Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, LRE, RR, FFT

Introduction

This hearing dealt with the tenant's 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;
- a monetary order for compensation for losses or other money owed under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70; and
- an order to allow the tenant) to reduce rent for the loss of quiet enjoyment and privacy agreed upon but not provided during this tenancy, pursuant to section 65.

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. The landlord attended with their legal counsel and one of their legal counsel's assistants, the latter of whom was able to assist both the landlord, and at times the tenant with translation into the English language from their native tongue.

As the tenant confirmed that they were handed the 10 Day Notice by the landlord on January 14, 2021, I find that the tenant was duly served with this Notice in accordance with section 88 of the *Act*. As the landlord confirmed that the tenant handed them a copy of the tenant's dispute resolution hearing package on January 20, 2021, I find that the landlord was duly served with this package in accordance with section 89 of the *Act.* As the tenant confirmed that they received a copy of the landlord's written evidence sent by the landlord by registered mail on February 10, 2021, I find that the landlord's written evidence was duly served in accordance with section 88 of the *Act*. The landlord's legal counsel (legal counsel) said that the only written evidence they had received from the tenant was three documents, two of which were text messages that were not written in

English, and the other being a photograph of a piece of heating equipment in the tenant's rental unit.

Preliminary Issue- Landlord's Request to Hear their Application Scheduled for May 3, 2021 with the Tenant's Current Application

Prior to this hearing, the landlord's legal counsel submitted a written request noting that there had been delays in the Residential Tenancy Branch's (RTB's) handling of the landlord's application for an Order of Possession and a monetary award for outstanding rent owing from this tenancy. Although a hearing had been scheduled for May 3, 2021, legal counsel requested permission to have the landlord's application heard along with the tenant's application at this hearing (see reference above).

At this hearing, the landlord's legal counsel stated that the tenant was sent a copy of the landlord's dispute resolution hearing package by registered mail on February 10, 2021, along with the landlord's written evidence for both hearings. The tenant confirmed that they received this package, but could not recall when they had retrieved it from the post office, believing that it was a few days ago. The legal counsel stated that the Canada Post delivery record showed that the package was successfully delivered to the tenant on February 12, 2021. Even this actual delivery date would be less than the 14 days of notice that the RTB's Rules of Procedure would require for service of an application to a respondent.

Although it is unfortunate that the landlord was unable to have their application submitted in time to hear their application alongside the tenant's application, I find that the timing of their application was such that it did not afford the tenant a proper opportunity to know the case against them with respect to the landlord's claim for a monetary award of $2,200.00. To do otherwise and proceed to hear both applications together would risk a potential denial of natural justice.

In making this decision, I note that most of the unpaid rent identified in the landlord's application is for the month of February 2021. This rent would not even have become due at the time that the tenant initiated their application for dispute resolution on January 17, 2021. Since the original application was launched by the tenant, the tenant has paid and the landlord has accepted a further $900.00 payment towards the amount that was identified as owing in the landlord's 10 Day Notice. On this basis, the circumstances have changed between the time of the tenant's original application and the landlord's subsequent application for a monetary award that was not outstanding at the time of the tenant's application.

At the hearing, I advised the parties of my decision to decline to include the landlord's application in the hearing of the tenant's application properly before me. The monetary outcome sought in the landlord's application remains scheduled to be considered on May 3, 2021.

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? Is the tenant entitled to any reduction in rent or monetary award as a result of their alleged loss of privacy or quiet enjoyment of the premises during this tenancy? Should any other orders be issued with respect to this tenancy? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This tenancy for a separate laneway home on the landlord's property commenced by way of a one-year fixed term Residential Tenancy Agreement (the Agreement) designed to extend from March 1, 2020 until February 28, 2021. Monthly rent is set at $1,300.00, payable in advance on the first of each month, including utilities. The landlord continues to hold the tenant's $650.00 security deposit paid on February 11, 2020.

The landlord's 10 Day Notice identified a total of $1,800.00 owing as of January 14, 2021. This amount was comprised of $500.00 in outstanding rent owing from December 2020 and $1,300.00 for January 2021. Although the tenant applied to cancel the 10 Day Notice on January 17, 2021, they did not make any payments to the landlord within five days of received the 10 Day Notice. They did pay $900.00 towards the outstanding rent on January 20, 2021. Both parties agreed that the tenant has not paid anything further to the landlord.

The landlord maintained that $900.00 of the amount identified in the 10 Day Notice remains outstanding, in addition to the $1,300.00 that became owing on February 1, 2021.

Although the tenant confirmed that they did not pay all of the rent identified as owing on the 10 Day Notice, they claimed that the true amount owing should have been $1,700.00 and not the $1,800.00 shown on the landlord's 10 Day Notice.

The tenant's primary reason for seeking a monetary award in the amount of $1,560.00 was that they alleged that the landlord had improperly contravened their right to privacy.

They asserted that on two occasions, the landlord entered the rental unit without first obtaining permission to do so. On the first occasion, the tenant maintained that the landlord entered the tenant's rental unit to change the dial on the tenant's washing machine to use cold water instead of warmer water. On the second occasion, on July 2, 2020, the landlord again entered the rental unit and moved the needle on the water heater from one setting to a different setting. On both occasions, the tenant was home at the time. The tenant said that they raised objections to the landlord entering their rental unit on both occasions. The tenant said the landlord maintained that the utility bills for the laneway house were too expensive and that the tenant must be doing something wrong to incur such high costs. The tenant said that they remained fearful of the landlord's monitoring of their utility usage during this tenancy.

The tenant said that they arrived at the claim of $1,560.00 by estimating that their loss of privacy reduced the value of their tenancy by 10% during the course of this fixed tenancy.

They also said that they understood that they would have to end their tenancy by February 28, 2021, the end of their one-year fixed term. They stated that they advised the landlord before the landlord issued the 10 Day Notice that they wanted to continue their tenancy, but were told by the landlord that they did not want this tenancy to continue past the original end date cited in the Agreement. The tenant also maintained that when they had difficulty paying all of their rent for December 2020, that the landlord agreed to let them pay their rent for that month later. They made no such assertion regarding the January 2021 rent.

The landlord testified that they never agreed to allow the tenant to remain in the rental unit without paying rent that was shown as owing on January 14, 2021, the date of their 10 Day Notice. Legal counsel for the landlord requested an end to this tenancy in accordance with the 10 Day Notice and the issuance of an Order of Possession.

The landlord confirmed that they did enter the rental unit twice during this tenancy. On both occasions, the landlord gave undisputed testimony that they did so when they went to the tenant's rental suite to collect monthly rent. On the first occasion, the landlord said that the tenant had complained that their water was not hot enough. The landlord walked into the rental unit with the tenant in attendance to revise the water heater to a higher setting. On the second occasion, the landlord believed that there may have been some problems with the shower head, which the tenant had been asking about, and the heater because the utility costs were more than the landlord was anticipating.

On both occasions, the landlord said that the tenant had no apparent problems with their entering the rental unit along with the tenant to try to remedy the situation.

The landlord claimed that there had been conversations about these issues beforehand on both occasions. The tenant maintained that there had been no conversations about these matters before the landlord entered the rental unit.

Analysis –Application to Cancel the 10 Day Notice

Section 26(1) of the *Act* establishes that "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(1) of the *Act* establishes how a landlord may end a tenancy for unpaid rent "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." Section 46 (4) (b) of the *Act* provides that upon receipt of a 10 Day Notice to end tenancy the tenant may, within five days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. Since the tenant has applied to cancel the 10 Day Notice three days after it was handed to them, the onus rests with the landlord to establish on a balance of probabilities that the tenant has failed to pay outstanding rent in accordance with the Agreement and that their failure to do so entitles the landlord to end this tenancy on the basis of the 10 Day Notice.

In this case, there is undisputed sworn testimony from the tenant that they did not pay all of the rent that they agreed was owing at the time that the 10 Day Notice was issued to them. Their only payment since that time has been a $900.00 payment made on the sixth day after they received the 10 Day Notice. The tenant also confirmed that they have not received any order from an arbitrator appointed pursuant to the *Act* that would allow them to refrain from paying any of the monthly rent that was then owing.

Under these circumstances and based on the evidence and testimony provided by the parties, I find that the landlord has established that the tenant has failed to pay rent that was owing as of the date of the issuance of the 10 Day Notice. As a result, I dismiss the tenant's application to cancel the 10 Day Notice and find that the landlord has valid grounds to end this tenancy for the non-payment of rent.

Section 55(1) of the *Act* reads as follows:

> *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 [form and content of notice to end tenancy], and*
> >
> > *(b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.*

Section 46(2) of the *Act* requires that "a notice under this section must comply with section 52 *[form and content of notice to end tenancy]*. I am satisfied that the landlord's 10 Day Notice entered into written evidence was on the proper RTB form and complied with the content requirements of section 52 of the *Act*. For these reasons, I find that the landlord is entitled to a two day Order of Possession. The landlord will be given a formal Order of Possession which must be served on the tenant.

Analysis- Remainder of Tenant's Application

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the tenant to prove on the balance of probabilities that the landlord contravened the Agreement and that there was a loss in the value of the tenancy resulting from that contravention.

Section 28 of the *Act* reads as follows:

> ***28*** *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*
>
> > *(a) reasonable privacy;*
> >
> > *(b) freedom from unreasonable disturbance;*

> *(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
>
> *(d) use of common areas for reasonable and lawful purposes, free from significant interference.*

Sections 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement."

Section 32 of the *Act* also establishes obligations on a landlord to maintain and repair a building

> ***32*** *(1) A landlord must provide and maintain residential property in a state of decoration and repair that*
>
> *(a) complies with the health, safety and housing standards required by law, and*
>
> *(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.*

In this case, the landlord has made no claim that they made a formal written request pursuant to section 29 of the *Act* to enter the rental unit on either of the occasions when the landlord entered the rental unit. However, on both occasions, the tenant was present, and on at least one of the occasions there is undisputed sworn testimony from the landlord that the request to resolve the problem with the temperature of the water was raised by the tenant. If there are problems with the provision of services such as appliances provided by the landlord as part of the tenancy or heat, hydro and water, these are responsibilities that landlord's are obligated to attend to in order to meet the requirements of section 32 of the *Act*.

There is conflicting testimony from the parties as to the extent to which the tenant objected to the landlord's visits to the rental unit to attend to potential problems with the appliances and provision of utilities. While the tenant claimed that they objected to the landlord's entry to the premises, the landlord maintained that the tenant expressed little concern about the landlord's request to attend to these matters. On both occasions the tenant was present, and apparently knew what the landlord had done to the various dials or meters. Given that the tenant had access to the washing machine and water

heater, they could easily have switched these settings to their original settings had the tenant been concerned about the results of the landlord's visits to the tenant's rental unit. The tenant provided no evidence that they had cause to reverse any of the dial settings made by the landlord when the landlord entered the rental unit.

I find the timing of the tenant's decision to raise these concerns are at odds with the tenant's claim that they lived in fear of the landlord's illegal entry to check on the tenant's use of utilities. In this regard, the tenant could not even remember when the first incident occurred. They did not dispute the landlord's claim that the landlord attended when they came to pick up a rent cheque and agreed to look at the settings to enable the tenant to receive hotter water. The second incident happened in July 2020, over six months before the tenant sought a rent reduction for the loss in value of their tenancy as a result of the landlord's actions. The tenant has supplied no records to demonstrate that they raised concerns about the landlord's access to the rental unit, and made no assertion that these inspections continued beyond July 2, 2020. It appears that these issues were only raised with the landlord after the landlord issued the 10 Day Notice seeking the payment of $1,800.00 in outstanding rent.

I find on every count that the tenant has fallen woefully short of meeting the burden of proof to establish entitlement to any type of rent reduction during this tenancy. The tenant has established no ongoing pattern of incidents of illegal entry to the rental unit. In fact, on the two occasions when the landlord did enter the rental unit, the tenant was present and allowed the landlord to enter the rental unit to look at appliances or heaters that the landlord claimed were not set properly. While in retrospect it would have likely been preferable had the landlord submitted a written request to enter the rental unit, it does not appear that this was contentious at the time, nor did the tenant make any issue of this until they received the 10 Day Notice. I also find that the amount of the monetary award claimed by the tenant is far in excess of any real loss in the value of their tenancy for isolated incidents that occurred near the beginning of their tenancy. Under these circumstances, I dismiss the tenant's application for a retroactive rent reduction without leave to reapply.

Since this tenancy is ending, there is no need to consider the tenant's application to restrict the landlord's right to enter the rental unit. In coming to this determination, I note that the last occasion when the tenant alleges that the landlord illegally entered the tenant's rental unit occurred in July 2020. As such, I find it highly unlikely that this is an ongoing or current problem that will resurface during the final few days of this tenancy.

As the tenant has been unsuccessful in this application, I make no order with respect to the tenant's application to recover the cost of the filing fee from the landlord.

Conclusion

I dismiss the tenants' application in its entirety without leave to reapply.

I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme 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 *Residential Tenancy Act*.

Dated: February 23, 2021

Residential Tenancy Branch