



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

FINAL DECISION for landlord's application

2ND INTERIM DECISION for tenant's application

Dispute Codes

Landlord's application: OPR, MNR, FF

Tenant's application: CNR, MNDC, FF

Introduction

This hearing commenced on September 22, 2015 to deal with cross applications. The tenant had filed an application to cancel a 10 Day notice to End Tenancy for Unpaid rent or Utilities; and, a Monetary Order for damage or loss under the Act, regulations or tenancy agreement. The landlords had filed for an Order of Possession for unpaid rent and a Monetary Order for unpaid rent and utilities. The landlords and the tenant's husband appeared on that hearing date. On that date, a number of preliminary and procedural matters were addressed. The hearing was adjourned and an interim decision was issued, which included findings on preliminary matters and orders to both parties. Accordingly, the interim decision should be read in conjunction with this decision.

At the reconvened hearing of November 17, 2015 both parties appeared, including the tenant, as I had ordered. I confirmed with the parties that they had been served with additional evidence that I had authorized and ordered by way of the interim decision.

As there were multiple issues under dispute, I confirmed that the issue of utmost importance is the determination of whether the 10 Day Notices to End Tenancy for Unpaid Rent or Utilities issued in July 2015 should be upheld or cancelled.

Both parties 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.

During the reconvened hearing, after hearing hours of testimony, the parties reached a mutual agreement with respect to: ending of the tenancy and resolution of the dispute concerning unpaid rent for four months in 2014. I have recorded that agreement by way of this decision and the Orders that accompany it.

The parties remained in dispute as to whether rent is owed for the months of January through April 2015 and I have made a decision with respect to that issue by way of this decision.

The landlords stated that the amounts claimed for utilities on the landlord's application have since been satisfied. As such it was unnecessary for me to make any findings as to this portion of the landlords' claims.

This decision resolves all of the issues raised in the landlord's application and this decision serves as the final decision for the landlord's application. However, due to time constraints the tenant's monetary claims were not heard and those claims were adjourned to a future date. Accordingly, Notices of Adjourned Hearing shall be sent to each party under separate cover with respect to the tenant's monetary claims and a final decision will be issued with respect to the tenant's monetary claims when the hearing of those claims is concluded. The parties were informed that I will not accept or permit any additional evidence submissions during the period of adjournment.

Issue(s) to be Decided

1. What are the terms of the mutual agreement reached by the parties during the hearing?
2. Does the tenant owe any rent for the months of January 2015 through April 2015 or has the matter already been adjudicated?

Background and Evidence

The tenant and the female landlord executed a written tenancy agreement for a two year fixed term tenancy that commenced on September 1, 2013 and was to continue on a month to month tenancy at the end of the fixed term. The tenant paid a security deposit of \$2,150.00 and was required to pay rent of \$4,300.00 on the 1st day of every month pursuant to the tenancy agreement.

The parties mutually agreed to the following terms during the hearing in resolution of some of their disputes:

1. The tenant shall be permitted occupancy of the rental unit until January 1, 2016 provided the landlord receives rent for December 2015 on or before December 1, 2015. If the landlord does not receive rent on or before December 1, 2015 the tenant shall return vacant possession of the rental unit to the landlords no later than December 1, 2015. The landlords shall be provided two Orders of Possession to serve and enforce as necessary and appropriate in the applicable circumstance: one that is effective on December 1, 2015 and the other that is effective on January 1, 2016.
2. The landlords shall be provided a Monetary Order for \$17,200.00 with respect to rent that was not paid for four months in 2014 and in exchange the Promissory Note dated December 24, 2014 that was signed by the tenant's husband for this same amount becomes null and void.
3. The utilities that were claimed on the landlord's application in the amounts \$1,971.63 and \$1,543.57 have since been satisfied and are no longer owing; however, utilities incurred since then shall remain payable by the tenant.

The parties remained in dispute as to whether the tenant owes \$900.00 for each of the months from January 2015 through April 2015. It was undisputed that the landlords collected only \$3,400.00 per month for each of these months by way of post-dated cheques the tenant had given to the landlord following a meeting between the parties in January 2015.

The landlords seek to have the shortfall of \$900.00 per month, or \$3,600.00, included in a Monetary Order against the tenant.

The tenant presented two positions in opposition of the landlord's request for \$3,600.00 in rent. Firstly, the tenant was of the position that this matter has already been heard and decided upon in previous dispute resolution proceedings. As an alternative position, the tenant submitted that the female landlord had agreed to the reduced rent of \$3,400.00 per month to reflect the condition of the rental unit; that the tenant described as being: mould and a non-working dishwasher.

The tenant stated that the landlord had originally agreed to reduce the rent to \$3,400.00 starting in August 2014 but that the landlord reneged on that agreement. Then, when the parties met again in January 2015 the landlord and tenant negotiated the reduced rent to reflect the condition of the rental unit since the landlord had reneged on their earlier agreement. As evidence of this position, the tenant submitted that on the post-

dated cheques she had written "paid in full" on the memo line. The tenant submitted that she wrote this since the landlord refused to sign any agreement acknowledging the rent reduction.

The female landlord testified that at no time did she agree to accept reduced rent because of the condition of the house. Rather, she claims the tenant advised her that she and her husband could not afford to pay the full amount of rent when she met them in January 2015 and that the tenant presented her with cheques for \$3,400.00 with the tenant's husband promising to pay the \$900.00 shortfall at a later time. The landlord stated that she was desperate to get any rent money on that date since the previous four months had not been paid, January 2015 rent had not yet been paid, the mortgage payment was due on the day of the meeting with the tenant, and the landlord did not have sufficient funds to cover the mortgage payment.

From the landlord's perspective, the landlord was unconcerned as to whether rent payments came from the tenant or the tenant's husband as they were a family unit and that she regarded the tenant's husband being an agent for the tenant. The tenant also submitted during the hearing that her husband acted as her agent with respect to tenancy related matters.

Analysis

Pursuant to section 63 of the Act, I have the authority to assist parties in settling their dispute and to record the agreement in the form of a decision or order. I have accepted and recorded the terms mutually agreed upon terms reached during the hearing and I make the terms an order to be binding upon both parties.

Pursuant to the mutual agreement, this tenancy shall end December 1, 2015 unless the tenant pays rent of \$4,300.00 on or before December 1, 2015 for the month of December 2015 in which case the tenancy shall end on January 1, 2016. The landlords are provided an Order of Possession effective December 1, 2015 that the landlords may serve and enforce if the tenant does not pay all of the rent for December 2015 on or before December 1, 2015. The landlords are provided an Order of Possession effective January 1, 2016 that may be served and enforced in any event.

Pursuant to the mutual agreement, I order the tenant to pay the landlords \$17,200.00 in unpaid rent for the four months that were not paid in 2014 and I provide the landlords a Monetary Order to reflect this order.

Pursuant to the mutual agreement, the unpaid utilities claimed in the amounts of \$1,971.63 and \$1,543.57 are recorded as being satisfied and I dismiss this portion of the landlords' claim. Utilities incurred since the landlord's filed their application shall be payable by the tenant pursuant to the terms of tenancy and the Act.

With respect to the landlords' claims for unpaid rent of \$900.00 for the months of January through April 2015 I provide the following findings and reasons.

An Arbitrator heard and issued a decision with respect to a hearing that took place on April 9, 2015 and dealt with the rent shortfall of \$900.00 per month. The tenant is of the position that decision should stand and I should not hear or decide this issue again. Generally, a matter that is heard and decided upon shall not be re-litigated under the principle of *res judicata*; however, the courts have found that a decision maker has some discretion as to whether to apply the principle. The Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44) and later in 2013 in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19) explained that "The underlying purpose [of *res judicata*] is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case." Further, discretion exists to ensure that "a judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

The Court in *Danyluk* (in choosing to exercise its discretion not to apply the principle), stated "Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim ... has simply never been properly considered and adjudicated."

The proceeding that took place on April 9, 2015 was to hear a tenant's application to determine whether a 10 Day Notice to End Tenancy for Unpaid Rent served on February 20, 2015 for unpaid rent for the months of December 2014 through February 2015 should be upheld or cancelled. In addition to determining the validity of the 10 Day Notice the Arbitrator hearing that case made further orders as to the amount of the monthly rent for the months of March and April 2015 even though the parties had not requested such. The Arbitrator ordered that rent would remain at \$3,400.00 per month based largely upon the testimony of the tenant's husband (whom the Arbitrator had considered to be a tenant at the time) which the male landlord could not comment on in the absence of the female landlord. It was recorded that the male and female landlord are estranged and the Arbitrator noted that neither party had requested the attendance of the female landlord.

As stated in my interim decision, I find it appropriate in the circumstances of this case and the previous dispute resolution proceedings to exercise my discretion and not applying the principle of res judicata considering:

1. The entire tenancy agreement had not been before a previous Arbitrator, the identity of the tenant or standing of the tenant's husband had not been explored; and, the testimony of the tenant's husband was taken as testimony of a tenant during previous dispute resolution proceedings even though he is not a tenant.
2. The female landlord who had primarily been dealing with the tenant was not named as a party to the dispute and had not been called to testify at the April 9, 2015 hearing even though she was the only landlord that could respond to the submissions of the tenant since the male and female landlords were estranged and the male landlord was not privy to any agreement reached in January 2015.
3. The tenant's husband put forth a different version of events at the April 9, 2015 than the tenant did during the hearing before me as to the reason the rent reduction was agreed upon. The Arbitrator recorded the submission of the tenant's husband as being "the landlord agreed to this rate of rent to make allowances for the tenants' inability to pay a higher rent." Whereas, during the hearing before me, the tenant testified that the rent was reduced to reflect an earlier agreement to reduce rent due to the condition of the rental unit.
4. The alleged agreement reached in January 2015 was between the female landlord and the female tenant, neither of whom were at the April 9, 2015 hearing.

Considering I have the complete tenancy agreement before me, and the parties who met in January 2015 were before me and they were able to hear and respond to the other parties' submissions, I find that by way of this proceeding the matter of the rent shortfall or rent reduction for January 2015 through April 2015 may finally be properly adjudicated and decided upon. Therefore, I proceed to consider the parties' respective positions as to whether the landlord had authorized a rent reduction starting January 2015 as alleged by the tenant.

Both parties provided different version of events as to what was discussed and agreed upon during a meeting that took place at the rental unit in January 2015. Neither party reduced the agreement to a formal writing. While the tenant wrote "paid in full" on the post-dated cheques, I also consider the landlord has pursued the tenant for the rent shortfall by way of 10 Day Notices and Applications for Dispute Resolution. I also accept that the landlord's position as being within reason that she took the cheques,

even in the reduced amount considering the landlord had suffered significant financial losses leading up to that meeting since the tenant had not paid for several months of rent. Also of consideration is that the tenant present any submissions as to how long the rent reduction was to apply and whether the rent was set to return to its full amount. Therefore, I find I am not overly persuaded by the tenant's notation on the post-dated cheques that there was an actual agreement for the landlord to waive entitlement to \$900.00 in rent each month.

Perhaps of even greater significance is that I note the tenant had included claims for compensation for mould and a non-working dishwasher in the amounts of \$6,802.50 and \$800.46 in filing her application against the landlord. I am of the view that the tenant cannot benefit from both a rent reduction and a Monetary Order for the same issues with the rental unit. If I were to accept the tenant's position that previous decision should stand and the tenant is entitled to a \$900.00 rent reduction for January through April 2015 then she would be precluded from making a monetary claim. Therefore, I find that it is fair and just to find the landlords entitled to a Monetary Order for the unpaid rent of \$900.00 for each of months of January 2015 through April 2015 and that I consider the tenant's claims for compensation for losses associated to mould and a non-working dishwasher, if any, under the tenant's application.

In light of the above, I provide the landlords with a Monetary Order in the sum of \$17,200.00 for four months not paid in 2014; plus, \$3,600.00 for the rent shortfall for the months of January 2015 through April 2015. I further award the landlords recovery of the \$100.00 filing fee they paid for their application. Accordingly, the Monetary Order provided to the landlords is for the sum of \$20,900.00.

Conclusion

The parties resolved some of the issues under dispute by way of a mutual agreement that I have recorded in this decision. Pursuant to the mutual agreement, the landlords are provided an Order of Possession effective January 1, 2015 that may be served and enforced in any event and the landlords have been provided an Order of Possession effective December 1, 2015 that may be served and enforced in the event the tenant does not pay rent of \$4,300.00 on or before December 1, 2015.

The landlords have been provided a Monetary Order in the sum of \$20,900.00 for unpaid rent and recovery of their filing fee.

The tenant's monetary claims against the landlords are set to be heard at a later date and a separate decision shall be issued under the tenant's file number. Notices of Adjourned Hearing shall be sent to each party by the Residential Tenancy Branch to advise the parties as to the date and time of the adjourned hearing.

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 20, 2015

Residential Tenancy Branch

