



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, MNDC, RP, RR

Introduction

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

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "10 Day Notice") pursuant to section 46;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order to the landlord to make repairs to the rental unit pursuant to section 33; and
- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. SC, the agent and interpreter spoke for the landlord (the "landlord").

As both parties were in attendance I attempted to confirm service of documents. The landlord testified that the landlord's 10 Day Notice was served personally on the tenant on February 5, 2017. The tenant initially disputed that he was provided the 10 Day Notice personally and said that the papers were found strewn outside of the rental unit. The tenant did eventually confirm that he received the 10 Day Notice on that date. I find that the landlord's 10 Day Notice was served on the tenant in accordance with section 88 of the *Act* on February 5, 2017.

The tenant testified that he served his application for dispute resolution dated February 6, 2017 on the landlord by registered mail on February 17, 2017. The landlord confirmed receipt of the tenant's application for dispute resolution. I find that the tenant duly served the landlord in accordance with section 89 of the *Act* on February 22, 2017, five days after mailing.

The tenant testified that he did not receive the landlord's evidentiary materials within the prescribed timeframe and objected to their inclusion. Rule 3.15 of the Residential Tenancy Branch's (the RTB's) Rules of Procedure requires that respondents provide their written evidence at least 7 days prior to a hearing. The tenant claimed that he received the written evidence on February 28, 2017 which was not within the time limits prescribed by the Rules of Procedure. The landlord was unable to provide an explanation as to why the tenant was not provided the written evidence earlier. The landlord testified that the majority of the submitted written evidence is documents that have previously been provided to the tenant during the tenancy such as utility bills and receipts for rent and utility payments. While I do not find the inclusion of late evidence to be prejudicial to the tenant in this case, I advised the parties that I would only consider those pieces of evidence included in the landlord's package that the tenant confirmed having received and reviewed on prior occasions pursuant to Rule 3.17 of the Rules of Procedure.

At the outset of the hearing, the tenant made an application to amend the monetary amount of the award sought. The tenant testified that the monetary amount being sought is \$7,875.00. Pursuant to section 64(3) of the Act and Rule 4.2 of the Rules of Procedure I amend the tenant's Application to decrease the monetary claim from \$24,000.00 to \$7,875.00.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to a monetary order for damage or loss as claimed?

Should the landlord be ordered to make repairs to the rental unit?

Is the tenant entitled to reduce the rent for repairs, services or facilities agreed upon but not provided by the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

The parties agreed on the following facts. This month-to-month tenancy began in February, 2008. The rental unit is the main floor of a detached house. The current rent

is \$1,480.00 payable on the first of the month. In addition the tenant is responsible to pay for half of the utilities for the rental building. A security deposit of \$700.00 was paid by the tenant at the start of the tenancy and is still held by the landlord.

The tenant testified that after signing the written tenancy agreement in February, 2008 a second tenancy agreement was drafted and signed on June 30, 2008. The tenant testified that the second agreement amended some details including the names of the parties, and affirmed the tenant's right to smoke in the rental unit and host small gatherings. The tenant testified that the second tenancy agreement did not change the amount of monthly rent or the tenant's obligation to pay half the utilities. The tenant also said that in addition to a security deposit he paid the landlord a utility deposit in the amount of \$200.00. The tenant did not provide a copy of the second tenancy agreement into written evidence. The landlord had no evidence or knowledge of a second tenancy agreement of June, 2008 or a utility deposit and disputed the existence of these documents.

The tenant confirmed that he is responsible for paying half of the utilities of the building to the landlord. He said that he is provided copies of the utility bills by the landlord and informed of how much he is required to pay each month. The tenant explained that because the landlord does not provide him the utility bill with sufficient notice, he is often unable to pay the utilities by the first of the month as required.

The tenant confirmed that he owed \$243.10 for utilities when the 10 Day Notice was issued. He testified that the 10 Day Notice erroneously indicated that the arrears were for outstanding rent. He said that he made a payment of \$100.00 on February 13, 2017 and a second payment sometime between that date and March 1, 2017 of \$143.10. The tenant made both payments in cash and was informed by the landlord who accepted the payments that they would still be seeking to end the tenancy.

The tenant provided several arguments regarding his obligation to pay for utilities. He said that the landlord does not provide the utility bill in a timely manner and therefore he cannot be expected to pay his portion of the monthly bills by the first of each month. He said that one of the electric companies is offering a payment plan whereby the bills for winter months can be deferred over a period of time and therefore he should not be expected to pay half of the full bill to the landlord on a monthly basis. He testified that he has informed the landlord of home efficiency plans to lower the monthly utility bills but the landlord has failed to implement energy efficient plans. He said that because the thermostat in the rental unit is broken and he has no control of the heat he should not be expected to pay the heating costs. Finally, he argued that because he has been

paying a portion of the utility bills he has an equitable interest in the utility account and he should be able to make decisions for the rental building.

The landlord confirmed that the tenant made payment of the arrears on those dates. He testified that the tenant was informed the payments were accepted for use and occupancy only and did not reinstate the tenancy. The landlord does not keep a ledger of payments but has consistently provided receipts to the tenant as the tenant pays his rent and utilities in cash. Several of the receipts were submitted into written evidence. The receipts show the amount paid by the tenant as well as indicating the amount still owing. The receipts function as both confirmation of payment received and a written demand for the unpaid portions of the rent and utilities. The landlord testified that the tenant has often been late in paying the full amount of rent and utilities. He said the arrears of \$243.10 arose from earlier shortfalls in payment.

The landlord disagreed with the tenant's arguments that the tenant is entitled to an equitable interest in the utility accounts or the property. He disputed the tenant's evidence that the thermostat in the rental unit is broken. He said that the payment plan offered by the electric company has nothing to do with the tenant's obligation under the tenancy agreement to pay half of the utility bills. The landlord disputed the tenant's evidence that copies of utility bills are not provided in a timely manner stating that they are given to the tenant when available.

The tenant stated that the rental agreement provides that cable television and a home alarm system are included but those services have been terminated by the landlord during the tenancy. The tenant testified that he has been paying for his cable since around 2013 and seeks a retroactive reduction of the rent for the costs incurred.

The tenant testified that the landlord has never cleaned the fireplace and chimney of the rental building during the tenancy. The tenant said that he used the fireplace regularly in the past but has stopped using it as he is concerned that it has not been properly maintained. He has not noticed any deficiencies but believes that it must be professionally serviced so that it does not present a hazard.

Analysis-End of Tenancy

In accordance with subsection 46(4) of the Act, the tenant must either pay the overdue rent and utilities or file an application for dispute resolution within five days of receiving the 10 Day Notice. Where a tenant applies to dispute a 10 Day Notice, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the 10 Day

Notice is based. In the present case, the landlord testified that there was an arrear of \$243.10 for utilities at the time the 10 Day Notice was issued.

The parties agreed that the arrear was for utilities. As the tenant pays both rent and utilities with a lump sum of cash I find that the parties are at liberty to determine what the payment is being made towards. The parties agreed that there was an arrear of \$243.10 after the payment on February 4, 2017 for \$1,671.00. It is unclear whether this arrear arose from the utility bills due on February 1, 2017 or an earlier underpayment. The receipts that the landlord has provided into evidence show that the tenant frequently underpays the monthly rent and utilities. The landlord testified that the arrear originated from past underpayments but was unable to specify when the arrear began. The tenant testified that there was no arrear prior to the payment of February 4, 2017 and that he was first informed of the \$243.10 arrear for utilities on that date. Under the circumstances, I find that the landlord has not shown on a balance of probabilities that the arrear of \$243.10 arose from past underpayments. I find the tenant's understanding that his account was up to date until the February 4, 2017 payment to be more credible. Accordingly, I find that the tenant was first provided with written notice of the arrear for unpaid utilities of \$243.10 on February 4, 2017.

I do not find the tenant's various submissions as to why he should not be required to pay the utilities as required in the tenancy agreement to be persuasive. The existence of a payment plan with one of the utility companies is immaterial to the tenant's obligation to pay his share of the monthly utility. The utility accounts are under the landlord's name and the landlord may choose the service and payment plan that they deem appropriate. The tenant has no equitable interest in either the rental property or the utility account simply because his monthly payments to the landlord contribute to the landlord's utility and property payments.

The tenant made two payments against the arrear, the first on February 13, 2017 and a second payment sometime before March 1, 2017. I find that the tenant was aware of his obligation to pay the utilities pursuant to the tenancy agreement. I find that pursuant to section 46(6)(b) of the Act, the tenant had 30 days from being given a written demand for payment to pay the utility charges in full. I find that the tenant paid the utilities within the 30 days provided by the Act.

Therefore, I find that as the tenant paid the utilities within the 30 days provided by the Act, the landlord's 10 Day Notice has no effect and I order that it is cancelled. This tenancy will continue until ended in accordance with the Act.

Analysis-Monetary Claim for Damages and Loss of Value of Tenancy

Section 67 of the *Act* allows me to issue a monetary award for damage or loss. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. This provision is also read in conjunction with paragraph 65 (1)(f) of the *Act*, which allows me to reduce the past or future rent by an amount equivalent to the reduction in value of a tenancy agreement.

I find that the tenant has failed to show that on a balance of probabilities he has suffered damage or loss as a result of the landlord's actions. I find that there is little evidence of the terms of the tenancy agreement. The tenant testified that there was a written tenancy agreement signed in June, 2008; however, the tenant failed to provide a copy into written evidence. There are no written records of correspondence from that time where the tenant and landlord discussed the cable service. The tenant testified that the landlord initially provided cable service at the start of the tenancy but it was removed in or around 2012. The tenant subsequently added cable service to his own account and paid for it for close to four years until the date of the hearing. The tenant did not provide any evidence that this arrangement was not accepted by the parties. If the cable television was a service that the tenant expected to be provided under the tenancy agreement it would be reasonable to expect that it would have been discussed at the time and that some written record of the discussion would exist. The tenant failed to provide any written evidence that the removal of cable service was in contravention of the tenancy agreement. While I accept the tenant's evidence that he started paying for cable television services in 2013, based on the evidence I am unable to find that this was a service the landlord was obliged to provide.

Similarly, I find little evidence that the landlord was obliged to provide an electronic alarm system for the rental unit or that the system was discontinued during the tenancy. The tenant had the opportunity to provide written evidence in support of his claim and failed to do so. He could have provided the tenancy agreement of June, 2008 or February, 2008 to show the terms of the tenancy but failed to do so. He could have provided written evidence of communication with the landlord but failed to do so. Based on the evidence I am unable to find that the tenant suffered any damage or loss as a result of the landlord's contravention of the *Act*, or tenancy agreement or that the landlord contravened any part of the *Act* or tenancy agreement. Accordingly, I dismiss the tenant's claim for a monetary award.

Analysis- Landlord's Duty to Maintain

I find that the tenant has failed to show on a balance that the landlord has failed to maintain the rental property in accordance with the *Act*. The tenant provided no written evidence regarding the state of the fireplace in the rental unit. The tenant gave testimony about a general need to clean the fireplace and chimney but provided no specific information about the current condition of the fireplace and chimney. The tenant testified that he used the fireplace during the initial years of the tenancy and chose not to use it later even though there were no indications that this fireplace posed a risk. I find that the tenant's complaints about the rental unit to be simply subjective complaints with no evidentiary basis. I find insufficient evidence that the landlord has not failed to properly maintain the rental property in accordance with the *Act* and I dismiss the tenant's application for a repair order.

Conclusion

The tenant's application to cancel the landlord's 10 Day Notice is allowed. The 10 Day Notice is of no continuing force or effect. This tenancy will continue until ended according to the *Act*.

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

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: March 21, 2017

Residential Tenancy Branch