Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Landlord's Application: OPR, OPC, MNR, FF
Tenant's Application: CNR, CNC, CNL, ERP, LRE, OLC, PSF, RP, RR

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant. The Landlord also filed an Application for Dispute Resolution and both applications were scheduled to be heard together.

The Tenant filed her application on November 21, 2016 for the following reasons: to cancel the notice to end tenancy for unpaid rent; for the Landlord to make emergency and non-emergency repairs to the rental suite; for the Landlord to make repairs to the rental suite; for the Landlord to comply with *Residential Tenancy Act* (the "Act"), regulation or tenancy agreement; for the Landlord to provide services or facilities required by law; to suspend or set conditions on the Landlord's right to enter the rental suite; to allow the Tenant to reduce rent for repairs, services or facilities agreed upon but not provided.

The Landlord filed her application on November 23, 2016 for an Order of Possession and a Monetary Order for unpaid rent. The Landlord amended her application on December 15, 2016 to end the tenancy for cause.

The Tenant amended her application on December 21, 2016 to include a request to cancel a notice to end tenancy for cause. The Tenant then amended her application on December 28, 2016 to cancel a notice to end tenancy for the Landlord's use of the rental suite.

The Tenant, the Landlord, and the Landlord's legal counsel appeared for the hearing. The Tenant and Landlord provided affirmed testimony and legal counsel made submissions and arguments for the Landlord. The parties confirmed service and receipt of each other's application.

Preliminary Issues

At the start of the hearing, after I had explained the hearing process to the parties, the Tenant requested an adjournment of the proceedings. The Tenant stated that because of the current situation of having to be forced to live outside of the rental suite due to remediation work the Landlord was undertaking inside the rental suite, the Tenant had not had sufficient time to gather evidence and wanted to rely on evidence she had served to the Landlord and the Residential Tenancy Branch two days prior to this hearing; that evidence was not before me at the time of the hearing or at the time of writing this Decision.

The Tenant explained that evidence consisted mainly of written submissions, photographs, and mold testing she had undertaken at the rental suite to show that this was causing her medical issues. I noted that the Tenant had provided two pages of a three page mold test completed for her dated November 22, 2016. The Tenant attached this with her December 28, 2016 amended application but the report does not detail any conclusions or findings.

The Tenant confirmed that the Landlord had not locked her out of the rental suite but the Tenant was limiting herself in entering with a mask on occasions when it was essential to do so. The Tenant testified that she had medical problems that had been caused by alleged mold from remediation work the restoration company was doing as a result of a leak in the suite. The Tenant stated she had not made a monetary claim for this issue but was intending to do so. The Tenant stated that the mold in the rental suite was making her sick and requested an adjournment on the grounds that she was ill and this caused the delay in her getting her evidence together in a timely fashion for service.

Legal counsel for the Landlord rejected the Tenant’s request for an adjournment submitting that the Tenant had no authority under the Act to withhold her rent from November 2016 onwards. Legal counsel submitted that the Tenant was in a dispute with the Landlord regarding the manner in which the Landlord was completing remediation work following the leak. Legal counsel submitted that the Tenant has been interfering and obstructing this work and therefore, the ending of the tenancy was an important issue that needed to be dealt with in a timely fashion that would be prejudicial to Landlord if it were to be delayed further.

Legal counsel argued that the Tenant had served the Landlord with 71 pages of evidence two days prior to this hearing which disadvantaged the Landlord because they did not have an opportunity to consider or rebut the Tenant’s evidence.

Legal counsel stated that the Landlord would not object to an adjournment of the hearing to be granted to hear any other issues which were not related to the notice to end tenancy for unpaid rent but insisted that there would be significant prejudice to the Landlord if a decision on the unpaid rent matter would be delayed. This was because the dispute was causing the Landlord significant distress and financial loss from having no rent for three months with the potential for further loss if there was a delay. Legal counsel also argued that a delay would put the Landlord's property at risk because the remediation work was being put on hold pending the outcome of this hearing due to the interference of the Tenant.

The Tenant stated that her documentary evidence was important in showing that the Landlord had not dealt with the mold problem and was providing a rental suite that was not in compliance with proper health and safety standards. The Tenant stated that she had a brain injury and ran out of ink for her printer and therefore argued that this was extenuating circumstances.

Rule 7.9 of the Dispute Resolution Rules of Procedure (the "Rules") states that without restricting the authority of the arbitrator to consider other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

Based on the foregoing, I carefully considered the submissions of both parties and I denied the Tenant's request for an adjournment of the hearing for the following reasons. The Tenant failed to provide sufficient supporting medical evidence to convince me that a medical condition prevented her from preparing and serving the Landlord and the Residential Tenancy Branch with a large amount of evidence within the time limits provided by the Rules or within a time period that would have allowed a fair opportunity for the Landlord to consider that evidence and respond to it. The Tenant did submit some evidence prior to this hearing but none of this evidence points to medical grounds to suggest that this affected the Tenant's ability to prepare and serve evidence pursuant to the Rules.

The Tenant stated that her access to the rental suite had prevented her from gathering her evidence in a timely fashion. In this respect, I find the Landlord did not prevent the Tenant from accessing the rental suite as the Tenant was not locked outside of it. Furthermore, I find the Tenant failed to satisfy me how her alleged restriction of access to the rental suite prevented her from submitting evidence. For example, the Tenant failed to convince me why getting a mold test for the rental suite or providing written submissions was hindered by the Tenant's lack of access to the rental suite. In this respect, I found the Tenant's submission not to be plausible and attributed this more to an effort to delay the proceedings.

The Tenant stated that she had a brain injury which prevented her from submitting her evidence on time but provided no supporting documentary evidence of this prior to this hearing. I find that as the Tenant would have been already aware of her brain injury and that she was residing outside of the rental suite at the time she was served the notice to end tenancy, then it would be reasonable to expect that the Tenant would have (a) provided medical evidence for this hearing and (b) gathered or requested the assistant of an agent/advocate to provide the necessary evidence to show the reasons why she was disputing the notice to end tenancy.

I balanced the prejudice to the Landlord that an adjournment of the proceedings would have caused and I accept that Landlord has been without rent for three months waiting for the outcome of this hearing. I also accept the Landlord is waiting to proceed with the remediation work that has been put on hold pending the outcome of this hearing and a delay may cause further deterioration of the rental suite.

I also note that when the Tenant made her amended Application on December 21, 2016 she also provided some documentary evidence which included: a copy of the tenancy agreement for this dispute; a black and white picture of what appears to be a petri dish; and a letter served to her by the Landlord regarding the end of tenancy date. The Tenant failed to provide me with sufficient reasons as to why she did not submit all of her evidence within the deadlines provided for by the Rules.

The Tenant confirmed that she had received the Landlord's Application, the Landlord's amended Application, and the Landlord's documentary evidence prior to the hearing within the deadlines provided for by the Rules. However, the Tenant then submitted that the Landlord's evidence should be dismissed because the Landlord had not labelled her evidence with page numbers. While it is good practice for a party to number their evidence package so that it can be easily followed during a hearing, this is not a mandatory requirement and is certainly not grounds alone to exclude evidence from

being considered. Again, I felt that this was another attempt by the Tenant to delay the proceedings further.

Based on the foregoing, I informed the parties that the hearing would proceed in the absence of the Tenant's documentary evidence but the Tenant would not be restricted in providing her documentary evidence into oral testimony; neither would the Tenant be prevented from referring to evidence provided by the Landlord to the Tenant for this hearing which included email correspondence sent by the Tenant to the Landlord.

Pursuant to Rule 2.3 of the Rules and based on the foregoing arguments, I decided that the only matters I will deal with in this Decision are the Tenant's request to cancel the notice to end tenancy for unpaid rent and the Landlord's request for an Order of Possession and a Monetary Order for unpaid rent. The remainder of the items claimed are dismissed as listed in the Conclusion section of this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to an Order of Possession and a Monetary Order for unpaid rent?

- Is the Tenant entitled to cancel the notice to end tenancy for unpaid rent?

Background and Evidence

The parties agreed that this tenancy for a basement suite started on August 1, 2016. The parties signed a tenancy agreement which was provided into evidence. The tenancy agreement shows that the term is for a fixed term due to expire on January 31, 2017.

The parties elected on the tenancy agreement that the tenancy may continue on a month to month basis after the fixed term ends and the parties handwrote that this is a "renewable lease". However, the second option of the tenancy ending and the requirement for the Tenant to vacate the rental suite was marked as "n/a" even though the boxes pertaining to this option had been initialed by both parties. The Landlord testified that the intention of the agreement was that after January 31, 2017 the tenancy was only going to be renewed by mutual agreement and that the Landlord did not want to renew it. The Tenant disputed the fact that the tenancy agreement allows for the tenancy to be ended at the end of January 2017.

The Landlord testified that on October 6, 2016, the Tenant reported that there was water leak in a pressure valve in the bedroom of the rental suite. The Landlord testified that she called a professional plumber to repair the leaking valve but this had resulted in excessive water damage which had to be remediated. The Landlord then hired a professional restoration company who attended the rental suite at the start of November 2016 to begin the remediation work. The Landlord testified that the Tenant started to claim that the remediation company had caused mold, already present in the rental suite, to become airborne and that the air inside the rental suite had become contaminated and was unfit for occupancy.

The Landlord testified that she had three mold tests conducted at the request of the Tenant in October 2016 to show the Tenant that there was not an excessive amount of mold in the rental suite. The Landlord explained that the Tenant was provided with the results of the mold testing by registered mail. However, the Tenant refused to accept the results stating that the testing undertaking as well as the methods being used by the restoration company to do the remediation work was not correct. Evidence of the mold testing and results were provided into evidence by the Landlord.

The Landlord testified that she received a number of emails from the restoration company who stated that they could no longer work at the rental suite because the Tenant was becoming more and more disruptive and interfering in their work. The Landlord provided email communication between her and the restoration company to support this testimony. The Landlord explained that this caused significant delay in the getting the remediation work done and as a result, the Landlord has had to employ another company to perform this essential work. The Landlord stated that the Tenant decided of her own volition to house herself in a tent outside the rental suite citing the fact that the rental suite is contaminated with mold which the Landlord disputes.

The Landlord testified that on November 1, 2016, the Tenant failed to pay any rent because of the alleged mold. As a result, the Landlord served the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the “10 Day Notice”) by registered mail on November 14, 2016. The 10 Day Notice dated November 9, 2016 shows a vacancy date of November 30, 2016 due to $1,100.00 due on November 1, 2016.

Legal counsel stated that the Tenant has also failed to pay rent for December 2016 and January 2017, which the Landlord also claims. Legal counsel stated that the Tenant does not have any authority under the Act to withhold rent as the Tenant has not presented any receipts for re-imbursement for emergency repairs she has completed and does not have blanket authority to withhold rent because she disagrees with the manner in which the restoration company is conducting the remediation work.

Legal counsel submitted that the Landlord has offered the Tenant the results of the mold testing so there is no requirement for her to be out of the rental suite. In addition the Landlord offered the Tenant hotel accommodation while the remediation work was taking place as well as a rent reduction but the Tenant decided to withhold rent instead in protest that the air in the rental suite is contaminated and is not fit to reside in.

The Tenant was asked to respond to the reasons why she had not paid rent. The Tenant spent a significant time of the 110 minute hearing testifying to evidence that was not relevant to the issues to be determined in this hearing. In this respect, the Tenant had to be cautioned several times to restrict her evidence to the matters to be decided on. The Tenant confirmed receipt of the 10 Day Notice on November 19, 2016 by registered mail. The Tenant stated that the plumbing company who completed the initial repair of the water leak used scrubbers that released toxic mold into the air of the rental suite. The Tenant stated that she disagreed with the methodology employed by the companies who did air testing for the Landlord citing that it was not done properly and that the testing looked for asbestos rather than for mold.

The Tenant denied that she was disruptive to the work that was being carried out by the remediation company and stated that the Landlord has failed to provide her with a safe rental suite. The Tenant questioned that if she cannot withhold rent for such a serious reason then what is the recourse for a tenant in this situation. The Tenant submitted that the Landlord had known about the mold problem before she took occupancy and that when the water leak occurred this is when the toxic mold was released. Therefore, the Landlord had failed to properly assess the extent of the mold contamination which had far exceeded the area from where the water leak started.

The Tenant repeatedly stated that the Landlord's failure to deal properly with the mold issue has caused her significant distress both physically to her medical conditions and emotionally. The Tenant confirmed that she had not provided the Landlord with any receipts for emergency repairs she had conducted to the rental suite but was not willing to pay any rent to the Landlord until the Landlord properly remediated the mold contamination in the rental suite. The Tenant confirmed that she was in the process of getting her further mold tests done to prove the suite was contaminated.

Analysis

Having examined the copy of the 10 Day Notice, I find the contents on the approved form complied with the requirements of Section 52 of the Act. I also accept the parties' evidence that the Landlord served the 10 Day Notice by registered mail pursuant to Section 88(c) of the Act which was received by the Tenant on November 19, 2016.

Accordingly, I find the Tenant made her application to dispute the 10 Day Notice within the five day time limit set by Section 46(4) (b) of the Act.

Section 26(1) of the Act requires a tenant to pay rent when it is due under a tenancy agreement **whether or not** a landlord complies with the Act unless the tenant has authority under the Act to withhold or deduct rent. This section of the Act specifically prohibits a tenant from withholding rent as a means to force a landlord to make repairs or when the landlord is alleged to be not in compliance with the Act. The Act provides alterative remedies where a landlord is not complying with the Act and if a tenant withholds rent contrary to the Act, they put their tenancy at risk of ending.

However, a tenant is able to withhold rent for very specific purposes stipulated by the Act. One the reasons where a tenant may withhold rent or make deductions from rent relates to emergency repairs. In this respect, the Act lays out very specific conditions as to when and how a tenant may make deductions in such a situation. Section 33 of the Act states:

33(1) "emergency repairs" means 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 purpose of repairing
(i) major leaks in pipes or the roof,
(ii) damaged or blocked water or sewer pipes or plumbing fixtures,
(iii) the primary heating system,
(iv) damaged or defective locks that give access to a rental suite,
(v) the electrical systems, or
(vi) in prescribed circumstances, a rental suite or residential property.

(2) The landlord must post and maintain in a conspicuous place on residential property, or give to a tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs.

(3) A tenant may have emergency repairs made only when all of the following conditions are met:
(a) emergency repairs are needed;
(b) 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;
(c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

(4) A landlord may take over completion of an emergency repair at any time.

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

(6) Subsection (5) does not apply to amounts claimed by a tenant for repairs about which the director, on application, finds that one or more of the following applies:
(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.

(7) 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.

In this case, I find the Tenant has failed to comply with the Act and did not have authority to withhold all rent for November 2016. The Tenant failed to provide sufficient evidence that she had presented the Landlord with any reimbursement costs she had incurred as a result of the Landlord's noncompliance with remedying the water leak and the resulting damage thereafter before the November 2016 rent was due.

Section 33 of the Act does not allow a tenant to withhold rent as a way to force a landlord into doing those repairs. In cases where a tenant does not have the means to complete emergency repairs after complying with Section 33(3) of the Act, a tenant's recourse under the Act is to apply for dispute resolution to prove that emergency repairs are required and request an order for the landlord to undertake them and obtain an Arbitrator's order to withhold rent until such time the repairs are completed. In this case, I find the Tenant has no evidence for paying for emergency repairs that would have given her authority to withhold all of November 2016 rent.

Based on the foregoing, I deny the Tenant's request to cancel the 10 Day Notice dated November 9, 2016. Accordingly, I grant the Landlord's request for an Order of Possession to end the tenancy. As the vacancy date of the 10 Day Notice has now

passed and the Tenant is in rental arrears, the Landlord is entitled to an Order of Possession which is effective two days after service on the Tenant. This order must be served on the Tenant and can be enforced in the Supreme Court of British Columbia as an order of that court.

As the tenancy has been ended through the 10 Day Notice, I find the notice to end tenancy for cause and the Landlord's use of the property is now a moot issue. This is also applicable to the remainder of the Tenant's application.

In relation to the Landlord's monetary claim, the Landlord filed for November 2016 rent only. However, Rule 4.2 of the Rules allows for an application to be amended if the amount of rent owing has increased since the time the application was made. Therefore, I amend the Landlord's application for the outstanding rental arrears and award the Landlord $3,300.00 in unpaid rent for the three months claimed.

As the Landlord has been successful in her application, the Landlord is also entitled to recover from the Tenant the $100.00 filing fee, pursuant to Section 72(1) of the Act. Therefore, the Landlord is issued with a Monetary Order for a total amount of $3,400.00. This order must be served on the Tenant and may then be filed in the Small Claims Division of the Provincial Court and enforced as an order of that court. Copies of the above orders are attached to the Landlord's copy of this Decision.

Conclusion

The Tenant breached the Act by not paying rent. The Landlord is granted a two day Order of Possession and a Monetary Order for unpaid rent and the filing fee of $3,400.00.

As the tenancy is to end, the Tenant's application for the following issues is dismissed **without** leave to re-apply because they are now moot: to cancel the notice to end tenancy for cause and Landlord's use of the property; for the Landlord to make emergency and regular repairs to the rental suite; for the Landlord to comply with *Residential Tenancy Act* (the "Act"), regulation or tenancy agreement; for the Landlord to provide services or facilities required by law; and, to suspend or set conditions on the Landlord's right to enter the rental suite. However, the Tenant is still at liberty to apply for a rent reduction and a monetary claim against the Landlord.

This Decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act

Dated: January 09, 2017

Residential Tenancy Branch