Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding KS & SY HUNG HOLDINGS LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MT, CNC, CNR, MNDC, AS, FF, OPC, MND, MNSD

Introduction

This hearing dealt with applications from both the landlords and the tenant under the *Residential Tenancy Act* (the *Act*). The landlords applied for:

- an Order of Possession for cause and for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- more time to make an application to cancel the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) of June 20, 2015 pursuant to section 66;
- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- cancellation of the landlord's 1 Month Notices of June 20, 2015 and June 30, 2015, pursuant to section 47;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order allowing the tenant to assign or sublet because the landlord's permission has been unreasonably withheld pursuant to section 65; and
- authorization to recover his 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.

Preliminary Issues

The male landlord (the landlord) testified that on July 2, 2015, he handed the tenant the 10 Day Notice for unpaid rent of $1,050.00, owing for July 2015. The tenant did not dispute the landlord's testimony and confirmed that she received the 10 Day Notice. I find that the tenant was duly served with the 10 Day Notice in accordance with section 88 of the *Act*.

The landlord testified that he has accepted rental payments from a government ministry on the tenant's behalf and from the tenant for July, August and September 2015. As no rent remains owing from this tenancy, the landlord withdrew the landlords' application to end this tenancy on the basis of the 10 Day Notice. This portion of the landlords' application and the tenant's application to cancel the 10 Day Notice are withdrawn.

At the commencement of the hearing, the landlord reduced the amount of his requested monetary award, originally cited as $1,575.00 and subsequently amended to $3,150.00, to a final total of $730.00. This was the amount he said was incurred by the landlords to remove items from the parking space assigned to the tenant. At the hearing, the landlord testified that this cleanup work occurred between August 1 and August 3, 2015.

The tenant reduced her requested monetary award from the $5,000.00 identified in her application for dispute resolution to $730.00, the same revised amount claimed by the landlord.

The tenant testified that she handed the landlord a copy of her dispute resolution hearing package containing her application for dispute resolution on or about July 13, 2015. Although she said that an individual witnessed her hand this package to the landlord, she provided no written evidence to this effect, nor did she have anyone appear on her behalf to give sworn testimony. The landlord denied having received a copy of the tenant's application and said that he was only expecting to have the landlords' application for dispute resolution considered at this hearing.

In considering this matter, I have taken into account the Residential Tenancy Branch's (the RTB's) Rule of Procedure 3.5 which reads as follows:

> ***3.5 Proof of service required at the dispute resolution hearing***
> *At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the Arbitrator that each respondent was served with the hearing package and all evidence, as required by the Act.*

I found all of the tenant's evidence regarding the service of documents vague and lacking in conviction and details. Based on the disputed sworn testimony, I find that the

tenant has not demonstrated to the extent required that she served the landlord with her dispute resolution hearing package in accordance with section 89 of the *Act*. I dismiss the tenant's application for dispute resolution in its entirety with leave to reapply regarding her application for a monetary award.

In dismissing the tenant's application, I note that the tenant's application requested more time to apply to cancel the landlords' 1 Month Notice of June 20, 2015. At the hearing, the tenant confirmed that she has received many notices to end tenancy from the landlords. The tenant is well aware of the time limits for applying to cancel notices to end tenancy, outlined clearly on all notices to end tenancy provided by the landlords on Residential Tenancy Branch (RTB) forms. The tenant's application for dispute resolution was received by the RTB on July 8, 2015, well after the expiration of the 10-day time limit for applying to cancel the landlord's 1 Month Notice of June 20, 2015. Although the parties explained that they have been involved in ongoing disputes, which led to a judicial review of a previous decision of an Arbitrator appointed under the *Act*, the tenant provided no satisfactory explanation for why she delayed applying to cancel the landlord's 1 Month Notice of June 20, 2015. As explained to the parties, I do not find that the tenant has supplied sufficient reason to grant an extension of time regarding her application to cancel the 1 Month Notice of June 20, 2015. Were I to have accepted that the tenant's application for dispute resolution was properly served to the landlords in accordance with section 89 of the *Act*, I would still have dismissed the tenant's application for more time to submit her application to cancel the 1 Month Notice of June 20, 2015.

The landlord gave sworn testimony that he handed the initial 1 Month Notice of June 20, 2015 to the tenant on that date. He testified that he handed the tenant a subsequent 1 Month Notice on June 30, 2015. Although the tenant denied that she was handed these 1 Month Notices, she did acknowledge that her roommate received these, which may have been posted on her door. Upon questioning, the tenant testified that she had received so many notices to end tenancy from the landlord for this rental unit, and for three others in the same rental property, that she was not certain as to which ones she received or when. She testified that she had no reason to dispute the landlord's claim regarding the dates when he served the three notices to end tenancy for this rental unit, where she resides. She said that she "most likely" did receive the 1 Month Notices as declared by the landlord. The tenant's only written evidence included copies of the 10 Day Notice and the two 1 Month Notices, copies of which were provided to the RTB by the tenant with her application for dispute resolution on July 8, 2015. Based on the sworn testimony of the parties and the written evidence before me, I find that the tenant was duly served with copies of the landlords' dispute resolution hearing package and application for dispute resolution in accordance with section 89 of the *Act.*

Although the tenant testified that she had received a copy of the landlords' written evidence package, she said that she did not receive this information until five days before this hearing. The RTB received this 156 page submission of late written and photographic evidence on September 8, 2015, six days before this hearing.

The RTB's Rules of Procedure 2.5 and 3.1 establish that evidence upon which an application intends to rely should be provided to the Respondent to the extent possible with the application for dispute resolution and within three days of receiving the Notice of Hearing from the RTB. Rule of Procedure 3.11 requires that "evidence must be served and submitted as soon as reasonably possible." This Rule further states that "if an Arbitrator determines that a party unreasonably delayed the service of evidence, the Arbitrator may refuse to consider the evidence." In addition, Rule 3.14 reads as follows:

> ***3.14 Evidence not submitted at the time of Application for Dispute Resolution***
> *Documentary… evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch not less than 14 days before the hearing…*

While I gave the landlord the opportunity to explain why none of the landlords' written and photographic evidence was provided to either the tenant or the RTB until shortly before this hearing, the landlord provided no explanation. Some of this evidence clearly arose during the period between the landlords' original application, received by the RTB on July 16, 2015, and September 14, 2015, the date of this hearing. However, much of this information is not properly before me as either part of the landlords' original application or amended application for dispute resolution. Rather, the landlords appear to have submitted a running account of the tenant's actions, which the landlords find objectionable. Many of these events include matters that were considered by another Arbitrator, KM, on June 17, 2015, with respect to the landlord's 1 Month Notice of April 28, 2015. Others have occurred since the landlords issued their 1 Month Notices of June 20, 2015 and June 30, 2015.

The RTB's Rule of Procedure 3.17 gives me the discretion to consider evidence not provided by the landlords in accordance with Rules 3.1 and 3.14 depending on whether the evidence is "new and relevant" and that it was not available at the time the application was filed or when the landlord served and submitted their evidence. While I have considered accepting this evidence, I find that the tenant would be unfairly prejudiced if I were to consider this late evidence, much of which is irrelevant to the issues properly before me and which involve matters that have arisen well after the

original application was submitted by the landlord. For these reasons, I have not taken into account the landlords' late written and photographic evidence.

I also note that the landlords submitted a copy of a more recent 1 Month Notice of July 20, 2015 in their written evidence, seeking an end to this tenancy on August 31, 2015. The only substantive difference in the reasons cited in this Notice and the previous two were that the landlords added that the tenant was repeatedly late in paying her rent. Although the landlords amended their application for dispute resolution on August 10, 2015, there was no reference to including this additional 1 Month Notice in that amended application. The landlords entered into written evidence a copy of this third 1 Month Notice, which the landlord said was also handed to the tenant. Since the landlords did not properly identify on their amended application that they also planned to have the 1 Month Notice of July 20, 2015 included for consideration at this hearing, I find that it would be unfair to consider that Notice as part of the issues properly before me. A party has a right to know the case against them and to be given an adequate opportunity to respond to that case. As the tenant was unaware until five days before this hearing that the landlord intended to seek an end to this tenancy for the additional reason of late payment of rent, I dismiss this portion of the landlords' application for dispute resolution. I will comment on this 1 Month Notice later in this decision.

Issues(s) to be Decided

Should the landlords' 1 Month Notices be cancelled? If not, are the landlords entitled to an Order of Possession? Are either of the parties entitled to a monetary order for losses or damage arising out of this tenancy? Are the landlords entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Are either of the parties entitled to recover their filing fees from one another?

Background and Evidence

The parties agreed that this tenancy for a rental unit where the tenant resides with a roommate commenced on or about July 2013. Monthly rent is set at $1,050.00, payable in advance on the first day of the month. Although the landlord could not confirm this, he did not dispute the tenant's assertion that she paid a $525.00 security deposit when this tenancy commenced. The landlord stated that there was no written tenancy agreement as the original arrangements had been made with his father. While the tenant claimed that there was a written tenancy agreement, she did not enter a copy of this agreement into written evidence.

The tenant entered into written evidence a copy of the 1 Month Notices of June 20 and June 30, 2015. In those 1 Month Notices, requiring the tenant to end this tenancy by

July 20, 2015 and July 31, 2015, respectively, the landlords cited the following reasons for the issuance of the Notices:

Tenant or a person permitted on the property by the tenant has:

- *significantly interfered with or unreasonably disturbed another occupant or the landlord;*
- *seriously jeopardized the health or safety or lawful right of another occupant or the landlord;*
- *put the landlord's property at significant risk.*

Tenant has engaged in illegal activity that has, or is likely to:…

- *adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord;*
- *jeopardize a lawful right or interest of another occupant or the landlord.*

As was noted above, the final 1 Month Notice of July 20, 2015, not properly before me as part of the landlords' application, added repeated late payment of rent as another reason for ending this tenancy for cause.

I heard conflicting testimony regarding whether there was an established practice whereby the tenant had been permitted to pay monthly rent within the first five days of each month as opposed to the first day of the month. The tenant said that the landlord's father and, for a period of time, the landlord allowed her to pay monthly rent after she received rent payments from other tenants in this property where she operates a business renting out rooms to tenants she locates. The landlord said that rent was due on the first of each month and the tenant has routinely failed to abide by this provision of her tenancy agreement. He said that he has not agreed to allow the tenant to pay her rent later than the first of each month.

The landlords' amended application for a monetary award for damage arising out of this tenancy of $730.00 included cleaning and disposal expenses incurred by the landlords primarily between August 1, 2015 and August 3, 2015. The tenant confirmed that the landlords likely did incur some costs in removing some of her possessions from the parking space she rents from the landlords in the parking garage. However, she maintained that half of the belongings the landlords removed were left there by unknown persons, a frequent occurrence in this location.

Analysis

I first note that the landlord bears the burden of proof in establishing that a notice to end tenancy was issued for valid purposes and that an Order of Possession should be issued.

In this case, the tenant has not made application pursuant to section 47(4) of the *Act* within ten days of receiving the 1 Month Notice of June 20, 2015. In accordance with section 47(5) of the *Act*, the tenant's failure to take this action within ten days would normally have led to the end of her tenancy on the corrected effective date of that 1 Month Notice, July 31, 2015.

These events would have led to the issuance of an Order of Possession to the landlords had the landlords not chosen to continue accepting monthly rent from the tenant and the government ministry on the tenant's behalf on at least four separate occasions after the corrected effective end date to this tenancy. The landlord confirmed that the landlords accepted these payments for rent. He testified that the landlords did not issue any receipts or any other written statements to either the tenant or the government ministry advising that the landlords did not wish to continue this tenancy and were still intent on obtaining an order of possession for the rental unit. If a landlord wishes to accept such payments, a landlord may note that the payments are accepted for "use and occupancy only" and not for the purposes of reinstating the tenancy. The landlord said that the tenant knew that he was still trying to end her tenancy, despite the landlords' acceptance of her ongoing rent payments. The tenant testified that she believed that by the landlords' acceptance of rent identified as owing in the landlords' 10 Day Notice, and in the landlords' application for a monetary award for unpaid rent for July, August and September, the landlords were allowing her tenancy to continue.

In considering this matter, I attach weight to the almost total lack of evidence or information provided by the landlords prior to five days before this hearing. The extent of the acrimony between the parties during the recent portions of this tenancy may have alerted the tenant that the landlords were intending to end this tenancy for cause despite her ongoing rental payments. However, the landlords have failed to provided written evidence that would have demonstrated that they alerted the tenant that the payments the landlords were accepting from her and the ministry on her behalf were insufficient to satisfy the landlords. In the absence of any evidence to the contrary, the tenant may very well have believed that the landlords had discontinued efforts to end her tenancy once payments to the landlords resumed and the landlords were no longer seeking a monetary award for unpaid rent. In total, at least four payments were made by the tenant and the government ministry after the issuance of even the most recent of the landlords' 1 Month Notices, that issued on July 20, 2015.

I find that by accepting repeated rent payments from the tenant and the government ministry on the tenant's behalf after the corrected effective dates of the two 1 Month Notices expired on July 31, 2015, the landlords have reinstated this tenancy. I also find that the landlords' continued acceptance of rent payments for September 2015, further reinstate this tenancy beyond the August 31, 2015 effective date identified in the 1 Month Notice of July 20, 2015.

For these reasons and to achieve clarity for the purposes of this ongoing tenancy, I find that this tenancy continues. I order that all 1 Month Notices issued with an effective date prior to September 30, 2015 are of no force or effect.

At the hearing, the landlord asked for a clarification as to whether the landlords could issue another 1 Month Notice for issues that were not before me. For the sake of clarification for this existing tenancy, I provide the following direction and guidance to the parties.

I note that late payments of rent by the tenant were identified as an issue even in Arbitrator KM's decision of June 17, 2015. Arbitrator KM reported that "The parties agreed that the tenant failed to pay $349.92 of her rent due for the month of June 2015." In that final and binding decision, Arbitrator KM made the following finding:

> *…The tenant has a contractual obligation to pay the full amount of rent on the first day of each month and I find that she failed to meet that obligation in the month of June. I find that the landlord is entitled to recover the unpaid rent for June and I award him $349.92…*

Despite Arbitrator KM's decision, the tenant asserted that a practice had been established whereby she had been allowed to pay monthly rent for this rental unit after the first of each month with impunity. On the basis of the evidence presented by the parties during the current hearing, the tenant is clearly on alert that the landlords expect that all monthly rental payments for this tenancy are due on the first of each month. At the hearing, I advised the tenant that any further tardiness in paying all of the rent owing for this tenancy by the first of each month will constitute a pattern of repeated late payment of rent. A single additional occurrence of late payment of rent has the potential to lead to the landlords' issuance of another 1 Month Notice.

In providing this guidance, I note that Arbitrator KM's decision also prevented me from considering the following portion of the landlords' current application that occurred prior to April 28, 2015.

> *Tenant or a person permitted on the property by the tenant has:*

- *seriously jeopardized the health or safety or lawful right of another occupant or the landlord;*
- *put the landlord's property at significant risk.*

The landlord cannot issue 1 Month Notices for any issues that have been conclusively determined by Arbitrators appointed under the *Act*. The landlords' reinstatement of the tenancy after issuing the 1 Month Notices of June 20, 2015, June 30, 2015 and July 20, 2015 prevents the landlords from issuing a new 1 Month Notice to End Tenancy for Cause for any of the following reasons for events that occurred prior to the last payment received from the tenant (or on the tenant's behalf) for rent owing from September 2015.

Tenant is repeatedly late paying rent.

Tenant or a person permitted on the property by the tenant has:

- *significantly interfered with or unreasonably disturbed another occupant or the landlord;*
- *seriously jeopardized the health or safety or lawful right of another occupant or the landlord;*
- *put the landlord's property at significant risk.*

Tenant has engaged in illegal activity that has, or is likely to:…

- *adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord;*
- *jeopardize a lawful right or interest of another occupant or the landlord.*

I also heard sworn testimony from the parties with respect to the landlords' amended claim for a monetary award of $730.00 for damage arising out of the tenancy. I find that the tenant was not properly alerted to the nature of this claim until five days before this hearing. This damage occurred well after the landlords submitted their original application for dispute resolution on July 16, 2015. Rule 2.3 of the RTB's Rules of Procedure establish that claims made in application must be related to teach other. Arbitrators have the discretion to dismiss unrelated claims with or without leave to reapply.

As was noted in Arbitrator KM's decision, a Respondent has the right to know the claim against them. I find that the landlords' original and amended applications for dispute resolution did not properly identify the true nature of the monetary claim requested by

the landlord at this hearing. The landlords' application for dispute resolution sought a monetary award for unpaid rent for July, August and September 2015. The landlords' very late submission of written evidence to the tenant and failure to note the new reason for seeking a monetary award in the amended application for dispute resolution prevented the tenant from preparing a defence of her position against the landlords' claim. For these reasons and in accordance with Rule 2.3, I dismiss the landlords' claim for a monetary award for damage with leave to reapply.

As the landlords have been unsuccessful in their application, I make no order regarding the recovery of their filing fee from the tenant.

Conclusion

I dismiss both applications relating to the 1 Month Notices without leave to reapply. All 1 Month Notices issued to the tenant for this rental unit thus far are dismissed without leave to reapply. The tenancy continues until ended in accordance with the *Act*.

The landlords' application for an Order of Possession based on the 10 Day Notice and the tenant's application to cancel the 10 Day Notice are both withdrawn.

I dismiss both applications for a monetary award with leave to reapply.

I dismiss both applications for the recovery of their filing fees without 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 15, 2015

Residential Tenancy Branch