



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding GREENAWAY REALTY LTD and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL, OPRM-DR

Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties.

The Landlord filed the application October 11, 2019 (the “Landlord’s Application”). The Landlord applied for an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated October 02, 2019 (the “10 Day Notice”). The Landlord also sought to recover unpaid rent, late fees and utilities and reimbursement for the filing fee.

The Tenants filed the application October 09, 2019 (the “Tenants’ Application”). The Tenants applied to dispute the 10 Day Notice, for an order that repairs be made to the rental unit and for reimbursement for the filing fee.

The Tenants submitted written materials outlining further requests such as reimbursement for cleaning expenses, a rent reduction and a hydro reduction. These requests were not set out in the Tenants’ Application.

K.G., C.G. and the owners appeared at the hearing for the Landlord. The Tenants appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. All parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing packages and evidence.

Tenant S.B. confirmed receipt of the hearing package and evidence for the Landlord’s Application. Tenant S.B. also confirmed receipt of the Monetary Order Worksheet.

K.G. confirmed receipt of the Tenants' evidence but testified that the Landlord did not receive the hearing package for the Tenants' Application. Tenant S.B. testified that the hearing package was served. I did not go into this further as K.G. agreed to me proceeding on both applications in any event.

Pursuant to rule 2.3 of the Rules of Procedure (the "Rules"), I advised the Tenants I would consider the dispute of the 10 Day Notice and dismiss the request for repairs as it is not sufficiently related to the dispute of the 10 Day Notice. I told the Tenants I would hear any relevant evidence about the dispute of the 10 Day Notice but would not consider whether they are entitled to a repair order. The request for repairs is dismissed with leave to re-apply. This does not extend any time limits set out in the *Residential Tenancy Act* (the "Act").

I also advised the Tenants I would not consider the requests outlined in their written materials as these were not outlined in the Tenants' Application as required.

Tenant S.B. sought an adjournment at the outset of the hearing on the basis that he was at the hospital in emergency and on medication. Tenant F.J. had called into the hearing on a separate line. I asked why Tenant F.J. could not conduct the hearing. Tenant S.B. testified that Tenant F.J. was watching their sick child. Tenant S.B. testified that his health issue arose two days prior to the hearing but that he ended up in emergency the morning of the hearing. Tenant S.B. testified that the health issue with their child arose four or five days prior to the hearing.

K.G. did not agree to an adjournment on behalf of the Landlord.

I denied an adjournment. I considered ruled 7.9 of the Rules. I determined an adjournment was not appropriate for the following reasons.

This matter deals with whether the tenancy will continue or end and therefore is important and has some urgency. The applications were made back in October and therefore the Landlord had already waited almost two months for a hearing.

Both Tenants appeared at the hearing. I was not satisfied Tenant F.J. could not conduct the hearing on behalf of the Tenants. The issues raised in the applications are straightforward. I note that Tenant F.J. was present throughout the hearing, answered questions when asked, provided testimony, was aware of the situation and had access to the Landlord's evidence. Further, Tenant S.B. was present throughout the hearing, was able to answer questions and provide testimony. The only issue that arose was

that neither of the Tenants had their own evidence in front of them. Tenant S.B. testified that this was because it was on his laptop at his office. In my view, both Tenants should have been prepared to conduct the hearing as both are named on the applications. Further, both Tenants should have ensured they had access to their own evidence prior to the hearing starting.

As well, there was no documentary evidence before me to support the Tenants' position about why they could not conduct the hearing on the hearing date.

In the circumstances, I was not satisfied an adjournment was necessary to provide a fair hearing and found there would have been prejudice to the Landlord if the hearing was adjourned.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered all documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

Landlord's Application:

1. Is the Landlord entitled to an Order of Possession based on the 10 Day Notice?
2. Is the Landlord entitled to recover unpaid rent, late fees and utilities?
3. Is the Landlord entitled to reimbursement for the filing fee?

Tenants' Application:

1. Should the 10 Day Notice be cancelled?
2. Are the Tenants entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted as evidence. It is between the owners and Tenants in relation to the rental unit. The tenancy started March 15, 2019 and is for a fixed term ending February 29, 2020. Rent is \$2,325.00 per month due on the first day of each month. The Tenants paid a security deposit of \$1,162.50 and pet damage deposit of \$1,162.50. The agreement is signed by the owners and Tenants.

K.G. testified that the written tenancy agreement submitted is the accurate tenancy agreement.

The Tenants denied that the written tenancy agreement is accurate. Tenant S.B. testified that a new tenancy agreement was entered into between the Landlord and Tenants. Tenant F.J. did not know if there was a new tenancy agreement entered into. The Tenants could not point to where in their documentary evidence there was support for the position that a new tenancy agreement was entered into. The Tenants agreed rent was \$2,325.00 per month due on the first day of each month throughout the tenancy.

I have reviewed all of the Tenants' evidence. I find the following documents relevant to this issue. An email from K.G. May 14, 2019 about getting the Tenants' initials on the tenancy agreement regarding the rent reduction relating to utilities. Emails between K.G. and the Tenants starting May 16, 2019 about a document relating to a rent change from \$2,325.00 to \$2,400.00 in relation to the utilities. An email from K.G. to Tenant F.J. May 13, 2019 with a message about the tenancy agreement that requires their initials which reflects the change in rent given the Tenants no longer had to pay for the lower tenant's utilities. None of the emails include the document referred to. There is no new tenancy agreement in the documentary evidence submitted.

The 10 Day Notice states the Tenants failed to pay \$2,325.00 in rent due October 01, 2019. It is addressed to the Tenants and refers to the rental unit. It is signed and dated by C.G. It has an effective date of October 15, 2019. Tenant S.B. advised that the Tenants did not take issue with the form or content of the 10 Day Notice.

A Proof of Service and photos were submitted in relation to service of the 10 Day Notice. The Proof of Service is signed by C.G. and states that the 10 Day Notice was posted to the door October 02, 2019. It is signed by K.G. as a witness. Both C.G. and K.G. confirmed the accuracy of the Proof of Service at the hearing.

Tenant S.B. testified that he assumes the 10 Day Notice was received October 02, 2019. Tenant F.J. testified that she believes the 10 Day Notice was received a few days after it was posted but within three days. Tenant F.J. acknowledged receiving both pages and agreed the 10 Day Notice was posted to the door of the rental unit. The Tenants testified that they filed their application October 09, 2019 with a request to waive the filing fee. Tenant S.B. testified that this was denied and the Tenants were told to pay the filing fee within two days. Tenant S.B. testified that the Tenants did so on October 18, 2019.

K.G. confirmed the 10 Day Notice relates to non-payment of October rent. K.G. testified that the Tenants have not paid rent or utilities since October.

Tenant S.B. agreed \$2,325.00 in rent was outstanding October 01, 2019. Tenant S.B. testified that the Tenants have not paid the Landlord any monies since being issued the 10 Day Notice.

I asked the Tenants for their reasons for not paying rent. The Tenants outlined the following reasons. The rental unit has needed repairs since they moved in. The repairs have not been done. They cannot use their kitchen or bathroom because of the repair issues. The Landlord told them they would be compensated for an issue that arose at move-in, but they never were. There is mold in the rental unit. The Tenants have had to go elsewhere to shower given the issues in the rental unit. They cannot use their main source of heat because of an issue with the propane.

Tenant S.B. confirmed the Tenants are not raising an issue about the amount of the security or pet damage deposits or a rent increase that is above the amount allowed by law. Tenant S.B. confirmed the Tenants did not have an order from an arbitrator allowing them to withhold rent.

Tenant S.B. testified that the Landlord agreed to the Tenants withholding ½ of May rent due to the issues that arose at move-in. The Tenants testified that this was a verbal agreement. The Tenants agreed there was no further agreement by the Landlord in relation to them withholding rent.

K.G. denied that the Landlord agreed to the Tenants withholding ½ of May rent.

I asked the Tenants if there was a time when they made a repair at the rental unit, paid for the repair themselves and asked the Landlord for reimbursement. Tenant S.B. testified that the Tenants hired a gas fitter and paid him \$150.00 in relation to the propane issue. Tenant S.B. testified that the Tenants asked the Landlord for reimbursement. Tenant S.B. did not know if the Tenants provided the Landlord a receipt or invoice for the \$150.00 paid. The Tenants also testified that they cleaned the rental unit at move-in and want reimbursement for the time spent doing this.

K.G. testified that the Landlord never received a receipt or invoice for the gas fitter hired by the Tenants.

K.G. confirmed the Landlord is seeking unpaid rent for October to December totalling \$6,975.00. K.G. sought an Order of Possession effective two days after service on the Tenants. K.G. confirmed the Landlord will reimburse the Tenants for rent paid for any period after the Tenants vacate in December.

Tenant S.B. testified that the Tenants should not be responsible for November and December rent because of the “fiasco” getting into the rental unit at the start of the tenancy. Tenant S.B. testified that the Tenants feel they are entitled to compensation for this. Tenant S.B. also reiterated that the Tenants cannot use their kitchen or bathroom.

The Landlord originally sought \$75.00 in late fees; however, K.G. acknowledged late fees are not provided for in the tenancy agreement. Tenant S.B. took the position that late fees are reflected in the new tenancy agreement signed and therefore the Tenants owe the Landlord for late fees.

In relation to unpaid utilities, the Landlord sought \$895.44 for BC Hydro and water as well as \$335.62 for propane. The Landlord sought reimbursement for BC Hydro and water bills not yet received.

The parties agreed the Tenants are responsible for paying BC Hydro, water and propane. The parties disagreed about what portion of the BC Hydro and water bills the Tenants are responsible for. K.G. testified that the agreement was the Tenants would pay 85% of these bills. The Tenants testified the agreement was they would pay 80% of these bills. Both parties submitted emails where they state their respective positions.

In relation to propane, K.G. testified that the Tenants filled the propane tank and did not pay the bill and therefore the Landlord was charged for the propane. K.G. testified that the bill was for \$349.67 but the Tenants paid some of this so the Landlord is seeking \$335.62.

In relation to the BC Hydro bill, the Tenants testified that issues in the rental unit have made the bill “outrageous” which is why they have not paid it. The Tenants outlined the issues as the propane issue which requires them to use electric heat, a leak in the ceiling which required them to run four large fans constantly and an issue with the dryer vent which requires them to dry their laundry twice.

The Tenants did not dispute that they owe for the water bill, they simply took the position that they only owe for 80% of it.

In relation to the propane, Tenant S.B. acknowledged the Tenants would usually be responsible to pay for this. However, Tenant S.B. testified that the Tenants did not pay for it because there is a leak in the pipes and thus the propane tank was empty before they could use any of the propane.

The Tenants acknowledged receiving the BC Hydro, water and propane bills.

The tenancy agreement indicates BC Hydro and water are not included in the rent.

The Landlord submitted the BC Hydro, water and propane bills.

Analysis

I am satisfied the written tenancy agreement submitted in evidence is accurate. I am not satisfied based on the evidence submitted that the parties agreed to and signed a new tenancy agreement as I do not have such a document in evidence before me. Further, the emails only refer to a rent change. The parties agreed rent has remained at \$2,325.00 throughout the tenancy.

Section 7 of the *Act* states:

7 (1) If a...tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying...tenant must compensate the [landlord] for damage or loss that results.

Section 26(1) of the *Act* states:

26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Section 46 of the *Act* allows a landlord to end a tenancy when tenants fail to pay rent. The relevant portions of section 46 state:

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...

(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...

Based on the written tenancy agreement, and agreement of the parties, I find the Tenants were required to pay \$2,325.00 in rent by the first day of each month. The Tenants provided a number of reasons for withholding rent.

There are only six reasons tenants can withhold rent:

1. When a landlord collects a security or pet damage deposit that is above the permitted amount (section 19(2) of the *Act*);
2. When section 33 of the *Act* in relation to emergency repairs applies;
3. When the landlord imposes a rent increase that is above the amount allowed by law (section 43(5) of the *Act*);
4. When the landlord issues the tenants a notice to end tenancy under section 49 of the *Act* for landlord's use of property (section 51 of the *Act*);

5. When an arbitrator allows the tenants to withhold rent (section 65(1)(f) of the *Act*); and
6. When the landlord consents to the tenants withholding rent.

Based on the testimony of the Tenants, the only reasons set out above that are possibly applicable are (1) section 33 of the *Act* in relation to emergency repairs applies and (2) the Landlord consented to the Tenants withholding rent.

What constitutes an emergency repair is set out in section 33(1) of the *Act*. Many of the issues raised by the Tenants are not emergency repairs as that term is defined in the *Act*. Further, section 33 of the *Act* states in part:

(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...

(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.

[emphasis added]

As stated in section 33 of the *Act*, tenants can only withhold rent pursuant to this section for amounts they have paid for emergency repairs. The only example the Tenants provided of having paid for emergency repairs was hiring the gas fitter. In relation to the gas fitter, I do not accept that the Tenants complied with section 33 of the *Act* in relation to withholding rent as I am not satisfied the Tenants provided the Landlord a receipt or invoice along with a request for reimbursement for the cost mentioned. Tenant S.B. did not know if a receipt or invoice was provided. K.G. testified that a receipt or invoice was not provided.

The Tenants raised an issue in relation to them cleaning at the start of the tenancy and seeking reimbursement for this. This is not an emergency repair issue as cleaning is not an emergency repair. Further, this is a compensation issue, not an issue that entitled the Tenants to withhold rent.

I find section 33 of the *Act* does not apply in the circumstances.

I do not accept that the Landlord agreed to the Tenants withholding ½ of May rent. The Tenants testified that this was a verbal agreement, not a written agreement. K.D. denied there was an agreement about the Tenants withholding ½ of May rent. I would expect an agreement about withholding rent to be in writing given the importance of paying rent in a tenancy and the consequences of failing to pay rent. Given the parties disagreed about a verbal agreement, and in the absence of some documentary evidence to support the Tenants' position, I do not accept that the Landlord agreed to the Tenants withholding ½ of May rent. I also note that May rent is not the issue before me.

None of the other reasons for withholding rent provided by the Tenants are valid reasons for withholding rent under the *Act*. If the Tenants felt they were entitled to compensation or a rent reduction, the proper course of action was to pay rent as required and seek compensation or a rent reduction through the RTB. I note that this needed to have been done prior to the Tenants withholding rent and being issued the 10 Day Notice.

Given the above, I do not find the Tenants had authority under the *Act* to withhold rent. I find the Tenants were required to pay \$2,325.00 by October 01, 2019 for October rent pursuant to section 26(1) of the *Act* and that section 46(3) of the *Act* does not apply.

I accept that the Tenants did not pay any rent for October by October 01, 2019 as the parties agreed on this. Given the Tenants did not pay rent as required, the Landlord was entitled to serve them with the 10 Day Notice.

Based on the Proof of Service, photos and testimony of K.G. and C.G., I accept that the 10 Day Notice was posted on the door of the rental unit October 02, 2019. I find the Tenants were served with the 10 Day Notice pursuant to section 88(g) of the *Act*. Given the evidence on when the Tenants received the 10 Day Notice is unclear, I apply section 90(c) of the *Act* which deems the Tenants to have received the 10 Day Notice October 05, 2019.

Upon a review of the 10 Day Notice, I find it complies with section 52 of the *Act* in form and content as required by section 46(2) of the *Act*. The Tenants did not dispute this.

The Tenants had five days from receipt of the 10 Day Notice on October 05, 2019 to pay or dispute it pursuant to section 46(4) of the *Act*. The Tenants therefore had until October 10, 2019 to pay or dispute the 10 Day Notice.

Based on the agreement of the parties, I accept that the Tenants did not pay any rent after the 10 Day Notice was issued.

The Tenants disputed the 10 Day Notice October 09, 2019 although the filing fee was not paid until October 18, 2019. Although an application is not complete until the filing fee is paid, and therefore the Tenants' Application was technically not filed in time, I have considered the Tenants to have disputed the 10 Day Notice October 09, 2019 for the purposes of this decision.

The Tenants provided their reasons for withholding rent. None of the reasons provided amount to authority under the *Act* to withhold rent. The Tenants did not provide any

other basis on which the 10 Day Notice is invalid. I find the 10 Day Notice is valid and dismiss the Tenants' dispute of the 10 Day Notice.

Section 55(1) of the *Act* states:

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...and

(b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I have found the 10 Day Notice complies with section 52 of the *Act*. I have also dismissed the Tenants' dispute of the 10 Day Notice. Therefore, pursuant to section 55(1) of the *Act*, I issue the Landlord an Order of Possession effective two days after service on the Tenants.

In relation to unpaid rent, I accept that the Tenants have not paid October, November or December rent as the Tenants acknowledged this. As stated above, I do not accept that the Tenants had authority under the *Act* to withhold rent as none of the reasons for withholding rent provided amount to authority under the *Act* to withhold rent. Again, if there were repairs needed in the rental unit or the Tenants felt they were entitled to compensation or a rent reduction, the proper course of action was to pay rent as required and seek relief through the RTB. In the circumstances, I am satisfied the Tenants owe the Landlord \$6,975.00 in rent for October to December. The Landlord is awarded this amount. However, the Landlord is to reimburse the Tenants for any rent paid past the date in December that the Tenants vacate.

In relation to late fees, I do not accept that the Landlord is entitled to these. I do not accept that late fees are permitted in the tenancy agreement and therefore the Landlord cannot charge these fees pursuant to section 7(1)(d) of the *Residential Tenancy Regulation*.

In relation to the utilities, the parties disagreed about what percentage the Tenants are responsible for. This is the Landlord's request and the Landlord's onus to prove. Further, the Landlord should have had this agreement in writing. I am not satisfied based on the testimony or evidence provided that the agreement was that the Tenants

would pay 85%. Therefore, I am only satisfied the Tenants are responsible to pay 80% which was the Tenants' position.

I am satisfied based on the bills and testimony provided that the Tenants owe:

- \$87.91 for the water bill from October 10, 2019 (80% of \$109.89);
- \$333.46 for the BC Hydro bill (80% of \$416.83); and
- \$335.62 for propane (100% of bill minus payment made).

I do not accept that the Tenants are relieved of their obligation to pay utilities for the reasons provided by the Tenants. As the parties agreed and as shown in the tenancy agreement, utilities are not included in rent and the Tenants are obligated to pay their portion of the utility bills. If the Tenants felt they were entitled to compensation or a reduction in the amount of utilities paid for the reasons provided, the proper course of action was to pay the utility bills and seek compensation or a reduction through the RTB.

I am satisfied the Tenants owe the amounts set out above. I decline to award the Landlord compensation for the utility bills that have not yet been received. In my view, the Landlord needs to wait until these bills are received so that the amount owing is known to the parties.

In summary, the Landlords are entitled to the following compensation:

- \$6,975.00 for unpaid rent for October to December;
- \$87.91 for the water bill;
- \$333.46 for the BC Hydro bill; and
- \$335.62 for propane.
- **Total = \$7,731.99**

As the Landlord was successful in this application, I award the Landlord reimbursement for the **\$100.00** filing fee pursuant to section 72(1) of the *Act*.

As the Tenants were not successful in this application, I decline to award them reimbursement for the filing fee.

The Landlord is issued a Monetary Order for \$7,831.99 pursuant to section 67 of the *Act*. The Landlord can keep the security and pet damage deposits towards this amount pursuant to section 72(2) of the *Act*. If the Landlord keeps the security and pet damage

deposits, the Landlord is only entitled to enforce the remaining portion of the Monetary Order. If the Landlord does not keep the security and pet damage deposits towards the outstanding amount, the Landlord is entitled to enforce the full amount of the Monetary Order.

Conclusion

The Tenants' dispute of the 10 Day Notice and request for reimbursement for the filing fee are dismissed without leave to re-apply.

The Landlord is granted an Order of Possession effective two days after service on the Tenants. This Order must be served on the Tenants and, if the Tenants do not comply with this Order, it may be filed and enforced in the Supreme Court as an order of that Court.

The Landlord is entitled to monetary compensation in the amount of \$7,831.99. I issue the Landlord a Monetary Order in this amount. The Landlord can keep the security and pet damage deposits towards this amount. If the Landlord keeps the security and pet damage deposits, the Landlord is only entitled to enforce the remaining portion of the Monetary Order. If the Landlord does not keep the security and pet damage deposits towards the outstanding amount, the Landlord is entitled to enforce the full amount of the Monetary Order. This Order must be served on the Tenants and, if the Tenants do not comply with the Order, it may be filed in the Provincial Court (Small Claims) 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 *Act*.

Dated: December 11, 2019

Residential Tenancy Branch