Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, DRI, LRE, MNDCT, OLC, PSF, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution (the "Application") that was filed by the Tenant under the *Residential Tenancy Act* (the "Act"), seeking to dispute a Notice of Rent Increase, cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice"), an order restricting or setting conditions on the Landlord's right to enter the rental unit, an order for the Landlord to comply with the *Act,* regulation, or tenancy agreement, an order for the Landlord to provide services or facilities agreed upon, compensation for loss or other money owed, and recovery of the filing fee.

I note that section 55 of the *Act* requires that when a tenant submits an Application seeking to cancel a Notice to End Tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a Notice to End Tenancy that is compliant with section 52 of the *Act*.

The hearing was convened by telephone conference call and was attended by the Tenant, the Landlord, and legal counsel for the Landlord. Although legal counsel for the landlord provided only submissions and arguments, the Landlord and the Tenant both provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure"); however, I refer only to the relevant facts and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be e-mailed to them at the e-mail addresses provided in the hearing.

Preliminary matters

Preliminary Matter #1

In the Application the Tenant sought multiple remedies under multiple sections of the *Act*, a number of which were unrelated to one another. Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

As the Tenant applied to cancel a 10 Day Notice and to dispute a related Notice of Rent Increase, I find that the priority claims relate to whether the tenancy will continue and the payment of rent. As the other claims by the Tenant are not sufficiently related to rent or the continuation of the tenancy, I exercise my discretion to dismiss the Tenants claims for an order for the Landlord to comply with the *Act, Regulation,* or tenancy agreement, an order restricting or setting conditions on the Landlord's right to enter the rental unit, an order for the Landlord to provide services or facilities agreed upon, and compensation for loss or other money owed with leave to re-apply.

Preliminary Matter #2

At the outset of the hearing the Landlord stated that she has a related Application which is scheduled for hearing August 3, 2018, and requested that either her Application be heard today or that the Tenant's Application be adjourned and heard at the same time as hers.

While the Tenant acknowledged receiving the Landlord's Application, Notice of Hearing, and the related evidence package, she testified that it was not received until a few days prior to the hearing. As a result, she stated that she did not have sufficient time to consider and respond to it. The Tenant therefore disagreed that the Landlord's Application should be heard during the hearing of her own Application. Further to this the Tenant also disagreed that her Application should be adjourned as she stated that she applied on-time, that the Landlord had sufficient time to file her own cross-Application in response, and that she has appeared at the hearing on-time and ready to proceed.

Section 2.11 of the Rules of Procedure states that to respond to an existing, related Application, respondents may make a cross-application, which must be filed as soon as possible, and in any event, not less than 14 days before the hearing so that the service provisions under Rule 3.15 can be met.

The Tenant filed her Application on April 17, 2018, and the hearing of her Application was subsequently scheduled for 9:30 A.M. on June 18, 2018. Although the Landlord requested that her Application, filed June 8, 2018, be heard alongside the Tenants Application, I note that it was filed less than 14 days before the scheduled hearing date for the Tenant's Application. Further to this, I find that the Landlord had ample time to file a cross-application within the prescribed time limits, should she have wished to do so.

The ability to know the case against you and to provide evidence and testimony in your defense is fundamental to the dispute resolution process. Given the Tenant's testimony that she has not had the opportunity to review and respond to the Landlord's Application, and the fact that the Landlord did not file her Application in time to be crossed with the Tenant's Application under the Rules of Procedure, I find that it would be significantly prejudicial to the Applicant, a breach of the principles of natural justice and a breach of the Rules of Procedure to allow the Landlord's

Application to be heard during the hearing. As a result, the Landlord's request to have the hearing of her Application brought forward was denied.

I also find that the Landlord had ample time to file a cross-application and to submit evidence in response to the Tenant's Application. As a result, her request to have the hearing adjourned and rescheduled also was denied. As a result, and pursuant to sections 6.2 and 7.1 of the Rules of Procedure, the hearing therefore proceeded as scheduled based on the matters claimed in the Tenant's Application.

Preliminary Matter #3

While both parties testified that they did not have some of the evidence submitted by the other party, ultimately both parties agreed that they had before them the tenancy agreement, the 10 Day Notice, the Notice of Rent Increase, e-mail correspondence between them, a package labelled "1st Affidavit…", and a package labelled "2nd Affidavit…". As a result, the hearing proceeded based only on the above noted documentary evidence, the testimony of the parties, and the submissions of the Landlord's legal counsel.

Issue(s) to be Decided

Is the Tenant required to comply with the Notice of Rent Increase?

Is the Tenant entitled to cancellation of the 10 Day Notice?

If the Tenant is unsuccessful in cancelling the 10 Day Notice, is the Landlord entitled to an Order of Possession pursuant to section 55 of the *Act*?

Background and Evidence

The tenancy agreement in the documentary evidence before me states that the fixed-term tenancy began on November 15, 2016, and was set to end on November 30, 2017. It also states that rent in the amount of $1,325.00 is due on the first day of each month. Both parties agreed that the tenancy did not end on November 30, 2017, and that the tenancy therefore continued on a month-to-month basis at $1,325.00 per month.

Although both parties agreed that the Tenant's teenage son stayed in the rental unit frequently in late 2017, they disagreed about how often he stayed in the rental unit in 2017 and over what time period, how often he currently stays in the rental unit, and whether or not he is a visitor or an occupant. The parties agreed that a Notice of Rent Increase was served on and received by the Tenant on December 30, 2018, increasing the Tenants rent to $1,551.00 effective April 1, 2018. The Notice of Rent Increase in the documentary evidence before me indicates that the rent was increased by $166.00 due to an additional occupant and then further increased by $60.00 as the Landlord stated that the rent had not been increased since the start of the tenancy on
November 15, 2016.

Both parties agreed that rent in the amount of $1,325.00 was paid for April 2018; however, the Landlord testified that when the Tenant failed to pay the full $1,551.00 owed, a 10 Day Notice was served for the outstanding balance of $226.00. The 10 Day Notice in the documentary evidence before me, signed and dated April 15, 2018, has an effective date of April 13, 2018, and states that as of April 1, 2018, the Tenant owed $226.00 in outstanding rent. In the hearing the Tenant acknowledged receiving the 10 Day Notice from the Landlord on April 15, 2018.

The Landlord testified that the Tenant acknowledged via e-mail correspondence that her son resides with her and that she actually paid an extra $25.00 towards her rent in acceptance of this fact in December of 2017. As a result, the Landlord stated that she was entitled to increase the monthly rent amount by 25% per month pursuant to clause A1 of the tenancy agreement. However, the Landlord stated that as the additional occupant was a teenager and not an adult, she chose to increase the Tenant's rent by only $166.00 per month, which is less than 25%, and subsequently served a Notice of Rent Increase to this effect. Further to this, the Landlord stated that a further $60.00 rent increase was imposed pursuant to part 3 of the *Act*, and part 4 of the

regulation. Despite the foregoing, legal counsel for the Landlord acknowledged that the $60.00 increase was in excess of the allowable 4% increase based on a rent amount of $1,491.00 ($1,325.00, plus $166.00 for the additional occupant) as the Landlord mistakenly rounded the allowable $59.64 up to the next dollar. As a result, he argued that the Tenant was therefore only obligated to pay $1,550.64.

The Tenant testified that her son and his father moved to BC in September of 2017, and that they live in rental unit not far from her own rental unit. She stated that in September 2017, her son resided with his father, with whom she shares custody, as she was away much of the month for work. However, the Tenant acknowledged that in November of 2017, and part of December 2017, her teenage son resided with her for approximately 50% of the time. The Tenant stated that once she became aware, through e-mail communications with the Landlord, that her rent was going to increase due to her son's presence in the rental unit, she renegotiated the living arrangements with her son's father as she could not afford the rent increase. As a result, the Tenant stated that staring part way through December; her son began residing with his father the majority of the time and only stays overnight with the Tenant 1-2 weekends per month. However, the Tenant did acknowledge that her son often spends time with her after school but argued the he is a guest and not an occupant as his main residence is elsewhere.

As a result, the Tenant stated that the rent increase for the additional occupant is not valid as at the time it became effective, her son was a guest and not an occupant. Further to this, she stated that the $60.00 rent increase is also invalid as it was based on the unlawful $166.00 increase for an additional occupant and exceeded the allowable 4%. Based on the above, the Tenant argued that her rent remains at $1,325.00 and that the 10 Day Notice should therefore be cancelled as the Landlord acknowledged that $1,325.00 was received for April rent.

Analysis

Having reviewed the documentary evidence before me, I find that the Tenant was served with the 10 day Notice on April 15, 2018, the date she acknowledged receiving it. I also find that the Landlord is entitled to increase the rent by 25% for each additional occupant in the rental unit, pursuant to clause A1 of the tenancy agreement. However, based on the documentary evidence and testimony before me, I am not satisfied, on a balance of probabilities, that at the time the Notice of Rent Increase was served, the Tenant had another occupant residing with her in the rental unit. Although the Tenant agreed that her son frequently stayed in the rental unit in late 2017, the Tenant testified that since that time, alternate accommodation arrangements have been made with his father and he only stays overnight with her 1-2 weekends per month. In one of her affidavits the Landlord stated that she inspected the rental unit on May 28, 2018, and got the impression that more than one person was residing in the rental unit due to the number of towels in the bathroom and a day bed in the living room.

Other than the affidavit in which she describes observations made in the apartment during an inspection on May 28, 2018, the remainder of the Landlord's evidence and testimony in support of her position that the Tenant's son is an occupant relates to e-mail communication or interactions with the Tenant or her son in late 2017; the period of time in which the Tenant has already acknowledged that her son was residing with her 50% of the time. Given that the Landlord is seeking a rent increase of $166.00 for an additional occupant effective April 1, 2018, I find that the matter I must decide is not whether the Tenant's son resided in the rental unit in 2017, but whether on
April 1, 2018, the Tenant had another occupant residing in the rental unit with her. The Tenant testified that her son now resides with his father full time and stays with her overnight only a few days per month. While the Landlord stated in her affidavit that she got the impression another occupant was living there in May of 2018, I do not find the presence of a day bed or the Landlord's subjective assessment regarding the meaning behind the number of towels in the bathroom sufficient evidence, on a balance of probabilities, to establish that the Tenant does in fact have another occupant residing in the rental unit.

As I am not satisfied that another occupant was residing in the rental unit on
April 1, 2018, I therefore find that the Landlord was not entitled to increase the rent by $166.00 on April 1, 2018. As the additional $60.00 rent increase sought by the Landlord in the Notice of Rent Increase was based on this increased rent amount, which I have already found to be invalid, and was in excess of the 4% annual rent increase allowable for 2018, I find that both the $166.00 rent increase and the $60.00 rent increase are of no force or effect.

Based on the above I find that the amount of rent owed by the Tenant on April 1, 2018, was $1,325.00 and that this rent amount will remain in effect until the rent is increased in accordance with the *Act* and the regulation. As both parties agreed that the Tenant paid April's rent in the amount of $1,325.00 on or before April 1, 2018, I therefore find that the 10 Day Notice is invalid and of no force or effect as no rent was in fact owed at the time it was served.

As the Tenant was successful in her Application, I find that she is also entitled to the recovery of the $100.00 filing fee, pursuant to section 72 of the *Act*. The Tenant is entitled to retain this amount from the next month's rent, or to recover it from the Landlord by way of the attached Monetary Order.

Despite the foregoing, the Landlord and the Tenant should both be aware that the Landlord remains at liberty to serve a new annual Notice of Rent Increase on the Tenant in accordance with the *Act* and the regulation. The Landlord also remains at liberty to increase the Tenant's rent in accordance with clause A1 of the tenancy agreement if she has evidence that after the date of the hearing, the tenant has and additional occupant residing with her in the rental unit.

Conclusion

I order that the 10 Day Notice is cancelled and that the tenancy continue in full force and effect until it is ended in accordance with the *Act*.

I order that the Tenant's rent remain at $1,325.00 per month until such time as it is lawfully increase in accordance with the *Act* and the regulation.

Pursuant to section 67 of the *Act*, I grant the Tenant a Monetary Order in the amount of $100.00. The Tenant is provided with this Order in the above terms and the Landlord must be served with this Order as soon as possible. Should the Landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court. The Tenant also remains at liberty to deduct $100.00 from the next month's rent in lieu of serving and enforcing this Monetary Order.

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: June 18, 2018

Residential Tenancy Branch