



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, DRI, MNDCT, MNRT, OLC, RR, FFT

Introduction

On September 17, 2018, the Tenant filed an Application for Dispute Resolution under the *Residential Tenancy Act* (“the *Act*”) to cancel a 10-Day Notice to End Tenancy for Unpaid Rent or Utilities (the Notice), to dispute a rent increase, to request a monetary order for damages or compensation under the Act, to request a monetary order to recover the cost associated with emergency repairs, to request an order for the Landlord to comply with the *Act*, to request an order for the Landlord to conduct regular repairs to the rental unit, and to recover the filing fee paid for this application. The matter was set for conference call.

The Landlord, her Counsel, her Agent and her Advisor (the “Landlord”) as well as the Tenant attended the hearing and were each affirmed to be truthful in their testimony. The Landlord and Tenant were provided with the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. The parties testified that they exchanged the documentary evidence that I have before me.

In a case where a tenant has applied to cancel a Notice, Rule 7.18 of the Residential Tenancy Branch Rules of Procedure require the landlord to provide their evidence submission first, as the landlord has the burden of proving cause sufficient to terminate the tenancy for the reasons given on the Notice.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

I have reviewed the Tenant’s application, and I note that he has applied to cancel a Notice to end tenancy as well as for several other issues. I find that some of these other issues are not related to the Tenant’s request to cancel the Notice. As these matters do not relate directly to a

possible end of the tenancy, I apply section 2.3 of the Residential Tenancy Branches Rules of Procedure, which states:

2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

I explained to the parties, at the outset of the hearing, that I am dismissing with leave to reapply, the Tenant's claims for a monetary order for damages or compensation under the Act, for an Order for the Landlord to comply with the *Act*, and for an Order for the Landlord to conduct regular repairs to the rental unit.

I will proceed with this hearing on the Tenant's claim to cancel the Notice, to dispute a rent increase, for a monetary order for the cost of emergency repairs, and to recover the filing fee for this hearing.

Issues to be Decided

- Should the Notice issued on September 17, 2018, be cancelled?
- If not, is the Landlord entitled to an order of possession?
- Did the Landlord issue and illegal rent increase?
- Is the Tenant entitled to a monetary order to recover the cost of emergency repairs?
- Is the Tenant entitled to the return of their filing fee?

Background and Evidence

Both parties agreed that the tenancy began on August 1, 2017, as a one-year fixed term tenancy that rolled into a month to month tenancy at the end of the fixed term. The parties also agreed that the Tenant paid the first years' worth of rent at the outset of the tenancy, in the amount of \$55,000.00. Both parties also agree that the \$2,500.00 security deposit for this tenancy, has not been paid by the Tenant. A copy of the tenancy agreement was submitted into documentary evidence by the Landlord.

The parties are in dispute as to how much the monthly rent is for this tenancy. The Landlord testified that the rent is, \$5,000.00 per month and that the Tenant had been given one month's free rent when the tenancy began, as he had paid the first years' worth of rent in advance. The Tenant testified that his monthly rent is \$4,583.33 and that he had never been given a month's free rent by the Landlord.

Both the Tenant and the Landlord agreed that the Landlord served the Notice to end tenancy to the Tenant by registered mail, sent on September 13, 2018.

The Tenant testified that he had a verbal agreement with the Landlord that he would only pay \$2,500.00 a month in rent for August, September, October and November 2018. The Tenant testified that they had entered into this agreement as he had paid for several repairs to the rental property and that the Landlord had not provided use of the guest house on the rental property as promised, and that the four-month rent reduction was compensation. The Tenant testified that he paid the reduced rent amount in August and September 2018 but that the Landlord had refused his \$2,500.00 rent payment for October 2018.

The Tenant also testified that he had paid out of pocket for emergency repairs to the rental property. The Tenant testified that he had paid to repair the fridge, stove, air conditioner, and the pool heater. The Tenant is requesting the recovery of this costs for emergency repairs to the rental unit. The Tenant submitted 15 pictures of the rental property, and 16 receipts for completed repairs into documentary evidence.

The Landlord testified that she had not agreed to a rent reduction for this tenancy and that no emergency repairs had been conducted on the property by the Tenant. The Landlord also testified that use of the guest house located on the rental property had never been promised to Tenant nor was the use of the guest house included in the tenancy agreement.

The Landlord testified that the rent for this tenancy is outstanding for August, September and October 2018. The Landlord is requesting an order of possession to enforce the Notice.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

Throughout these proceedings, I received contradictory verbal testimony from the parties to this dispute regarding the amount of rent due each month. When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making a claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. As this is a hearing to cancel a Notice to end tenancy due to unpaid rent, and the Landlord has the burden of proving that the Notice is valid, I find that the Landlord must provide evidence to show how much the monthly rent is for this property.

I have reviewed the tenancy agreement, submitted by the Landlord, and I find the tenancy agreement shows that the rent for this rental unit was contracted to be \$55,000.00 per year. I also find that there is no evidence before me to show that the Tenant had been given one month's free rent for the initial term of this tenancy. Therefore, I find that the monthly rent for this tenancy is \$4,583.33, calculated at the yearly rent rate of \$55,000.00 divided 12, by the number of months in a calendar year.

I have also received contradictory verbal testimony from the parties to this dispute regarding the existence of an agreement for a rent reduction. As it is the Tenant who is claiming the existence of this agreement, I find that it is the Tenant who has the burden to provide sufficient evidence to prove this claim, that this agreement existed. I have reviewed the documentary evidence submitted by the Tenant, and I find that there is no evidence before me to show that there had been an agreement for a rent reduction between these parties.

I find that the Landlord served a Notice to End Tenancy due to Non-payment of rent on September 13, 2018, by sending it by registered mail to the Tenant, which is an approved method of service provided for under section 88 of the *Act*.

Section 46 of the *Act* requires that upon receipt of a Notice to End Tenancy for Non-payment of Rent a tenant must, within five days, either pay the amount of the arrears indicated on the Notice or dispute the notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch. If the tenant does not do either of these things, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice under section 46(5).

Landlord's notice: non-payment of rent

- 46** (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
- (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.
- (4) Within 5 days after receiving a notice under this section, the tenant may
- (a) pay the overdue rent, in which case the notice has no effect, or
 - (b) dispute the notice by making an application for dispute resolution.
- (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
- (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
 - (b) must vacate the rental unit to which the notice relates by that date.

I find that the Tenant received the 10-Day notice on September 18, 2018, five days after it was mailed to him, pursuant to section 90 of the *Act*, and that he did apply to dispute the Notice within the legislated timeline.

I accept the testimony of both parties that the Tenant paid \$2,500.00 in rent for August 2018, and \$2,500.00 in rent for September 2018, and has paid nothing for October 2018. As of the

date of this hearing I find that the Tenant is past due in his rent, in the amount of, \$8749.99; consisting of \$2,083.33 for August 2018, \$2,083.33 for September 2018, and \$4583.33 for October 2018.

I find that the Tenant has not provided any evidence to show that he had permission from the Landlord to withhold the rent, or that he had an order from this office allowing him to withhold any portion of the rent. I have also reviewed the Tenants documentary evidence in regard to this claim that he did not pay his full rent for August, September and October 2018 due to the costs he incurred to conduct emergency repairs to the rental unit. Section 33 of the *Act* states the following:

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.

I have carefully reviewed the receipts submitted into documentary evidence by the Tenant, and I find that they show that regular repairs and maintained had been completed to the rental property, but not emergency repairs. I find that the repairs conducted on the rental property by the Tenant do not fall under the definition of emergency repairs, pursuant to section 33(1c) of the *Act*, and therefore could not be withheld from the rent by the Tenant. Consequently, I find that the Tenant was not within his rights to retain any portion of the rent due to these repairs.

Therefore, I find that the Tenant is in breach of section 26 of the *Act* by not paying the rent in accordance with the tenancy agreement and I dismiss the Tenant's application to cancel the Notice.

Section 55 of the *Act* states that a landlord may request an order of possession if a notice to end the tenancy has been given by the landlord and the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired.

Order of possession for the landlord

55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

- (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
- (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I have reviewed the Notice to End Tenancy, and I find the Notice complies with section 52 of the *Act*. As I have dismissed the Tenant's application, pursuant to section 55 of the *Act*, I must grant the Landlords an order of possession to the rental unit.

I find that the Landlord is entitled to an order of possession, pursuant to section 55 of the *Act*, effective two days after service on the Tenants. This order may be filed in the Supreme Court and enforced as an order of that Court. The Tenants are cautioned that costs of such enforcement are recoverable from the Tenants.

As I have previously found that the Tenant had not completed emergency repairs on the rental unit, I dismiss the Tenants claim for a monetary order for the recovery of the cost associated with emergency repairs of the rental property.

In addition, section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Tenant has not been successful in his application, I find that the Tenant is not entitled to recover the \$100.00 filing fee paid for his application.

Conclusion

I grant an **Order of Possession** to the Landlord effective **two days** after service of this Order on the Tenant. Should the Tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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 30, 2018

Residential Tenancy Branch