Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNDC, OLC, RP, LRE, RR

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to make repairs to the rental unit pursuant to section 33;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses with relevant testimony regarding the issues in dispute and to cross-examine one another.

Although the tenant applied to cancel the landlord's 1 Month Notice on January 12, 2018, it became apparent during the course of this hearing that no 1 Month Notice was issued to the tenant. The only notice to end tenancy issued by either party was a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice), which the tenant confirmed having been handed by the landlord on January 29, 2018. I find that the 10 Day Notice was duly served to the tenant in accordance with section 88 of the *Act*.

As the landlords confirmed that they received individual copies of the tenant's dispute resolution hearing package sent by the tenant by registered mail on January 15, 2018, I find that the landlords were both duly served with this package in accordance with section 89 of the *Act.* Since the landlords confirmed that they had received copies of the tenant's written evidence with the hearing package, I find that the tenant's original written evidence was served in accordance with section 88 of the *Act*.

At the hearing, Landlord NC (the landlord) testified that the landlords had sent written evidence in opposition to the tenant's claim as part of their own application for dispute resolution, which they reported is to be heard by the Residential Tenancy Branch (the RTB) on July 16, 2018. They believed that this evidence was to be considered as part of both hearings. They also noted that they had not served the tenant with this evidence for the current hearing because he had not provided them with his new mailing address.

After the hearing, I was able to locate this evidence, but note that the landlords provided no indication with that evidence that it was their intention to have this evidence considered for both hearings. The RTB's online system requires parties to submit any evidence they wish to have considered as part of a hearing in the file documents for that particular application. Since this evidence was not properly submitted for consideration of the tenant's application, I have not taken it into account as part of my decision-making. The landlords did provide an undisputed description of this evidence at the hearing. The tenant did not question their assertion that he had not paid any rent for January 2018, nor have they received the tenant's forwarding address in writing for the purpose of returning his security deposit.

Both parties agreed that this tenancy ended on January 31, 2018, when the tenant surrendered his keys to the landlords. The tenant maintained that he did so to comply with the landlords' 10 Day Notice.

Since this tenancy has ended, there was no need to consider the tenant's application to cancel the landlord's 1 Month Notice, which, as noted above, was never issued to him. Similarly, the tenant's application to obtain repairs to the rental unit and to have the landlords comply with the *Act* and the tenancy agreement is also moot, given that this tenancy has ended. These aspects of the tenant's application are hereby withdrawn.

The sole remaining issues for consideration are the tenant's claim for a monetary award for losses and damages arising out of this tenancy and for a retroactive reduction in rent.

Issues(s) to be Decided

Is the tenant entitled to a monetary award for losses and damages arising out of this tenancy? Is the landlord entitled to a retroactive reduction in rent due to the loss in value of his tenancy?

Background and Evidence

The parties signed a month-to-month residential tenancy agreement for a separate building on the landlords' property on January 1, 2014. This tenancy commenced on that date. Monthly rent was initially set at $650.00, payable in advance on the first of each month. As of September 1, 2016, the monthly rent increased to $675.00. The landlords continue to hold the tenant's $325.00 security deposit paid on January 1, 2014.

While the landlords were in Mexico, a severe storm caused damage to the tenant's building on December 30, 2017. A large branch from a tree on municipal property fell on the roof puncturing both the roof and the tenant's ceiling. The tenant immediately notified the landlord, requesting emergency repairs. Over the following days and after more storms occurred, additional branches and trees in this area continued to fall. As rent had not yet been paid for January 2018 and it appeared to the landlords that major repairs would be required and that the tenant would not be able to continue living there, Landlord EC sent the tenant an email on January 3, 2018, which included the following:

> *…I expect the roof will have to be replaced as well as drywall repairs to the inside which will be done when we return in February. If you choose to move we understand and will relax the customary requirements of 30 days notice. You may stay there rent free for the month of January but must be vacated by January 31st so that we can proceed with repairs and will keep the suite for our own use.*

In a subsequent email of January 9, 2018, Landlord EC provided the following update on the landlords' efforts to have the municipality deal with the fallen tree branch within a few days. They also reiterated their offer to let the tenant stay in the rental unit rent-free for the month of January while the tenant sought accommodations elsewhere:

> *…We talked to the city engineer today and they are sending someone within the next couple of days to deal with the trees.*
>
> *Our offer still stands for January rent providing you are vacating by the end of January. If you have not moved out by the time we get home, then January and February rents will be do and payable and we will not waive the customary requirements or notice to vacate.*
>
> (as in original)

Both parties confirmed that one of the landlord's neighbours, with the assistance of the tenant, removed the heavy branch from the roof of the tenant's rental suite. Although the tenant was not satisfied that the linoleum covering placed on the roof by the neighbour as a temporary repair was adequate to ensure his safety and to protect his rental suite from leakage, the landlord testified that this repair did hold up until the landlord returned from Mexico in late January.

The tenant maintained that he felt unsafe staying in the rental unit while a piece of the tree was piercing his ceiling and while other nearby branches and trees continued to cause damage in the area. He claimed that these trees should have been trimmed long ago and that he should not have borne the financial burden of finding another residence.

The tenant's application for a monetary award of $5,000.00 included $2,500.00 to cover his costs of temporary accommodations, finding another rental suite and moving, and a further $2,500.00 to reimburse him for the costs associated with pursuing his application for dispute resolution and the stress related factors he experienced as a result of this sequence of events. Although the RTB asks all parties seeking a monetary award to complete a Monetary Order Worksheet to outline the details of their claims, the tenant did not complete one. When asked by the landlord to provide details as to how he arrived at the $5,000.00 claim, the tenant provided few details, stating that he believed that the $2,500.00 he was asking for to compensate him for his move was "a drop in the bucket" compared to what he experienced.

Part of the tenant's claim for compensation also relied on his discovery that the rental unit that he had been living in since January 2014 was described by an inspector with the municipality as an illegal suite. He maintained that the landlords had allowed him to live in an illegal suite and that their interest in having him move was prompted by his discovery that they had failed to obtain the necessary permits to make this suite legal. The tenant read into the record the contents of a February 7, 2018 letter from an inspector with the municipality who noted that no permit had been issued to the landlords permitting them to rent this cottage to a tenant.

On this point, the landlord gave sworn testimony that the landlords had consulted with two inspectors with the municipality before they rented this suite to the tenant and were told by both of them that they could rent out the cottage as it was a legal non-conforming use. The landlord testified that the municipal inspectors closed their file on this matter at that point.

Analysis

While I have turned my mind to all the documentary evidence that was properly submitted to the RTB for this hearing and served to the other parties, including photographs, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the tenant to prove entitlement to a monetary award as it is his claim.

Section 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid or future rent owed by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement."

It is difficult to consider the tenant's claim for a monetary award without taking into account that the tenant still has not paid rent for January 2018, the last full month of this tenancy. Any retroactive reduction in rent allowed for the reduction in the value of this tenancy resulting from the fallen tree on December 30, 2017, could only impact the following month's rent. I find the landlords in no way negligent in any way with respect to the damage caused by a tree falling on their property from municipally owned land. Their duty was to repair the damage as soon as was reasonably possible, and I am satisfied that the temporary repairs accomplished this objective to an extent, pending their return later that month. They also contacted the municipality, which took action to clear the damaged tree branches so as to reduce the potential for a recurrence of problems. If the tenant had paid full monthly rent for January 2018, or if he remains bound to pay full rent for that month, I would need to consider the extent to which that amount should be reduced as a result of the loss in value of his tenancy during the month of January 2018.

Section 26(1) of the *Act* establishes that "a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent."

There is undisputed evidence that the tenant did not pay any rent for January 2018, and that the only formal notice to end tenancy issued by either party was the landlord's 10 Day Notice of January 29, 2018. Section 45(1) of the *Act* requires a tenant to end a month-to-month (periodic) tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for January 2018, the tenant would have needed to provide his notice to end this tenancy before December 1, 2017.

A tenancy can also be ended if it is "frustrated", a legal term included in paragraph 44(1)(e) of the *Act* that is reserved for severe situations where the tenancy could not possibly be continued. For example, if a

flood washed away a rental building, it could not possibly continue, nor could anyone live in a building severely damaged by fire.

Under normal circumstances, written exchanges would be required to change or modify the terms of a tenancy agreement. However, in this case, with the landlords absent and with no one designated by them to act on their behalf as the *Act* requires them to do when they are absent for an extended period of time, I find it reasonable to rely on emails or texts as the only realistic substitute for more formal written correspondence between the parties. In this case, the landlords' emails demonstrate that they believed after hearing of the damage caused to their community and to this rental suite that the tenant would not be able to continue living in this building until repairs could be undertaken. As such, they sent the tenant at least two emails to advise him that they were willing to waive the normal requirements for providing a 30 day notice to end this tenancy. As outlined above, the landlords gave the tenant repeated instructions that he was to vacate the rental unit by the end of January, and if he did, they would not charge him rent for that month. Rather than returning in February as they stated they were going to, the landlords actually returned by at least January 29, as they issued him a 10 Day Notice that day. The 10 Day Notice sought an end to this tenancy for unpaid rent, unpaid rent that they had already agreed to waive.

I am mindful of the landlords' outstanding application for a monetary award for unpaid rent owing for January 2018, and recognize that the landlords have made a separate application that is not properly before me at this time.

Section 62 of the *Act* provides me with a broad delegation of powers to make findings that I find to be related to the disputes that arise under the *Act* or the tenancy agreement. These powers also enable me to make findings of fact that I believe are necessary in the consideration of the dispute before me. I find it difficult if not impossible to make a finding with respect to the tenant's claim for a reduction in the value of his tenancy without taking into consideration the fact that he has not paid rent for January 2018, and that he followed the instructions provided to him by the landlords in their emails by vacating the rental unit on January 31, 2018. The fact that the landlords returned from Mexico earlier than they had said they were going to, changed their minds about allowing the tenant a free month's rent after seeing the damage to the rental property themselves and after the tenant served them with his application for a monetary award does not undo their earlier agreement to forego any payment of rent for January 2018, provided he had vacated the rental unit by January 31.

Under these circumstances, I find that any monetary award for the loss in value of this tenancy for which the tenant is entitled to receive arising out of the damage caused by the fallen tree branch is offset by the landlords' emailed agreement that they were foregoing his payment of rent for January 2018, provided he vacated by the end of that month. Since he did vacate the rental unit by January 31, 2018, in response to their emails, I find that the landlords agreed to let him end his tenancy without paying rent for January 2018. As this is the only month for which I find the tenant entitled to any monetary award, and he has not paid any rent for January 2018, I dismiss the tenant's application for a monetary award without leave to reapply.

In making this decision, I have also considered the tenant's claim that he is in some way entitled to a monetary award relating to the illegality of the rental suite in which he was residing for three years. I find that the landlords have provided undisputed sworn testimony that is just as convincing as the tenant's evidence with respect to the alleged illegality of the rental suite. At any rate, this tenancy did not end on the basis of any order from the municipality, but on the basis of the events stemming from the fallen tree

and the dispute as to whether or not the tenant was required to pay rent for January 2018, a dispute which eventually led to the landlords' issuance of a 10 Day Notice. I dismiss this aspect of the tenant's application, also without leave to reapply, as I find that the tenant has failed to demonstrate any entitlement to a monetary award in this regard.

I also find that the tenant is not entitled to moving expenses, his costs associated with finding a new home or any award for costs related to the stress he experienced as a result of this matter. He vacated the rental unit after failing to pay rent for January 2018, and after receiving emails from the landlords allowing him to forego the usual 30-day time requirement for providing the landlords with notice of his intention to end this tenancy. The only type of notice to end tenancy that contains a provision for a monetary award is a 2 Month Notice to End Tenancy for Landlord's Use of Property, which allows for a monetary award equivalent to one full month's rent to the tenant receiving such a notice. The landlords' emails allowing the tenant to remain in possession of the rental unit for the month of January 2018 without paying any rent essentially provided him with the same monetary allowance as would have been provided had the landlords issued a 2 Month Notice.

As noted at the hearing, the only hearing related costs for which a party may claim entitlement to receive are their filing fees for the application for dispute resolution. They must bear the remainder of any hearing related costs. In this case, the tenant did not apply for the recovery of his filing fee. I dismiss the tenant's application to recover his hearing related costs without leave to reapply.

Conclusion

I find that the landlords waived their right to obtain monthly rent from the tenant for the month of January 2018 by way of their emails to the tenant in early January 2018, and the tenant's subsequent compliance with their requirement that he vacate the rental unit by January 31, 2018. I find that any monetary award which the tenant is entitled to receive as a result of this application is limited to the period from January 1, 2018 until January 31, 2018. As the tenant has not paid any rent for January 2018, I make no monetary order in the tenant's favour with respect to this application.

The tenant's applications to cancel a 1 Month Notice that was never issued to him, and to require the landlords to undertake repairs and to comply with the *Act* and the tenancy agreement are withdrawn.

The remainder of the tenant's application is dismissed without leave to reapply.

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: March 12, 2018

Residential Tenancy Branch