



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The tenant testified that she personally served the landlord's representative with the dispute resolution package on 4 March 2015. The landlord appeared and confirmed that she was in receipt of the tenant's application and evidence. On the basis of this evidence, I am satisfied that the landlord was served with the dispute resolution package pursuant to section 89 of the Act.

The landlord testified that she served the evidence to the tenant personally. The landlord testified that the tenant would not take the package. The tenant stated that she had not received the landlord's evidence. Pursuant to section 88 of the Act, I find that the tenant was served with the package notwithstanding her evidence that she did not receive it: the tenant may not avoid service by refusing to physically take the package.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

This tenancy began approximately seven years ago.

On 31 May 2011, the landlord issued a Notice of Rent Increase to the tenant (the 2011 Increase). This notice set out that the tenant's monthly rent would increase by \$15.00, from \$1,035.00 to \$1,050.00. This new rent was effective as of 1 September 2011. The permitted rent increase pursuant to the regulations for 2011 was 2.30%. The actual rent increase was 1.45%. The tenant paid monthly rent of \$1,050.00. The tenant provided me with an example cheque #256 that shows payment of \$1,050.00.

On 29 May 2012, the landlord issued a Notice of Rent Increase to the tenant (the 2012 Increase). This notice set out that the tenant's monthly rent would increase by \$25.00, from \$1,050.00 to \$1,075.00. This new rent was effective as of 1 September 2012. The permitted rent increase pursuant to the regulations for 2012 was 4.30%. The actual rent increase was 2.38%. Despite the rent increase to \$1,075.00, the tenant began paying rent of \$1,100.00 in error. The tenant paid \$1,100.00 per month in rent. The tenant provided me with an example cheque #257 that shows payment of \$1,100.00. The cheque memo indicates that it is for rent due 1 September 2012. The tenant provided me with a second example cheque #294 that also shows payment of \$1,100.00.

The tenant testified that she began to pay \$1,100.00 in rent as her neighbours had been issued \$50.00 rent increases that year and she thought that her rent increased by that amount. The tenant did not realise until years later as she had not had the time to review her papers. The tenant testified that she discovered the error only recently when she took the time to review her paperwork.

On 28 May 2013, the landlord issued a Notice of Rent Increase to the tenant (the 2013 Increase). This notice set out that the tenant's monthly rent would increase by \$41.00, from \$1,100.00 to \$1,141.00. This new rent was effective as of 1 September 2013. The permitted rent increase pursuant to the regulations for 2013 was 3.80%. This rent increase was based on the incorrect amount of rent the tenant had been paying and not the correct base of \$1,075.00. Accordingly, the actual rent increase was 6.14%. The tenant paid monthly rent of \$1,140.00. The tenant provided me with an example cheque #300 that shows payment of \$1,140.00. The tenant provided me with a second example cheque #113 that shows a payment of \$1,140.00.

On 26 August 2014, the landlord issued a Notice of Rent Increase to the tenant (the 2014 Increase). This notice set out that the tenant's monthly rent would increase by \$25.00, from \$1,140.00 to \$1,165.00. This new rent was effective as of 1 December 2014. The tenant paid rent of \$1,165.00 in December 2014, January 2015 and February 2015.

The tenant provided a cheque dated 1 March 2015 to the landlord in the amount of \$39.00. The cheque was accompanied by a letter that set out the tenant's claim that she had overpaid rent for thirty months. The letter set out that the tenant was deducting an amount of \$750.00 from March's rent to compensate the tenant for the overpayment. The tenant set out that she owed \$390.00 as the remainder of March's rent.

On 1 March 2015, the landlord wrote to the tenant demanding the full amount of March's rent and drawing the tenant's attention to the mismatched figures (that is, \$390.00 and \$39.00).

On 1 March 2015, the tenant wrote to the landlord providing a corrected cheque.

On 2 March 2015, the landlord issued the 10 Day Notice to the tenant. That notice set out that the tenant had failed to pay \$800.00 of rent that was due 1 March 2015. The 10 Day Notice set out an effective date of 12 March 2015. The 10 Day Notice was served to the tenant personally on or about 2 March 2015.

The landlord testified that there are no outstanding orders of this Branch.

The landlord submitted that as the tenant induced the landlord's error the tenant ought to bear the consequences, in part or in full.

Analysis

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice; however, pursuant to subsection 46(3), a notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

Pursuant to section 41 of the Act, a landlord may only increase rent in accordance with the Act. Subsection 43(1) permits increases to the amount permitted by the regulations, as ordered by a director, or agreed to by the tenant in writing. In accordance with subsection 43(5) if the landlord collects a rent increase that does not comply with the Act, the tenant may deduct the increase from rent or otherwise recover the increase.

By way of the tenant's mistake, the landlord collected a rent increase (in excess of that permitted by law) of \$25.00 per month from 1 September 2012 to 1 August 2013.

The landlord adopted the tenant's mistake as the landlord's own when the landlord used the mistaken rent of \$1,100.00 to calculate the base for the 2013 Increase. The effect of this mistake was a rent increase of 6.14%. The amount permitted by law for that year was 3.80%.

Residential Tenancy Policy Guideline, "37. Rent Increases" establishes that a rent increase that does not comply with the Act does not result in an increased rent:

If a landlord collects a rent increase that does not comply with the Legislation, the tenant may deduct the increase from rent, or may apply for a monetary order for the amount of excess rent collected. In those circumstances, the landlord may issue a new 3 month Notice of Rent Increase, as the original notice did not result in an increased rent.

The last validly issued Notice of Rent Increase was the 2012 Increase. This means that the tenant overpaid rent by at least \$25.00 per month from 1 September 2013 to date. Accordingly, the tenant overpaid rent of at least \$750.00. As the tenant was entitled to recover at least \$750.00 from the landlord, the tenant's deduction in the amount of \$750.00 from March's rent was permitted. Pursuant to subsection 46(3), the 10 Day Notice is invalid and has no effect. The tenant's application is allowed.

The tenant has not applied to dispute the rent increases. I make no finding as to the current monthly rent.

In respect of the landlord's argument that the tenant induced the landlord's error: while this is entirely true, I am unable to offer the landlord any relief as I have no equitable jurisdiction and am bound to apply the statute.

As the tenant was successful in this application, I find that the tenant is entitled to recover the \$50.00 filing fee paid for this application.

Conclusion

The 10 Day Notice is cancelled. The tenancy will continue until it is ended in accordance with the Act.

The tenant is entitled to deduct \$50.00 from future rent in satisfaction of her monetary award to recover her filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: April 10, 2015

Residential Tenancy Branch