Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPR MNR MNSD FF
Tenant: CNR ERP OLC FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties. The participatory hearing was held, via teleconference, on November 6, 2020. Both parties applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "*Act*").

Both parties attended the hearing and provided testimony. The Landlord confirmed receipt of the Tenant's application and evidence packages. No issue was raised with respect to the service of those documents. I find the Tenant sufficiently served his application and evidence.

The Landlord provided proof of service to show he sent his Notice of Hearing, and evidence by registered mail on September 23, 2020. The Landlord stated that the Tenant never picked up this package and it was returned to him. Pursuant to section 89 and 90 of the Act, I find the Tenant is deemed served with this package 5 days after it was mailed to his residence, regardless of whether or not he picked it up.

The Landlord sent a second evidence package to the same address, by registered mail, on October 29, 2020, which the Tenant acknowledged getting. The Tenant did not take issue with the service of this second package. I find the second evidence package was sufficiently served for the purposes of this hearing.

The Landlord has requested to amend their application to include rent that has accrued since the original application date. I turn to the following Rules of Procedure (4.2):

Amending an application at the hearing

In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.

Further, the Landlord requested to amend their application to allow them to retain the security deposit to offset rent owed and to recover the cost of the filing fee. In consideration of these requests, I hereby amend the Landlord's application accordingly.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Issues

Both parties are seeking multiple remedies under multiple sections of the *Act*, a number of which were not sufficiently related to one another. Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

After looking at the list of issues both parties applied for, and based on the evidence before me, I find the most pressing and related issues in this cross-application are related to the payment/non-payment of rent and the order of possession (whether or not the tenancy will continue, or end, based on the Notice issued.) As a result, I exercise my discretion to dismiss, with leave to reapply, all of the grounds in both applications with the exception of the following grounds:

- an order of possession based on a 10-Day Notice (the Notice) for unpaid rent or utilities and whether or not the Tenant is entitled to have this Notice cancelled; and,
- a monetary order for the Landlord for unpaid rent or utilities.;

Issues to be Decided

- Should the 10 Day Notice to End Tenancy be cancelled?
    - If not, is the landlord entitled to an Order of Possession?
- Is the landlord entitled to a monetary order for unpaid rent or utilities?

Background and Evidence

Both parties agree that monthly rent is set at $8,500.00 and is due on the first of the month. The Landlord currently holds a security deposit of $3,900.00 and a pet deposit of $3,900.00. The Tenant acknowledged receiving the Notice on September 4, 2020. A copy of the Notice was provided into evidence which shows that the Landlord issued this Notice on September 4, 2020, for $8,500.00 in outstanding rent that was due on September 1, 2020.

The Landlord stated that the Tenant has not made any payments towards rent since the Notice was issued, and the Tenant now owes 3x $8,500.00 = $25,500.00. The Tenant did not dispute that the fact that he hasn't made any rent payments in September, October, or November. However, the Tenant stated that because there are so many issues with the house, that he should not have to pay the amount sought by the Landlord.

The Landlord stated that the Tenant has lived in the rental unit for a couple of years, and throughout this time, there have been a few water issues, and other repairs to the boiler and the furnace. The Landlord stated that all of the issues that he was made aware of were dealt with quickly and honestly, and there are no outstanding repairs at this time, nor does he owe the Tenant any money for any emergency repairs. The Landlord stated that he has paid for all repairs that he was made aware of.

The Landlord stated that the Tenant moved into the house in September of 2018, and he renewed his tenancy agreement the following September (2019). Then, the Tenant again renewed his tenancy agreement for this year on or around August 4, 2020. The Landlord stated that when the Tenant signed another lease in August of this year, he never once mentioned that there were any repairs that were required, nor did he bring up anything to do with money owed. The Landlord stated that the Tenant ran into money troubles in September and since that time, has pointed to issues from the past to find a way out of having to pay rent.

The Tenant feels there are many issues with the house which are serious safety concerns. The Tenant has concerns about carbon monoxide, air quality, poor heating, and boiler/furnace dysfunction. The Tenant stated he installed a carbon monoxide detector near the furnace and it has gone off many times. The Tenant stated that the fire department has recently attended the house as a result of the alarms. The Landlord stated that he already had carbon monoxide alarms installed as required under the building code, and the new alarm the Tenant put in, was right inside the furnace room,

which is why the alarm was going off. The Landlord stated that these alarms are not meant to be put inside the furnace room, only in living areas.

The Tenant stated that from day 1, the heater and hot water was not functioning correctly, and there are concerns with the safety of the boiler unit. The Tenant stated that the Landlord sent someone to fix it, numerous times. However, the Tenant feels the issues persisted. The Tenant stated that the last guy that came on behalf of the Landlord opined that the boiler is “not good” and the radiant floor heating pipes are not functioning correctly.

The Tenant stated that the Landlord’s solution to the heat issues (too hot in some rooms, cold in others) was to turn down the furnace. The Tenant stated that his whole family has PTSD due to the carbon monoxide alarms going off recently, and the potential air hazards. The Tenant opined that some of these issues are causing his family members to have headaches. The Tenant stated he paid to fix the fireplace but was unclear how much this cost, or what the exact issue was.

The Tenant loosely referred to repairs he has done over the years but did not provide any breakdown as to what these repairs cost (in total), and whether they qualify as “emergency repairs”. The Landlord stated he never received any phone call from the Tenant regarding emergency repairs, and only ever received a few emails about some more minor items such as air conditioners, and space heaters. The Tenant provide a few email exchanges he has had with the Landlord over the years, mostly from 2018 and 2019. The Landlord stated that as you can see in the emails, he reimbursed the Tenant for anything outstanding that he felt he was responsible for.

Again, the Landlord reiterated that he has never received any formal request for emergency repairs from the Tenant, and never had the Tenant call him with an urgent emergency repair request. The landlord denies that he owes any money to the Tenant for any emergency repair. The Landlord also reiterated that if there was in fact money owing from the past months/years, then why didn’t the Tenant mention anything when he renewed his lease a couple of months ago.

The Tenant feels the Landlord has blamed him for all the issues with the house, and he no longer trusts what the Landlord says or does.

The Tenant provided a few receipts in his evidence package. All 3 receipts are for items at Canadian Tire with transaction dates of December 2018, March , 2019, and April 2019. There are a variety of items on the receipts and no explanation was provided as to whether or not any of the items on the receipts relate specifically to emergency repairs. The Tenant briefly stated that he had to buy some supplies to help clean up a water leak, and also some heater/air conditioners to supplement the house furnace.

The Landlord stated that there were a few items in 2019 that he agreed to pay the Tenant for to help make the unit more comfortable (fireplace repair, air conditioner, a couple of heaters and a few supplies). The Landlord stated that he repaid the Tenant for these items last year at the time the lease was renewed in 2019, as evidenced by the email exchanges showing the reconciliation of those items at that time.

The Landlord stated that the Tenant hasn't raised any issues in a long time, since 2019. The Landlord stated that whenever he was made aware of an issue with the house, he would send a technician to fix the problem.

Analysis

When a Tenant applies to cancel a Notice, the Landlord has the onus to prove the basis for the Notice. I note in civil law matters such as these, the standard of proof is based on a balance of probabilities, not the criminal court standard of proof beyond a reasonable doubt.

The Landlord issued the Notice on September 4, 2020, because the Tenant failed to pay monthly rent ($8,500.00 due on September 1, 2020). No rent has been paid since that time, and at the time of this hearing, 3 months are outstanding (September, October, and November 2020). The Tenant did not dispute that no rent has been paid from September 2020 onwards, although he provided an explanation as to many issues he has had with the house over the years.

Section 26 of the *Act* confirms that a tenant must pay rent when it is due unless the tenant has a right under the *Act* to deduct all or a portion of rent. When a tenant does not pay rent when due, section 46 of the *Act* permits a landlord to end the tenancy by issuing a notice to end tenancy. A tenant who receives a notice to end tenancy under this section has five days after receipt to either pay rent in full or dispute the notice by filing an application for dispute resolution.

I note that one of the reasons that a Tenant may legally withhold rent under the Act is to recover money they paid for "emergency repairs." I further note that emergency repairs,

and related requirements, are defined in the Act under section 33, and there is a process for the Tenant to follow to make emergency repairs, pay for them, and then be able to deduct any amounts paid from rent owing. If all steps are not followed, the amounts may not be withheld from rent. That being said, even in situations where a Tenant completes emergency repairs in full compliance with section 33 of the Act, but withholds more than the repairs actually cost, the Landlord may still be entitled to an order of possession, even if there are mere pennies owing.

Emergency repairs

33 *(1)In this section, "emergency repairs" means repairs that are*

(a)urgent,

(b)necessary for the health or safety of anyone or for the preservation or use of residential property, and

(c)made for the purpose of repairing

(i)major leaks in pipes or the roof,

(ii)damaged or blocked water or sewer pipes or plumbing fixtures,

(iii)the primary heating system,

(iv)damaged or defective locks that give access to a rental unit,

(v)the electrical systems, or

(vi)in prescribed circumstances, a rental unit or residential property.

[…]

(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.

After reviewing the totality of the evidence and testimony of both parties, I am not satisfied that the Tenant completed emergency repairs in full compliance with section 33(3) of the Act such that he would have a right to deduct any of the historical amounts from current rent. Furthermore, it appears the historical amounts have been repaid, regardless of whether or not they qualify as “emergency repairs” (more on this below). There is no evidence the Tenant followed section 33(3) of the Act and there is no evidence or testimony to substantiate that he made at least two attempts to call the Landlord prior to making any repairs.

As per some of the emails provided into evidence, it appears the Landlord agreed to reimburse a few items back in 2019. These items were discussed leading up to the renewal of the lease in the summer of 2019. The Landlord stated that he provided payment to the Tenant at that time and all the amounts were reconciled, regardless of whether or not they were officially an “emergency repair”. The Landlord explained that he presumed everything was okay with respect to the amounts he reimbursed the Tenant for because the Tenant never said anything further after their talks in the summer of 2019, until this September when the Tenant ran into money troubles and couldn’t pay his rent. To support that all money was reconciled, the Landlord pointed to the fact that the Tenant didn’t raise any issue regarding any money owing when they renewed the lease agreement in August of 2020. The Landlord also highlighted an email where he tells the Tenant that his cheque for reimbursement was ready for pickup anytime after August 12, 2019. The Tenant feels he is still owed more money for the repairs and headaches he endured but did not provide a clear or consistent explanation or itemization of what he is owed, and whether they qualify as “emergency repairs”.

Having reviewed this issue, I note there is insufficient evidence showing there have been any recent amounts (from 2020) paid by the Tenant to do an emergency repair. Even if amounts were paid by the Tenant for repairs throughout the tenancy, there is no evidence that the Tenant followed the protocols under section 33 of the Act, which are required in order for any of those amounts to be treated as legal deductions for emergency repairs from outstanding rent.

I find it more likely than not that any amounts outstanding have been reconciled long before the non-payment of rent issue came up this September. I find it more likely than not that the amounts, in 2019, that the Landlord agreed to repay to the Tenant (ie- heaters, plumbing fees, air conditioners, fireplace) have been repaid given the lack of evidence from the Tenant showing that he ever raised any further outstanding amounts with the Landlord after the summer of 2019 and after the repayment cheque was given to him. It seems likely that, had there been any outstanding amounts which the Tenant felt he was still owed, or amounts that *may* have qualified as emergency repairs, that he would be able to provide evidence to show this was brought to the attention of the Landlord, especially in and around the time the lease was renewed in August of 2020. It does not appear as though the Tenant raised any significant repair issues again until after he failed to pay rent in September of 2020.

Overall, I am not satisfied that the Tenant completed emergency repairs in compliance with section 33 of the Act such that he had a right to deduct any amounts outstanding from rent owed.

Next, I turn to the Notice issued. I find the 10 Day Notice was received by the Tenant on September 4, 2020. It was issued because the Tenant failed to pay September rent on the first of the month in the amount of $8,500.00. There is no evidence to show that any rent payments have been made for September, October, or November 2020.

As rent has not been paid when due, and there is insufficient evidence before me that the Tenant had a right under the *Act* to deduct all or a portion of rent, I find that the Tenant's Application is dismissed. When a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with section 52 of the *Act*, section 55 of the *Act* requires that I grant an order of possession to a landlord. Having reviewed the Notice, I find it complied with section 52 of the *Act*. Accordingly, I find the Landlord is entitled to an order of possession, which will be effective two (2) days after it is served on the Tenant.

Next, I turn to the Landlord's request for a monetary order for unpaid rent. After considering the evidence before me, including the absence of evidence to show the

Tenant had a legal right to withhold rent, I find there is sufficient evidence to demonstrate that the tenant owes and has failed to pay rent for the months of September, October, and November 2020, totalling $25,500.00.

This decision only relates to the Notice, what rent is owed, and whether there were emergency repairs paid for by the Tenant which could then be deducted from outstanding rent. I make no findings on whether the Tenant is entitled to compensation for any other matter.

Section 72 of the *Act* gives me authority to order the repayment of a fee for an application for dispute resolution. Since the Landlord was substantially successful in this hearing, I order the tenant to repay the $100. Also, pursuant to sections 72 of the *Act*, I authorize that the security deposit, currently held by the Landlord, be kept and used to offset the amount of rent still owed by the Tenant. In summary, I grant the monetary order based on the following:

Claim	**Amount**
Cumulative unpaid rent as above	$25,500.00
Other:	
Filing fee	$100.00
LESS:	
Security and pet Deposit currently held by Landlord	($7,800.00)
TOTAL:	**$17,800.00**

Conclusion

The Tenant's application to cancel the 10 Day Notice is dismissed.

The landlord is granted an order of possession effective **two days after service** on the tenant. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

The landlord is granted a monetary order pursuant to Section 67 in the amount of **$17,800.00**. This order must be served on the tenant. If the tenant fails to comply with

this order the landlord may file the order in the Provincial Court (Small Claims) and be 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 *Residential Tenancy Act*.

Dated: November 09, 2020

Residential Tenancy Branch