and reside in the premises, and avoided the landlord when he attempted to deal with them after January 28. The tenant's evidence of mold certainly raises a concern, but I note that there is no supporting medical evidence as to any health issues, and no supporting evidence that a moisture or mold environment has rendered the premises unliveable.

I also do not find credible the submission of the landlord that the only excessive moisture reading in the premises taken January 28 was found over the pool of water under the tenants' mattress. I prefer the tenant's testimony that the moisture reader also determined excessive moisture in other areas of the rental unit. This testimony is buttressed by the tenant's testimony and photographic evidence as to the presence of mold growing in other areas of the premises.

It is well known that some molds which grow as a result of excessive moisture can pose a significant health hazard to occupants. I appreciate the tenants' concerns in this regard, and I find the tenants took an appropriate first step in alerting the landlords to the issue. However, some of subsequent steps taken by the tenants were not appropriate.

The tenants effectively breached their agreement with the landlords when they declined to provide the landlords with a written notice as to a firm date of the ending of their tenancy. Accordingly as of February 1, they were obliged to pay their February rent. I note that section 26(1) of the Residential Tenancy Act specifically requires that tenants must pay their rent when it is due under the tenancy agreement, whether or not the landlord complies with the Residential Tenancy Act or the tenancy agreement. This means that in the absence of an enforceable agreement to the contrary, the tenants were required by law to pay their February rent on or before the first day of February, whether or not there was mold in the premises, and whether or not any excessive moisture was the responsibility of the landlord to repair.

As the February rent was due and owing as of February 1, but was not paid, it follows that the 10 day Notice to End Tenancy was valid. Upon receipt of that Notice, the tenants had two options: either pay the February rent within 5 days, or vacate within 10 days. They did not do either. The notice is therefore found effective to end this tenancy, and the landlords have established a right to possession. The tenants' claim to cancel the notice is dismissed.

As the tenants resided in the premises the entire month of February, the landlords are entitled to recover the rent for this full month from the tenants. In terms of March rent, I note that the landlord seeks an immediate order of possession, yet seeks rent for all of March, and even for April. In this regard, having accepted the tenant's testimony that there is mold in the premises, and that the landlords will be required to effect repairs to the premises before re-renting the premises, I do not find that the landlord is entitled to a loss of rental income for any period in which the tenants are not actually residing in the premises. Given that it is certain that the tenants will not vacate until at least March 15, 2015, I will issue an Order of Possession effective that date, and I also order that the tenants must pay rent to the landlord for half the month of March. The landlords are therefore is entitled to an award of $1,950.00 representing the loss of rent for February and half of March, plus $50.00 as recovery of the landlord's filing fee. The landlords are also entitled to retain the security deposit in partial satisfaction of the award. Should the tenants overhold beyond March 15, the landlord is at liberty to reapply for any further loss of rental income.

Conclusion

Pursuant to Section 55 of the Residential Tenancy Act, I issue an Order of Possession, effective March 15, 2015. Should the tenants fail to comply with this Order, the landlords may register the Order with the Supreme Court for enforcement.

The landlords are awarded $2,000.00, representing the referenced rent for February and March and the recovery of the filing fee. The security deposit totals $650.00, and I order, pursuant to section 38(1)(d) that the full amount of the deposit be retained, in partial satisfaction of this monetary award. The remaining balance due by the tenants to the landlords, equalling $1,350.00, must be paid immediately.

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 06, 2015

Residential Tenancy Branch