



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNDC, OLC, RR, FF

Introduction

This hearing was scheduled to hear the tenant's application to cancel a 1 Month Notice to End tenancy for Cause ("1 Month Notice"); monetary compensation for damage or loss under the Act, regulations or tenancy agreement; orders for the landlord to comply with the Act, regulations or tenancy agreement; and, authorization to reduce rent payable. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

At the outset of the hearing, I proceeded to confirm service of hearing documents upon each other and the Residential Tenancy Branch. The tenant testified that her hearing package was sent to the landlord's agent via registered mail on June 5, 2017. The landlord's agent confirmed receipt of the registered mail package in early June 2017 and testified that she forwarded the documents to the landlord or landlord's lawyer.

The landlord's lawyer submitted that the hearing package received in early June 2017 did not include a copy of the tenant's Application for Dispute Resolution but that a copy of the 1 Month Notice was provided along with a Notice of Hearing, Fact Sheet, Monetary Order worksheet that was not sufficiently filled out, and tenancy agreement.

The tenant had filed her Application for Dispute Resolution online and stated that she forwarded the email received from the Residential Tenancy Branch, containing the hearing package documents, to her friend who printed the documents and mailed them to the landlord's agent on her behalf. The tenant's friend who performed these tasks was not called to testify.

On June 30, 2017 the landlord's agent and the tenant exchanged emails and after informing the tenant that a copy of the Tenant's Application for Dispute Resolution had not been received the tenant sent a copy to the landlord's agent via email.

The landlord filed an Application for Dispute Resolution on June 30, 2017 seeking an Order of Possession for cause and a monetary Order against the tenant and that hearing is set to be heard on September 28, 2017 with a different Arbitrator.

As to the discrepancy concerning service or the late service of the tenant's Application for Dispute Resolution the landlord's lawyer indicated that the landlord did not wish to adjourn the proceeding and would prefer to deal with the 1 Month Notice at this hearing rather than wait for the September 28, 2017 hearing date, but the landlord was not agreeable to dealing with the other remedies sought by the tenant on her Application for Dispute Resolution. The tenant was also agreeable to severing the other issues identified on her Application for Dispute Resolution and dealing only with the 1 Month Notice during this hearing. I confirmed that both parties wished to proceed to determine whether the 1 Month Notice should be upheld or cancelled and that the tenant's other remedies would be severed from this Application for Dispute Resolution. Accordingly, I have dealt with the 1 Month Notice by way of this decision and the other remedies sought by the tenant are dismissed with leave to reapply.

Since I have dealt with the 1 Month Notice in this decision, which includes the landlord's entitlement to an Order of Possession, the landlord's request for an Order of Possession under her Application for Dispute Resolution set to be heard on September 28, 2017 becomes moot. However, the landlord's monetary claim remains scheduled for September 28, 2017 unless the landlord cancels that hearing. Having severed the tenant's other remedies and dismissed them with leave to reapply; the tenant was informed that she remains at liberty to reapply for those remedies and request that her claims be joined to be heard at the same time as the landlord's monetary claims. However, it is important to note that there are time limits for doing so.

The tenant had also sent evidence to the landlord's agent via courier on July 6, 2017. The tenant's evidence was confirmed to be received by the landlord's agent and forwarded to the landlord or landlord's lawyer. Although courier service is not an acceptable method of service under section 88 of the Act, the landlord's lawyer stated the landlord has no objection to admittance of the tenant's evidence that pertains to the 1 Month Notice. Accordingly, I deemed the landlord sufficiently served with that evidence pursuant to the authority afforded me under section 71 of the Act.

The landlord had also submitted a large written submission and evidence that has been admitted and considered in making this decision.

Issue(s) to be Decided

Should the 1 Month Notice to End tenancy for Cause be upheld or cancelled?

Background and Evidence

The one year fixed term tenancy started on December 1, 2015 and continued on a month to month basis upon expiration of the fixed term. The tenant is required to pay rent of \$1,750.00 on the first day of every month. The tenant paid a security deposit of \$875.00 and a pet damage deposit of \$500.00. The rental unit is described as a condominium unit on the 10th floor of the building. The landlord owns the condominium unit in the stratified building.

The subject 1 Month Notice to End tenancy for Cause (the “1 Month Notice”) was sent to the tenant via registered mail on or about May 20, 2017 and received by the tenant on May 25, 2017. The 1 Month Notice has a stated effective date of June 30, 2017 and indicates the following reasons for ending the tenancy:

- Tenant or a person permitted on the property by the tenant has put the landlord’s property at significant risk.
- Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit or property.

In the “Details of Cause” box on the 1 Month Notice the landlord writes: “Tenant flooded the unit in August 2016 and caused significant damages to the unit, the common area and 2 units below. Repairs of the unit and common areas (excluding the 2 units below) costs over \$33k.”

The landlord’s lawyer submitted that the 1 Month Notice was inaccurate in that only one unit below the rental unit was impacted by the flood, not two units, and requested the 1 Month Notice be amended to reflect that.

Landlord's reasons for issuing 1 Month Notice

I heard the landlord had two primary reasons for issuing the 1 Month Notice to the tenant. Below, I have summarized those reasons.

1. Extraordinary damage

The tenant caused a flood to occur in the unit in August 2016 by allowing the water to overflow the shower and the water damage to the rental unit, the unit below, and the common area was significant. There was an immediate emergency response to deal with extraction of water and drying efforts. Damage to drywall, flooring and the door frame of an adjacent unit resulted from the water egress. Repairs to drywall and door frame followed in the months of October and November 2016. The hardwood flooring in the living area of the rental unit cupped after being exposed to the water and in April 2016 and May 2017 the landlord had the flooring removed and replaced the flooring in the living area. The landlord also decided to replace the carpeting in the bedrooms with hardwood flooring at the same time.

The landlord did not carry owner's insurance but the tenant carried tenant's insurance. The tenant's insurance provider covered the cost of the tenant having to move to temporary accommodation, paid for repairs to the unit below, and paid the landlord \$26,057.11 in compensation; however, the landlord submitted that her losses greater than this amount. The landlord provided a listing of amounts spent for emergency response, repairs and floor replacement that totals \$33,984.44, plus invoices to support this amount. Below, I have itemized the listing of expenditures submitted by the landlord:

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|---|---------------|
| Paid to strata for emergency response | \$13,512.50 |
| Paid to strata for repair in common area | 620.13 |
| Paid to restoration company for repairs | 3,072.51 |
| Paid to restoration company for repairs | 3,072.25 |
| Paid to restoration company for "betterments" | 9,145.71 |
| Paid to flooring company for bedroom hardwoods | 3,663.59 |
| Paid to flooring company for grinding living room floor and "wasted trip charge" | 288.75 |
| Paid to third party for floor leveling | <u>609.00</u> |
| Total | \$33,984.44 |

The landlord submitted that she had tried to make the tenancy work after the flood occurred but the tenancy relationship became fractured in April 2017 once the tenant started requesting compensation from the landlord and indicated she intended to file an Application for Dispute Resolution due to the length of time the repairs were taking to complete. The tenant then put a stop payment on the rent for May 2017 which the landlord interpreted as an aggression move on part of the tenant. The tenant did subsequently pay the rent for May 2017 on May 10, 2017.

2. Property at significant risk (landlord unable to obtain insurance)

The landlord did not carry property owner's insurance at the time of the flood and the strata bylaws were amended in December 2016 to require all owners to have property insurance as a result of this flood. In or around April 2017, the landlord contacted her insurance broker who advised her that she could not obtain property insurance if the tenant remains in the rental unit meaning the landlord will remain in violation of the strata by-law.

The landlord submitted an email exchange with her insurance broker dated June 28, 2017. In the email exchange, the landlord informed the insurance broker that "We have finally settled all the insurance claims and I'm trying to evict the tenant as we're going through claims. I need to understand again from our last conversation. I will not be able to get a new insurance policy with the current tenant because of her flooding place..." The insurance broker responds, in part: "Since the current Tenant is still occupying your Rented Unit, I would not foresee any of my contracted Insurance Companies will be interested to consider your application for Condo Owner's Liability Insurance. It is better to approach them when you have a New Tenant renting ..."

Tenant's position

With respect to the reasons cited above, the tenant provided the following responses.

1. Extraordinary damage

The tenant acknowledged that in August 2016 she fell asleep in the shower and water escaped the shower, resulting in water damage to the rental unit, the unit below, and in the common hallway. The tenant noted; however, that there was a water leak coming from the shower at the start of the tenancy that the landlord had repaired approximately a week later; however, the tenant had emailed the landlord to indicate the repair was not fully completed. The tenant also stated that she noticed the shower was slow to

drain. The tenant was of the position the flood was the result of a combination of her falling asleep and permitting the water to overflow the shower and the pre-existing problem with the shower. As evidence to her communication regarding the shower repair the tenant pointed to an email. The tenant provided an email dated January 6, 2016 sent to the landlord and landlord's agent. In the email the tenant writes, in part: "A plumber came to fix the drain in the shower and I am waiting for him to come back to ensure all steps have been taken to ensure no future water damage."

The tenant stated on the day the flood occurred she had fallen asleep in the shower after enduring a considerable period of insomnia. The tenant submitted that she has taken steps to address her insomnia and that this issue is under control now.

The tenant testified that she carried tenant's insurance; that she promptly filed a claim with her insurance provider; and her insurance policy settled with the unit below and the landlord for a payment of over \$26,000.00 that represented the actual cash value of the landlord's losses.

The tenant acknowledged that she had put a stop payment on the May 2017 rent cheque but denied it was done as a form of aggression. Rather, the tenant explained that she was frustrated that the repairs and floor replacement took several months to complete, which the tenant attributed to the landlord not carrying owner's insurance and the floor leveling was the result of improper installation of the floor leveler when the former hardwood flooring was installed. The delays resulted in the tenant storing many of her possessions in boxes for five months and living elsewhere for periods of time. During that time of repairs and living elsewhere the tenant had continued to pay full rent and utilities for the rental unit. The tenant requested compensation from the landlord to which the landlord was not agreeable. Shortly after putting a stop payment on the rent cheque the tenant contacted the Residential Tenancy Branch and determined she did not have the right to withhold rent from the landlord and she paid the May 2017 rent.

The tenant points out that the landlord's decision to issue the 1 Month Notice coincides with the repairs finally being completed after being compensated by the tenant's insurance company.

2. Property at significant risk (landlord unable to obtain insurance)

After the landlord put forth that she could not obtain owner's insurance the tenant consulted with her insurance broker and was advised that it may be more difficult for the landlord to obtain insurance but not because of the tenant. Rather, the difficulty would

be attributable to the landlord not carrying insurance and then trying to get insurance after a loss occurred.

The tenant considers the email from the landlord's insurance broker to be an opinion that is inconsistent with the information she was provided.

Landlord's rebuttal

The landlord acknowledged that there was a leak from the shower at the start of the tenancy that was repaired. The landlord did not receive communication from the tenant that the repair was incomplete or that the drain was slow.

The landlord denied that the repairs to the unit, and delay in having them completed, were the fault of the landlord and that it was confirmed by the restoration crew that there was no mould or health concerns.

The tenant chose to pack her possessions in boxes when she did.

The tenant's expenses to live elsewhere during the period of repairs were covered by the tenant's insurance policy; however, the water damage to the common areas were not covered by the tenant's insurance policy and the landlord had to reimburse the strata corporation approximately \$14,000.00.

Tenant's response to landlord's rebuttal

The tenant acknowledged that no mould was found once the hardwood flooring was pulled up but that she was concerned for her health and the health of her child and pet until that point.

The tenant questioned whether the costs to rectify the common area water damage would have been covered by the landlord's insurance policy had she had carried insurance at the time.

Analysis

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove, based on a balance of probabilities, that the tenancy should end for the reason(s) indicated on the Notice.

Below, I provide analysis, findings and reasons with respect to each of the primary reasons for ending the tenancy upon consideration of everything before me.

1. Extraordinary damage

As to the landlord's submission that she seeks to end the tenancy because the tenant caused extraordinary damage to the unit by way of water damage, I find it reasonable to expect that the landlord would have done so shortly after the flood occurred if that was the genuine reason for ending the tenancy.

As to the landlord's assertion that damages cost over \$33,000.00, I find this amount exaggerated and misleading considering the following. As provided in the Background and Evidence section of this decision, this amount is the sum of various invoices from the strata corporation, restoration company and flooring companies; however, this sum does not take into account the payment to the landlord by the tenant's insurance company of over \$26,000.00 and appears to include the cost of "betterments", replacement of the bedroom carpeting with hardwood flooring and poor floor leveling work from when the former hardwood floors were installed. Although the landlord asserted that she had to pay the strata approximately \$14,000.00 at her expense, I find it more likely that the tenant's insurance policy compensated the landlord for the emergency response and repairs that were paid to the strata and denied coverage for the cost of betterments or repairs unrelated to the flood such as floor leveling which is not attributable to the tenant's negligence.

The landlord acknowledged that she tried to make the tenancy work and that once the tenant started requesting compensation from the landlord the relationship broke down. Whilst the tenant put a stop payment of the May 2017 rent cheque, which is a breach of the Act, this was rectified a short time later.

In light of the above, I am of the view that the 1 Month Notice was issued by the landlord out of retaliation for the tenant seeking compensation or intending to file an Application for Dispute Resolution for repair orders, which is her right to do, more so than that of damage to the unit. Further, after hearing from the tenant I am satisfied that she is now aware that she does not have the right to withhold rent without the authorization of an Arbitrator or the landlord and I am reasonably satisfied she will not do that again.

Where parties are in dispute as to whether a party is entitled to compensation from the other, the parties may seek dispute resolution by filing an Application for Dispute

Resolution and seeking monetary compensation. That remedy is still available to the parties.

2. Property at significant risk (landlord unable to obtain insurance)

As to the landlord's submission that she is unable to get owner's insurance whilst the tenant remains in possession of the rental unit, I find I am unpersuaded this was a reason for issuing the 1 Month Notice. I note that the landlord did not make any reference to insurance in the details of cause space provided on the 1 Month Notice. Further, the email exchange between the landlord and her insurance broker took place in June 2017 and merely indicated a previous conversation without specifying a date.

Both parties provided opposing positions as to whether the landlord would be able to obtain owner's insurance; however, neither called an insurance expert to testify, and the landlord provided an email from her insurance broker for me to consider. I note that the landlord's insurance broker indicates the landlord may not be approved by the insurance providers he deals with and that "it is better" that she try after the tenant is out of the rental unit. However, the landlord's insurance broker does not indicate that it is unlikely or impossible for the landlord to get insurance coverage if she were to apply for insurance with a company he does not ordinarily use. Further, it appears to me that the landlord has not even submitted an insurance application through her broker or another broker that may use different insurance providers. Accordingly, I am of the view the landlord was pre-mature in taking the position she is unable to get insurance.

In light of all of the above, I find the landlord has not satisfied me that the tenancy should end at this time for the reasons provided and I grant the tenant's request to cancel the 1 Month Notice with the effect that the tenancy continues. The landlord's request for an Order of Possession is denied.

I am of the view that both parties have contributed to this dispute and I award the tenant recovery of one-half of the filing fee she paid, or \$50.00. By way of this decision, **the tenant is hereby authorized to deduct \$50.00 from a subsequent month's rent to satisfy this award.**

Conclusion

The tenant's request to cancel the 1 Month Notice is granted and the tenancy continues.

The other remedies sought by the tenant are dismissed with leave to reapply.

The tenant has been awarded recovery of one-half of the filing fee she paid for this application and has been authorized to deduct \$50.00 from a subsequent month's rent to satisfy this award.

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: August 16, 2017

Residential Tenancy Branch