Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNC, MNDCT, LRE, FFT

Introduction

In this dispute, the tenants seek an order setting aside a One Month Notice to End Tenancy for Cause (the "Notice") dated July 27, 2020, pursuant to section 47 of the *Residential Tenancy Act* (the "Act"). In addition, they seek compensation under section 67 of the Act and an order restricting the landlord's right to enter the rental unit, under section 70 of the Act. And, they also seek recovery of the application filing fee under section 72 of the Act.

The tenants filed an application for dispute resolution on July 31, 2020 and a dispute resolution hearing was held on September 25, 2020. The tenants, their legal counsel, the landlord, a translator, and the landlord's agent attended the hearing and were given a full opportunity to be heard, present affirmed testimony, make submissions, and call witnesses.

Preliminary Issue 1: Service of Evidence

In respect of the service of evidence, tenants' counsel raised an objection with respect to a second package of evidence that the landlord had submitted, explaining that he received it on September 16, 2020. While he also said that he had time to review it, his clients were prejudiced due to the lack of time to respond to that evidence. The landlord's agent countered this, saying that they had submitted it within the required timeline.

As per Rule 3.15 of the *Rules of Procedure,* "the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing." In this case, as the landlord – that is, the respondent – served this evidence nine days before the hearing, I find that their evidence was served in compliance with the *Rules of Procedure* and is therefore admitted. I note that the landlord took no issue with the service of the tenants' evidence.

Preliminary Issue 2: Severing of Unrelated Matters

As briefly discussed with tenants' counsel, given the limited time in which the parties had to conduct a dispute resolution hearing, and, taking into the account the rather more urgent aspect of the tenants' application (namely, the application to set aside the Notice), I dismiss the tenants' application for compensation under section 67 of the Act, and, the tenants' application for an order to restrict the landlord's right to enter the rental unit pursuant to section 70 of the Act. And, while these two claims are not entirely unrelated to the primary issue, more critical is that the primary issue must be dealt with more expediently.

Therefore, those two components of the tenants' application are dismissed, with leave to reapply. As such, I will not, for the purposes of this Decision, refer to or otherwise reproduce evidence of either party relating to the tenants' claim for compensation or for the order under section 70 of the Act.

Issues

1. Are the tenants entitled to an order cancelling the Notice?
2. Are the tenants entitled to recovery of the filing fee?

Background and Evidence

The tenancy in this dispute commenced on June 1, 2019. Monthly rent is $3,100.00 and the tenants paid a security deposit of $1,550.00. A copy of the written tenancy agreement was submitted into evidence. It should be noted that the tenancy agreement contains a clause that requires the tenants to carry tenant insurance.

On July 27, 2020, the landlord's agent (hereafter the "landlord" for brevity) issued the Notice. A copy of the Notice was submitted into evidence, and which indicated that the landlord intended to end the tenancy because (1) the tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord, and (2) the tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.

The landlord testified that on April 10, 2020, the tenants left a faucet on which resulted in flooding. According to the landlord, the flood caused "extraordinary damage" to both the rental unit and other rental unit and the building (the latter two of which, the landlord

clarified, are not owned by the landlord). Moreover, the cost of the damage is approximately $21,000.00. In addition, the landlord provided written submissions and testified that another occupant, an elderly fellow in the unit below the rental unit, suffered discomfort from having heaters on for the purpose of drying out his residence, which had received some of the floodwater.

Under cross-examination by tenants' counsel, the landlord admitted that there are no reports or documentary evidence of the actual damage to any of the other units in the building. She also admitted under cross that the floor was dried 100%, but that it needs restoration work, which will cost approximately $21,000.00. Counsel asked the landlord to confirm whether the only permanently damaged parts of the property (within the rental unit) were a vanity, some baseboard, and an area of drywall. The landlord conceded this. These three pieces of property were the only ones which were permanently damaged and required actual replacement.

In respect of the downstairs occupant, the landlord testified under cross-examination that she did not personally speak with the occupant. It should be noted that the landlord did not produce any documentary evidence directly from the downstairs occupant concerning their medical condition.

In his testimony, the tenant (A.B.) testified at length about how the events of April 10, 2020 unfolded. The circumstances that lead to the faucet being left on were largely driven by the tenant's stress and anxiety from his business being affected by the pandemic. However, it remains the landlord's onus on which they must prove their case, so I will not reproduce anything further regarding how and in what manner the faucet was left on, nor the details regarding how the tenants dealt with the flood.

It is worth noting, however, that the tenants lived elsewhere for ten days while the restoration company was drying the rental unit out. But the tenant emphasized that this choice was largely out of convenience, and, because they were not comfortable being around the workers (because of the pandemic) when they were working in the rental unit. The rental unit was otherwise "liveable," he noted.

Regarding the actual damage to the rental unit, the tenant testified that the baseboard, the vanity, and some additional baseboard in an exit passageway (or something described as such). The tenant explained that they had tenant's insurance, and that their insured paid the full amount of $5,530.00 that the landlord had sought in respect of the damage.

In their closing submission, the landlord briefly cross-examined (through their translator) the tenant regarding the steps they took in responding to the faucet being left on and the ensuing flooding. However, the cross-examination did not appear to relate to the damage caused, so I instructed the landlord's agent that the cross-examination ought not to continue. In addition, there were but a few minutes remaining in the hearing.

In his closing submission, tenant's counsel argued (and his arguments reiterated those outlined in his written submission) that the tenants left the faucet on by accident. Moreover, there was only nominal damage to the rental unit and that there is no evidence of significant water damage. He pointed out that just because it might cost the landlord $21,000.00 to completely restore the floors, such an estimate is not evidence of, and does not establish, that there was in fact extraordinary damage. Further, he argued that "extraordinary" damage means that such damage is exceptional, and above and beyond normal damage caused by a tenant. Such flooding, as the one which occurred here, is not uncommon, he submitted. And this commonality or potential for such flooding is something that is contemplated as possible by the parties, hence the inclusion of the tenant's insurance clause in the tenancy agreement.

. . .

At the very end of the hearing, the landlord's agent briefly asked about what she should do in respect of trying to gain entry into the rental unit. While I make no findings of fact or law in respect of this matter as it relates to the tenants' claim, the landlord's agent may wish to review section 29 of the Act. It should be noted that there is no ministerial order currently in place, as of September 25, 2020, which restricts a landlord's right to enter a rental unit as it was restricted under previous ministerial orders.

Analysis

At the outset, it should be noted that I have only reviewed and considered oral and documentary evidence submitted meeting the requirements of the *Rules of Procedure,* to which I was referred, and which was relevant to determining the issues of this application.

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.

Are the tenants entitled to an order cancelling the Notice?

Where a tenant applies to dispute a One Month Notice to End Tenancy for Cause, the onus is on the landlord to prove, on a balance of probabilities, the ground or reasons on which that Notice is based.

The Notice in this case was issued under sections 47(1)(d)(ii) and (f) of the Act, which states the following:

> A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies: [. . .]
>
> (d) the tenant or a person permitted on the residential property by the tenant has
>
> (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant [and]
>
> (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

First, the landlord has provided no evidence, other than uncorroborated testimony of the landlord's agent, to establish or prove that the tenants seriously jeopardized the health or safety or a lawful right or interest of the landlord (who do not reside in the building) or another occupant. There was reference to an elderly gentleman and alleged issues to his health or comfort, but there was no supporting documentary evidence of this. Nor did the gentleman testify. The tenants dispute this aspect of the landlord's submission.

When two parties to a dispute provide equally reasonable accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. In this case, I find that the landlord has failed to provide any evidence that the tenants seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant. Therefore, for these reasons, I cannot find that the landlord has established this first ground on which the Notice was issued.

Second, the landlord argued that it would cost $21,000.00 to repair the flooring, and this is necessary because the damage caused by the tenants leaving the faucet on is extraordinary.

However, under cross-examination, the landlord's agent testified that the floor is dry and is otherwise not permanently damaged. The only damage cause by the flood which required replacement and full repairs were to the vanity, baseboards, and drywall. Indeed, this appears to be a situation where, while it would be desirable to have the floors replaced, it is such that they do not require to be replaced. There is, I note, no evidence that the floors are damaged beyond repair and the tenants' submitted a photograph of the floor. The floor appears, in fact, to be in what appears to be excellent condition. This fact was commented on by the tenant during his testimony, in which he said that the floor was "virtually indistinguishable from before [the flood]."

While I do not fully accept counsel's argument that an estimated cost of renovations does not necessarily equate to proof of the extent of damage, what is important here is that, quite simply, there is no evidence that the damage was extraordinary. Simply because the cost of replacing the flooring in the rental unit is estimated to be quite high (when the necessity of doing so is rather doubtful), such an estimate is not proof of the extraordinariness of the damage. In this case, therefore, I do not find that the landlord has proven the second ground on which the Notice is based.

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 not met the onus of proving the grounds on which the Notice was issued.

Hence, I hereby order that the Notice dated July 27, 2020 is cancelled and of no force or effect. The tenancy shall continue until it is ended in accordance with the Act.

Are the tenants entitled to recovery of the filing fee?

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 tenants were successful, in respect of their application to cancel the Notice, I grant their claim for reimbursement of the $100.00 filing fee.

To this end, I order, pursuant to section 72(2)(a) of the Act, that the tenants may make a one-time deduction $100.00 from a future rent payment in full satisfaction of this award.

Conclusion

I hereby order that the Notice dated July 27, 2020 is cancelled.

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: September 28, 2020

Residential Tenancy Branch