



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding KRYSTALKRU DEVELOPMENTS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, RP, OLC, FF

Introduction

This hearing dealt with the tenant's application for repair orders and a Monetary Order for damage or loss under the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and 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.

Preliminary and Procedural Matters

At the outset of the hearing I informed the parties that the landlord and the person appearing with the landlord had been involved in the sale of my personal residences in the past. I informed the parties that I was of the view that I would conduct an unbiased hearing; however, if any party had any reservations or concerns about my role as the Arbitrator I would adjourn the hearing and request a different Arbitrator hear the matter. Both parties indicated that they were not concerned about my ability to be unbiased and wanted to proceed.

I noted that the tenant had indicated two different matters to resolve under a single application and I cautioned the parties that there may not be sufficient time to hear both matters. The tenant's representative stated that the landlord has been attending to repair issues and withdrew the request for repair orders. The hearing proceeded to deal with the tenant's request for monetary compensation.

During the hearing, the tenant's representative requested that I make a determination as to the portion of utilities the tenant is responsible to pay. I amended the application to indicate the appropriate dispute code and I have made such a determination in this decision.

Issue(s) to be Decided

1. What is the portion of utilities the tenant is required to pay?
2. Has the tenant established an entitlement to monetary compensation from the landlord for damage or loss under the Act, regulations or tenancy agreement?

Background and Evidence

The parties executed a written tenancy agreement on April 1, 2012 for a tenancy set to commence on April 1, 2012. The written tenancy agreement indicates the monthly rent is \$1,200.00 and rent does not include any utilities. The date rent is payable is not specified; however, the parties testified that it has been the practice to pay rent on the first day of the month. The tenancy agreement does not have an addendum.

The tenancy agreement indicates that no security deposit was paid although the parties were in dispute as to whether one was transferred from a previous tenancy agreement the parties had. The tenant's representative indicated the security deposit was not the primary focus of this dispute resolution proceeding. Accordingly, I have made no findings of fact as to whether the landlord is holding a security deposit for this tenancy.

The rental unit is the upper level of a house and there is a basement suite in the lower level that is rented to other tenants. The parties were in agreement that for more than four years since this tenancy commenced the tenant has been paying 100% of the electricity, water and garbage bills for the property and the tenants occupying the basement suite pay rent that is inclusive of utilities. The utility accounts had been in the tenant's name until recently when this dispute arose and the tenant took the utilities out of his name. The landlord proceeded to put the utilities in his name so that the services would not be terminated to the property and has been demanding payment from the tenant.

The landlord had issued two 10 Day Notices to End Tenancy for Unpaid Rent and Utilities, which were the subject of a previous dispute resolution proceeding (file number for the previous dispute is reflected on the cover page of this decision). The 10 Day Notices were cancelled because the landlord failed to wait 30 days after demanding payment before issuing the 10 Day Notices to End Tenancy for Unpaid Rent and Utilities. The Arbitrator hearing that case made no finding as to whether the tenant owed the landlord, or whether the landlord owes the tenant, for utilities, and that is the focus of this proceeding.

By way of this application, the tenant seeks to recover 40% of the hydro bills, plus, 50% of water and garbage bills he has paid between April 2012 and May 2016 for a total claim of \$6,115.76. Below, I have summarized the parties' respective positions concerning the tenant's obligation to pay for utilities.

The tenant's wife and representative submitted that requiring the tenant to pay 100% of the utilities for the house, which includes the basement suite occupied by other tenants, is grossly unfair for the tenant and not an enforceable term.

As to the reason the tenant did not seek remedy for over four years, the tenant and his wife explained that before the tenant's wife moved into the rental unit in March 2016 the tenant did not realize he was paying all the utilities for the entire house. The tenant's wife did some investigating and determined there was only one hydro and water account for the property and that the basement suite tenants' rent was inclusive of utilities. I heard that the tenant is usually busy working and has an easy going personality whereas the tenant's wife admitted that she more suspicious by nature.

The tenant stated that he has no issue with paying for utilities related to his rental unit or the occupants in the rental unit but does not agree with paying for the utilities consumed by the basement suite tenants.

The tenant's wife submitted that the rental unit has been occupied by the tenant and his children at various times, before she moved into the rental unit in March 2016 with her two children. Currently, the rental unit is occupied by the tenant, the tenant's wife and the two children of the tenant's wife. The basement suite is occupied by two adults and two children. The tenant and his wife put forth that the rental unit is approximately 1,100 square feet and the basement suite is slightly less than one-half of that. The landlord; however, submitted the rental unit was closer to 1,400 square feet including a rec room and the basement suite is approximately 600 square feet.

The tenant's wife put forth that a reasonable approximation for splitting hydro would be 60% to reflect square footage and the number of occupants and 50% of water and garbage services; however, the tenant's representative was agreeable to leaving the allocation to my discretion.

The landlord submitted that when the tenancy formed the parties discussed that the tenant would be responsible to "cover the utilities" which meant paying all of the utilities, just as he had done at another residence the tenant had previously rented from the landlord. The landlord submitted that having the utilities in the tenant's name and the tenant's responsibility was preferable to the landlord as it was less work for the landlord

but that the tenant's burden was more than offset by a reduced rental rate of \$1,200.00 per month. In entering into the current tenancy agreement with the tenant the landlord also recognized that the tenant had been a good tenant. The landlord testified that the market value for the rental unit in 2012 was \$1,500.00 and at that rate the tenant would have had to pay for 2/3 of the utilities.

The landlord also pointed to the tenant waiting more than four years to bring this issue up and was of the view that the tenant's lack of action is indicative of the tenant being fully aware of their agreement. The landlord also testified that the tenant was fully aware that the basement suite rent was inclusive of utilities because the tenant had rented the basement suite prior to moving upstairs to the rental unit. The tenant agreed that he had resided in the basement suite although the number of months provided by the parties differed.

The tenant acknowledged that when the tenancy formed the landlord had said to the tenant that the tenant would "cover the utilities" as he had done at the previous house the tenant rented from the landlord. The tenant testified that he did pay for utilities at the previous house he rented but was of the belief the basement suite in that house had a separate hydro meter. The landlord countered that statement by testifying he had built the house previously rented by the tenant and that it only had one hydro meter.

The tenant acknowledged that the rental rate of \$1,200.00 per month that was set in 2012 was low but claims that it was set low because the house was in need of repairs and in poor condition. The landlord disputed that the rental unit was in poor condition and referred to renovations he had done after the last tenant vacated.

The landlord submitted that the current market rental rate for the rental unit was estimated to be \$1,900.00 per month by a rental manager. The tenant's wife questioned the estimated market rent and whether that rate applies to the whole house which is what the landlord is currently collecting between the two units. The tenant's wife pointed out that the rental manager provided an estimate of \$1,900.00 for "the home" and not specifically the rental unit. The agent for the property management company appearing at the hearing confirmed that the estimated rate of \$1,900.00 is for the rental unit and not the entire house.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

The burden of proof is based on the balance of probabilities. It is important to note that where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Upon consideration of everything before me, I provide the following findings and reasons.

The parties were in dispute as to whether they had an agreement for the tenant to pay all of the utilities for the entire property, including those consumed by the basement suite tenants. Alternatively, the tenant is of the position that if there was an agreement for the tenant to pay all of the utilities, the requirement is grossly unfair to the tenant.

It is undisputed that there is only one hydro and water meter at the property and only one garbage pick-up contract has been obtained for the entire property and that these utilities are consumed by both the tenant and the tenants in the basement suite (these services are herein referred to as "the common utilities"). It is also undisputed that for more than four years the tenant had been paying the bills for the common utilities.

Firstly, I proceed to determine whether the parties had an agreement for the tenant to pay all of the utilities at the property, including the utilities consumed by the basement suite tenants.

Typically a written tenancy agreement will clearly outline a tenant's obligation to pay utilities. The written tenancy agreement in this case indicates that utilities are not included in the monthly rent payment but there is no indication in the tenancy agreement that there is only one meter for hydro and water. There is no provision in the tenancy agreement that indicates the tenant is responsible for certain portion of the common utilities. Nor is there an express provision that reflects that the all of the utilities for the entire property are the responsibility of the tenant and this burden is offset by reduced rent. Therefore, I find the written tenancy agreement is sufficiently

vague and ambiguous in the circumstances with respect to utilities and subject to different interpretation.

Where a contract is clear and appears whole, the parol evidence rule of contract law provides that extrinsic evidence is not permitted. Extrinsic evidence includes discussions had prior to entering into the written contract, past agreements, and conduct of the parties. However, one of the exceptions to the parol evidence rule is where it is necessary to resolve an ambiguity. Having found the tenancy agreement that provides for the tenant's obligation to pay for all or part of the utilities is ambiguous in the circumstances I have considered parol evidence in resolving this dispute.

As to discussions the parties had before executing the written tenancy agreement, the parties provided consistent testimony that it was understood that the tenant would "cover the utilities", as he did under a previous tenancy he had with the landlord. However, tenant claims he was unaware that he was paying all of the utilities under his previous tenancy. I find this hard to believe considering hydro meters are usually very apparent on the exterior of a residential building and a single hydro meter should be readily apparent. Also, I find that sharing a garbage pick-up service would be readily apparent as well. I accept that water meters may be less obvious since they are often located under a cover in the ground.

In any event, I find it most compelling that for over four years the tenant had been paying all of the utilities at this property and I am satisfied that he knew or ought to have known he was doing so especially considering he had resided in the basement suite at this property and did not pay utilities in addition to rent and, as provided above, I also find it unlikely the tenant was unaware that there is only one hydro meter and one garbage service at the property.

In light of the above, I find I prefer the landlord's version of events that the tenant understood and agreed that he would pay for all of the utilities at the property when he entered into the tenancy agreement. That being said, having such an agreement brings me to the second issue to resolve which is whether such an agreement is unconscionable as submitted by the tenant's representative.

Section 6 of the Act provides that an unconscionable term in a tenancy agreement is not enforceable. Section 3 of the Residential Tenancy Regulations provides the definition of "unconscionable". It is defined as follows: "For the purposes of section 6 (3) (b) of

the Act [*unenforceable term*], a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party." [My emphasis underlined]

Residential Tenancy Branch Policy Guideline 1: *Landlord & Tenant – Responsibilities for Residential Premises*, provides policy statements with respect to shared utility services, as follows:

SHARED UTILITY SERVICE

1. A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable as defined in the Regulations.
2. If the tenancy agreement requires one of the tenants to have utilities (such as electricity, gas, water etc.) in his or her name, and if the other tenants under a different tenancy agreement do not pay their share, the tenant whose name is on the bill, or his or her agent, may claim against the landlord for the other tenants' share of the unpaid utility bills.

In the case before me, the tenants of the basement suite are not required to pay a share of the utilities to the tenant as their rent includes utilities and I find part 2. described above does not apply in this case. However, part 1. may be applicable.

Residential Tenancy Policy Guideline 8: *Unconscionable and Material Terms* also provides policy statements with respect to unconscionable terms. It provides:

UNCONSCIONABLE TERMS

Under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.

Terms that are unconscionable are not enforceable. Whether a term is unconscionable depends upon a variety of factors.

A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.

The burden of proving a term is unconscionable is upon the party alleging unconscionability.

[My emphasis underlined]

In keeping with policy guideline 8 the tenant bears the burden to prove the term requiring him to pay all of the utilities is unconscionable in the circumstances.

The tenant has estimated that he has overpaid utilities by \$6,115.76 between April 2012 and May 2016, which I calculate to be the equivalent of approximately \$122.32 per month [$\$6,115.76 / 50$ months].

Both parties recognized that the rent payable for the rental unit was set at a low rate in 2012. The landlord submitted that the rent was set approximately \$300.00 below market in 2012. The tenant did not provide an estimate of market value in 2012. In the absence of any evidence from the tenant, I accept the undisputed submission that market rate for a unit such as the rental unit would have been approximately \$1,500.00. Also, the landlord presented evidence that current market rental rate for the rental unit is \$1,900.00 per month which I find further supports the undisputed submission that the rent was set low in comparison to the market rent of \$1,500.00 in 2012. Accordingly, it would appear to me that the tenant was provided reduced rent of \$300.00 per month in exchange for his increased utility obligation which has amounted to approximately \$122.32 per month.

While the tenant submitted that the rent was set at a low rate in 2012 to reflect the poor condition of the rental unit I find the tenant did not present sufficient evidence to demonstrate that except for more current pictures of cracked or loose tile grout in the bathtub surround which the landlord has since addressed according to the tenant's wife. Therefore, I find the tenant did not satisfy me that the reduced rent he has benefited from is attributable to the rental unit being in poor condition.

Having found there is evidence to demonstrate the tenant has been provided a significantly reduced rent that has greatly exceeded his increased utility obligation, I find the terms of the tenancy agreement are not unconscionable.

In light of the above, I find the tenant did not meet his burden to demonstrate that the terms of the tenancy agreement is unconscionable or that he is entitled to recover utility

payments from the landlord. Therefore, the tenant's monetary claim against the landlord is dismissed.

As requested by the tenant's representative, and in keeping with the authority afforded me under section 62 of the Act, I order that the tenant continue to pay for all of the utilities at the property and in recognition of that, the rent remains at its current rate, subject only to the rent increase provisions provided under the Act. This order remains in effect until such time the tenancy ends or the parties mutually agree to renegotiate their terms of tenancy and record their new agreement by way of a new tenancy agreement.

Conclusion

The tenant's request for a Monetary Order is dismissed.

I have ordered that the tenant remains obligated to pay all of utilities for the property and the rent remains at its current rate, subject only to the rent increase provisions of the Act. This order remains in effect until such time the tenancy ends or the parties mutually agree to renegotiate their terms and enter into a new tenancy agreement.

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 02, 2016

Residential Tenancy Branch