Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPN, FFL

Introduction

This is an Application for Dispute Resolution brought by the Landlords requesting an Order for Possession on the basis of a notice provided by a co-tenant who vacated the premises in 2017. The Landlords also request an order for payment of the filing fee.

Both Landlords, IC and PC, and the Tenant, CB, appeared for the scheduled hearing. I find that the notice of hearing was properly served and that evidence was submitted by all parties. I do note that additional evidence was submitted only three days prior to the hearing, however, I note that much of it might not have been submitted earlier due to the fact that it involved reports which could only be obtained shortly before the hearing. I see no prejudice to either party by accepting this late evidence into consideration, but note that it is only to be considered to the extent it is relevant to the issues.

The hearing process was explained and parties were given an opportunity to ask any questions about the process. The parties were given a full opportunity to present evidence, make submissions, and to cross-examine the other party on the relevant evidence provided in this hearing.

Issue(s) to be Decided

Are the Landlords entitled to an Order for Possession pursuant to section 45 and 55 of the Residential Tenancy Act (“Act”)?

Are the Landlords entitled to payment of the filing fee of $100.00, pursuant to section 72 of the Act?

Background and Evidence

The tenancy began on December 1, 2014 as a one-year fixed term, later reverting to a month-to-month tenancy (hereinafter referred to as the "original tenancy"). The Landlords state that they gave their word that the rent amount would never be increased from the $800.00 per month, plus utilities, and that they have abided by that promise.

The agreement indicated two Tenants would reside in the basement suite, CB and his girlfriend, AC. She moved out the summer of 2017. The remaining Tenant notified the Landlords that AC had moved out in December of that year. The Landlords requested written notification from AC and she delivered an email dated January 13, 2018 which stated, "*Please be advised as of last summer of 2017 I will no longer be living at 1786 Coleman ave (B) thank you amanda campagna*"'; a hand-written signature is attached to the notice which was submitted into evidence.

In a later written statement dated February 4, 2018, which was witnessed by a third party, AC provided her reasons for leaving, which states in part: "*My reasons on moving out are due to stress and anxiety on the mould it's a major health concern not just for me but for anyone who has lived or will live in the basement suite. I have asked Ian and Patricia to fix the problem plenty of time but they fail to do so.*" Both parties confirm that AC continues to visit her boyfriend at the property, but that she no longer resides there.

On January 28, 2018, the Landlords prepared and served on the remaining Tenant a One Month Notice to End Tenancy for Cause effective February 28, 2018. The Landlords state that the relationship with CB was often volatile and that they did not want him to continue living in the basement suite.

They argued that the Tenant did not maintain the premises in a clean manner, that there were noise issues and there were issues with how he or his guests parked their vehicles. The Tenant disputes these allegations and contends that the Landlords want him out because they have said that they simply "do not like" him, and that he suspects they want higher rent for the basement suite.

The Tenant had complained about the mould repeatedly, which seemed to create further animosity. After he received the One Month Notice to End Tenancy, the Tenant brought an application to cancel the notice as he wanted to continue to live in the rental premises. In addition, he brought forward a substantial claim for monetary relief and a request for emergency repairs to address a significant mould problem, which he stated contributed to health issues and a strained relationship with his girlfriend and Landlords.

Both parties admit that the relationship between the Landlords and the Tenant grew uncomfortable and even volatile and aggressive.

A hearing was held on March 29th through the Residential Tenancy Branch. As a result of the decision, the Landlords notified the Tenant in writing that High Precision Monitoring & Analysis would conduct testing on April 17, 2018; on April 19th, they gave written notice to the Tenant that there would be a remediation process underway from April 27 through April 30th, 2018 to rectify the mould issues that were found and were documented in a report dated February 16, 2018, which was submitted into evidence along with photographs showing the extent of the mould growth inside the rental premises.

The Landlords argued that the Tenant attempted to restrict access, although admits that the work was completed on those days and in compliance with the Arbitrator's decision, with the exception of a seam along the bathtub which will be rectified shortly. The Landlords and Tenant arranged for the Tenant to stay at a hotel while the work was underway.

As the Tenant was also awarded $150.00 per month to cover exposure to mould for the months of February, March and April, he served the monetary order and demanded payment to reimburse his hotel costs, which the Landlords had indicated they agreed to do once receipts were provided by the Tenant.

The Landlords state that they obtained a certified cheque to cover both amounts and it was sent by registered mail to the Tenant on May 3rd, which will be delivered shortly; in the meantime, the Tenant sought information from the Residential Tenancy Branch and determined that he could simply deduct his monetary award from his rent under section 72(2) of the Act, which states that where there is a monetary award to be paid by a landlord, a tenant may deduct the amount from any rent due to the landlord.

The Tenant then paid only $250.00 of the $800.00 in rent, plus utilities, for May 1st. However, as the Landlords only received part of the rent on May 1st, they served a 10-Day Notice to End Tenancy for Unpaid Rent which the Tenant has disputed within the 5-day limitation period; the Tenant states that a hearing has been set for June 22nd to cancel that notice and other relief.

There was a discussion on how to resolve the issue so that money owed by both parties could be properly accounted for, as it appeared to simply be an issue of the money crossing paths over the month-end; the matter is to be resolved by the Tenant agreeing

to have the $550.00 in cash for the balance of the May rent delivered by someone to the Landlords' residence around 6 pm on May 4th, the Landlords providing assurance that one of them would be there to accept the delivery and to provide a written receipt.

The Tenant was then instructed at the hearing to speak to an Information Officer at the Residential Tenancy Branch next week once he received the receipt for his full rent (paid within the five-day limitation period allowed under the 10-Day Notice) and payment of his $550.00 monetary award plus hotel reimbursement which the Landlords assured was en route, so that he could determine whether his application required amendment before serving notice on the Landlords.

The Landlords may wish to consider whether to cancel their 10-Day Notice and are also invited to speak to an Information Officer once payment has been received from the Tenant. I make no finding of fact on the validity of the 10-Day Notice to End Tenancy nor any issues the Tenant has raised in his application to be heard June 22nd, however, given the confusion over the payment of the monetary award of March 29th and the rent having been due May 1st, the parties may wish to reconsider their positions once payments and receipts are properly distributed as per the arrangement agreed upon today. Both parties are instructed to bring forward this decision to any future hearing into evidence for the Arbitrator to review and consider.

The Tenant then confirmed that he normally pays his monthly rent in cash to the Landlord's sister who resides upstairs; a receipt is provided to him and he read a recent one at the hearing; there was no indication that ongoing rent had been accepted "for use and occupancy only".

Analysis

As a result of he hearing held March 29, 2018, the Arbitrator concluded:

1. "*I determined the tenants are entitled to an Order to cancel the one month Notice to End Tenancy as the landlord(s) failed to identify a ground to end the tenancy. Section 47 of the Residential Tenancy Act (the section that deals with the grounds to end a tenancy on the basis of a one month Notice to End Tenancy) does not identify the tenant giving notice as a ground to end the tenancy. As a result, I ordered that the Notice to End Tenancy be cancelled. An Order for Possession cannot be issued where the Notice to End Tenancy has been cancelled. The tenancy shall continue with the rights and obligations of the parties remaining unchanged*."

2. The Landlords were ordered to complete testing for mould and remedy the problem by April 30th, 2018;
3. The Landlords were ordered to pay the Tenant the sum of $450.00 as compensation for living with the mould from February 1 through April 30, 2018, which the Arbitrator indicated was the only period of time he was satisfied that there was a significant mould issue of which the Tenant had notified the Landlord in writing to rectify; the filing fee of $100.00 was also ordered.

Part of the confusion regarding the tenancy may rest with the previous Arbitrator's finding at page 4 that "*the tenancy shall continue with the rights and obligation of the parties remaining unchanged*", which on the face of it, appears to contradict the comment following on page 5 of his decision, "*I determined that this notice ends the tenancy effective on the date the Notice was received by the landlord*." For this reason, I have undertaken to explain in greater detail the current status of both the original tenancy and the one which exists today.

The Landlords initially raised the fact that there was a One Month Notice to End the Tenancy served which justifies an Order for Possession. The Tenant had applied to cancel that notice, and the Arbitrator agreed in his March 29th decision that it was not valid. Accordingly, I find that the One Month Notice to End Tenancy for Cause is *res judicata* and not an issue I may consider. *Res judicata* is the doctrine that an issue has been definitively settled by a judicial decision. The three elements of this doctrine, according to Black's Law Dictionary, 7th Edition, are: an earlier decision has been made on the issue; a final judgement on the merits has been made; and the involvement of the same parties. I am not prepared to review or consider the validity of the One Month Notice dated January 28, 2018 at this time.

Although I cannot consider the previous One Month Notice to End Tenancy dated January 28, 2018, the Landlords have brought this current application for an Order for Possession as a result of the Tenant's notice to end vacancy. Under section 55(2) of the Act, it states, "*The landlord may request an order for possession of a rental unit in any of the following circumstances by making an application for dispute resolution: (a) a notice to end the tenancy has been given by the tenant*". I find that the Landlords have properly brought forward an application under that section by filing for dispute resolution and that no other notice was required to be served on the Tenant aside from the Notice of Hearing.

The Landlords request an Order for Possession based on AC's written notice under sections 45 and 55 of the Act. The parties disagreed over whether proper notice was

given to end the tenancy by AC. The Tenant argued that emails and text messages do not suffice as formal notice to end a tenancy, and that AC was simply notifying that she was no longer living there. The Landlords argued that the notice from AC was in writing and contained her signature and therefore is valid. The notice requirements are provided in section 45 of the Act, which states:

"*Tenant's notice*

> ***45*** *(1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that*
>
> *(a) is not earlier than one month after the date the landlord receives the notice, and*
>
> *(b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*
>
> *(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*
>
> *(a) is not earlier than one month after the date the landlord receives the notice,*
>
> *(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and*
>
> *(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*
>
> *(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.*
>
> *(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy]*."

The required form and content of the notice is outlined in section 52 of the Act, which states:

"*Form and content of notice to end tenancy*

> ***52*** *In order to be effective, a notice to end a tenancy must be in writing and must*
>
> *(a) be signed and dated by the landlord or tenant giving the notice,*

> *(b) give the address of the rental unit,*
> *(c) state the effective date of the notice,*
> *(d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy,*
> *(d.1) for a notice under section 45.1 [tenant's notice: family violence or long-term care], be accompanied by a statement made in accordance with section 45.2 [confirmation of eligibility], and*
> *(e) when given by a landlord, be in the approved form*."

Although the parties made argument as to the validity of the notice provided by AC, I note that the Arbitrator's decision of March 29, 2018 states at pages 4 and 5: "*The Tenant AC has given the landlord notice in writing that she was not living in the rental unit as of the summer of 2017. I determined that this notice ends the tenancy effective on the date the Notice was received by the landlord."*

With respect to the written notice provided by AC, I am bound by this previous decision and cannot revisit the same facts to make an alternate determination. The issue is *res judicata* and I cannot consider the arguments over the validity of the notice. The original tenancy with CB and AC named as Co-Tenants, is no longer in effect.

I now turn my attention to whether the Landlords are entitled to an Order for Possession, which effectively evicts the remaining Tenant.

Policy Guideline 13 of the Residential Tenancy Branch covers the rights and responsibilities of co-tenants. The original tenancy had reverted to a periodic month-to-month tenancy after the initial one year fixed term. In such circumstances, the policy states:

> "*Where co-tenants have entered into a periodic tenancy, and one tenant moves out, that tenant may be held responsible for any debt or damages relating to the tenancy until the tenancy agreement has been legally ended. If the tenant who moves out gives proper notice to end the tenancy the tenancy agreement will end on the effective date of that notice, and all tenants must move out, even where the notice has not been signed by all tenants.* ***If any of the tenants remain in the premises and continue to pay rent after the date the notice took effect, the parties may be found to have entered into a new tenancy agreement****. The tenant who moved out is not responsible for carrying out this new agreement*." (bolding added)

The Arbitrator determined on March 29th that the January 13th notice from AC ended the tenancy and therefore, as of the stated effective date, she is no longer responsible for any debt or damages relating to the tenancy. The Landlords submit that the entire tenancy is terminated and that they are entitled to possession of the rental premises. However, the second part of the policy states that a landlord and remaining tenants may be found to have entered into a new tenancy agreement, to which the original tenant (AC in this case) would not be responsible for.

In order to determine whether a new tenancy has been entered into, one must consider the facts and circumstances involving the ongoing relationship between the parties. I find as a fact that:

- the Tenant, CB, has continued to make regular and timely rent payments and has paid his share of the utilities; the issue of the new 10-Day Notice for Unpaid Rent appears to be as a result of the Tenant deducting his monetary award only, and he is prepared to pay the difference as per the agreement reached during the hearing, based on the testimony of the Landlords that his monetary award payment is in delivery;
- the receipts the Tenant is issued by the agent for the Landlords are not noted as being “for use and occupancy only”;
- the Tenant has continued to meet rent payment obligations from September through April 30th despite the departure of his girlfriend, and the Landlords have continued to accept those payments as part of a tenancy; and
- the previous Arbitrator appears to have acknowledged the existence of a new tenancy between the remaining Tenant and the Landlords by setting out obligations for both parties into the future; for example, the Landlords had to pay $150.00 per month for the months of February, March and even April of 2018. The Landlord was ordered to remedy the mould problem and the Tenant was to allow access for that process which was ordered to be done in the thirty days following the decision, again implying that the rights and obligations of the parties continue under a new tenancy.

There is sufficient evidence, on a balance of probabilities, that a new tenancy was created and accepted. There is no notice by this Tenant to terminate the new tenancy. Accordingly, the application by the Landlords is dismissed. The new tenancy shall continue until such time as either party provides proper notice under the Act or by Order of the Residential Tenancy Branch.

As both parties described the situation as volatile, I suggest that communications be made clearly and preferably in writing to avoid confusion and misunderstanding which may ignite further incidents. Now that the mould issue has been rectified, the Tenant's complaints about health issues may be alleviated and the parties can start anew with this tenancy and abide by the rules of the legislation and regulations in good faith, without further disruption.

The Landlords provided testimony that there are noise and cleanliness issues with respect to the Tenant; those issues are not before me but the Landlord may have remedies under the legislation **if** there is sufficient evidence to prove these allegations. In addition, the promise not to increase the rent is of no force or effect at this point, as this is a new tenancy, and there are provisions for incremental increases to rent with proper notice in advance to the Tenant, as provided in the legislation.

Conclusion

The Landlords' application for an Order for Possession based on the notice provided by former Tenant, AC, is hereby dismissed without leave to re-apply. The new tenancy with CB shall continue with the rights and obligation of the parties remaining unchanged, until terminated with proper notice by either party or by order of the Residential Tenancy Branch.

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: May 07, 2018

Residential Tenancy Branch