Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, CNR, LRE

Introduction

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

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As Tenant TAS (the tenant) confirmed that they received the landlord's 1 Month Notice on May 31, 2019, and the landlord's 10 Day Notice on or about June 27, 2019, find that the tenants were duly served with these Notices in accordance with section 88 of the *Act*. As the landlord confirmed that they received the tenants' original dispute resolution hearing package and the tenant's amended dispute resolution hearing package in which cancellation of the landlord's 10 Day Notice was added to the issues to be considered at this hearing well in advance of this hearing, I find that the landlord was duly served with this package in accordance with section 89 of the *Act.* Since both parties confirmed that they had received one another's written evidence, I find that the written evidence was served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Should any orders be issued with respect to the landlord's right to enter the rental unit?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters, receipts, estimates, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenants' claim and my findings around each are set out below.

This tenancy for a rental unit on the opposite side of a duplex from the owner of this property commenced on September 1, 2013. Although there is no written Residential Tenancy Agreement between the parties, the parties agreed that monthly rent is currently set at $1,240.25, payable in advance by the first of each month. While the landlord referred to an informal agreement between the landlord and the tenant whereby monthly rent would be paid in advance prior to the first of each month, there is nothing in writing to document this arrangement, nor evidence that this forms a formal part of even the parties' oral agreement. In the absence of a written tenancy agreement between the parties, I rely on the tenant's Application for Tenancy which the landlord entered into written evidence, and which clearly shows that rent is not due until the first of each month. The landlord continues to hold a $575.00 security deposit for this tenancy.

The landlord's 10 Day Notice dated June 26, 2019, sought an end to this tenancy due to unpaid rent of $1,240.25 that was identified as owing as of July 1, 2019, and $85.00 in unpaid utilities. At the hearing, the landlord said that the tenant had made an informal agreement with the landlord to pay rent by the 26th of each month, although there was no written agreement to confirm this arrangement. The landlord said that no specific written notice requesting payment of the unpaid utilities bill had been issued to the tenants before the 10 Day Notice was issued.

The landlord's 1 Month Notice identified the following reasons for ending this tenancy by June 30, 2019:

Tenant has caused extraordinary damage to the unit/site or property/park.

Breach of a material term of the tenancy agreement.

In their sworn testimony, and written and photographic evidence, the landlord maintained that during the course of their tenancy the tenants did not advise the landlord of mould damage, affecting both bathrooms in this rental unit, flooring, plumbing, ceiling tiles, walls, baseboards and a cupboard. The landlord alleged that the first notification that the owner of this property received from the tenants of this extensive damage was immediately prior to an inspection of the rental unit on April 11, 2019. Until that time, the landlord claimed that the owner of the property had never been alerted to mould problems, flooding problems or any issues that would cause the extraordinary damage to the rental unit that the owner is now going to have to repair. The landlord entered into written evidence statements from three different contractors who were asked by the owner to assess the damage in the rental unit and provide estimates as to the cost of repairs. These contractors attributed the damage to water left on the floor of the upper level bathroom after a bath or a shower. One of the estimates provided by one of the contractors identified the following anticipated costs of repair:

Drywall repairs and new finishes on the main floor in the kitchen and half bath as well as the repairs around the upstairs bathroom. ($1,100.00)
Potential Tile work in the upstairs bathroom. (budget $1,000.00)
Potential trim work to replace rotten wooden elements in the upstairs bathroom (budget $500.00)
Total Bathtub replacement will be estimated if it comes to that.
Total upstairs bathroom remodel will be estimated if it comes to that.
Structural elements needing repair will be estimated when they become exposed.

In addition to this detailed estimate, the landlord also submitted the final page of another eight or nine page estimate that summarized different costs that would be encountered in the removal of hazardous waste as some of the materials requiring repairs contained asbestos. This amount totalled $7,206.95. At the hearing, the tenants' advocate said that it was difficult to assess the validity of this estimate without the preceding pages of this document.

In sworn testimony at the hearing and in their written evidence, the landlord maintained that there was a leak in the overflow of the bathtub, which needed to be repaired. The landlord said that the dwelling where the tenants were residing was likely built in the

early 1980s, and that there had been no major renovations done to the bathrooms or walls. The landlord maintained that some of the damage that had now become apparent was clearly attributable to the tenants, although some such as the repairs to the overflow mechanism in the upstairs bathroom were likely the landlord's responsibility. The landlord estimated that the tenants were responsible for most of the damage through either their own actions, through overfilling the bathtub, or through failing to notify the owner that there were mould problems and water damage until April 11, 2019. The landlord noted that an Addendum signed by the tenant and the owner at the time the Application for Tenancy was submitted indicated that the tenants were responsible for notifying the landlord of any leaks or repairs that needed immediate attention. Section 9 of the Addendum entered into written evidence by the landlord reads in part as follows:

...If important repairs such as taps, toilets, drains, etc.,...are not reported and damage could have been limited, tenant will be charged for the repair/damage...

I have also considered a June 5, 2019 written statement from the owner's brother who inspected the rental unit with the owner on April 19, 2019. At the hearing, the owner's brother confirmed the information provided in their written statement. This included the owner's brother's assessment of the length of time that the mould in the ceiling had likely been present. This also included their conclusion that the flooding on the upstairs bathroom floor had likely occurred when someone entered a filled bathtub. They surmised that the overflow drain could not handle the extent of water that flowed over the bathtub, onto the floor and leaking through the floors and into the ceiling below.

At the hearing, the tenant gave undisputed sworn testimony that they had been alerting the landlord to the presence of mould on the windows of the bedrooms and bathroom almost since this tenancy began. The tenant and Tenant PM, the tenant's adult son said that there was no fan in either bathroom and that the owner had advised them to keep the upstairs bathroom open when they showered or used the bathroom and to leave the bathroom door open. The tenant gave undisputed sworn testimony that on about 95% of the time, they had left the bathroom windows open when showering, only keeping it closed when the temperatures dropped well below freezing in the winter months. The tenant said that about three years ago the owner had told them that they were unwilling to incur the $400.00 cost to have a bathroom fan installed in the upstairs bathroom, despite the tenant's frequent requests for this method of reducing the humidity level in this rental unit, The tenant said that they had done what they could to reduce the humidity level, to the point of purchasing and using two dehumidifiers for the

rental home. They gave undisputed sworn testimony that the basement of the rental home is quite humid. They said that the building envelope has likely been compromised by the owner's refusal to take effective action to reduce the humidity levels in this home, which has probably extended to the owner's side of this duplex. The tenant said that the owner had told them that the problems with mould at the bottom of windows also affected the owner's own bedroom and that the owner provided advice on how to remove the mould from the bottom of the windows on an ongoing basis. The tenant said that their son's bedroom window was always mouldy.

The tenant also gave undisputed sworn testimony that the landlord was first made aware of the recent problems with condensation in the upstairs bathroom in December 2018. The tenant referenced a specific conversation with the owner of the home on Christmas Even in 2018, in which the high condensation levels in the bathroom were discussed.

The tenant said that they had not really noticed the wetness under the sink in the kitchen because they seldom used that cupboard.

The tenant's witness provides support services to the tenants' family as both of the adult children have conditions that require some element of support. This witness said that they have been inside the rental home on an almost weekly basis since November 2018. They said that they never noticed the ceiling mould until relatively recently and that the home is generally kept in very good condition.

The tenants' advocate maintained that this is an ageing building and that much of the damage is likely attributable to the landlord's failure to maintain the rental unit in an adequate way, given the tenant's repeated raising of concerns about the humidity levels in this rental home. The tenants' advocate maintained that some of the items that have been damaged have been extended beyond their useful life and that there is no direct evidence that the tenants allowed the bathtub to overflow causing the damage to the floor, baseboards, walls and ceiling below the upstairs bathroom. The tenants' advocate also observed that the estimates provided by the landlord were unclear as to the extent of the repairs required, some of which may result from the presence of asbestos within the rental unit.

Analysis - 10 Day Notice

At the hearing, the landlord confirmed the tenant's testimony that the tenants had paid the amount of rent identified as owing in the 10 Day Notice on June 29, 2019. As this rent was paid in full within five days of receiving the 10 Day Notice, rent was not even due until July 1, 2019, and the landlord had not issued any specific written request for payment of the $85.00 in utilities, I advised the parties at the hearing that there was no basis for the landlord proceeding with an attempt to end this tenancy for unpaid rent or utilities identified on the 10 Day Notice. The landlord's 10 Day Notice is set aside and is of no continuing force or effect.

Analysis - 1 Month Notice

Section 47 of the *Act* contains provisions by which a landlord may end a tenancy for cause by giving notice to end tenancy. Pursuant to section 47(4) of the *Act*, a tenant may dispute a 1 Month Notice by making an application for dispute resolution within ten days after the date the tenant received the notice. If the tenant makes such an application, as was the case in this instance, the onus shifts to the landlord to justify, on a balance of probabilities, the reasons set out in the 1 Month Notice.

I note that the landlord altered the wording of the required RTB Form RTB-33 by striking out some of the wording, " *that was not corrected within a reasonable time after written notice to do so"* from the prescribed wording of that portion of the 1 Month Notice. As I noted at the hearing, the wording of Form RTB-33 is designed to mirror the exact wording of the relevant portion of paragraph 47(1)(h) of the *Act*, which reads in part as follows:

> ***47*** *(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:*
>
> *(h) the tenant*
>
> *(i) has failed to comply with a material term, and*
>
> *(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;..*

As these are prescribed forms, landlords do not have the option of amending the reasons for seeking an end to a tenancy, by removing wording that does not match with their circumstances. As the landlord's 1 Month Notice modified the reasons for seeking an end to this tenancy in a way that does not match with the wording of paragraph

47(1)(h) of the *Act*, and no written notice was given to the tenants to correct the alleged breach of a material term by the tenants, the landlord's 1 Month Notice must rest on the sole basis of the following reason properly cited in the 1 Month Notice:

> *(f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;*

The issue before me is not whether damage has occurred for which the tenant is at least partially responsible, nor whether the landlord may be entitled to a monetary award for damage in some future claim by the landlord. Rather, the damage required to enable a landlord to end a tenancy for cause pursuant to paragraph 47(1)(f) of the *Act* requires a landlord to demonstrate that the tenant has caused extraordinary damage to the rental unit to the property.

There are two parts to the threshold that a landlord must meet in order to satisfy the burden of proof in such cases. First, the landlord must demonstrate on a balance of probabilities that the tenant has caused the damage. Second, the landlord must demonstrate that the damage is "extraordinary." As there is no definition of "extraordinary damage" in the *Act,* I rely on the following definitions from the Webster's New World Dictionary:

1. not ordinary
2. going far beyond the ordinary; unusual; remarkable

Such wording was not used in Section 9 of the Addendum cited by the landlord at the hearing, as that section only indicated that the tenants will be charged for the repairs and damage if they fail to report leaks or damage to the landlord. As such, I find that Section 9 of the Addendum has little bearing upon the issue at hand.

Based on the evidence before me, there is little question that damage has occurred during the course of this tenancy, damage which will likely require expensive repairs. In this regard, I find that the landlord has been diligent in obtaining three estimates for the non-hazardous portions of these repairs and another estimate for those portions of the repairs requiring the removal of hazardous waste,. The landlord has provided statements from those contractors who have inspected the premises. as well as photographs, a statement from the owner's brother and participation at this hearing by

the owner's brother who provided sworn testimony to confirm their perspective on the damage that has arisen.

While the statements from the contractors are of some value, they did not attend the hearing to support their conclusions as to the source of the damage that requires repair. As was noted by the tenants' advocate, it is difficult to assess the extent to which the $7,206.95 estimate provided by the hazardous waste specialist represents costs that should be attributable to damage created by the tenants when only the final page of their eight or nine page document was entered into written evidence by the landlord. Although the presence of asbestos in this rental home certainly increases the costs of repair, the extent to which the damage is "extraordinary" cannot be influenced by the presence of hazardous materials within the structure of the dwelling for which the presence of such is by no means the tenant's responsibility.

Many of the tenant's sworn statements regarding the frequency and timing of discussions the tenant had with the owner with respect to condensation and humidity problems within the rental unit could have been disputed had the owner been available to provide sworn testimony at this hearing. Rather than having the owner present to address the tenant's sworn testimony, the landlord, who was clearly not involved in any of these discussions, was the sole representative of the landlord who attended this hearing (with the exception of the landlord's witness).

Separate from the more compelling and specific, undisputed sworn testimony provided by the tenant and Tenant PM at this hearing, the nature of the damage is such that it is quite possible that major portions of this damage could have arisen as a result of a malfunctioning overflow drain in the bathtub. The landlord admitted that the leak from the overflow drain would not have been the tenant's responsibility to repair. In fact, the owner's brother gave sworn testimony at the hearing that even upon his detailed inspection of the upstairs bathroom, which included cutting out pieces of the wall, he was unable to locate the leak in the overflow drain. Under such circumstances, it is not surprising that the tenants would not have recognized that an overflow drain designed to look after overflow problems was not functioning as it should. While I have taken into account the opinion of the owner's brother that the flooding likely occurred when the bathtub was overfilled and the overflow drain was unable to cope with that level of overfilling when someone entered the bathtub, the malfunctioning of the overflow drain itself could also have been instrumental in leaks that affected the flooring and ceiling below that bathroom.

If there were a history of the landlord immediately attending to concerns about moisture, condensation and even mould within the rental unit, the landlord may have been in an improved position to maintain that the tenants had failed to report leaks and mould immediately to the owner of the property when they became visible. However, in this instance, there is undisputed sworn testimony before me that the tenants did raise concerns about mould and condensation with the landlord on an ongoing basis in the past, and the owner chose to do little to address such concerns. The tenants claim to have followed the instructions regarding keeping the bathroom window and door open to lessen the humidity in that room. The tenant gave undisputed sworn testimony that they installed not one but two dehumidifiers to lessen the humidity level in this rental unit.

I also must taken into account the age of this rental home, and the apparent failure to undertake any renovations or repairs, in particular to address the tenants' concerns about the lack of a bathroom fan in the rental unit. If this building were constructed in the early 1980s as the landlord maintained at the hearing, this lack of upgrading would have exhausted the useful life of at least some of the damaged elements that the landlord maintained the tenants have been responsible for causing during this tenancy. According to the RTB's Policy Guideline 40, the useful life of many of these items, such as the bathtub (20 years), cabinets (25 years), tile (10 years) and even walls (20 years) would have been due for replacement by now on the basis of reasonable wear and tear for a rental unit that is 35 plus years of age. Given the undisputed sworn testimony from the tenant that the landlord refused to install a bathroom fan and had taken no action to address the humidity problems raised by the tenant, the useful life of many of these elements of a residential tenancy would likely be even further reduced from those identified in Policy Guideline 40.

While the landlord may have met at least some of the burden of proof that damage has occurred during this tenancy, I find that the landlord has not met the burden of proof required to demonstrate that this damage went "far beyond the ordinary", was "unusual" or was "remarkable", the most specific definitions of "extraordinary" referenced earlier in this decision. In addition, the landlord has not established that the tenants have been responsible for causing the damage. In coming to this finding, I rely on the tenant's undisputed sworn testimony that the landlord has not addressed the concerns they have raised about the humidity within this rental unit, the malfunctioning of the overflow drain in the rental unit, the landlord's admission that the tenants are only partially responsible for the repairs, and the expiration of the useful life of many of the items noted in the landlord's list of items damaged.

For the above reasons and based on a balance of probabilities, I find that the landlord has not met the threshold required to demonstrate that this tenancy can be ended on the basis of paragraph 47(1)(f) of the *Act*, the only eligible reason cited correctly in the landlord's 1 Month Notice. For this reason, I allow the tenants' application to cancel the 1 Month notice.

I wish to emphasize that my decision is narrowly focussed on the extent to which the tenants are responsible for extraordinary damage to the rental unit or rental property, the terms used in paragraph 47(1)(f) of the *Act*. My decision with respect to whether the landlord is entitled to end this tenancy on those grounds does not impact any future application as to whether the tenants are responsible for damage to the rental unit or whether the landlord is entitled to some form of monetary award for damage. These are not issues that are before me, and would in all likelihood rely on a different test than that which is applied in the interpretation of paragraph 47(1)(f) of the *Act*.

Analysis - Landlord's Right to Enter Rental Unit

At the hearing, the parties agreed that the owner of the property previously understood that placement of a notice to inspect the rental unit is deemed received when it was placed on the tenants' door, enabling the landlord to inspect the rental unit on 24 hours notice. The landlord confirmed that the owner of the property now realized that notices posted on a door are deemed received on the third day after posting, pursuant to section 90 of the *Act*. In the event that more immediate, non-emergency access to the rental unit is required, the landlord can still hand the tenant a 24 written notice to inspect the rental unit. As both parties had a proper understanding of the landlord's right to enter the rental unit, there is no need to issue any orders with respect to this part of the tenants' application.

Should misunderstandings arise in the future with respect to inspections, I would encourage the parties to review the wording of the *Act,* the RTB's website and/or contact an Information Officer with the RTB for clarification of these provisions whereby landlords can access their rental units with proper written notice to do so.

Conclusion

I allow the tenants' application to set aside both the 10 Day Notice and 1 Month Notice, which are no longer of any continuing force or effect. This tenancy continues until ended in accordance with the *Act*.

Since both parties now correctly understand the provisions of the *Act* with respect to issuing written notices to inspect the rental unit, I dismiss the tenants' application for the issuance of an order restricting the landlord's right to enter the rental unit.

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: July 23, 2019

Residential Tenancy Branch