Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FF

Introduction

This hearing dealt with the tenants' 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;
- authorization to recover their 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 tenants were represented by the tenant SS (the tenant). The tenant confirmed that she was appearing on behalf of both tenants.

The landlord acknowledged receipt of the tenants' evidence. The landlord testified that he served his evidence to the tenants by registered mail. The tenant did not contest this service.

At the hearing the landlord made an oral request for an order of possession in the event I find that the 10 Day Notice was validly issued.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an order of possession? Are the tenants 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 submissions and / or arguments are reproduced here. The principal aspects of the tenants' claim and my findings around it are set out below.

This tenancy began in mid-July 2015. The landlord and tenants entered into a written tenancy agreement on 22 May 2015. Monthly rent of $1,250.00 is due on the first. The rental unit is on the upper floor of the residential property. Another occupant rents the lower rental unit.

The tenant testified that on 23 July 2015 she noticed a puddle of water on the floor by the toilet. The tenant testified that mopped up the water. The tenant testified that the puddle continued to form. The tenant testified that the downstairs occupant informed the tenant that there was a moderate amount of water leaking into the lower rental unit.

The tenant testified that the toilet was the only toilet in the rental unit. The tenant testified that she did not have personal experience dealing with a leak such as this before. The tenant testified that she was worried as there was water all over the floor constantly and the floor was getting soaked. The tenant testified that she believed, as a result of the water entering into her flooring and the other occupant's ceiling, there was a high risk of mould. Further, the tenant testified that she was worried that the water going through the floor/ceiling could affect electrical wiring.

The tenant testified that she attempted to contact the landlord but that her call went straight to voicemail. The tenant testified that she telephoned a second time and left a voicemail. The tenant testified that she left a voicemail at 1317 on 25 July 2015. The tenant testified that she was not told by the landlord that he was going out of town. The tenant provided me with a printout of her cell calls for the relevant period. The invoice notes calls to the landlord's numbers on the following seven occasions:

- 24 July 2015 @1340 number ending "42"
- 24 July 2015 @1346 number ending "42"
- 24 July 2015 @1411 number ending "21"
- 25 July 2015 @1317 number ending "42"
- 25 July 2015 @1317 number ending "21"
- 1 August 2015 @1512 number ending "42"
- 1 August 2015 @1513 number ending "21"

On 27 July 2015, the tenants had a plumber attend at the rental unit. The tenant

testified that the plumber told her that the toilet was approximately 46 years old and that he could not guarantee a repair on a toilet of that age. The tenant agreed to the toilet being replaced. The tenant testified that the plumber attended for approximately three hours as there were complications in completing the repair. The plumber invoiced the tenants $758.10, which the tenants paid.

The landlord testified that he returned from vacation 1 August 2015. On 1 August 2015, the landlord attended at the rental unit to collect postdated cheques. The tenant provided the landlord with the receipt for the emergency repairs and informed the landlord that she would offset the amount from rent. The landlord refused the offset and told the tenant to pay her full rent. The tenants provided the net rent amount.

On 14 September 2015, the landlord issued the 10 Day Notice to the tenants. The 10 Day Notice set out that the tenant had failed to pay $758.00 in rent that was due 1 August 2015. The landlord testified that the 10 Day Notice was actually created on 4 September 2015 and that he inadvertently inverted this date with the effective date of the 10 Day Notice.

The landlord testified that he provided two contact numbers to the tenant: Number 1 ending in “42” and Number 2 ending in “21”. The landlord testified that he did not receive any calls or voice messages from the tenant while he was on vacation. The landlord later testified that he received a voice message from the tenant on his home voicemail that indicated the tenant was bringing in a plumber. The landlord submitted that the tenant should have left a voice message on his cell phone or emailed.

The landlord testified that when the tenant moved in there was no damage to the toilet. The landlord testified that the toilet is the original with the home, which was constructed in the late 1970s. The landlord contends that the porcelain of this toilet was good for one hundred years. The landlord testified that he wanted to see the old toilet to inspect the damage, but that the toilet was already discarded. The landlord testified that damage to the toilet as described by the tenant occurs when the bolts are overtightened or there is an outside force applied to the tank.

The landlord submitted that the repairs were not emergency repairs within the meaning of the Act. The landlord submitted that the tenant should have turned off the water to the tank and then used an outside water source to fill the toilet bowl in order to flush wastewater. The landlord submitted that the provisions in relation to emergency repairs allow a tenant to make repairs but not to replace anything.

The landlord submitted that the plumber took advantage of the tenant and that the tenant paid an excessive amount for the repairs. The landlord testified that the toilet was replaced with a “high end” toilet. The landlord provided me with various quotes for toilets and installation labour. A quote dated 7 August 2015 is in the amount of $288.12. A quote dated 4 August 2015 is in the amount of $239.40.

I was provided with a copy of the invoice from the plumber dated 27 July 2015. The invoice is in the amount of $758.10. The invoice sets out a written account of the repairs made. The invoice notes that the toilet was leaking badly as a result of a cracked tank.

I was provided a letter dated 10 September 2015 from the lower occupant. The letter sets out that on 25 July 2015 the occupant observed a moderate drip coming through the ceiling fan and pooling on her floor. The occupant notes she called the landlord that day and left messages about the details of the leak. The occupant did not receive a response and telephoned the landlord two days later. The second call went directly to voicemail as well.

I was provided with a second letter dated 13 October 2015 from the downstairs occupant. The letter notes no mould or water damage to the insulation in the lower unit ceiling.

Analysis

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.

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.

In this case, the tenants say they were permitted to deduct a portion of rent for emergency repairs they completed pursuant to subsection 33(7) of the Act.

Section 33 of the Act describes “emergency repairs” as those repairs that are (a) urgent, (b) necessary for the health or safety of anyone or for the preservation or use of residential property, and (c) made for the purposes of:

- repairing major leaks in pipes or the roof,
- damage or blocked water or sewer pipes or plumbing fixtures

- the primary heating system
- damaged or defective locks that give access to the rental unit
- the electrical systems
- in prescribed circumstances, a rental unit or residential property

Subsection 33(3) of the Act sets out that a tenant may make emergency repairs where emergency repairs are needed, the tenant has made at least two attempts by phone to contact the landlord, and the tenant gave the landlord a reasonable amount of time to make the repairs.

If a tenant has attempted unsuccessfully to have the landlord complete emergency repairs, subsection 33(5) of the Act requires a landlord to reimburse a tenant for emergency repairs if, the tenant claims reimbursement from the landlord and provides the landlord a written account of the emergency repairs accompanied by receipts for the amounts claimed. If the landlord does not reimburse the tenant, then the tenant may deduct the amount from rent or otherwise recover the amount (Act, s. 33(7)). There is no amount of time set out in section 33 for the tenant to wait before deducting the amount.

Pursuant to subsection 33(6) of the Act, the landlord is not responsible for the cost of emergency repairs where:

(a) the tenant made the repairs before one or more of the conditions in subsection (3) were met;
(b) the tenant has not provided the account and receipts for the repairs as required under subsection (5) (b);
(c) the amounts represent more than a reasonable cost for the repairs;
(d) the emergency repairs are for damage caused primarily by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

In this case, there was only one toilet in the rental unit and it was leaking. I accept the tenant's evidence that she was concerned about the water entering floor/ceiling. Consistent accumulation of water on the floor that is leaking to a lower unit is an urgent situation. The repair was clearly for the use of the residential property as at least one properly functioning toilet available to the tenant is a highly important feature for the use of the rental unit contained within the residential property. There is no doubt that the repair was in relation to a damaged plumbing fixture. On this basis, I find that the plumbing repairs were "emergency repairs" within the meaning assigned by subsection 33(1) of the Act.

I accept that the emergency repairs were needed: The tenant provided her testimony and a written statement from the lower level occupant that show that there was a moderate amount of water pooling in the upper level bathroom on the floor and dripping through the ceiling to the unit below. A leak such as this represents a necessary repair.

I reject the landlord's submission that the tenants should have turned off the water to the tank and flushed the toilet through use of an external source of water. This stopgap remedy is beyond that which can reasonably be expected of an ordinary tenant. The tenants were not required to live without a functioning toilet for an indeterminate period of time.

The tenant testified that she attempted to telephone the landlord at least twice. The tenant's records indicate the tenant called at least five times between the discovery of the leak and hiring the plumber. The landlord did not dispute that the numbers the tenant used were the numbers the landlord provided to the tenant for calling him. There is no requirement in the Act that the tenants email the landlord and this submission is rejected. The tenants waited two days from the tenant's second attempt before having a plumber come to the rental unit to investigate the leak. I find that this is a reasonable amount of time to wait. I find that the tenants have met the conditions of subsection 33(3) of the Act and were entitled to commence the emergency repairs themselves.

The tenant testified that she provided the plumbing receipt to the landlord. The landlord did not contest receiving the invoice from the plumber. I find that the invoice sets out a written account of the repairs. I find that the tenants have satisfied their obligations in subsection 33(5) of the Act.

The first day that the landlord made contact with the tenant was also the same day the rent was due. The landlord indicated that day his refusal to reimburse the entire amount of the emergency repairs through an offset of the rent amount. There is no time limit for repayment set out in subsection 33(5) of the Act before a deduction pursuant to subsection 33(7) of the Act can occur. I find that the tenant was entitled to deduct the amount from rent that day as the landlord indicated his refusal to reimburse (by way of offset) the tenant on the day rent was due.

The landlord submits that the tenants were not entitled to deduct any amount as the amount they paid was unreasonable. The landlord also submits that the emergency repair provisions do not permit a tenant to replace the toilet.

I disagree with the landlord that “repairs” within the meaning of section 33 prevent a tenant from replacing the toilet. Replacing an item or part may be the only way of making a meaningful repair. It would be nonsensical to read section 33 so narrowly. In this case the toilet was approximately forty years old. The landlord contends that the life expectancy of a toilet is one hundred years. While not determinative, *Residential Tenancy Policy Guideline* “40. Useful Life of Building Elements” sets out that the life expectancy of a toilet is twenty years. As the toilet had far outlasted its original life expectancy, it is reasonable for the tenants to consider replacement of the broken toilet as a suitable repair.

The landlord has provided quotes for replacement of a toilet. The landlord has not satisfied me that these quotes adequately account for the circumstances in which the tenants found themselves. The tenants did not know the source of the leak or what was required to repair or fix the leak. The invoice necessarily includes the plumber’s investigation of the leak and his advice in fixing the problem. The quotes provided are for the replacement of a toilet and do not indicate consideration of the specific circumstances of the tenant. There is nothing in the Act that requires the tenants to retain any damaged items as part of the repair. The tenants were not required to find the best or most economical solution, merely to act reasonably. Reasonably means that the tenants must act within a range of acceptable outcomes. I find that the tenants selected a solution within the range of reasonable outcomes. I find that the landlord has not shown that the repair was unreasonable.

The landlord had not provided any evidence that would indicate that the tenants caused the damage to the toilet.

If the landlord wanted to ensure he or his agents were able to complete emergency repairs to his standards and preferences he should have left a telephone number at which he (or his agent) could be reached.

I find that the tenants were entitled to deduct the full amount of the invoice from rent pursuant to subsection 33(7) of the Act. As the tenants were entitled to deduct the amount from rent, the 10 Day Notice was not validly issues and is of no force and effect. The landlord is not entitled to an order of possession. The tenancy will continue uninterrupted until it is ended in accordance with the Act.

As the tenants have been successful in their application, they are entitled to recover their filing fee from the landlord. The tenants are issued a monetary order in the amount of $50.00.

Paragraph 72(2)(a) of the Act sets out:

> If the director orders a party to a dispute resolution proceeding to pay any amount to the other...the amount may be deducted...in the case of payment from a landlord to a tenant, from any rent due to the landlord...

Accordingly, the tenants may recover the $50.00 monetary order by deducting that amount from rent or seek recovery of that order directly from the landlord. If the tenants elect to deduct this monetary order from rent, payment of the net amount of rent will satisfy the tenants' obligations pursuant to section 26 of the Act.

Conclusion

The tenants' application is allowed in full.

The 10 Day Notice is cancelled and is no force and effect. The tenancy will continue until it is ended in accordance with the Act.

The landlord's oral request for an order of possession is dismissed.

I issue a monetary order in the tenants' favour in the amount of $50.00. The landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

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: December 8, 2015

Residential Tenancy Branch