



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FF

Introduction

This hearing dealt with two applications under the *Residential Tenancy Act* (the “Act”). Both applications were based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the “10 Day Notice”). The tenant’s application is for an order cancelling 10 Day Notice. The landlord’s application is for an order of possession and a monetary order for unpaid rent and utilities.

Both the tenant and the landlord attended the hearing. Both gave affirmed testimony and were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions.

The landlord confirmed receipt of the tenant’s application, notice of hearing, and supporting materials. The tenant denied that she had received the landlord’s application, notice of hearing, and supporting evidence. The landlord testified that she had served the tenant with her application and evidence by registered mail. A copy of the registered mail address slip addressed to the tenant at the rental unit address and the Canada Post receipt, dated December 29, 2016, was provided by the landlord. Based on the landlord’s evidence, I find the tenant was sufficiently served with the landlord’s application and evidence in accordance with the Act.

At the hearing the tenant withdrew her application for more time to dispute the 10 Day Notice, as she had disputed it within the applicable timeline.

Issues

Is the tenant entitled to an order cancelling the 10 Day Notice?

Is the landlord entitled to an order of possession and a monetary order?

Background and Evidence

The 10 Day Notice is dated December 16, 2016. It claims outstanding rent of \$1,960.00 as of December 1, 2016 and outstanding utilities of \$727.96. The landlord testified the 10 Day Notice was posted on the tenant's door on December 17, 201 and provided a witnessed Proof of Service document confirming the same. The tenant confirmed receipt of the 10 Day Notice.

Both parties submitted copies of the tenancy agreement in evidence. The landlord's copy had handwritten additions on the last page. The tenancy began on July 15, 2016 with a rent of \$980.00 due on the first of each month. The tenancy agreement provides for a fee of \$25.00 on late payment of rent. A security deposit of \$490.00 was paid at the start of the tenancy.

The provision on utilities is different between the two agreements. In the tenant's copy of the agreement, the tenant (called "resident") commits to pay "all utilities and/or services based upon occupancy of the premises except ___" and the word "yes" has been written into the blank space provided. In the landlord's copy the word "yes" has been crossed out and the following has been inserted at the end of the agreement: "Utilities fees would be shared percentage based on numbers of persons living in the house. Residents have to pay own bills of utilities (reproduced as written)."

The tenant and the landlord agreed that the tenant had not paid rent for November, December, or January. The tenant testified that she had withheld rent because the landlord had not repaired certain things that she had promised to repair at the beginning of the tenancy.

The tenant stated that the rental unit does not have a functioning stove, and that the hotplate that the tenant is forced to use causes the fuse to blow. The tenant also stated that the upper back deck is falling apart, and impeding the tenant's entrance into her downstairs unit. The furnace is not heating the tenant's unit. In the tenant's submission, conditions in the rental unit are "appalling."

The landlord did not disagree with the tenant's description of the rental unit. She did say that she had delivered a stove to the tenant. However, the tenant testified that there is no stove plug in the rental unit, and the landlord was unable to confirm that there is. The landlord simply said that she had not promised the tenant that any repairs or changes would be made to the rental unit.

The landlord is reminded that the landlord is responsible under s. 31(1) of the Act for maintaining the residential property in a state that complies with the health, safety, and housing standards required by law and that is suitable for occupation by a tenant.

The landlord made the following claims for outstanding utilities, supported by invoices except where indicated, and accompanied by calculations of the amounts she says are attributable to the tenant based on the number of occupants in both the lower and upper units at the time:

BC Hydro July – Aug	\$181.62 (x 4/5 = \$135.38)
BC Hydro Sept – Nov	\$360.86 (x 2/3 = \$240.57)
BC Hydro Nov – Dec	Actual invoice not in evidence, and calculation based on number of tenants not clear
Water Aug – Oct	\$91.82 (x 2/3 = \$61.22)
Water Oct – Dec	\$57.39 (tenant's share \$38.26)
Wifi Sept	\$34.27 (tenant's share \$11.20)

The landlord also submitted the written demand she made for the rent and utilities to the tenants, dated December 16, 2016.

The tenant testified that utilities were paid until October. However, she did not provide any evidence of this.

The landlord also submitted a copy of a receipt for \$800.00 that she says she gave to the tenants for the purchase of a new washer and dryer, and that the tenants “cheated” her by only purchasing one second hand washer. However, this claim was not in her application and, even if it had been, it is not clear it falls under the Act.

Analysis

Section 46 of the Act provides that a landlord may end a tenancy if rent is unpaid on any day after it is due by giving notice to end the tenancy effective on a date no earlier than 10 days after the tenant receives the notice. Under subsection (4), the tenant has 5 days after receipt of the notice to pay the overdue rent or dispute the notice by making an application for dispute resolution, failing which the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice.

As the 10 Day Notice was served on December 17, 2016, and the tenant applied on December 21, 2016 to dispute it, the tenant is within the 5 day timeline permitted by s. 46. However, the tenant agrees that she has withheld the whole of the rent owing October, November, and December owing to the conditions of the rental unit. Although the conditions may well have been substandard, the tenant did not have the authority under the Act to deduct any portion of rent under s. 26 of the Act.

Section 26 of the Act provides as follows:

26(1) 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 a right under this Act to deduct all or a portion of the rent.

Rent may be withheld only in very limited circumstances. A tenant may withhold a certain amount if, for instance, all of the criteria set out in s. 33 of the Act have been met with respect to emergency repairs. At no time does the tenant have the right to simply withhold rent because they feel they are entitled to do so.

I find that the landlord is entitled to a two (2) day order of possession, pursuant to section 55 of the Act. I find that the landlord's 10 Day Notice complies with section 52 of the Act.

I find the tenant has breached section 26 of the Act by failing to pay rent when due under the tenancy agreement and this has caused losses to the landlord. Specifically, the landlord has suffered a monthly loss of \$980.00 for November, 2016 – January, 2017, inclusive, for a total of **\$2,940.00** in unpaid rent. The landlord did not indicate on her application that she also sought late fees and I decline to award these.

I accept that the tenant was responsible for a percentage of the utilities under the landlord's version of the tenancy agreement, and, as the tenant has not submitted any evidence to the contrary, find that the landlord has established a monetary claim of **\$ 486.63** in outstanding utilities.

As the landlord's application is successful, I grant the landlord the cost of the filing fee in the amount of **\$100.00** pursuant to s. 72(1) of the Act.

I order that the landlord retain the security deposit of **\$490.00** partial full satisfaction of the claim and I grant the landlord an order under section 67 of the Act for the balance due of **\$3,036.63**.

This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court. The tenant is cautioned that costs of such enforcement are recoverable from the tenant.

Conclusion

The tenant's application is dismissed without leave to reapply.

The landlord's application is allowed.

The landlord is granted an order of possession effective two (2) days from the date of service.

The landlord is granted a monetary order and may keep the security deposit in partial satisfaction of the claim and the landlord is granted a formal order for the balance due.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the Act and is final and binding unless otherwise indicated in the Act.

January 25, 2017

Residential Tenancy Branch