



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

CORRECTED DECISION

Dispute Codes CNC, CNR, MNDCT, OLC, FFT

Introduction

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

- cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47;
- cancellation of the 10 Day Notice to End Tenancy for Unpaid Utilities, pursuant to section 46;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67;
- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenants' agent testified that she did not know when the tenants served the landlord with the notice of dispute resolution package. The landlord's agent testified that the notice of dispute resolution package was received in person in September 2018. I find that the landlord was served with this package in accordance with section 89 of the *Act*.

The tenants' agent testified that she did not know when the tenants served the landlord with the amendment to the dispute resolution package. The landlord's agent testified that the tenant's amendment package was received in September 2018. I find that the landlord was served with the amendment package in accordance with section 88 of the *Act*.

I note that Section 55 of the *Act* requires that when a tenant submits an Application for Dispute Resolution 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 the *Act*.

Preliminary Issue- Severance

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the One Month Notice to End Tenancy for Cause and the 10 Day Notice to End Tenancy for Unpaid Utilities and the continuation of this tenancy are not sufficiently related to any of the tenants' other claims to warrant that they be heard together. The parties were given a priority hearing date in order to address the question of the validity of the Notices to End Tenancy.

The tenants' other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the One Month Notice to End Tenancy for Cause and the 10 Day Notice to End Tenancy for Unpaid Utilities. I exercise my discretion to dismiss all of the tenants' claims with leave to reapply except cancellation of the Notices to End Tenancy and recovery of the filing fee for this application.

Issue(s) to be Decided

1. Are the tenants entitled to cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47 of the *Act*?
2. Are the tenants entitled to cancellation of the 10 Day Notice to End Tenancy for Unpaid Utilities, pursuant to section 46 of the *Act*?
3. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced

here. The relevant and important aspects of the tenants' and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on April 1, 2018 and is currently ongoing. Monthly rent in the amount of \$2,300.00 is payable on the first day of each month. A security deposit of \$1,100.00 and a pet damage deposit of \$200.00 were paid by the tenants to the landlord. The tenancy agreement states that water and electricity are not included in rent. The landlord lives above the tenants for some months out of the year. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The landlord's agent testified that on August 23, 2018 the tenants were personally served with a written demand for payment of utilities. The demand letter dated August 23, 2018 was entered into evidence. The tenants' agent did not know when the August 23, 2018 letter was received.

The landlord's agent testified that on September 23, 2018 she posted a 10 Day Notice to End Tenancy for unpaid utilities with an effective date of October 6, 2018 (the "10 Day Notice") on the tenants' door. The tenants' agent did not know when the tenants received the 10 Day Notice. The 10 Day Notice states that the tenants owe \$152.30 in outstanding utility bills. The tenants filed to dispute the 10 Day Notice on September 25, 2018.

The landlord's agent testified that on September 24, 2018 the tenants paid the landlord \$152.30 for outstanding utility bills.

The landlord's agent testified that on September 23, 2018 she posted a One Month Notice to End Tenancy for cause with an effective date of November 1, 2018 (the "One Month Notice"). The tenants' agent did not know when the tenants received the One Month Notice. The tenants filed to dispute the One Month Notice on September 25, 2018. The One Month Notice was entered into evidence.

The One Month Notice states the following reasons for ending the tenancy:

- Tenant or a person permitted on the property by the tenant has:
 - significantly interfered with or unreasonably disturbed another occupant or the landlord's agent;
 - seriously jeopardized the health or safety or lawful right of another occupant or the landlord's agent;

- Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to:
 - damage the landlord's agent's property;
 - jeopardize a lawful right or interest of another occupant or the landlord's agent.
- Breach of material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;

Significant Interference/Unreasonable Disturbance

The landlord's agent testified that the tenants have constantly e-mailed her complaining about their washing machine, the cleanliness of their windows and noise from the unit above them. The landlord's agent testified that the tenants have also knocked on her door to make complaints. E-mails from the tenants to the landlord making complaints were entered into evidence. The tenants' agent testified that the tenants were justified in their complaints because the washing machine was leaving a film on their clothes, there was mold in the window sills and the landlord's agent's dog ran around at night and barked throughout the day. The landlord's agent denied that her dog ran around at night.

The landlord's agent testified that the tenants parked in the middle of the garage which prevented the landlord from also parking in the garage. A photograph of the tenants' car parked in the middle of the garage was entered into evidence.

The landlord's agent testified that the landlord's unit has been very hot lately and alleged that the tenants' left the heat on high while they are out of the country so as to create a large bill and to make the landlord's unit uncomfortable. The tenant's agent testified that she didn't think the tenants would do that.

Serious Jeopardization of Health/Safety/Lawful Right

The landlord's agent testified that on one occasion tenant V.Y. yelled at the landlord while he was painting the deck railing above the tenants rental property because the landlord had to stand in the patio used by the tenants to paint the railing. The landlord's agent testified that this caused the landlord to have heart palpitations.

The tenants' agent testified that tenant V.Y. was angry that she was not provided with 24 hours notice that the landlord would be on her patio. The landlord's agent testified that the patio was in the backyard and that while the tenants had the right to use the

backyard and patio, they did not have exclusive occupation of the patio and that the landlord was not required to give the tenants notice before entering the patio. The tenants' agent testified that there was an oral agreement between the landlord and the tenants that the tenants had exclusive occupation of the patio.

Illegal Activity- Damage to Landlord's Property

The landlord's agent testified that when the tenants were parking their car in the garage, the car struck a suitcase which knocked over a metal basket which damaged the wall and sink. The tenants' agent stated that the tenants did bump into a suitcase in the garage but that no damage occurred as a result of this incident. The landlord submitted photographs of the damage to the wall and sink but did not submit a move in condition inspection report setting out the condition of the garage when the tenants moved in. The landlord's agent did not provide the federal, provincial or municipal law she believes the tenants breached.

Illegal Activity- Jeopardization of Legal Right/ Interest

The landlord testified that the tenants took photographs of the landlord while he painted the deck railing without the landlord's consent. The tenants submitted photographs of the landlord standing on the patio next to the subject rental property, painting the deck railing. The landlord's agent did not provide the federal, provincial or municipal law she believes the tenants breached.

Breach of a Material Term

The landlord's agent testified that when the landlord and the tenants entered into the tenancy agreement, the tenants orally agreed not to make noise after 10:30 p.m. The landlord's agent testified that the tenants made noise up until 11:00 p.m. The landlord's agent entered into evidence a letter from the landlord to the tenants dated August 23, 2018 which states in part:

Complaints have been reported regarding excessive noise levels coming from your rented premises, specifically, loud music and TV noise that occur inside and outside the unit. Two such argument occurred on 08/13/2018 11 pm and 08/19/2018 11 am-12pm.

The August 23, 2018 letter went on to say that "if this behaviour continues, I will issue you a Notice to End Tenancy...I expect your full cooperation and immediate attention to

this matter. Ignoring this warning and continuing to cause excessive noise will result in your eviction.

The tenants' advocate did not know anything about the alleged oral agreement to remain quiet after 11 pm.

The landlord entered into evidence an email from the landlord's agent to the tenants dated July 19, 2018 and an email from the tenants to the landlord's agent dated July 19, 2018. The email from the landlord's agent states "as we discussed on the first day, no TV, music etc after 10 pm, especially no later than 10:30. Please keep the noise to the minimum after 10pm. Thanks."

The responding email from the tenants states in part that "I don't think it will be possible to accommodate your request. We watch TV until 11 pm usually."

Analysis

Section 46(6) of the *Act* states that if a tenancy agreement requires the tenant to pay utility charges to the landlord, and the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them, the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

Section 46(4) states that if within 5 days after receiving a notice under this section, the tenant pays the overdue rent, the notice has no effect.

I find that the landlord served the 10 Day Notice on the Tenants pursuant to section 88 of the *Act*. Since the tenants paid the utilities stated as outstanding on the 10 Day Notice within five days of receiving the 10 Day Notice, I find that the 10 Day Notice is of no force or effect, pursuant to section 46(4) of the *Act*.

Significant Interference/Unreasonable Disturbance

Section 47(1)(d)(i) states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property.

I find that the landlord was disturbed by the tenants; however, this disturbance was not significant enough to constitute an unreasonable disturbance. The tenants are entitled

to complain to their landlord about issues arising out of their tenancy. I find that parking in the middle of the garage does not constitute significant interference or an unreasonable disturbance.

In regard to the landlord's claim that the tenants are leaving the heat on, the onus or burden of proof is on the party making the claim. When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails. I find that the landlord has not proved that the tenants are intentionally leaving the heat on to disturb the landlord.

Serious Jeopardization of Health/Safety/Lawful Right

Section 47(1)(d)(ii) states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant.

I find that the landlord's agent has failed to prove that the actions of the tenants jeopardized the health, safety, or lawful right or interest of the landlord. In this case, I find that a verbal argument does not breach s. 47(1)(d)(ii) of the *Act*.

Illegal Activity

Sections 47(1)(e)(i) and 47(1)(e)(iii) state that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that:

- has caused or is likely to cause damage to the landlord's property,
- has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord.

The term "illegal activity" includes a serious violation of federal, provincial or municipal law, whether or not it is an offence under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property.

The party alleging the illegal activity has the burden of proving that the activity was illegal. Thus, the party should be prepared to establish the illegality by providing to the arbitrator and to the other party, in accordance with the Rules of Procedure, a legible copy of the relevant statute or bylaw.

In considering whether or not the illegal activity is sufficiently serious to warrant terminating the tenancy, consideration would be given to such matters as the extent of interference with the quiet enjoyment of other occupants, extent of damage to the landlord's property, and the jeopardy that would attach to the activity as it affects the landlord or other occupants.

The landlord gave insufficient evidence of illegal activity at all. I find that the ~~tenant~~ landlord has not proved that the tenants engaged in any illegal activities.

Breach of a Material Term

Sections 47(1)(h)(i) and 47(1)(h)(ii) state that a landlord may end a tenancy by giving notice to end the tenancy if the tenant:

- has failed to comply with a material term, and
- has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

Policy Guideline 8 states that a material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

I find that the landlord's preference that the tenants remain quiet after 10:30 p.m. is not a material term as it is not a term in the tenancy agreement whatsoever. I find that even if there was an oral agreement to have quiet hours start at 10:30 p.m., the landlord has failed to prove that both parties understood that the breach of that term would result in the end of the tenancy. The landlord has not established on the balance of probabilities that the term was a material term.

As I have found that none of the landlord's reasons to end this tenancy, as stated on the One Month Notice, are valid, I find that the One Month Notice is of no force or effect.

Since the tenants were successful in their application, I find that they are entitled to recover the \$100.00 filing fee from the landlord.

Conclusion

I find the 10 Day Notice of no force or effect.

I find the One Month Notice of no force or effect

I issue a Monetary Order to the tenants in the amount of \$100.00.

The tenants are 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.

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: October 12, 2018

Residential Tenancy Branch

DECISION/ORDER AMENDED PURSUANT TO SECTION 78(1)(A)
OF THE RESIDENTIAL TENANCY ACT ON OCTOBER 23, 2018
AT THE PLACES INDICATED BY UNDERLINING OR USING ~~STRIKETHROUGH~~.