



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, CNR, OPL, OPR, MNR, MNDC, RP, ERP, PSF, DRI, FF

Introduction

This hearing dealt with cross applications. The tenants filed to cancel a *2 Month Notice to End Tenancy for Landlord's Use of Property*; orders for repairs and emergency repairs; orders for the landlords to provide services or facilities required by law; to dispute an additional rent increase; and, monetary compensation for damages or loss under the Act, regulations or tenancy agreement. The tenants subsequently filed three Amendments to: dispute a *10 Day Notice to End Tenancy for Unpaid Rent* dated October 25, 2017 and a *10 Day notice to End Tenancy for Unpaid Rent* dated November 2, 2017 and to increase their monetary claim. The landlords applied for an Order of Possession based on the *2 Month Notice to End Tenancy for Landlord's Use of Property* and the *10 Day Notices to End Tenancy for Unpaid Rent* dated October 25, 2017 and November 2, 2017; and, to seek monetary compensation for unpaid rent for the month of October 2017.

Preliminary and Procedural Matters

The hearing process was explained to all of the parties and the parties were given the opportunity to ask questions.

The three landlords named in this decision are the children of the owners of the house and they act as agents for the owners. By definition of "landlord" under section 1 of the Act, "landlord" includes the owner of the property and/or a person acting on behalf of the owner, such as an agent or property manager. Accordingly, it would appear that there are five persons who meet the definition of landlord with respect to this property. Reference to "landlord" in this decision may include one or more of the landlords, including agents for the owners. Where particularly relevant, certain parties have been identified by their initials.

At the outset of the hearing, I explored service of hearing documents and evidence upon each other and the Residential Tenancy Branch. The landlords confirmed receipt of the tenants' original Application for Dispute Resolution and two of the Amendments filed by the tenants. The landlords did not receive the Amendment submitted by the tenants on October 27, 2017 where they seek to dispute the 10 Day Notice dated October 25, 2017. The tenant stated that the October 27, 2017 Amendment was sent to the landlord JC via registered mail on October 27, 2017 but the registered mail was returned to sender because the tenant did not use the correct service address; however, when the registered mail was returned the landlord picked it up from the mailbox at the rental property. The landlord acknowledged picking up registered mail at the rental property but stated that was done in September 2017 and the package did not contain an Amendment. The registered mail tracking number provided by the tenant shows that the mail was sent October 27, 2017 and returned to sender in November 2017. There is a signature of the person who accepted return of the registered mail and the name is none of the parties before me or the owners of the property. It was apparent to me that both parties were prepared to

present evidence with respect to the validity of the 10 Day Notice issued on October 25, 2017 and I permitted the tenant's application to be amended during the hearing to include dispute of that 10 Day Notice out of an abundance of fairness to the tenants.

The landlord pointed out that the landlord did not receive any evidence with the tenant's hearing documents. I confirmed that I had not received any evidence from the tenants either and the only documents they submitted that were before me were their Application for Dispute Resolution, the three Amendments described above, and copies of the 10 Day Notices.

The landlords submitted that the Landlord's Application for Dispute Resolution was sent to each tenant on November 10, 2017 and the landlord's evidence was sent to each tenant via registered mail on November 17, 2017. The landlord testified and provided photographic evidence to show the registered mail sent to the tenants was refused. The tenant acknowledged that she refused the registered mail. Pursuant to section 90 of the Act, a person is deemed to be served five days after mailing even if they refuse to accept or pick up their mail. Accordingly, I deemed the tenants served with the landlord's Application for Dispute Resolution and evidence five days after mailing. In consideration that the tenants had not seen the landlord's Application for Dispute Resolution I explained the remedies sought by the landlords by way of their Application for Dispute Resolution. The tenants responded by confirming that the landlords' request for an Order of Possession based on the Notices to End Tenancy the tenants had filed to dispute and Monetary Order for unpaid rent did not come as a surprise and the tenants were prepared to provide their position with respect to those matters. During the hearing, I read from certain relevant documents and evidence so that the tenants may respond to those documents.

In light of the above, this decision has been made based on the oral submissions of both parties; the documentary evidence provided by the landlords; and review of the Notices to End Tenancy submitted by both parties.

After both parties had an opportunity to be heard, I determined the tenancy has ended for unpaid rent, for reasons provided in this decision. Accordingly, I found it unnecessary to consider the tenants' request for orders for compliance, repairs and conditions on the landlord's right to enter. The tenants did not present evidence to suggest they have paid an additional rent increase and I did not consider their request to dispute an additional rent increase further. The tenants had requested monetary compensation by way of their original Application and the third Amendment but they tenants did not provide a detailed description or calculation, as required under section 59 of the Act and the Rules of Procedure, to demonstrate how the sum requested was calculated or what it represents. Therefore, I did not consider the tenant's monetary claim further and it is dismissed with leave to reapply.

Issue(s) to be Decided

1. Should the *2 Month Notice to End Tenancy for Landlord's Use of Property* dated September 1, 2017 be upheld or cancelled?
2. Should the *10 Day Notice to End tenancy for Unpaid Rent* dated October 25, 2017 be upheld or cancelled?
3. Should the *10 Day Notice to end Tenancy for Unpaid Rent* dated November 2, 2017 be upheld or cancelled?
4. Is the landlord entitled to an Order of Possession based on one of the Notices to End Tenancy described above?

5. Is the landlord entitled a Monetary Order for unpaid rent?

Background and Evidence

An oral tenancy agreement formed approximately 2.5 years ago between the tenant JO and the landlord AL. The rent was set at \$700.00 payable on the first day of every month. No security deposit was required or collected. In approximately June 2017, JO's mother, referred to as tenant CP, moved into the rental unit with JO.

I heard that JO and landlord had an employer/employee relationship when the tenancy formed. AL acknowledged that the rental unit was in run-down condition when the tenancy formed but JO was in need of housing so he rented the unit to JO as-is and in recognition of its condition the first couple of months were rent free.

The landlords' agents have served three Notices to End Tenancy upon the tenants. Below, I have described the three Notices to End Tenancy, the landlords' submissions and the tenants' responses.

2 Month Notice dated September 1, 2017

On September 1, 2017 a *2 Month Notice to End Tenancy for Landlord's Use of Property* ("2 Month Notice") was served upon tenant JO in person. The 2 Month Notice has a stated effective date of November 1, 2017 and indicates the reason for ending the tenancy is because "the rental unit will be occupied by the landlord or landlord's close family member".

The landlords' agents, who are the children of the owners of the property, stated the owners currently reside on the upper floor of the residential property. The owners are elderly and use the services of homecare providers. The owners seek to regain use of the entire house, including the lower floor where the rental unit is located in order to have a second bathroom and access to the laundry room by way of the interior stairs.

The tenants questioned the landlords' motives for ending the tenancy and suspect the landlords seek to end the tenancy to re-rent the unit for more rent and because there was a falling out between tenant JO and landlord AL when JO refused to return to work for AL. The landlords' agents denied the tenants' allegations and stated the real reason for issuance of the 2 Month Notice is to accommodate their aging parents' needs and keep them residing at home as long as possible.

10 Day Notice dated October 25, 2017

The landlords submitted that the tenants did not pay rent for October 2017. On October 25, 2017 the landlord posted a *10 Day Notice to End Tenancy for Unpaid Rent* ("10 day Notice") on the door of the rental unit. The 10 Day Notice indicates the tenants failed to pay rent of \$700.00 that was due on October 1, 2017.

The tenants testified that the landlord AL had promised to install a new countertop in the rental unit but then refused to do so. The tenant testified that they approached landlord JC about the countertop and JC gave the tenant authorization to go ahead and purchase and install a new countertop and take the cost from the rent for October 2017. The tenant claims the authorization was given in late September 2017, the tenant ordered a countertop from a large home supply retailer shortly thereafter and it was installed at

the end of October 2017. The tenant also stated that she ordered the new countertop after contacting the Residential Tenancy Branch. The tenant testified that JC subsequently informed the tenant that she would not authorize the tenants to install a new countertop and the tenants would have to pay rent for October 2017 but by that time the money had already been spent on the new countertop and the new countertop was not returnable. The tenant CP claims to have sent the purchase order, receipt and left over rent money not spent on a new countertop, cash of approximately \$290.00, to JC by way of regular mail. The address the tenant sent the mail to is an address she found in the phone book for a man with the same last name as landlord JC.

JC testified that she did not give the tenants authorization to withhold rent and purchase a countertop. Rather, when the tenant raised the countertop issue to her, JC informed the tenant that the landlords would contact a countertop supply company and that the tenants had to pay rent. When the tenant indicated that the countertop had been installed, the landlord requested photographs of it but the tenant did not provide any photographs. The landlord did not receive a receipt for the purchase of the countertop or leftover cash from the tenant.

I noted that there were no photographs of a countertop or a receipt for the purchase of a countertop in the documents submitted by the tenants. The tenant acknowledged that she did not keep copies of the receipt or purchase order for the countertop.

I also noted that included in the landlords' evidence were text messages exchanged between the landlord and the tenant on September 30, 2017. I the text message that appears to have been written by the tenant aloud and the tenant CP confirmed that it was a message she had sent. The text messages read as follows:

Landlord's text message of September 30, 2017:

"Hi [name of tenant], I'd like to come by and pick up the rent tomorrow. Please let me know what time works best. Thanks"

Tenant's text message response of September 30, 2017:

"We gave you written notice last month that we needed a counter top or we would take the rent and buy one ourselves.

We've talked to the residential tenancy board, The health authority and both "TOLD" me to go buy a countertop ourselves. The were appalled & disgusted to know [name of JO] has gone 3 years without it.

I'm also having an inspector come in here & check out the heat situation since we have NONE.

We have a new countertop coming should be the end of next week.

[Name of JO] had NO idea he was in an illegal suite.

By the end of Oct 2017 if we do not receive a brand new tub surround then we will take Nov's rent and purchase it ourselves."

[Reproduced as written]

10 Day Notice dated November 2, 2017

The landlord served a 10 Day Notice by posting on the door on November 2, 2017. The 10 Day Notice indicates rent of \$700.00 was due on November 1, 2017.

According to the landlord, on November 3, 2017, tenant CP presented the landlord with \$700.00 and the tenant indicated it was payment for November 2017 rent. The landlord took the money and issued a receipt indicating it was for "occupancy" of the rental unit and that no monies had been received for October 2017 rent.

As provided under section 46 of the Act, if a tenant pays the outstanding rent within five days of receiving a 10 Day Notice, the 10 Day Notice is nullified. Since the tenant paid the outstanding rent within five days of receiving this 10 Day Notice and the tenant indicated it was rent for November 2017, I found the 10 Day Notice dated November 2, 2017 was nullified by way of payment. Accordingly, this 10 Day Notice has no further force or effect.

Order of Possession

The parties provided consistent testimony that rent or monies for use and occupancy for December 2017 has not been paid or collected. The landlords requested an Order of Possession effective as soon as possible citing concerns over the tenant CP's behaviour toward the owners' homecare providers and possible losing their services.

The male tenant indicated he does not have an intention to move out. The female tenant proposed payment of rent for December 2017 and subsequent month(s) in exchange for more time to move out given the lack of housing available in the area. The landlords were not agreeable to permitting the tenants more time to move out.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons with respect to the matters before me.

10 Day Notice dated October 25, 2017

Generally, where a notice to end tenancy comes under dispute, the landlord bears the burden to prove the tenancy should end for the reason(s) indicated on the Notice to End Tenancy. In this case, I was provided consistent submissions that: the tenants did not pay rent of \$700.00 that was payable to the landlord on October 1, 2017; the tenants did not pay \$700.00 to the landlord for October 2017 on any other date; and the landlord served a 10 Day Notice to end Tenancy for Unpaid rent upon the tenants. I

have considered the 10 Day Notice to be under dispute as explained in the Preliminary and procedural Matters section of this decision. Where 10 Day Notice comes under dispute the tenant bears the burden to prove the rent was paid, the tenant had a legal right to withhold rent, or the Notice is otherwise invalid.

Section 26 of the Act provides that a tenant must pay rent when due under their tenancy agreement, even if the landlord has violated the Act, Regulations, or tenancy agreement, unless the tenant has a legal right to withhold rent.

In this case, the tenants assert that they had a right to withhold rent and I proceed to consider whether they had a legal right to do so under the Act. The Act provides very specific and limited circumstances when a tenant may withhold rent otherwise payable to the landlord.

Under section 33 of the Act a tenant may deduct from rent the cost the tenant incurred to make an “emergency repair”. Several criteria to establish an entitlement to recover the cost of an emergency repair must be met, including demonstrating that the repair was urgent and necessary and pertained to critical components of the building such as leaking pipes, roof, the electrical system or the heating system. The tenant must also provide the landlord with a copy of the receipt before making the deduction. I find that replacing countertops is not an emergency repair. Nor, did the tenant prove that she gave a receipt, if one exists, to the landlord. Therefore, I am unsatisfied the tenants were entitled to deduct monies for rent for October 2017 due to an emergency repair, as defined under section 33 of the Act.

Section 51(1.1) of the Act permits a tenant to withhold the last month of rent where a landlord has given a tenant a *2 Month Notice to End Tenancy for Landlord's Use of Property*. In this case, the tenants did receive a 2 Month Notice in September 2017 and the last month of tenancy was set to be November 2017 unless the tenants gave written notice to end the tenancy earlier. The tenants had not given the landlord written notice that they were accepting ending the tenancy in October 2017 due to the 2 Month Notice. Nor, did the tenants assert that they withheld October 2017 rent in satisfaction of compensation payable under section 51 of the Act. Therefore, I find I am unsatisfied the tenants were withholding rent for October 2017 in accordance with section 51(1.1) of the Act.

Where a tenant has an outstanding repair issue, the tenant may seek an Arbitrator's authorization to reduce rent payable. However, the tenant must obtain the Arbitrator's authorization before making any deductions. The tenants in this case, did not have an Arbitrator's authorisation to make deductions to withhold rent for October 2017.

If a landlord waives or otherwise authorizes a tenant to withhold or make deductions from rent otherwise payable, I accept that would entitle the tenant to do so in accordance with that waiver or agreement. The tenants allege that the landlord JC gave the tenant authorization to withhold rent so as to purchase and install a new countertop. The landlord refuted the tenant's allegations and provided a very different version of events.

I find the tenant's versions of events were inconsistent, not supported and not credible; and, I prefer the landlord's version of events, considering the following factors. When I asked the tenant when she ordered the countertops the tenant initially stated that they were ordered after the landlord gave her authorization to do so. At a later time, the tenant stated that the countertops were ordered after talking with the Residential Tenancy Branch (RTB). If the tenant had the landlord's authorization to use rent

money to purchase new countertops, contacting the RTB would be unnecessary. Further, replacing countertops is not an emergency repair and I highly doubt the RTB would inform the tenant that it is permissible to withhold rent to replace the countertops. Also of consideration is that the tenants did not provide any documentary or photographic evidence to demonstrate that a countertop was supplied and installed or the cost of doing so. Finally, the tenant's version of events provided orally during the hearing is inconsistent with the text message the landlord provided as evidence, which I reproduced in the Background and Evidence section of this decision. In the text messages, the landlord indicates she is coming to collect rent for October 2017 which is inconsistent with the landlord authorizing the tenant to withhold rent. The tenant's text message refers to giving the landlord notice of the need for a new countertop and that the tenants would take the rent to do so. The text message does not describe the landlord giving the tenant prior authorization to purchase and install a countertop by using the rent money. The text message appears to convey that the tenant was of the position she had decided to use money for repairs she viewed as necessary without first getting the appropriate authorization. All these factors considered, I find I am unsatisfied the tenants had the landlord's authorization to withhold rent for October 2017.

In light of the above, I find there is insufficient evidence to demonstrate the tenants had a lawful right to withhold rent from the landlords for the month of October 2017. Therefore, I find the landlords were in a position to serve the tenants with a 10 Day Notice and I uphold the Notice.

I note that the 10 Day Notice does not have an effective date indicated. Since the tenants acknowledge receipt of the 10 Day Notice on October 25, 2017, as indicated on their Amendment, the effective date should have read November 4, 2017 or later. Since it has been well over 10 days since the tenants received the 10 Day Notice I am satisfied that to amend the 10 Day Notice to indicate an effective date of November 4, 2017 would not unduly prejudice the tenants. I amend the Notice accordingly pursuant to the authority afforded me under section 68 of the Act.

2 Month Notice dated September 1, 2017

The 2 Month Notice has an incorrect effective date and the effective should have read November 30, 2017 in keeping with the notice requirement of section 49 of the Act. Pursuant to section 53 of the Act, where a Notice to End Tenancy has an incorrect effective date, the effective date is automatically changed to comply with the Act. Accordingly, the 2 Month Notice has been automatically changed to have an effective date of November 30, 2017.

Having already found the tenancy at an end due to unpaid rent, I find it unnecessary to determine whether the 2 Month Notice should be upheld or cancelled.

Since the parties did not withdraw the 2 Month Notice by mutual consent, I find the landlords remain obligated to give the tenants compensation payable to tenants in receipt of a 2 Month Notice, as provided under section 51(1) of the Act. The landlords also remain obligated to use the rental unit for the stated purpose for at least six months after the landlords regain possession of the rental unit.

Order of Possession

As provided under section 55(1) of the Act, where a Notice to End Tenancy is upheld, the landlord shall be granted an Order of Possession provided the Notice to End Tenancy is in the approved form and otherwise complies with the form and content requirements of the Act.

The 10 Day Notice dated October 25, 2017 is in the approved form and I find it was duly completed, with the exception of the effective date. As provided previously, I have amended the 10 Day Notice to reflect an effective date of November 4, 2017.

The effective dates of both of the Notices to End Tenancy presented to me have since passed. The tenants have not paid for use and occupancy for the rental unit for December 2017 and the landlords were seeking an Order of Possession effective as soon as possible over concerns about conduct toward the owners' caregivers. Although the tenant attempted to justify her conduct, it was undisputed that the police were called in response to the tenant's conduct. In these circumstances, I provide the landlords with an Order of Possession effective two (2) days after service upon the tenants.

Monetary Order for unpaid rent

The landlords are entitled to recover unpaid rent of \$700.00 for the month of October 2017 and I award the landlords that amount. The tenants are entitled to compensation equivalent to \$700.00 for receiving a 2 Month Notice. Therefore, I offset this compensation payable to the tenants against the rent the tenants owe the landlords for October 2017. In doing so, the tenants are now considered to be in receipt of the compensation they are entitled to under section 51(1) of the Act.

The landlords are also entitled to compensation from the tenants for the days they continue to over-hold the rental unit; however, the landlords did not seek such compensation by way of their Application for Dispute Resolution or make a request to amend their claim during the hearing. Thus, the landlords remain at liberty to make another Application for Dispute Resolution to seek other damages or loss against the tenants if they so choose.

Filing fee

The landlord's application had merit and I award the landlord's recovery of the \$100.00 filing fee they paid for their application. Since there is no security deposit held by the landlords, I provide the landlords a Monetary Order in the amount of \$100.00 to serve and enforce upon the tenants.

Conclusion

The tenancy has ended due to unpaid rent and the landlords are provided an Order of Possession effective two days after service.

The tenants owe the landlords rent for October 2017; however, this has been offset by the compensation the tenants are entitled to receive under section 51(1) of the Act. Therefore, I do not provide the landlords with a Monetary Order for unpaid rent and the tenants are now considered to be in receipt of compensation payable under section 51(1).

The tenants' monetary claims against the landlords have been dismissed with leave. The landlords are also at liberty to seek any other damages or losses the landlords may incur, other than unpaid rent for October 2017, by way of a subsequent Application for Dispute Resolution.

The landlords have been awarded recovery of the filing fee and are provided a Monetary Order in the amount of \$100.00 to serve and enforce upon the tenants.

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: December 07, 2017

Residential Tenancy Branch