



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, MND, FF; CNC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- an order of possession for cause pursuant to section 55;
- a monetary order for damage to the rental unit pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

This hearing also addressed the tenant's cross application for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the "1 Month Notice") pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenant and landlord attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. Each party confirmed that they had received the other party's application.

Preliminary Issue – Timeliness of Tenant's Application

At the outset of the hearing, the landlord contended that the tenant's application should be dismissed because the tenant filed his application to cancel the 1 Month Notice late.

Section 47 of the *Act* provides that upon receipt of a 1 Month Notice the tenant may, within 10 days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch ("RTB"). In this case, the tenant confirmed personal receipt of the 1 Month Notice on December 6, 2016 and the record shows he filed his application to cancel the 1 Month Notice on December 16, 2016. Based on the above, and in accordance with section 47 of the *Act*, I find the tenant filed his application in time.

Preliminary Issue – Service of Landlord's Evidence

During the hearing, the landlord testified that he did not serve the tenant the 6 page evidence package he intends to rely upon.

A party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case. Since the landlord did not serve this evidence to the tenant, there would be a denial of the fundamental right to natural justice if I were to consider the landlord's evidence that was not provided to the tenant. It would prejudice the tenant to admit evidence that he has not had the opportunity to review. For these reasons, I have not relied on the landlord's 6 page evidence package to form any part of my decision.

Preliminary Issue – Tenant's Late Evidence

In addition to the evidence served with the application, the tenant testified that he slipped 2 pages of evidence under the landlord's door the evening prior to the hearing. The landlord confirmed receipt of this evidence but contended it was late and should not be considered.

Rule 3.14 of the RTB Rules of Procedure establishes that the respondent and the RTB must receive documentary evidence not less than 14 days before the hearing. If the evidence is received following this timeline, the evidence may or may not be considered depending on whether the applicant can prove this evidence was new and relevant evidence that was unavailable at the time this application was made. The evidence package was duly served just 1 day prior to the hearing and the tenant did not show this evidence was new and unavailable at the time the application was made. For these reasons, I have not relied on the tenant's 2 page evidence package to form any part of my decision.

Issue(s) to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an order of possession?

Is the landlord entitled to a monetary order for damage to the rental unit?

Is either party authorized to recover the filing fee from the other party?

Background and Evidence

The rental unit is the upstairs of a two-story house. The tenant resides upstairs while the landlord resides downstairs. As per the testimony of the parties, the tenancy began on August 1, 2014 on a month-to-month basis. Rent in the amount of \$1,689.00 is payable on the first of each month. The tenant remitted a security deposit in the amount of \$775.00 at the start of the tenancy. The tenant continues to reside in the rental unit.

The tenant confirmed receipt of the landlord's 1 Month Notice dated December 6, 2016. The grounds to end the tenancy cited in that 1 Month Notice were:

- the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord
- the tenant has engaged in illegal activity that has, or is likely to damage the landlord's property

Landlord's Claim

The landlord testified that the 1 Month Notice was issued due to noise and damage. Specifically the landlord testified that the tenant's wife sings loudly, and that the tenant has caused significant water damage on two occasions by overflowing the kitchen sink.

The landlord seeks a monetary order in the amount of \$3,500.00 for the water damage.

The landlord is also seeking to recover the \$100.00 filing fee for this application from the tenant.

Tenant's Claim

The tenant claims that the 1 Month Notice was served following a November 27, 2016 incident between the landlord and tenant. The tenant explained that on November 27, 2016 he had company over which included children. The landlord banged on the ceiling and door of the rental unit while the landlord's girlfriend yelled and cursed at the tenant and guests. Following the incident the tenant sent a letter regarding the incident to the landlord. In reply, the landlord issued the 1 Month Notice.

The tenant testified that he is conscience of the noise travel between the two levels and has made efforts to minimize noise.

In relation to the damage claimed by the landlord the tenant acknowledged overflowing the kitchen sink on one occasion in August of 2016 and was uncertain whether the

second occasion in November of 2016 was a result of an overflowed sink or defective dishwasher.

Analysis

1 Month Notice

The onus is on the landlord to prove the reasons listed on the 1 Month Notice took place by the tenant or person permitted on the property by the tenant.

The landlord has provided insufficient evidence to establish the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord. The landlord testified that the noise that prompted the 1 Month Notice was in relation to singing, yet failed to establish the frequency or severity of the singing to determine any level of significant inference. The landlord's application to end the tenancy on this ground is dismissed.

The landlord has failed to establish the tenant has engaged in illegal activity, a serious violation of federal, provincial or municipal law. Therefore I dismiss the landlord's application to end the tenancy on the ground the tenant has engaged in illegal activity that has, or is likely to damage the landlord's property.

Overall, I find the landlord has failed to satisfy his burden of proving the reasons behind the 1 Month Notice. Accordingly, the 1 Month Notice is set aside.

Monetary Claim

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party.

In this case, the onus is on the landlord to prove, on a balance of probabilities, the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the landlord in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

The landlord seeks damages in the amount of \$3,500.00 for water damage but has provided insufficient evidence to establish both incidents occurred as a result of tenant negligence or proof of the actual amount required to repair the water damage. For these reasons, I dismiss the landlord's application for a monetary order.

Filing Fee

As the tenant was successful in his application, I award him the \$100.00 filing fee paid. Because the landlord was not successful in his application I find the landlord is not entitled to the recovery of the \$100.00 filing fee.

Conclusion

The tenant's application to cancel the 1 Month Notice is upheld. The tenancy continues until it is ended in accordance with the *Act*.

The landlord's application for a monetary order for damage to the rental unit is dismissed without leave to reapply.

The tenant is entitled to deduct \$100.00 from future rent in satisfaction of the monetary award to recover the filing fee.

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: January 23, 2017

Residential Tenancy Branch