Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, CNR, MNR, MNSD, ERP, RP, PSF, OLC, DRI, RR, FF

Introduction

This hearing dealt with cross applications. All 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.

The landlords applied for:

- an Order of Possession for unpaid rent;
- a Monetary Order or unpaid and/or loss of rent; unpaid utilities; other damages or loss under the Act, regulations or tenancy agreement; and,
- Authorization to retain the tenants' security deposit and pet damage deposit.

The tenants applied for numerous remedies, as follows:

- To cancel a 10 Day Notice to End Tenancy for Unpaid Rent;
- Orders for the landlords to make repairs and emergency repairs to the property;
- Orders for the landlords to comply with the Act, regulations or tenancy agreement;
- Orders for the landlords to provide services or facilities required by law;
- To dispute of an additional rent increase;
- Authorization to reduce future rent payable;
- Monetary compensation for emergency repairs made; and,
- Monetary compensation for other damages or loss under the Act, regulations or tenancy agreement.

At the outset of the hearing, I confirmed that the parties were in receipt of the other party's hearing documents and evidence. It should be noted that I heard the lanldord had delivered an evidence package to an adult occupant who resides in the rental unit

with the tenant. The male tenant confirmed that he received the packages the lanlrod delivered to the adult occupant. I also heard that female tenant was not served directly by the landlord. Rather, the landlord provided two packages to the male tenant who in turn gave one of the packages to the female tenant. The female tenant confirmed she received the landlords' hearing documents from the male tenant and that she understood the claims against her. Although the landlord did not serve documents in a manner that complies with requirements of sections 88 and 89 of the Act, section 71 of the Act provides me the authority to deem a party sufficiently served. In this case, I was satisfied that the tenants were in receipt of the landlords' hearing documents and evidence and I deemed the tenants sufficiently served pursuant to the authorization afforded me under section 71 of the Act.

Preliminary and Procedural Matters

1. Exclusion of tenant as a named party

The tenants requested that the female tenant be excluded as a named party to this dispute for the following reasons: the female tenant no longer occupies the rental unit and removed all of her possession from the unit by December 4, 2017; the female tenant was not a tenant on the leases that pre-dated the most recent tenancy agreement that she signed in 2016; the female tenant assumed that when the 2016 tenancy agreement expired in 2017 the landlords and the male tenant would re-negotiate their lease and that she would not be listed as a tenant. The female tenant acknowledged that she did not give a notice to end tenancy to the landlords.

The landlords were not agreeable to excluding the female tenant as a named party. The landlord pointed out that the female tenant signed the tenancy agreement that is the subject of this proceeding and since the parties did not agree on new terms of tenancy the tenancy agreement converted to a month to month tenancy. Further, the female tenant did not give notice to end tenancy and the rental unit has not been vacated since one of the co-tenants and another occupant remain in possession of the rental unit.

Upon review of the tenancy agreement executed on July 27, 2016, which was provided to me by both parties, I noted that it was executed by both co-tenants appearing before me. The tenancy was set to commence on October 1, 2016 for a fixed term set to expire on September 30, 2017. The tenancy agreement requires the tenants to vacate the rental unit by the end of the fixed term. Effective December 16, 2017 the Act was amended so that landlords may no longer require tenants to vacate the rental unit at the

end of the fixed term in most circumstances; however, prior to December 16, 2017 landlords may require tenants to vacate the rental unit at the end of the fixed term so long as the tenancy agreement provides that. If the tenants do not, the landlord could seek an Order of Possession. The fixed term in this case ended on September 30, 2017 meaning the tenants were required to vacate the rental unit unless a new tenancy agreement was entered into or the parties agreed to extend the fixed term. While I heard the parties were in negotiations to enter into a new tenancy agreement, an agreement was not reached and the tenants remained in possession of the unit, which is a breach of the tenancy agreement.

With co-tenancy agreement, all co-tenants are jointly and severally responsible for fulfilling all of the tenants' obligations under the tenancy agreement. A landlord may pursue one or all co-tenants for damages or loss that results from a breach of the tenancy agreement and it is upon the co-tenants to apportion any liability to the landlords among themselves. Both tenants were required to vacate the rental unit by September 30, 2017 and they failed to do so. It is not enough that one of the co-tenants subsequently moved-out. Rather, all occupants and their possessions had to be removed by September 30, 2017. Accordingly, I find the female tenant remains liable to any damages or loss that resulted from the tenants' failure to vacate the rental unit.

The landlords also submitted an alternative argument which was that the tenancy continued on a month to month basis after the expiry of the fixed term. If that were the case, the tenants would be responsible to pay rent that is required under the tenancy agreement that remained in effect until the tenancy came to an end, such as by way of a notice to end tenancy. The tenants did not serve the landlords with a Notice to End Tenancy. Rather, the only Notice to End Tenancy that was served was a 10 Day Notice to End Tenancy for Unpaid Rent by the landlord and the tenants did not pay the outstanding rent or vacate the rental unit. Again, it is not sufficient that only one of the occupants moved out to meet the tenants' obligation.

As I see it the co-tenants have been in violation of their tenancy agreement in either circumstance and since co-tenants are jointly and severally liable, I deny the tenants' request to exclude the female tenant as a named party.

2. Naming of tenant

On another procedural matter, I noted that the tenancy agreement identifies the female tenant with a different last name than that appearing on the Applications for Dispute Resolution. The tenant explained she uses both names. None of the parties requested

the name of the female tenant be amended and I have left style of cause consistent with the naming of the female tenant on the Applications.

3. Mutual agreement to end tenancy

Shortly after the hearing commenced, I confirmed with the male tenant that he is in the process of finding new accommodation. Accordingly, I explored whether the parties had an appetite to negotiate a mutually agreeable date for the tenant to return possession of the rental unit to the landlords. The parties turned their minds to reaching a mutually agreeable vacate date and after some discussion the parties agreed that the tenant shall return vacant possession of the rental unit to the landlords by March 1, 2018. Based on their mutual agreement, I make no findings as to the validity or enforceability of the 10 Day Notice and I provide the landlords with an Order of Possession based on their mutual agreement.

4. Sever and dismiss portions of the tenants' application

Rule 2.3 of the Rules of Procedure provides me authorization and discretion to sever and dismiss issues that are not sufficiently related to the primary matter to resolve. Since the tenant has remained in possession of the rental unit and had not paid rent for several months, I determined that the primary issue to resolve was the status of the tenancy. As seen above, the parties came to an agreement with respect to returning possession of the rental unit to the landlords. For the remainder of the hearing time I informed the parties that I would make a determination as to whether the tenants owe the landlords rent and/or loss of rent and whether the tenants had a legal right to make deductions or withhold rent. The tenant identified emergency repairs as being a reason for making deductions from rent. By way of this decision, I have made determinations with respect to all of the landlords' monetary claims and determined whether the tenants are entitled to compensation for emergency repairs. The remainder of the tenants' monetary claims are dismissed with leave to reapply.

For reasons given in his decision, I have concluded that this tenancy has already ended. Since the tenancy is already over and the tenant shall be returning possession of the rental unit to the landlords very soon, many of the tenants' other remedies are moot; including: the request for orders for the landlords to make repairs, provide services or facilities, to comply with the Act, and authorization to reduce future rent payable. Accordingly, I issue no other orders with the decision.

Issue(s) to be Decided

1. Are the landlords entitled to recovery unpaid and/or loss of rent from the tenants in the amounts claimed?
2. Are the landlords entitled to recovery of utilities and other damages or loss under the Act, regulations or tenancy agreement?
3. Are the landlords authorized to retain the security deposit and pet damage deposit in partial satisfaction of unpaid and/or loss of rent?
4. Did the tenants make emergency repairs that are recoverable from the landlords?

Background and Evidence

The male tenant has been occupying the rental unit since 2013 and the parties entered into new tenancy agreements every year. The most recently executed tenancy agreement was executed by the co-tenants on July 27, 2016 for a fixed term tenancy set to commence on October 1, 2016 and end on September 30,2 017 (hereon in referred to as the tenancy agreement). The tenancy agreement provides that the tenants would have to vacate the rental unit at the end of the fixed term. The tenants were required to pay monthly rent of $3,900.00 on the first day of every month; however, the landlords had agreed to permit partial installments of $1,600.00 due on the first day of the month; $1,300.00 on the 10th day of the month; and, $1,000.00 on the 20th day of every month. The landlords are holding a security deposit of $1,300.00 and a pet damage deposit of $1,300.00.

In July 2017 the parties started to negotiate terms with a view to entering into a new tenancy agreement but were unsuccessful in reaching mutually agreeable terms. Nor, did the tenants vacate the rental unit by the end of the fixed term.

The landlords provided a ledger to demonstrate the rental payments received during the tenancy, starting in October 2016. The tenant confirmed that he reviewed the ledger and that it accurately reflects the payments made to the landlords. Based on the ledger, starting in June 2017 the tenants began falling behind in their rental payments and when the tenancy agreement came to an end on September 30, 2017 the tenants were in rental arrears of $4,600.00. The tenants made two subsequent payments to the landlords: $1,200.00 on October 31, 2017 and $3,000.00 on November 14, 2017 which the landlords applied to the rental arrears from September 2017.

The landlords issued a 10 Day Notice to End tenancy for Unpaid Rent on November 20, 2017 with an effective date of December 1, 2017 indicating rent of $8,200.00 was outstanding for the months of September 2017, October 2017 and November 2017. The property manager gave the 10 Day Notice to the tenant in person on or about November 21, 2017. The tenants did not pay any monies to the landlords after receiving the 10 Day Notice. The tenants filed to dispute the 10 Day Notice on November 30, 2017. The female tenant removed her possession from the rental unit on December 4, 2017; however, the male tenant and his mother continue to occupy the rental unit.

The landlords seek to recover unpaid and/or loss of rent from September 2017 through February 2018 in the amount of $19,900.00, as detailed in the ledger; less, $546.00 the landlords agree to pay the tenant for an emergency repair of the heating system.

The tenants were of the position they had a right to make deductions or withhold rent from the landlords. I explained to the parties that the Act provides a tenant the right to make deductions or withhold rent in limited circumstances, which are: overpaid security or pet damage deposit; overpaid rent; a deduction authorized by the landlord; a deduction authorized by an Arbitrator; or the tenant's cost to make an emergency repair that has not been reimbursed. The tenant stated he had a legal right to make deductions for emergency repairs he made. I proceeded to explore this position with both parties.

The tenant invoiced the landlord on November 10, 2017 for an emergency repair he made to the heating system in the amount of $546.00. The landlords agreed to deduct this amount from rent owed by the tenants and this invoice was not in dispute.

The tenant also invoiced the landlords on November 10, 2017 and on February 6, 2018 in the amounts of $1890.00 and $630.00 respectively. The invoices reflect rental of five commercial grade electric heaters at the rate of $60.00 per month for use in the rental unit during the months of mid-December 2016 through mid-April 2017 and October through December 2017. The heaters were acquired from the tenant's own private corporation.

It was undisputed that the primary heating system in the rental unit (a geothermal system) failed in December 2016 and with the landlord's knowledge and consent the tenant "jerry rigged" portions of the existing system so that it would generate some heat and electric heaters would supply more heat to the house (the tenant referred to as "the

back-up system”). The landlords had a new primary heating system installed in December 2017.

The tenant submitted that the heaters are commercial grade and cost approximately $250.00 each to purchase and last one to two years depending on the environment and the amount of use. The tenant submitted that the heaters could have been used on other projects or jobs but instead had to be used at the rental unit because the landlords would not replace the primary heating system. The tenant acknowledged that he did not inform the landlords that he would be billing the landlords when he brought the electric heaters to the rental unit but that he waited several months to request payment which the landlords refused to pay.

The landlords did not dispute that the tenant had brought heaters in to the rental unit for heat but submitted they were unaware how many heaters the tenant brought in and the tenant did not indicate to them that he would be billing the landlords to do so. The landlords submitted that had they known the tenant was going to bill the landlords so much in rental fees they would have purchased heaters. In recognition that the tenant provided heaters to use in the house during the colder months, the landlords were agreeable to compensating the tenant $1,000.00, the equivalent of $200.00 per heater.

The landlords also seek recovery of $872.49 for propane that the tenant used between the time the propane tank was filled on December 6, 2017 and when the tank was topped up again on January 11, 2017. The landlords also pointed out that the tenants would be responsible for propane used until the March 1, 2018 although the consumption is not known at this time. I noted that the tenancy agreement and the Addendum provide that the tenants are responsible to pay all utilities except water. I noted that the landlords had provided a copy of the propane bill from December 6, 2017 but did not the bill for the January 11, 2018 fill. The tenant stated that he did receive a copy of the January 11, 2018 bill and he submitted it with his evidence. I was able to locate the January 11, 2018 propane bill under the tenant’s submissions and confirmed that the propane company invoiced the landlord $872.49 for propane on January 11, 2018. The tenant was of the position that the heating costs are extraordinarily high due to a lack of insulation.

The landlords also seek to recover $1,687.49 for banking fees and credit card interest incurred to borrow money to cover the mortgage payments due to the tenants’ failure to pay rent. The landlords explained they had to borrow money from a private lender at higher interest rates due to their poor credit rating. I dismissed this claim summarily as such costs are not recoverable from a tenant under the Act.

Analysis

Under section 26 of the Act, a tenant is require to pay rent when due in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement; unless, the tenant has a legal right to withhold or make deductions from rent. The Act provides very limited and specific circumstances where a tenant may legally withhold rent from the landlord. An amount paid by a tenant to make an "emergency repair" is one of the circumstances where a tenant may be entitled to make deductions from rent.

As of September 30, 2017, when the fixed term tenancy ended, the tenants were in rental arrears of $4,600.00. The tenants made two subsequent payments to the landlord in the amounts of $1,200.00 and $3,000.00 which the landlord applied to the rental arrears, leaving a balance of rent owing of $400.00.

The tenant submitted that he made emergency repairs to the property for which he has not been reimbursed; however, the outstanding "invoices" provided to me are dated in November 2017 and February 2018. Accordingly, I find the landlords are entitled to recover $400.00 in unpaid rent for September 2017.

As for the landlords' entitlement to rent after the tenancy expired on September 30, 2017 I find as follows.

Based on the tenancy agreement executed by the parties, the tenancy was set to end on September 30, 2017 and the tenants were required to vacate the rental unit by that date since the parties did not reach an agreement to extend that agreement or enter into a new tenancy agreement. Where a tenant does not vacate the rental unit when the tenancy ends, section 57(3) of the Act provides that the landlords may pursue the tenant for compensation "for any period that the over holding tenant occupies the rental unit after the tenancy is ended." In this case, the tenants have over-held the rental unit since October 1, 2017 and will continue to do so until March 1, 2018 based on their agreement reached during this hearing, thus benefiting from the continued occupation of the unit. I calculate the landlords' entitlement to compensation for over-holding to be $3,900.00 per month since this is the amount the tenants were paying for rent prior to the end of the tenancy, as requested by the landlords. For the months of October 2017 through February 2018 I determine the landlords are entitled to compensation for over-holding in the amount of $19,500.00 [calculated as $3,900.00 x 5 months].

As for the landlords claim for unpaid utilities, it is undisputed that the landlords have presented the tenant with a copy of the propane bill for January 11, 2018 which represents topping up the propane tank and reflects the consumption of propane after the new heating system was installed in December 2017. The tenancy agreement and section 20 of the Addendum are clear in that the tenants are responsible to pay for all utilities at the property except for water. Therefore, I further find the landlords entitled to recover $872.49 propane from the over-holding tenants.

As for the tenants' argument heating costs were extraordinarily high due to insufficient insulation, the tenant's claims related to lack of a heat source and insulation were dismissed with leave to reapply and the amounts paid or payable for utilities, including the award for propane in this decision, may form part of the tenant's future claims against the landlords.

As for making emergency repairs to the property, section 33 of the Act conveys the right for a tenant to make a deduction for an emergency repair; however, there are many criteria that must be met in order to obtain that right.

Below, I have reproduced section 33 for the parties' further reference:

Emergency repairs

33 (1) In this section, **"emergency repairs"** means repairs that are

(a) urgent,

(b) necessary for the health or safety of anyone or for the preservation or use of residential property, and

(c) made for the purpose of repairing

(i) major leaks in pipes or the roof,

(ii) damaged or blocked water or sewer pipes or plumbing fixtures,

(iii) the primary heating system,

(iv) damaged or defective locks that give access to a rental unit,

(v) the electrical systems, or

(vi) in prescribed circumstances, a rental unit or residential property.

(2) The landlord must post and maintain in a conspicuous place on residential property, or give to a tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs.

(3) A tenant may have emergency repairs made only when all of the following conditions are met:

(a) emergency repairs are needed;

(b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;

(c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

(4) A landlord may take over completion of an emergency repair at any time.

(5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant

(a) claims reimbursement for those amounts from the landlord, and

(b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

(6) Subsection (5) does not apply to amounts claimed by a tenant for repairs about which the director, on application, finds that one or more of the following applies:

(a) the tenant made the repairs before one or more of the conditions in subsection (3) were met;

(b) the tenant has not provided the account and receipts for the repairs as required under subsection (5) (b);

(c) the amounts represent more than a reasonable cost for the repairs;

(d) the emergency repairs are for damage caused primarily by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(7) If a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

The landlords were agreeable to compensating the tenant entirely for one invoice he issued to them on November 10, 2017 in the amount of $546.00. Therefore, I award the tenant recovery of this amount without further analysis.

The tenant put forth two other invoices for “emergency repairs” that the landlords were not agreeable to paying in their full amount and I proceed to consider the tenant’s request to deduct $1,890.00 and $630.00 for these “emergency repairs”.

Based on the undisputed evidence of both parties, I accept the primary heating failed in December 2016 and that a “back-up system” was developed by the tenant, or his corporation, to supply heat in the house (referred to as the “back-up system”). In the absence of a functioning primary system, I further accept that the back-up system became the primary heating system, at least until a new primary heating system was installed in December 2017. It was also undisputed that starting in December 2016 the tenants required the use of electric heaters as part of the back-up system in order to obtain more heat in the house and that the heaters were supplied by the tenant or his company and that the landlords’ agent was aware of this. However, the tenant did not indicate he would be billing the landlords for the use of his company’s heaters and did not invoice the landlords for several months afterwards. This scenario is very atypical for emergency repairs as an emergency repair usually involves a one-time repair that is made in an urgent situation because the tenant cannot reach the landlords despite trying two times. It would appear to me that the landlords did respond to the failure of the primary heating failure in December 2016 issue and there was discussion as to tenant providing the “back up system”. What the tenant is now seeking is recovery of rental fees for the heaters that were supplied over several months after the primary system failure but without a meeting of the minds with respect to compensation for that service.

As with any applicant, the tenant applicant has a duty to mitigate losses. Accordingly, I accept the landlord's argument that had the landlords known the tenant was going to invoice the landlords for heater rental fees for several months they would have purchased heaters as being a reasonable one. Taking into account the tenant testified the heaters cost approximately $250.00 to purchase, the tenant or his company still own the heaters which can be re-used elsewhere now, I find the landlords' offer to compensate the tenant $1,000.00 (which equates to $200.00 per heater or 80% of their purchase price) for seven months of use to be reasonable. Therefore, I award the tenants $1,000.00 for use of the heaters and I authorize this amount to be deducted from rent or loss of rent awarded to the landlords.

As for the landlords' request to recover banking fees and interest costs to borrow money to pay the mortgage on the property, I dismissed this claim summarily since such costs are not recoverable under the Act. The tenants failed to pay all of the rent starting before the tenancy agreement expired; yet, the landlords did not pursue ending the tenancy for failure to pay rent until much later. Further, the tenancy was set to end on September 30, 2017 when the fixed term expired and the landlords did not pursue remedies available to the landlords under the Act, which would have been to seek an Order of Possession effective September 30, 2017. The Act provides a number of remedies where the other party has breached the Act or the tenancy agreement; however, it is upon the party who suffered the loss to take action in a timely manner to mitigate losses. Had the landlords taken action in a timely manner they could have avoided incurring borrowing costs.

I award the landlords recovery of the filing fee as the landlord's claim for unpaid and/or loss of rent had merit. I make no award for recovery of the filing fee paid by the tenants since the tenants have been over-holding for several months without paying rent and the emergency repairs were much less than the outstanding rent. The tenants' other monetary claims may have merit but that shall be determined if the tenants file another Application for Dispute Resolution and the filing fee paid for any subsequent Application for Dispute Resolution will be considered in concluding that proceeding.

I authorize the landlords to retain the tenants' security deposit and pet damage deposit in partial satisfaction of the unpaid and loss of rent.

In light of all of the above, I provide the landlords with a Monetary Order to serve and enforce upon the tenants in an amount calculated as follows:

Unpaid rent – September 2017	$ 400.00
Loss of rent – October 2017 through February 2018	19,500.00
Propane used up to January 11, 2018	872.49
Filing fee	100.00
Less: authorized deductions for emergency repair	(546.00)
Less: authorized deduction for heater rental	(1,000.00)
Less: security deposit and pet damage deposit	(2,600.00)
Monetary Order for landlords	$16,726.49

Conclusion

The landlords are provided an Order of Possession effective March 1, 2018 based on a mutual agreement reached by the parties during the hearing.

The landlords have been authorized to retain the tenants' security deposit and pet damage deposit and have been provided a Monetary Order for unpaid and/or loss of rent, utilities; less, authorized deductions for emergency repairs and heater rental in the amount of $16,726.49.

I have made a determination on the tenants' right to make deductions for emergency repairs to the primary heating system, including heater rental; however, the remainder of the tenants' monetary claims against the landlords are dismissed with leave to reapply. The other remedies sought by the tenant are moot since the tenancy has ended.

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: February 15, 2018

Residential Tenancy Branch