



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL OPRM-DR

Introduction

This hearing was convened by way of conference call concerning an amended application made by the landlord seeking an Order of Possession and a monetary order for unpaid rent and utilities, and to recover the filing fee from the tenants for the cost of the application.

The landlord and one of the tenants attended the hearing and each was represented by an Articled Student. The parties each gave affirmed testimony and their representatives were given the opportunity to question each of them and give submissions.

During the course of the hearing, it was determined that the landlord has obtained an Order of Possession at a previous hearing, and the landlord's application for an Order of Possession in this application is withdrawn.

The landlord's representative opposed the inclusion of the tenant's late evidence. It was received 2 days prior to the hearing and the landlord has not had an opportunity to review it with the representative. The tenant's representative responded that since he was only recently contacted by the tenant, it is good evidence and ought to be considered. The Rules are clear, that any evidence a respondent wishes to rely on must be provided to the Residential Tenancy Branch and to the applicant. I see no reason to allow the evidence outside the time limits, particularly where it is disputed by the other party, and that it was only provided 2 days prior to the hearing, and there is no compelling reason that it wasn't provided by the tenant earlier. Therefore, I decline to consider it.

Also during the course of the hearing I determined that evidentiary material provided by the landlord, as well as the amendment to the landlord's application, were not before me although filed 14 days prior to the hearing and delivered to the tenant. I now have that material, which confirms that it was provided on January 3, 2018, all of which has been reviewed and is considered in this Decision.

Issue(s) to be Decided

The issues remaining to be decided are:

- Has the landlord established a monetary claim as against the tenants for unpaid rent?
- Has the landlord established a monetary claim as against the tenants for unpaid utilities?

Background and Evidence

The landlord testified that this fixed term tenancy began on June 20, 2016 and expired on June 19, 2017. The parties entered into another written tenancy agreement for a fixed term to commence on June 20, 2017 and expiring on June 30, 2018, and the tenants still reside in the rental unit. Rent in the amount of \$4,250.00 per month is payable on the 1st day of each month, which is specified in both tenancy agreements. At the outset of the tenancy the landlord collected a security deposit from the tenants in the amount of \$2,125.00 as well as a pet damage deposit in the amount of \$1,000.00, both of which are still held in trust by the landlord. The rental unit is a 5 bedroom single family dwelling and copies of both tenancy agreements have been provided as evidence for this hearing.

The landlord further testified that the tenants were served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, and a copy has been provided for this hearing. It is dated October 12, 2017 and contains an effective date of vacancy of October 22, 2017 for unpaid rent in the amount of \$4,250.00 that was due on October 1, 2017. A Proof of Service document has also been provided which shows that a tenant was served personally served on October 12, 2017, but does not name the person served.

On September 28, 2017 the landlord served the tenants with a One Month Notice to End Tenancy for Cause for operating an unlicensed Bed and Breakfast and allowing short-term rentals advertised on Air BNB as well as a manufacturing business in the rental unit, although no permits are required.

The tenants disputed both notices and a hearing December 20, 2017 resulted in a dismissal of the tenant's application and the landlord was granted an Order of Possession effective January 31, 2018. The landlord testified that the tenants have not paid any rent since and arrears have accumulated to \$17,000.00 for October, 2017 through January, 2018.

The landlord also testified that the tenants failed to pay the water/sewer/garbage billings from the local District, and the landlord claims \$2,370.67. The tenancy agreement provides that the tenants will pay the regular invoices, but failed to do so, and the landlord paid that amount to the District to prevent further late charges and penalties. An Invoice has been provided as evidence for this hearing, and the amount covers the period of July 1 2017 to September, 2017.

The landlord's application also includes a claim of \$5,000.00 for an insurance deductible however the landlord withdraws that claim.

The hearing on December 20, 2017 dealt with the tenants' application to cancel the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, among other relief. A copy of the Decision has been provided as evidence for this hearing, and it states, in part:

"Two Notices to End Tenancy were personally served, a 10 Day Notice dated October 12, 2017 to be effective October 22, 2017 and a One Month Notice to End Tenancy for cause dated September 28, 2017 to be effective October 31, 2017. The tenant filed an amendment to cancel these Notices and to increase their monetary claim to \$30,064.55."

The Decision also states that the tenants' Application for Dispute Resolution also included applications for orders that:

- "a) That the landlord do emergency repairs pursuant to section 33; and
- b) That the landlord repair and maintain the property pursuant to section 32;
- c) That the landlord provide facilities required by law pursuant to section 27;
- d) To suspend or set limits on the landlord's entry into the rental suite;
- e) To cancel both Notices to End Tenancy;
- f) To obtain compensation for loss of use of premises due to lack of repair;
- g) To obtain compensation for repairs done by the tenant;
- h) To obtain compensation for loss of peaceful enjoyment; and
- i) To recover the filing fee for this application."

Because the landlord had not filed an Application for Dispute Resolution, the landlord's monetary claim for unpaid rent and utilities was not heard or adjudicated upon. The landlord testified that the Arbitrator in that hearing found that numerous sinks and toilets leaked during the tenancy, and the tenants were granted a monetary order in the amount of \$5,625.00 and permitted to reduce rent owed by that amount. However, the landlord does not agree that the leaks resulted in extraordinary costs for the utilities. A neighbour broke an outside sewer pipe during construction, and the landlord had it fixed within 4 or 5 days. The rental home has a water meter, and the bill increases according

to water usage, however the tenants had Air BNB customers without the landlord's knowledge or consent. The toilets needed repair, and the landlord fixed them. It's an old house with 5 bedrooms, and the only people to reside in the rental unit were the 2 tenants.

The landlord claims \$17,000.00 for unpaid rent and \$2,370.67 for the unpaid utility bill and recovery of the \$100.00 filing fee for the cost of this application.

The tenant testified that she and her father currently occupy the rental unit. When the tenancy agreement was renewed in 2017 the tenant told the landlord who would be occupying it and that the tenant would be using a portion as a home office. The landlord had full knowledge of an Air BNB sublet, and agreed to that because the tenant was helping her father who is disabled. The tenants earned approximately \$24,000.00 in 2017, and had roommates from time to time. When the second tenancy agreement was created, the tenants had asked that subletting was permitted, and the landlord decided to cross out a portion of the Addendum, which reads as follows: "10. USE OF THE RENTAL UNIT: The Tenant(s) and Tenant's guests shall use the Rental Unit for private residential purposes only and not for any illegal, unlawful, ~~commercial or business purposes.~~"

The tenant further testified that the Air BNB earned \$2,500.00 per month at least, and considering the loss of that revenue as a result of the landlord's failure to comply with the tenancy agreement regarding subletting and the time the tenant was not able to invest in her own business at \$30.00 per hour, the tenants should only pay the landlord \$5,000.00 instead of the \$17,000.00 claim for the period of October, 2017 through January, 2018. The last Air BNB rental was prior to September 28, 2017.

The tenants didn't pay the water bill for the billing period of July 1, 2017 to September 30, 2017 because faucets all leak and toilets continually run and the landlord won't make the repair. Therefore, the tenants dispute payment of the landlord's \$2,370.67 claim for unpaid utilities.

The tenants stopped paying rent to the landlord because the landlord served the tenants with the One Month Notice to End Tenancy for Cause. However, due to the tenant's father's physical disabilities the tenants had nowhere to go, so didn't vacate the rental unit. The landlord has 4 rental properties, and the tenant does not believe the landlord has been impacted at all as a result of not collecting rent.

Submissions of Landlord's Representative

The tenants have been over-holding the rental unit, and the *Residential Tenancy Act* specifies that tenants must pay rent even if the landlord fails to comply with the tenancy agreement or the *Act*. The Decision of the director on December 20, 2017 granted the landlord an Order of Possession effective January 31, 2018 because of unpaid rent, and the tenants haven't paid any rent for October, 2017 or since.

The December 20, 2017 Decision also states that the tenancy ended on October 22, 2017, and the landlord's representative submits that as a result the tenancy became a month-to-month tenancy and rent is still owed.

The tenants disputed both notices to end the tenancy, and applied for a review of the Decision.

Submissions of Tenants' Representative

The tenants do not dispute that they didn't pay rent for October, 2017 through January, 2018. Both the landlord and the tenants are in breach, and common law says that an innocent party is entitled to damages. At the end of the day, who suffered what damages is to be determined, and then do the math. It was always about the amount – a numbers game, and the tenant testified that she started looking for another place immediately upon receiving the first notice to end the tenancy. It comes down to damages each party has suffered. It is the landlord applicant who has the burden of proof and the duty to mitigate.

The landlord repudiated the contract and the tenants agreed to that. The tenancy ended on October 22, 2017 according to the December 20, 2017 Decision, pursuant to the notice to end the tenancy, and therefore, the tenancy agreement doesn't apply. Considering the common law, and the loss of the Air BNB, the tenants can't be expected to pay that amount of rent.

Analysis

The tenancy agreement speaks for itself, that rent is \$4,250.00 per month. That applies whether or not the landlord agreed to or ever knew about subletting, or if the tenants ever did sublet.

I have read the Decision of the Arbitrator from the December 20, 2017 hearing, and I agree with the landlord's representative that the tenants over-held, however the Order of Possession granted to the landlord is effective January 31, 2018. Regardless of the date the tenants actually move out of the rental unit, rent is payable in that amount. The tenants have already had a hearing with respect to reducing rent and monetary

compensation for the landlord's failure to provide quiet enjoyment and make repairs. The Decision specifically states that the tenant submits that:

"They believe the rent for October 2017 should be waived due to the problems they have suffered due to lack of repair. They recounted major problems of a leaking roof, constant plumbing problems and a flood that made the lower floor unusable and flooded with sewage. They state a new sewage line is needed. Other problems were noted also. The gas fire pilot light needed fixing, the front walkway and steps are deteriorating and in need of repair."

It also states that the tenants' monetary claim against the landlord amounted to \$30,064.25 for cleaning, repair costs, and \$25,000.00 of which was for a refund of 6 months rent. The Arbitrator found that:

"I find them entitled to 10% rebate of rent for the 13 months of loss of peaceful enjoyment and inconvenience due to neglect of the landlord. This totals \$5525 rebate."

The tenants have been granted a monetary order in the amount of \$5,625.00, including recovery of the \$100.00 filing fee and may not now dispute the amount of rent payable because of the landlord's failure to comply with the *Residential Tenancy Act* or the tenancy agreement. That is a matter that has already been adjudicated upon and the tenants have already been granted compensation. The Decision also provides that the tenants may reduce rent owed to the landlord by that amount.

The tenants' representative submits that because the December 20, 2017 Decision states that the tenancy ended on October 22, 2017, the tenancy agreement ended and the parties had no agreement with respect to the amount of rent payable from that date to the effective date of the Order of Possession, January 31, 2018. Having found that the tenants have already been awarded compensation, I find that the monthly rent of \$4,250.00 continues to the date the tenants vacate the rental unit. I find that the landlord has established a claim for unpaid rent in the amount of \$17,000.00.

With respect to unpaid utilities, I have reviewed the utility invoices, and it's clear that the water bills are the responsibility of the tenants according to the tenancy agreement. The tenants feel they should not have to pay because the water continually ran and the landlord failed to make those repairs. That is disputed by the landlord. The tenants do not dispute that they didn't pay the bill, and don't dispute the amount of the Invoice. However, the Decision of the December 20, 2017 hearing does not indicate that the tenants' application was supported by the fact that the water bills were high. The tenants had the opportunity to raise that during the hearing of their application. Further, there is no evidence to support that if the bill should be reduced, by what amount it

should be reduced. The tenants' representative suggested to the landlord that the amount would be about \$70.00 per month, but the landlord did not agree.

I find that the landlord has established the claim of \$2,370.67 for unpaid utilities.

Since the landlord has been partially successful with the application, the landlord is also entitled to recovery of the \$100.00 filing fee.

Having found that the tenants owe to the landlord the sum of \$19,470.67, and the tenants currently have a monetary order as against the landlord in the amount of \$5,625.00, I order that enforcement of either order be set off from the other.

Conclusion

For the reasons set out above, I hereby grant a monetary order in favour of the landlord as against the tenants pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$19,470.67.

This order is final and binding and may be enforced.

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: January 22, 2018

Residential Tenancy Branch