



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, MNR, MDSD & FF

Introduction

The Application for Dispute Resolution filed by the Tenant makes the following claims:

- a. An order to cancel the 10 day Notice to End Tenancy dated May 1, 2017
- b. An order disputing a rent increase that does not comply with an increase permitted by the Regulations
- c. An order that the Landlord comply with the Act, regulation and/or the tenancy agreement.
- d. An order that the tenant recover the cost of the filing fee

The Application for Dispute Resolution filed by the landlord makes the following claims:

- a. An Order for Possession for non-payment of rent
- b. A monetary order in the sum of \$797.25 for unpaid rent and/or utilities
- c. An order to retain the security deposit
- d. An order to recover the cost of the filing fee

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The parties acknowledged they had received the documents of the other party.

I find that the 10 day Notice to End Tenancy on or about May 1, 2017. Further I find that the Application for Dispute Resolution/Notice of Hearing filed by each party was sufficient served on the other. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the tenant is entitled to an order to cancel the 10 day Notice to End Tenancy dated May 1, 2017
- b. Whether the tenant is entitled to an order disputing a rent increase that does not comply with an increase permitted by the Regulations
- c. Whether the tenant is entitled to an order that the Landlord comply with the Act, regulation and/or the tenancy agreement.
- d. Whether the tenant is entitled to an order that the tenant recover the cost of the filing fee
- e. Whether the tenant is entitled to recover the cost of the filing fee?

- f. Whether the landlord is entitled to an Order for Possession?
- g. Whether the landlord is entitled to A Monetary Order and if so how much?
- h. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
- i. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence

The rental property is a four plex. The rental units are not individually metered. However, two units are on one meter and the other two units are on a second meter. .

The tenant and previous owner entered into a written tenancy agreement that provided that the tenancy would start on April 1, 2015. The rent was \$1175. The agreement provided that water, electricity and heat was included with the rent.

The present landlord purchased the rental property in late 2015 or early 2016. At the end of February the landlord served a 2 month Notice to End Tenancy on the Tenant. On March 7, 2016 the parties entered into a Mutual Agreement to End the Tenancy on August 2, 2016.

The parties subsequently entered into a written tenancy agreement on July 6, 2016 that provided the tenancy would start on August 1, 2016, end on July 31, 2017 and become month to month after that. The tenancy agreement provided the rent for August was \$1300. The landlord completed renovations during that month. It further provided the rent commencing September 1, 2016 to July 31, 2017 was \$1425. The security deposit of \$525 paid February 16, 2016 was transferred to this tenancy.

The written tenancy agreement signed July 6, 2017 in the form provided by the Residential Tenancy Branch stated that water, heat and electricity was included in the rent. It also included an Addendum that provided that the estimate for Gas, Electricity and water was \$125 per month. "If the utility bills start going over \$125/mo average per month, whether from increased usage or utility rate increase, the utility rent amount will need to go up accordingly. This will be communicated every 6-12 months with each side of the duplex."

The written tenancy agreement included a clause that stated that if there is an Addendum the Addendum forms part of the tenancy agreement.

The landlord testified as follows:

- The parties orally agreed to enter into the tenancy agreement around May 12, 2016. The tenant asked the landlord provided the tenancy agreement so that she could show it to her lawyer. The landlord sent the tenancy agreement and Addendum to the tenant around the middle of May. It was initially sent to the wrong e-mail address. However, the address was corrected and the Tenant received it on May 17, 2016.
- The landlord testified she met with the Tenant on July 5, 2017 and went over the tenancy agreement and Addendum term by term. The landlord circled the \$125 charge for utilities charge during this process. At tenant's request she kept the agreement, signed the agreement the next day and returned it to the landlord. The tenant initialed the bottom of each page to the Addendum.
- The landlord testified that she calculated the \$125 per month based on information given to her from the previous owner. However, as it turns out this is not sufficient to cover the utility cost.

- She gave the tenant a letter dated February 22, 2017 setting out an accounting of the increase cost of utilities.
- On March 27, 2017 the landlord served a written demand on the Tenant attaching the usage for both sides. The demand states that the utilities for the tenant's side has cost an extra \$987 for the period February 16, 2016 to March 31, 2017. While she was not demanding payment of this amount she was demanding payment of an additional \$90 a month starting April 1, 2017.
- In calculating the additional amount owed by the Tenant for utilities she determined the tenant was using a greater amount of utilities than the adjoining unit and that she would have to pay more of the utility amount. The basis of this calculation is set out in the landlord's e-mail dated February 22, 2017.
- On May 1, 2017 the landlord served a 10 day Notice to End Tenancy on the Tenant stating rent of \$1425 was owed and \$90 was owed for utilities following a written demand on March 27, 2017.
- The landlord served a Notice of Rent Increase dated March 27, 2017 that stated as follows:
 - Your current rent is \$1300 (+125 utilities)
 - The rent increase is \$46.10 (+90 utilities)
 - Your new rent will be \$1563.10 starting on August 1, 2017.

The solicitor for the Tenant makes the following submissions:

- The Addendum is not enforceable because it was signed under duress. The tenant testified she felt pressured to sign because if she did not the landlord would evict her.
- The Addendum is not in the approved form.
- The Addendum is inconsistent with the terms of the tenancy agreement which provides that the utilities are included with the rent.
- The landlord is inconsistent in the application of this term. The tenant on the other side of the rental property has not been asked to pay the increase in utilities.
- The landlord has harassed her.
- The landlord is discriminating against the tenant because of her ethnicity.
- The arbitrator should apply the principle contra proferentum and interpret the tenancy agreement against the landlord.

Analysis - Order of Possession:

I do not accept the submission of the solicitor for the Tenant that the Addendum is null and void. The signature page of tenancy agreement provides that the Addendum is to form part of the tenancy agreement. The Addendum formed a significant portion of the discussion between the parties.

Further I do not accept the submission that the tenancy agreement and Addendum is not enforceable because it was obtained through duress. I prefer the evidence of the landlord to that of the tenant on this point. The tenancy agreement and Addendum was given to the Tenant around the middle of May as she wished an opportunity to go over it with her solicitor. There was a delay of over 1 ½ months before the parties got together. I accept the evidence of the landlord that the parties went over the tenancy agreement and Addendum term by term. The sum of \$125 is circled. At some stage the tenant initialed each page of the Addendum. The tenant did not sign the agreement until the next day. It is unclear whether she went over the document with her solicitor. However, she had ample time to do so. The Application for Dispute Resolution filed by the Tenant states that the tenant did not seek legal advice prior to signing. I do not accept the submission the Addendum is unenforceable on the basis that it was signed under duress.

I do not accept the submission of the Tenant that she is being discriminated against because of her ethnicity. The tenant testified she is being discriminated against because she is from Egypt. The landlord denied this testifying she spent several years living in Turkey and she is a converted Muslim. There is insufficient evidence to support this allegation.

There is confusion with the drafting of the tenancy agreement. On page 2 it provides that water, electricity and heat are included with the rent. The Addendum provides for a utility payment of \$125 a month with the provision that it can be increased. In my view it is not appropriate to ignore the Addendum as it is part of the agreement between the parties. The better view is to interpret the Addendum so that it is consistent with the tenancy agreement.

The rent in the tenancy agreement is set at \$1425. The Addendum clarifies this indicating that the rent of \$1425 includes \$125 for gas, electricity and water costs. It further indicates that if the utility bills go over this amount the utility rent amount will go up accordingly. The proper interpretation of this agreement is as follows:

- The rent is \$1300 per month.
- In addition the tenants are to pay \$125 per month for gas, electricity and water.
- If the utility bills go over the \$125 per month, the amount to be paid will go up accordingly.

As a result I determined the agreement provides that the landlord is able to charge an increased amount if the usage goes over the \$125 per month. It does not allow the landlord to retroactively recover any overages.

However, I do not accept the submission of the landlord as to how she calculated the amount the Tenant has to pay for the overage. She has charged the tenant more than the adjoining tenant on the basis that the tenant's usage is more than the adjoining Tenants. There is no provision in the tenancy agreement and Addendum that permits the landlord to charge more to one side over the other at the landlord's discretion.

The tenancy agreement and Addendum is silent on how any overage is to be paid. In my view one has to look at what was the intention of the parties at the time the tenancy agreement was entered into. In the circumstances I determined that there should be an implied term that any overage should be split equally between the Tenant and the adjoining Tenant.

The landlord may have an agreement with the adjoining tenant that she would not charge the adjoining tenant an increase. However, whatever agreement that may exist between the landlord and the adjoining Tenant is not binding on the Tenant. The obligation of the Tenant to pay an overage is determined as set out above.

Tenant's Application:

As a result I ordered that the Notice to End Tenancy dated May 1, 2017 be cancelled. The landlord has liberty to serve a new notice after she has properly calculated the tenant's share of the overage based on a 50/50 split and giving the tenant a written demand in accordance with the Act. Further, the Notice to End Tenancy dated May 1, 2017 should be cancelled as it is dated May 1, 2017 and alleged rent of \$1425 is due on May 1, 2017. The landlord must wait until the following day to serve such a Notice.

The Tenant disputes the rent increase dated March stating that it does not comply with an increase permitted by the Regulations. The Notice of Rent Increase charged 3.7% on the current rent of \$1300. This is permitted under the Act. However, it purports to charge the tenant an additional \$90 per month for utilities over and above the \$125 charged. For the reasons set out above I determined this is invalid. The Act and Regulations do not give an arbitrator the authority to vary a Notice of Rent Increase. In any event there is insufficient evidence to determine what amount of a valid increase. As a result I ordered that the Notice of Rent Increase dated March 27, 2017 be cancelled as it purports to claim an amount not permitted.

Policy Guideline #37 provides as follows:

Disputing a Proposed Rent Increase

A tenant cannot dispute a rent increase that does not exceed the percentage permitted as an Annual Rent Increase¹⁷, an amount the tenant has agreed to in writing, or an amount ordered by an arbitrator as an Additional Rent Increase¹⁸. A tenant is not required to pay an additional rent increase until served with the Notice of Rent Increase and a copy of the arbitrator's order granting the additional rent increase.

A tenant will receive notice of a landlord's application for an additional rent increase, and will have an opportunity to provide evidence, however they may also choose to be represented by one or more of the tenants named as they are now in a joined application.

If a landlord collects a rent increase that does not comply with the Legislation, the tenant may deduct the increase from rent, or may apply for a monetary order for the amount of excess rent collected. In those circumstances, the landlord may issue a new 3 month Notice of Rent Increase, as the original notice did not result in an increased rent.

The landlord has the right to serve a new 3 month Notice of Rent Increase setting out the proper amount for the overage based on a 50/50 split with the adjoining Tenant.

The Tenant has been partially successful with this application. I ordered that the landlord pay to the Tenant the sum of \$50 being one half of the cost of the filing fee such sum may be deducted from future rent.

Landlord's Application:

For the reasons set out above I determined the Notice to End Tenancy dated May 1, 2017 is cancelled. I dismissed the landlord's application for an Order of Possession. The landlord retains the right to serve a new Notice to End Tenancy in accordance with the Act and the reasons set out above.

I dismissed the landlord's application for a monetary order with liberty to re-apply. I determined the tenancy agreement did not give the landlord to make a retroactive charge for any overage. However, the demand was given in March. I determine the landlord is entitled to claim an overage charge commencing April 1, 2017 and on the first day of each month thereafter on the basis of a 50/50 division of the overage.

Conclusion:

I determined the landlord is entitled to increase the portion of the rent for utilities with the increase in utility usage on a 50/50 basis with the adjoining unit. I ordered the 10 day Notice to End Tenancy dated May 1, 2016 and the Notice of Rent Increase dated March 27, 2017 be cancelled. I dismissed the landlord's

application with leave to serve a new 10 day Notice after proper determination of the overage has been made, The landlord also has leave to serve a new Notice of Rent Increase after the proper calculation has been made. The landlord has leave to file a new Application for Dispute Resolution seeking a monetary order after the provisions of the Act and Regulations have been followed.

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: June 21, 2017

Residential Tenancy Branch