Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, FF

Introduction

This hearing dealt with applications by the tenants and the landlords. The tenants' application, dated January 12, 2017, is to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated January 9, 2017 with an effective date of January 19, 2017 (the "10 Day Notice"). Although the tenants had also originally applied for an order requiring the landlord to make emergency repairs, they advised at the outset that the repairs had been made and they now seek compensation for time without heat. The tenants acknowledged they had not indicated this on their application. Accordingly, the question of compensation for having been without heat was not addressed. However, the tenants are at liberty to bring a separate application with respect to those losses.

The landlords' application was for an order of possession based on the 10 Day Notice. The landlords also sought an order of possession based on a 1 Month Notice to End Tenancy for End of Employment dated December 31, 2016, with an effective date of February 1, 2017 (the "1 Month Notice").

Both of the tenants attended the hearing with an advocate. One of the landlords attended with counsel. The hearing process was explained and the participants were asked at both the beginning and the end if they had any questions. The participants were given a full opportunity to be heard, to present their affirmed testimony and documentary evidence, to make submissions, and to respond to the submissions of the other party.

Service of the parties' respective applications, notices of hearings, and associated evidence was not at issue. The parties also agreed that the landlord personally served the tenant with the 10 Day Notice on January 9, 2017.

However, the tenants asserted that they had not received the 1 Month Notice. The landlord provided a Proof of Service document signed by a third party indicating that the 1 Month Notice had been left on the door of the rental unit on December 31, 2017. Section 90(c) of the Act provides that a document that has been posted on the door is deemed to have been served three days after posting. However, as per the Residential Tenancy Branch ("RTB") Policy Guideline 12, this is rebuttable. The tenants testified that they would have disputed the 1 Month Notice on January 12, 2017, when they applied to dispute the 10 Day Notice.

Based on the tenants' testimony I accept that the tenants did not receive the 1 Month Notice until they received the landlords' application package. Accordingly, I dismiss the landlords' application for an order of possession based on the 1 Month Notice with leave to reapply. Based on my decision below that application is not likely to be necessary in any event.

Issues to be Decided

Are the tenants entitled to an order cancelling the 10 Day notice?

If not, are the landlords entitled to an order of possession based on the 10 Day Notice?

Are the landlords entitled to return of the application filing fee?

Background and Evidence

I have reviewed and considered all evidence and testimony before me that met the requirements of the Rules of Procedure, but refer to only the relevant facts and issues in this decision. In particular, I have not considered the materials provided by the landlord with respect to the largely historical involvement of one of the tenants with the justice system or the retainer letter between the landlords and their counsel.

A copy of the tenancy agreement was submitted in evidence. The tenancy agreement includes the RTB standard form and reflects a one year fixed term tenancy with a start date of October 1, 2016 and rent of $1,000.00 due on the first of each month. It is signed by both tenants on October 1, 2016. The agreement indicates that it includes an addendum of 6 pages. The first page of the addendum indicates that rent is $1,500.00 monthly, and states: "Conditionally, the amounts due from Residents to [landlord], while employed by [employer] shall be reduced to $1000.00 per month . . . At termination of employment, the resident(s) must pay the regular monthly rental fee

whereby the rent shall increase to $1,500.00 per month." This provision appears to be initialed by one of the tenants as do other parts of the addendum.

The tenants admitted having signed this agreement, including the addendum, at the same time. However, the female tenant submitted that they should not be held to what they characterize as an illegal rent increase because they were asked to sign it after they had moved in and were under duress.

Also in evidence is an email dated January 3, 2017 from one of the tenants to the landlord asserting, among other things, that the addendum to the tenancy agreement is a separate contract and is not legally binding because it represents an illegal rent increase. One of the tenants submitted a written statement dated January 11, 2017 that includes this: "Myself and [cotenant] did sign a 1 year lease . . . The monthly rent is set at 1000$ per month. The tenants pay utilities bills. There was also another paper signed indicating our property boundary. No guests longer than x amount of days and other stipulations I cannot recall" (reproduced as written).

The parties agree that the male tenant had been employed by the landlords as a caretaker on the property and that he resigned in late December, 2016.

The 10 Day Notice claims arrears of $1,050.00 and utilities of $87.57 as of January 9, 2017. The tenants did not appear to understand the specifics of the amount claimed as arrears. The landlord testified that the $1,050.00 owing comprises three different amounts as follows:

One, the landlord says there is $250.00 owing in prorated September, 2016 rent. The landlord testified that tenants moved in before October 1, on or about September 26, 2016, and she claims prorated rent for those days in September. The landlord submitted copies of some text correspondence between herself and the tenants dated September 21, 2016, in which the tenants advise they have to move out of their prior residence on Monday (September 26), the landlord responds that she requires rental insurance before the move in, and the tenants then advise they already have insurance.

Also in evidence is a demand letter dated October 3, 2016 from the landlord with respect to the September amount that closes with the following: "Lastly, I consider you move in as an act of unlawful break and entry, as I had not provided you the keys, nor amended the agreement to move up the date, nor have you provided evidence of the required insurance. All while I was out of the country" (reproduced as written). The tenants say that they did not receive this letter until they received the landlords' evidence for this hearing.

Two, the landlord says that the tenants paid only $700.00 of the $1000.00 owing for November. A copy of a demand letter for the outstanding $300.00 dated November 4, 2016 was also in evidence. Again, the tenants say they did not receive this letter until the landlord brought her application.

Three, the landlord claims that $500.00 was outstanding for January's rent because as of the beginning of that month the rent increased to $1,500.00 as the tenant was no longer employed.

The landlord testified that she made written demand for unpaid utilities on November 1, 2016. A copy of her demand letter was in evidence. The landlord acknowledged that this amount had been paid by the tenants within 5 days of receipt of the 10 Day Notice.

The tenants say that until receiving the landlords' evidence package, they did not understand that the landlord considered anything was outstanding for September. They say there was no communication from the landlord indicating that anything was owing for September or disputing the early move in date after they had assured her they had insurance.

The male tenant also said that there had been an accident involving his truck and that he and the landlords had agreed that November's rent would be reduced by $300.00 as compensation to him and to avoid the landlords' having to claim against their insurance with respect to the accident. As set out above, the tenants stated that he did not receive the landlord's November 4, 2016 letter requiring payment of this $300.00 in November. At the hearing I questioned the landlord about the circumstances of her delivery of her November 4 letter to the tenant. She appeared uncomfortable and spoke haltingly. She was unable to recall any details of the tenant's response to receipt of the letter.

Both landlord and tenants agreed that rent has been paid for February in the amount of $1,000.00, although the landlord has not accepted the tenants' transfer. The landlord was advised that a landlord may accept monies for "use and occupancy only" where the tenancy is in dispute and the rental unit is still occupied.

Analysis

Section 46 of the Act allows a landlord to end a tenancy if rent is unpaid on any day after the day it is due. The landlord alleges three different outstanding amounts. I

accept only one of the landlord's claims. Nevertheless, this is sufficient for the landlord to succeed.

I do not accept that there was $250.00 owing for September or $300.00 for November. The landlord's text with respect to the early move-in does not state that the tenants may not move in early. Nor does it say that if they do they will be charged prorated rent. There is no evidence that the landlord advised the tenants in advance that if they were going to move in early they would owe additional rent. And I do not accept that the landlord delivered the October 3 letter to the tenants in October. Correspondence dated January 3, 2017 from the tenants to the landlords does not address claims by the landlords for September (or November) rent. If the landlord had actually given the tenants her October and November demand letters, the tenants would, more likely than not, have responded to the claims made in those letters. Nor does it seem likely that the landlord advised the tenants at the beginning of the tenancy, on October 3, 2016, that she considered their having moved in a number of days early to be an unlawful break and entry. Certainly this accusation does not appear to have disrupted the relationship early on which, as the parties agreed, required considerable contact. Based on these considerations, I find that the landlord waived her right to insist on rent for the last week of September and that the agreement described by the tenants with respect to the discount for November rent was indeed made.

Although I do not accept that any monies were outstanding for September or November, I accept that the addendum to the tenancy agreement required the tenants to pay an additional $500.00 monthly once the employment relationship ended. The standard form RTB agreement indicates that it includes an addendum. The addendum sets out clearly that rent will increase upon the termination of the employment relationship. Although the agreement with addendum could have been more clearly drafted, I find that it was sufficiently clear for the tenants to have understood and agreed to the rent increase.

Section 43 of the Act allows a landlord to impose a rent increase if that increase is agreed to by the tenant in writing:

> **43** (1) A landlord may impose a rent increase only up to the amount
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> (a) calculated in accordance with the regulations,
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> (b) ordered by the director on an application under subsection (3), or
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> (c) agreed to by the tenant in writing.

Although the parties may not contract out of the Act, and could not, for instance, agree to an otherwise unauthorized rent increase, this situation is different as the rent is connected to and subsidized as a result of the employment relationship. I find that monthly rent increased after the tenant resigned, and that the tenants failed to pay $500.00 of the $1,500.00 owing as of January 1, 2017.

The tenants allege that they were under duress when they signed the agreement on October 1, 2016, having moved in the week before. However, there is insufficient evidence to suggest that they were coerced or compelled to sign it. Although they may have risked having to move out immediately after having moved in if they had refused to sign it, there is no evidence that the landlords required the tenants to sign or that the tenants had no other options than to sign. There is no evidence that the tenants attempted to renegotiate the agreement upon being aware of the terms of the addendum. More likely the tenants assumed the employment relationship would continue and that the conditional rent increase would not take effect.

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, none of which apply in this case. As set out above, I do not consider the change to monthly rent to be an illegal rent increase.

Section 55 of the Act requires that an order of possession be granted where a tenant's application to dispute a notice to end tenancy is dismissed or a landlord's application is allowed. Based on the above, I conclude that the tenants owed an additional $500.00 for January which was not paid. Accordingly, I uphold the 10 Day Notice. The tenancy ended on January 19, 2017, the effective date of the 10 Day Notice. The tenants were required to vacate at that time. As the tenants have paid $1,000.00 for February, which is the amount they understood they owed, I grant the landlords an order of possession effective at 1:00 pm on February 28, 2017.

This is an unfortunate situation. I accept that the tenants have always paid what they have understood to be owing, and they appear to have misunderstood the legitimacy of

the rent increase. Although this was not canvassed at the hearing, I am concerned based on the documentary evidence that the landlord may not have provided the tenants with a copy of the tenancy agreement. This would be in breach of s. 13 of the Act. It would also have added to the tenants' difficulty understanding where they stood.

The landlords are advised that they are not required to insist on their strict legal rights and may in recognition of the complexity of the situation allow the tenants more time to locate new housing.

Conclusion

The tenants' application to cancel the 10 Day Notice is denied.

The landlord's application for an order of possession based on the 10 Day Notice is allowed.

The landlord is granted an order of possession effective February 28, 2017.

In light of the complexity of this situation and my findings as to whether the landlord delivered the October and November letters, I decline to award the landlord the application filing fee.

The tenants are at liberty to make a separate application for compensation for loss of heat.

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.* Pursuant to s. 77 of the *Act,* a decision or an order is final and binding, except as otherwise provided in the *Act.*

Dated: February 17, 2017

Residential Tenancy Branch