Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution, filed on June 19, 2018, wherein the Tenants requested an Order canceling a 1 Month Notice to End Tenancy for Cause issued on June 11, 2018 (the "Notice").

The hearing was conducted by teleconference on August 17, 2018. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me. The Tenants were also assisted by a law student, J.T., as well as her legal supervisor, E.P.

Preliminary Matter—Service of the Tenants' Evidence

During the hearing the Landlord, ~~R.M.,~~ B.S. alleged they did not receive~~d~~ the Tenant's evidence until less than one week before the hearing; Branch records confirm that evidence was not provided until August 10, 2018.

R.M. also stated that they did not receive the Tenants' legal counsel' written submissions until the day before the hearing. As noted during the hearing, written submissions are not evidence and there is no requirement that they be exchanged prior to the hearing; by providing the written submissions to the Landlords, counsel for the Tenants has merely given them the opportunity to review the arguments which will be advanced by the Tenant.

Rules of procedure in courts and administrative tribunals relating to the timely exchange of *evidence* are designed to prevent what is commonly called "trial by ambush": a situation where one party is not afforded a reasonable opportunity to respond to the

other party's evidence. To ensure fairness decision makers may exclude evidence which is delivered outside the applicable rules or adjourn a hearing to provide the non-offending party the opportunity to respond.

Hearings before the Residential Tenancy Branch are governed by the *Residential Tenancy Branch Rules of Procedure*; the following *Rules* apply to the service of evidence in such proceedings:

1.1 Objective

The objective of the Rules of Procedure is to ensure a fair, efficient and consistent process for resolving disputes for landlords and tenants.

3.1 Documents that must be served

The applicant must, within 3 days of the hearing package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

a) the application for dispute resolution;

b) the notice of dispute resolution proceeding letter provided to the applicant by the Residential Tenancy Branch;

c) the dispute resolution proceeding information package provided by the Residential Tenancy Branch;

d) a detailed calculation of any monetary claim being made;

e) a copy of the Notice to End Tenancy, if the applicant seeks an order of possession or to cancel a Notice to End Tenancy; and

f) any other evidence, including evidence submitted to the Residential Tenancy Branch with the application for dispute resolution, in accordance with Rule 2.5 [*Documents that must be submitted with an application for dispute resolution*].

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch not less than 14 days before the hearing.

In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the Arbitrator will apply Rule 3.17.

3.15 Respondent's evidence

To ensure fairness and to the extent possible, the respondent's evidence must be organized, clear and legible.

The respondent must ensure documents and digital evidence that are intended to be relied on at the hearing are served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. In all events, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than 7 days before the hearing.

In the event that evidence is not available when the respondent submits and serves their evidence, the Arbitrator will apply Rule 3.17 [*Consideration of new and relevant evidence*].

See also Rules 3.7 [*Evidence must be organized, clear and legible*] and 3.10 [*Digital evidence*]

3.16 Respondent's proof of service

At the hearing, the respondent must be prepared to demonstrate to the satisfaction of the Arbitrator that each applicant was served with all their evidence, as required by the Act.

3.17 Consideration of new and relevant evidence.

Evidence not provided to the other party and the Residential Tenancy Branch in accordance with Rules 3.1, 3.2, 3.10, 3.14 and 3.15 may or may not be considered depending on whether the party can show to the Arbitrator that it is new and relevant evidence and that it was not available at the time that their application was filed or when they served and submitted their evidence.

The Arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party.

Both parties must have the opportunity to be heard on the question of accepting late evidence.

> If the Arbitrator decides to accept the evidence, the other party will be given an opportunity to review the evidence. The Arbitrator must apply Rule 6.3 [*Whether to adjourn the dispute*

> **7.8 Adjournment after the dispute resolution hearing begins**
>
> At any time after the dispute resolution hearing begins, the arbitrator may adjourn the dispute resolution hearing to another time.
>
> A party or a party's agent may request that a hearing be adjourned.
>
> The arbitrator will determine whether the circumstances warrant the adjournment of the hearing.
>
> **7.9 Criteria for granting an adjournment**
>
> Without restricting the authority of the arbitrator to consider other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:
>
> • the oral or written submissions of the parties;
> • the likelihood of the adjournment resulting in a resolution;
> • the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
> • whether the adjournment is required to provide a fair opportunity for a party to be heard; and
> • the possible prejudice to each party.

I find the Tenants failed to serve their August 10, 2018 evidence submission on the Landlords in accordance with the *Rules of Procedure.* To consider the Tenants' August 10, 2018 evidence submission of would be prejudicial to the Landlords and would deny the Landlords a fair opportunity to respond to this evidence. As well, I note that the Tenants failed to make submissions as to the reason for the late delivery of this evidence, and whether it could properly be construed as "new and relevant" as provided for in *Rule 3.17.*

I accept the Tenants' testimony that the Landlords were served with the Notice of Hearing by registered mail sent June 22, 2018 (the tracking number for that package is recorded on the unpublished cover page of this my Decision). I find that the Landlords were provided with notice of the Tenants' claim nearly two months prior to the hearing. As such, although the Landlords did not have the Tenants' August 10, 2018 evidence

submission as required by the *Rules* the Landlords had ample opportunity to submit any and all evidence they had in support of their wish to end this tenancy.

Hearings at the Branch are scheduled on a priority basis. Hearings which involve urgent matters such as emergency repairs and the validity of a notice to end tenancy are scheduled sooner than monetary claims. The hearing before me dealt with the Tenants' request to cancel a notice to end tenancy and as such was scheduled as a priority. As the continuation of the tenancy is at issue, there is significant prejudice to the parties should I adjourn the matter. I also find, based on the acrimony between the parties, that an adjournment will not aid in the resolution of this matter and would rather be prejudicial to both parties.

I therefore exercise my discretion and decline to consider the Tenants' evidence submitted on August 10, 2018.

No other issues with respect to service or delivery of documents or evidence were raised by either party. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters—Email Communication with the Parties

The parties confirmed their email addresses during the hearing. The parties confirmed their understanding that this Decision would be emailed to both parties and that any applicable Orders would be emailed to the appropriate party.

Issue to be Decided

Should the Notice be cancelled?

Background and Evidence

Residential Tenancy Branch Rules of Procedure Rule 6.6 provides that when a tenant applies to cancel a notice to end tenancy the landlord must present their evidence first as it is the landlord who bears the burden of proving the reasons for ending the tenancy.

As such, although the hearing convened as a result of the Tenant's Application, the Landlords presented their evidence first.

The Landlord, R.M., testified on behalf of the Landlords. She confirmed that this tenancy began April 1, 2016 for a fixed two year term. Monthly rent was initially payable in the amount of $1,200.00 and is currently $1,245.00.

The rental unit is a two bedroom basement suite. The Landlord and her spouse, the other named Landlord, B.S., live upstairs.

The parties participated in a hearing before me on May 17, 2018 (the file number for hearing is noted on the unpublished cover page of this my Decision); by decision dated May 25, 2018, I granted the Tenants' application to cancel two notices to end tenancy. I also noted conflict arose in the tenancy due to misunderstandings and misinformation between the parties and therefore made the following findings/orders:

1. Rent is due in full on the 2nd of the month.

2. The current rent payable is $1,245.00 as of May 1, 2017.

3. The Landlord may issue a Notice of Rent Increase in the approve form, provided that such an increase is issued pursuant to Part 3 of the *Residential Tenancy Act.*

4. Should the Tenant fail to pay rent as required, the Landlord may issue a Notice to End Tenancy for Unpaid Rent pursuant to section 46 or a Notice to End Tenancy for Cause pursuant to section 47(1)(b).

5. I Order that the Landlords must not enter the rental unit unless such entry is in accordance with section 29 of the *Act.*

6. I Order that the Tenant must not unreasonably prohibit the Landlord's entry to the rental unit, provided that such entry is in accordance with section 29 of the *Act.*

7. I find that the occupants of the rental unit are as noted on the Tenant's Application for Dispute Resolution dated March 3, 2018, and which include the Tenant, his wife and his two children. This does not restrict the Tenant's right to have guests (which the parties agree is a guest whose stay is limited to one week or less). Should the Tenant allow more occupants to reside in the rental unit, the Tenant must obtain the Landlord's consent, failing which the Landlord may issue a Notice to End Tenancy pursuant to section 47 (1)(c) of the *Act.*

8. I Order that the Landlord must remove all locks to the rental unit heat control by no later than May 31, 2018.

9. I find that water, electricity, heat and cablevision are included in the payment of rent. Should the Tenant's use of heat in the rental unit substantially increase following their access to the heat control, the Landlord is at liberty to apply for an additional rent increase, or to otherwise seek monetary compensation, or to end the tenancy.

10. I find that the tenancy agreement provides that "regular laundry" (including but not limited to: towels, bedding and regular clothing and excluding delicate clothing) is to be washed off-site. Should the Landlord have reason to believe the Tenant and his family are washing their regular laundry in the bathtub of the rental unit, the Landlord is at liberty to apply for an additional rent increase or to otherwise seek monetary compensation from the Tenant.

11. I find that a material term of the tenancy agreement is that there is no smoking in the rental unit. Should the Tenant breach this prohibition, the Landlord may issue a Notice to End Tenancy for Cause under section 47(1)(h).

Less than a month after the May 17, 2018 hearing the Landlords issued the Notice which is the subject matter for the hearing before me on August 17, 2018. The Landlord testified that the reasons for issuing the Notice are that the Landlord believes the Tenants' are creating a hazard by repeatedly causing the electrical circuit breakers on the electrical panel to "trip".

A copy of the Notice was provided in evidence and upon which the Landlords listed the following reasons for wishing to end the tenancy:

- 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, or
  - put the landlord's property at significant risk;

- the Tenant has engaged in illegal activity that has caused or is likely to
  - has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or

The Landlord also provided the following "Details of Causes":

> "Due to incident on 08/06/2018 [Tenant's first name] and family tripped the electrical circuit breaker in their suite as a result of excessive power overload. This is the third incident since you have moved in. This constitutes a very serious fire hazard causing our property to be at great risk, endangering the lives and safety of the landlords and other tenant living on property."

The Landlord, R.M., testified that on June 8, 2018 after returning from shopping, she and her husband received a voice mail message from the Tenant, S.D., at 9:45 p.m. indicating there was no power and asking the Landlord to reset the breaker. The Landlord testified that she refused their request as she wanted to know why the breaker had blown.

The Landlord stated that each of the units (three in total) have separate electrical panels but all panels are all in the garage and not accessible to the respective tenants. Consequently, if a circuit breaker trips, the Tenants must seek assistance from the Landlords.

The Landlord further testified that this was the third time the Tenants have "blown the breaker" and she believes they are doing something to cause this problem and are putting the home at risk of fire.

The Landlord stated that when they first investigated the circuit breaker tripping the Tenants alleged it was "faulty wires". In response the Landlord stated that she asked them to point out where the "hanging wires were".

In response to my question as to whether they had a qualified electrician inspect the electrical system the Landlord stated that they had an inspection when they purchased the home 15 years ago.

The Landlord also claimed that the second time the breaker was blown was shortly after they saw the Tenant was charging a car battery which she submitted is misusing the electrical.

The Landlord also stated that the Tenants have "electrical devices which they have not disclosed" (specifically: video gaming systems at the home) which she believes are overloading the electrical system.

The Landlord was not able to testify as to how many electrical outlets there were in the rental unit although she stated that there were several in each room. She confirmed that the home was built 20 years ago.

In terms of the *illegal activity* alleged on the Notice, the Landlord stated that the Tenants are "bringing other people onto the property without letting the Landlord know". She

claimed that they sell second hand items online and as a result third parties come to the house. She reported that on one occasion "a couple people" came to the house and were banging on the Landlord's door when the Tenant was trying to sell a car. The Landlord said that she felt pressured by these "people" to call the Tenants. The Landlord also alleged these "people" were yelling and screaming at her which she found to be very unprofessional.

In reply to the Landlords' submissions the Tenant, R.M., confirmed that they do not have access to the electrical panel. R.M. also stated that they have only had one incident with the electrical system circuit breaker tripping, not three as alleged by the Landlord and that in any case they have not improperly overloaded the electrical system.

R.M. confirmed that she asked the Landlord to bring in an electrician to look at the electrical system and the Landlord refused.

R.M. stated that she believes the Landlords issued the Notice as they simply want the tenancy to end. She claimed that in March of 2018 when they refused to move out at the end of the fixed term tenancy the Landlord stated that they wanted to end the tenancy so they could raise the rent.

R.M. also stated that the day after the May 17, 2018 hearing the Landlords told them they would do whatever they needed to end the tenancy.

For reasons which will be expanded upon later in my Decision I informed the Tenants I did not need to hear further from the Tenants with respect to their Application.

Analysis

Ending a tenancy is a significant request and may only be done in accordance with the *Residential Tenancy Act.* A landlord who seeks to end a tenancy for cause pursuant to section 47 of the *Act* bears the burden of proving the reasons for ending the tenancy.

After consideration of the testimony of the parties and on a balance of probabilities, I find the Tenants' Application should be granted and the Notice should be cancelled.

The Landlords alleged the Tenants have created a fire and safety hazard by tripping the electrical circuit breaker. The allegations on the Notice are that this has *seriously jeopardized* the health or safety of another occupant or the landlord and put the landlord's property at *significant risk.* The use of such wording in the legislation is purposeful and reflects the standard of proof required for a landlord to end a tenancy for these reasons.

I find the Landlords have failed to meet the burden of proving this tenancy should end for the reasons cited on the Notice. The Landlords provided insufficient evidence that the Tenants actions or negligence with respect to the use of the electricity has created any risk. An electrical circuit breaker is designed to protect an electrical circuit from damage caused by excessive current. Without supporting evidence from a qualified electrician, I am unable to find that the tripping of the circuit breaker is a result of something the Tenants did or should have done, or rather some fault with the electrical system itself.

I accept the Tenants' evidence that they have asked the Landlord to have the electrical system inspected and the Landlords have failed to do so. In failing to make such enquiries, I find it more likely the Landlords simply wish to end this tenancy for any reason possible, rather than a genuine concern over the safety of the electrical system.

The evidence confirms the Tenants do not have access to their electrical panel; as such, they are unable to reset a circuit breaker which has tripped. Without such access, the Tenants are reliant on the Landlords to reset the breaker, and the Landlords failure to do so my negatively impact the Tenants' right to quiet enjoyment.

The Landlord also stated that the Tenants failed to disclose electrical devices in the rental unit; there is no legal obligation for the Tenants to do so.

Should the Landlords genuinely believe there is a risk associated with the electrical system, they should exercise due diligence and have this system inspected. Any findings or reports from such an inspection should also be provided to the Tenants.

The Landlords also allege the Tenants have engaged in illegal activity which has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property. The *illegal activity* alleged by the Landlords is the selling of second hand items online.

Residential Tenancy Branch Policy Guideline 32—Illegal Activities provides the following guidance:

> The term "illegal activity" would include a serious violation of federal, provincial or municipal law, whether or not it is an offense 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.

The Landlords have failed to provide any evidence to support their claim that the selling of second hand items is illegal. I therefore find that the Landlords have failed to prove this reason cited on the Notice.

More problematically, the Landlord, R.M., suggested she believes the Tenants must inform her of any guests to the rental unit. She is incorrect.

As discussed in the hearing, the Tenants are entitled to quiet enjoyment of the rental unit and are granted exclusive possession of the rental unit pursuant to section 28 of the *Act* which reads as follows:

> **Protection of tenant's right to quiet enjoyment**
>
> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
>
> (a) reasonable privacy;
>
> (b) freedom from unreasonable disturbance;
>
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline 6—Right to Quiet Enjoyment provides guidance with respect to monetary claims when a tenant's right to quiet enjoyment has been breached by a landlord. The Landlords are cautioned in this regard.

The allegations and testimony of the Landlord suggest the Landlord is unaware of her rights and responsibilities as a landlord. The parties are reminded that a residential tenancy is a business relationship which must be conducted in accordance with the *Act* and the *Regulations.*

Conclusion

The Tenants' application to cancel the Notice is granted. The tenancy shall continue until ended in accordance with the *Act.*

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: August 22, 2018

Corrected: September 11, 2018

Residential Tenancy Branch