Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MT, CNL

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking more time to cancel a notice to end tenancy and to cancel a notice to end tenancy.

The hearing was conducted via teleconference and was attended by the tenant; her advocate; the landlord and her agent.

At the outset of the hearing, I reviewed the Application for Dispute Resolution with the tenant and her advocate. I noted that the tenant had submitted her Application for Dispute Resolution on January 15, 2016 seeking to cancel a 1 Month Notice to End Tenancy for Landlord's Use of Property and to recover the filing fee.

I note this Application was returned to the tenant with directions to apply for more time to dispute a notice to end tenancy and to remove her request to recover the filing fee. These changes were submitted on January 25, 2016.

Also on January 25, 2016 the tenant submitted a copy of a 10 Day Notice to End Tenancy for Unpaid Rent. The tenant states that she was told by the service representative at Service BC that this would be sufficient to amend her Application for Dispute Resolution to include disputing the additional Notice to End Tenancy.

Audit notes show the tenant had discussed this issue with the Senior Information Officer on February 16, 2016. On February 17, 2016 the tenant submitted an Amendment to an Application for Dispute Resolution form that states: "Adding proof that the landlord was sent prior notice of emergency repairs for drywall instullation with copy of picture & invoice from….."[reproduced as written]

While the tenant had not, prior to this hearing, submitted any document confirming that she wished to amend her Application for Dispute Resolution seeking to cancel a 10 Day Notice to End Tenancy for Unpaid Rent, I find that there **may** have been some confusion in the administrative procedures by either Service BC or the Residential Tenancy Branch.

In the interest of natural justice and administrative fairness, I will accept the amendment to the tenant's Application for Dispute Resolution to include seeking to dispute the 10 Day Notice to End Tenancy for Unpaid Rent issued on January 22, 2016.

I also note however, that the landlord has obtained an order of possession, on February 10, 2016, through the Direct Request process on another file. In that proceeding the tenant filed an

Application for Review Consideration alleging the landlord obtained the order of possession by fraud.

The Review Consideration Decision issued on February 19, 2016 confirmed the original decision and dismissed the tenant's Application for Review Consideration. I note, from that decision that the tenant asserted that she had had to pay for emergency repairs and that is why she withheld rent from the landlord.

In fact, the Arbitrator found that the tenant had not completed any emergency repairs as defined under Section 33 of the *Residential Tenancy Act (Act*) because she had had drywall repairs completed.

The Review Consideration Decision confirmed that the decision and order of possession dated February 10, 2016 stand and remain in full force and effect. While I have no authourity under the *Act* to alter the Decision of February 10, 2016 or the Review Consideration Decision of February 19, 2016 I have, as noted above, allowed the tenant to amend her Application for Dispute Resolution for this hearing to include a determination as to whether or not the 10 Day Notice issued on January 22, 2016 should have been cancelled.

Also at the outset of the hearing the landlord sought confirmation that I had received her two packages of evidence that she had submitted on February 29, 2016 to the Residential Tenancy Branch, I confirmed that I had received one package but not her second package. I ordered the landlord to fax the second package to me immediately after the hearing on March 4, 2016 and I note the package was received that date.

I also acknowledge that the landlord's evidence was submitted later than usually allowed under the Residential Tenancy Branch Rules of Procedure. However, due to the unique circumstances of this hearing, that is that the landlord had already been issued an order of possession to end the tenancy, I find it reasonable that the landlord did not submit any evidence for this hearing until it was confirmed for her that this hearing would proceed which was late in February 2016. As such, I order the landlord is permitted to have served her evidence late.

The tenant stated she had not received any evidence from the landlord. The landlord testified that she had an upper floor tenant print her evidence package and put in the tenant's mailbox on February 29, 2016. The landlord stated the upper floor tenant later checked and found the package was gone the same day.

I advised the parties, during the hearing, I would reserve my decision on whether I could consider the landlord's documentary evidence for this written decision. My decision on this issue is found below in the Analysis section of this decision.

Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to cancel a 10 Day Notice to End Tenancy for Unpaid Rent; to more time to dispute a notice to end tenancy; to cancel a 2 Month Notice to End Tenancy for Landlord's Use of Property and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 46, 47, 66, 67, and 72 of the *Act.*

Should the tenant be unsuccessful in seeking to cancel the 2 Month Notice to End Tenancy for Landlord's Use of Property it must also be decided if the landlord is entitled to an order of possession pursuant to Section 55(1) of the *Act*.

Background and Evidence

The tenant submitted into evidence the following relevant documents:

- A copy of a tenancy agreement signed by the parties on October 1, 2013 for a month to month tenancy beginning on October 1, 2013 for the monthly rent of $900.00 due on the 1st of each month with a security deposit of $450.00 paid;
- A copy of a 2 Month Notice to End Tenancy for Landlord's Use of Property issued on December 29, 2015 with an effective vacancy date of March 1, 2016 citing the landlord has all necessary permits and approvals required by law to demolition the rental unit or repair the rental unit in a manner that requires the rental unit to be vacant; and
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent issued on January 22, 2016 with an effective vacancy date of February 7, 2016 due to unpaid rent in the amount of $525.00.

In her Application for Dispute Resolution the tenant stated that she received the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property on December 29, 2015. She stated in the hearing that she did not think January 1, 2016 would be included in the determination of days she was allowed to file her Application because it was a statutory holiday.

She later stated that she received the 2 Month Notice on January 2, 2016 and that she did not need additional time to submit her Application because she filed it on January 15, 2016 within the required 15 days. And if she did need more time it was because she had to research information; she is full time student and mother and had had the flu during this time.

When asked why she had written on her Application for Dispute Resolution that she had received on December 29, 2015 she stated that is because that is the date the landlord had put on the Notice. She stated that she had been away for December 30, 2015 and when she returned on January 2, 2016.

The landlord submitted the 2 Month Notice to End Tenancy for Landlord's Use of Property was served to the tenant on December 29, 2015 by posting it on the door of the rental unit.

The landlord explained that she had been required, by her insurance company, to complete some upgrades to the residential property that included eliminating al knob and tube wiring and as a result they need to open up all of the ceilings in this rental unit; to update to 200 amp service and to replace all electrical panels to bring everything up to current code.

The tenant asserts the landlord did not have the required permits to complete the work they intend to do.

The landlord's agent testified that he had been working with local authourities on the permits when it was discovered that the rental unit had never been permitted by the local authourity as a separate rental unit. The agent went on to explain that he was working through the process of getting appropriate approvals to allow the unit to exist and that after that was complete they would obtain the permits for the work they were seeking to complete. The agent confirmed also

that if the local authourities did not approve the existence of the rental unit that they may be required to demolish the rental unit.

The agent also stated that their intention, in issuing the 2 Month Notice was so that they could remove the ceiling and do all of the work that did not require any permits to prepare for the overall project prior to getting the permits.

In regard to the 10 Day Notice to End Tenancy for Unpaid Rent the landlord submitted that the tenant only paid rent in the amount of $375.00 and as such, she issued, on January 22, 2016 a 10 Day Notice to End Tenancy for Unpaid Rent.

The tenant submitted that after there had been a flood in November 2015 the landlord failed to complete all of the required repairs within a reasonable time. She states that she got permission from the landlord to use the service providers that she hired to complete drywall repairs. The tenant submitted the repairs were necessary for health and safety because electrical wires were hanging loss.

The landlord testified that she never gave the tenant permission to hire anyone to complete any drywall work. She states that immediately after the flood had occurred which was a massive flooding in the local area that impacted several other homes, flood restoration companies were extremely busy and it was difficult to find anyone available.

In support of this claim the tenant submitted an invoice from a service provider indicating that on December 12, 2015 he completed drywall work in the rental unit; a photograph of a wall showing recent drywall work below the electrical plug; an undated and uncredited text message stating “I will go with your guy”; an invoice for labour and material to complete drywall work; an email from the tenant to the landlord dated December 28, 2015 stating: “Please find attached an Invoice from (service provider). The amount will be applied to January 2016 rent as per tenancy branch re: Emergency Repairs.” [reproduced as written except for the removal of the service provider’s name]

Analysis

While this decision is based mostly on the evidence and testimony provided by the parties I note overall, I find I am persuaded in favour of the landlord’s submissions.

I find the tenant’s testimony to be less reliable because throughout the hearing she changed her submissions to support her position (i.e. date she received the 2 Month Notice is different on her Application than in her testimony); she changed the nature of the emergency repair to include covering up electrical work rather than just drywall after she received the Review Consideration Decision that found she had not identified an emergency as defined under the *Act*; and in addition when pressed for specific answers the tenant often provided evasive responses.

As such, in regard to the issue of the landlord’s evidence, despite the tenant’s position that she did not receive the landlord’s evidence I find the landlord’s testimony regarding its service to be more credible. I find the tenant was sufficiently served with the landlord’s evidence, pursuant to Section 71(2)(b).

Section 49 of the *Act* allows a landlord to end a tenancy if the landlord has all the necessary permits and approvals required by law and intends, in good faith, to renovate or repair the rental unit in a manner that requires the rental unit to be vacant.

From the testimony of both parties I understand what the landlord had been attempting to do by wanting to prepare the rental unit to start the larger project when the permits were granted, however, I find that even by the time this hearing was held the landlord still did not have the permits.

In addition, I note from the landlord's testimony that the potential exists where the landlord may also be ordered to dismantle the rental unit. If so directed the landlord would be allowed, under Section 47 of this *Act,* to issue a 1 Month Notice to End Tenancy for Cause (to comply with a government order) which would not obligate the landlord to provide the tenant with any compensation.

Based on these findings, I find the landlord's issuance of the 2 Month Notice to End Tenancy for Landlord's Use of Property to be premature. I, therefore, cancel the 2 Month Notice to End Tenancy for Landlord's Use of Property issued on December 29, 2015. As a further result, I note the landlord is not obligated to provide the corresponding compensation equivalent to 1 Month's rent should the notice have been enforceable.

Section 46 of the *Act* states a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy on a date that is not earlier than 10 days after the date the tenant receives the notice. A notice under this section must comply with Section 52 of the *Act*.

Section 26 of the *Act* states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has the right under this *Act* to deduct all or a portion of the rent.

As a decision on the validity and enforceability of the 10 Day Notice to End Tenancy for Unpaid Rent issued by the landlord on January 22, 2016 has already been made by an adjudicator and a Review Consideration has been dismissed by an arbitrator that might have suspended the decision and/or order I find have no authourity to overturn those previous decisions.

However, even if I were able to overturn the above noted decision and orders I find based on the submissions of the tenant and landlord that the tenant has failed to establish that she had authourity under the *Act* to withhold any amount of rent from the landlord. I have made this determination for the following reasons.

Section 33(1) of the *Act* defines "emergency repairs" as repairs that are urgent, necessary for the health or safety of anyone or for the preservation or use of residential property, and made for the purpose of repairing:

- Major leaks in pipes or the roof,
- Damaged or blocked water or sewer pipes or plumbing fixtures,
- The primary heating system,
- Damaged or defective locks that give access to a rental unit, or
- The electrical systems.

Section 33(3) states a tenant may have emergency repairs made only when all of the following conditions are met:

- Emergency repairs are needed;
- The tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs; and
- Following those attempts, the tenant has given the landlord reasonable time to make the repairs.

Section 33(5) stipulates that a landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant claims reimbursement for those amounts from the landlord, and gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

Section 33(7) allows that if a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

Despite the tenant's assertion that the repairs fall under Section 33 of the *Act*, I find that regardless of the reasons she wanted the drywall completed the repair was not a repair to the electrical systems of the rental unit and therefore does not fall under Section 33. Additionally, the tenant provided no evidence to even support her claim that any wires were hanging in a dangerous fashion. If this were an electrical problem I would have also expected an electrician to be required to complete some of the repair work.

Furthermore and regardless of the fact that the flood occurred in mid-November 2015, I find the tenant has provided no evidence that she, just prior to hiring her drywall contractor, attempted to contact the landlord and specifically ask for drywall repairs. Section 33 requires the tenant to make at least two attempts to do so.

I find the uncredited and undated text messages to do not provide any evidence to support her claim that she got permission from the landlord to make these specific repairs a month after the emergency need (ie. The flood) was identified to the landlord. In fact, I find the landlord took all necessary steps to deal with the flood and necessary repairs that could be considered an emergency long prior to the middle of December when the tenant had the drywall work completed.

And finally, I note that the email sent from the tenant to the landlord on December 28, 2015 with the invoice from the tenant's contractor was not a demand for reimbursement as is required under Section 33(5).

If it were, the tenant should have requested reimbursement from the landlord. If it had been a true emergency repair and the landlord refused to reimburse the amount then and only then would the tenant be allowed to deduct it from a future rent payment. The tenant does not have authourity under Section 33(7) to simply deduct without giving the landlord an opportunity to assess whether or not she would have paid for it.

Conclusion

Based on the above, I dismiss the tenant's Application for Dispute Resolution 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: March 07, 2016

Residential Tenancy Branch