Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the landlord: FFL OPRM-DR
For the tenant: CNR FFT OLC RP

Introduction

In this cross-application, the landlord sought an order of possession for unpaid rent, a monetary order for unpaid rent, and a monetary order for recovery of the filing fee, pursuant to sections 55, 67, and 72, respectively, of the *Residential Tenancy Act* (the "Act").

The tenant sought to cancel a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice"), an order for regular repairs, an order that the landlord comply with the tenancy agreement, and recovery of the filing fee, pursuant to sections 46(4), 32 and 62(3), 62, and 72, respectively, of the Act.

The landlord applied for dispute resolution on October 14, 2019 and the tenant applied for dispute resolution on October 11, 2019. A dispute resolution hearing was held on Tuesday, November 26, 2019. The landlord, the landlord's representative, a witness for the landlord, and the tenant, attended the hearing.

The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The parties did not raise any issues with respect to the service of notices or evidence.

I have reviewed evidence submitted that met the *Rules of Procedure* and to which I was referred but have only considered evidence relevant to both the preliminary issues and issues of this application.

Preliminary Issue: Dismissal of Claims Unrelated to the Notice

Rule 2.3 of the *Rules of Procedure,* under the Act, states that claims made in an application must be related to each other. The rule further states that an arbitrator may use their discretion to dismiss unrelated claims with or without leave to reapply.

Having reviewed the tenant's application, I find that the claims other than the application to dispute the Notice are unrelated to this central claim. The most important matter that must be dealt with is determining whether this tenancy will continue. This is not to say that the issues raised by the tenant regarding heat are not important, or that they were not related to the issue of the Notice. However, as will be explained below, the issues are not legally related.

For that reason, I dismiss the tenant's claims for orders related to regular repairs and for compliance with the tenancy agreement, both without leave to reapply.

Preliminary Issue: Amendment of Landlord's Application

The landlord's application named two tenants. However, the evidence, and acknowledgement by the landlord, is such that the second named tenant ("L.D.") vacated the rental unit sometime in March 2019. The landlord did not serve the second tenant with any evidence or notices related to this dispute; as such, I advised the landlord that they had two options: (1) withdraw their application and properly serve both named tenants, or (2) amend their application to remove the second named tenant. The landlord stated that they desired to amend their application.

Given that the second named tenant has not been in the rental unit since March 2019 and for all intents and purposes has no involvement in these matters, it is fair and reasonable for the landlord to amend their application. This amendment is reflected in the cover page (the style of cause) to this decision and accompanying orders.

Issues

1. Is the tenant entitled to cancel the Notice?
2. If not, is the landlord entitled to an order of possession for unpaid rent?
3. And, is the landlord entitled to a monetary order for unpaid rent?
4. Is either party entitled to recovery of the filing fee?

Background and Evidence

The parties testified and confirmed that the tenancy commenced December 1, 2018, and that monthly rent in the amount of $1,350 is due on the last day of the month prior to the month for which it is due. A security and a pet damage deposit each equal to half of the monthly rent is currently held by the landlord in trust. A copy of the tenancy agreement was submitted into evidence. The tenancy agreement includes the names of both the tenant and the second (now removed) tenant. Finally, the tenancy agreement indicates that heat is included in the rent.

The landlord's representative testified that rent for October 2019 was not paid when it was due on September 30, 2019. They sent a reminder to the tenant on October 4, 2019 that rent was owing. On October 4, 2019, the Notice was served on the tenant by being slipped through the mail slot in the tenant's door, and a copy was served by email. The Notice, a copy of which was submitted into evidence by both parties, indicated that rent in the amount of $1,350 was due on September 30, 2019. A copy of a proof of service document was also submitted into evidence. The tenant did not dispute that she received the Notice in the manner described by the landlord's representative. No rent was paid after the Notice was given.

On October 31, 2019, the tenant did not pay rent in the amount of $1,350 for the month of November 2019, the landlord's representative testified. As such, the landlord currently seeks a monetary order equivalent to $2,700 (two months' rent).

The tenant did not dispute that she has not paid rent for October or November. She testified that she has had no access to heat in the rental unit for the past few months. Though, the issues concerning heat loss and retention appeared to have existed since she (and the second tenant) moved in last December. The tenant testified that she has done repairs, reinforcing and gaps in the windows, and so forth, in an effort to keep the rental unit warm. Last time she checked the temperature, it was 15°C in the rental unit. She is out of pocket approximately a hundred dollars related to her attempts to keep the place warm. At the moment she only has access to a small portable space heater.

In her final submission (the landlord did not have any final submissions) the tenant explained that the issue is about heat and energy savings, and that she has made improvements to enhancing the home's comfort. In summary, she noted that rent was withheld because of the landlord's inability or refusal to solve the ongoing heat issue.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

In the case, the landlord has the onus to prove that the tenant did not pay rent in accordance with the law and that they, the landlord, are therefore entitled to an order of possession and a monetary order. Conversely, the tenant has the onus to prove that they paid rent, or had the legal authority to not pay rent, which might render the 10 Day Notice is invalid.

Section 26 of the Act requires that a tenant must pay rent when it is due under the tenancy agreement, *whether or not the landlord complies with the Act, regulations or the tenancy agreement, unless the tenant has a right under the Act to deduct all or some of the rent.*

Pursuant to section 46 of the Act, the Notice informed the tenant that the Notice would be cancelled if they paid rent within five days of service. The Notice also explains that the tenant had five days from the date of service to dispute the Notice by filing an Application for Dispute Resolution.

The landlord testified and provided documentary evidence (by way of the Notice and a monetary order worksheet) to support their submission that the tenant did not pay rent when it was due for the months of October and November 2019. Indeed, the tenant acknowledged that she did not pay (or withheld) the rent for those two months.

There is no evidence before me that the tenant had a right under the Act to withhold the rent as they did. Under the Act there are only four exceptions when a tenant has a right to deduct some or all of the rent.

First, section 19 of the Act permits a tenant to deduct an overpayment from rent when a landlord requires, or collects, a security or pet damage deposit in excess of the Act.

Second, section 33(7) of the Act permits a tenant to deduct an amount from rent that the tenant expended on emergency repairs and where the landlord has failed to reimburse the tenant for those expenses. In order to determine whether a tenant has a right to deduct from rent under this section, it is necessary to apply section 33 to the facts.
Third, section 43(5) of the Act states that, where a landlord collects a rent increase that does not comply with the Act (section 43(1)), the tenant may deduct the increase from

rent, or otherwise recover the increase.

Fourth, under sections 65(1)(b) and (c), and section 72(2)(a) of the Act, a tenant may deduct an amount from rent when ordered by an arbitrator.

In this case, there is no evidence that the tenant had a right under any of these four sections of the Act to not pay the rent. And while I empathize with the tenant that the lower level rental unit may be cold – 15°C is far too cold for ordinary, daily living – she nonetheless had no legal right to withhold rent. The tenant may very well have had a valid claim for an order requiring the landlord to make reasonable efforts to provide heat as required by the tenancy agreement, but at this point it is simply too late to address those claims.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has met the onus of proving their claim that the tenant did not pay rent when it was due, and that the tenant now owes $2,700.00 in rent arrears. Thus, I dismiss the tenant’s application without leave to reapply.

Section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee. As the landlord was successful, I grant their claim for reimbursement of the filing fee of $100.00.

A monetary order in the amount of $2,800.00 is granted to the landlord.

Regarding the order of possession, if a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the arbitrator 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 arbitrator, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

Here, I find that the Notice complies with section 52 of the Act and I have dismissed the tenant’s application to dismiss the Notice. As such, I grant the landlord an order of possession.

Conclusion

The tenant’s application is dismissed in its entirety without leave to reapply.

I grant the landlord an order of possession, which must be served on the tenant and is effective (2) two days from the date of service. This order may be filed in, and enforced as an order of, the Supreme Court of British Columbia.

I grant the landlord a monetary order in the amount of $2,800.00, which must be served on the tenant. The order may be filed in, and enforced as an order of, the Provincial 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 Act.

Dated: November 26, 2019

Residential Tenancy Branch