Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant's Application: RR, MNDCT, CNR, RP, OLC, FFT
Landlord's Application: MNDL-S, MNRL-S, OPR, FFL

Introduction

This hearing was set to deal with cross applications. The tenant applied to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities ("10 Day Notice"); orders for repairs; orders for the landlords to comply with the Act, regulations or tenancy agreement; authorization to reduce rent payable; and, a Monetary Order for damages or loss under the Act, regulations or tenancy agreement. The landlords applied for an Order of Possession for unpaid rent; a Monetary Order for unpaid and/or loss of rent and damage to the rental unit; and, authorization to retain the tenant's security deposit.

Both parties appeared or were represented at the hearing and had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

Preliminary and Procedural Matters

1) Service of hearing materials

The tenant testified that she served the tenant's proceeding package and some evidence to the female landlord, in person, on or about December 14, 2020. The landlords confirmed receipt of the tenant's proceeding package and acknowledged some evidence was included in this package.

The tenant testified that she served the landlords with another evidence package more than two weeks before the scheduled hearing date although she was uncertain of the

exact date. The landlords confirmed receipt of the second package on February 14, 2021.

The landlord testified that the landlord's proceeding package and an evidence package with pages 1 – 38 were served to the tenant in person on or about January 2, 2020. The landlord served additional evidence to the tenant, in person, on January 2, 2021 and again on February 14, 2021. The tenant confirmed receipt of three packages from the landlords.

The parties appeared uncertain as to which documents were served on which date. The parties expressly stated they did not take issue with service of documents upon them, they were willing to be deemed sufficiently served and they wished to proceed. I instructed the parties to point to documents they wished to rely upon as they presented their respective position and that if the other party was not in receipt of that documentation, they may raise it to my attention. The parties were agreeable to this approach and I admitted their hearing materials into evidence.

2) Jurisdiction

The landlords are seeking recovery of unpaid and/or loss of rent with respect to a "house" and a "garage". The landlords had prepared a tenancy agreement for the "house" and a separate agreement for the "garage". Both agreements were before me.

The tenancy agreement for the "house" was made with SH as the tenant and indicates a month to month tenancy started November 1, 2018 and required the tenant to pay monthly rent of $1450.00.

The tenancy agreement for the "garage" was made with LH as the tenant and indicates a tenancy started on October 1, 2019 on a month to month basis and required the tenant to pay monthly rent of $600.00.

The landlord testified that when the tenancy for the house started the garage was rented to a third party and was not part of the rental for the house. During the tenancy, the tenancy for the garage ended and LH and the landlord reached an agreement for LH to rent the garage for the purposes of growing cannabis. The garage was not living accommodation. The landlord prepared a separate tenancy agreement for rental of the garage to LH and testified that rental of the garage was not dependent on rental of the house and vice versa. In other words, one agreement could be ended without ending the other agreement.

I informed the parties that my jurisdiction to resolve disputes is conveyed upon me under the *Residential Tenancy Act* ("the Act"). Accordingly, my jurisdiction is limited to disputes concerning residential tenancy agreements and rental units. The Act defines a rental unit as **living accommodation** rented or intended to be rented to a tenant. Based on the evidence before me, I noted the tenancy agreement for the house did not provide for garage space and the garage space was rented to a person other than the tenant and under a separate agreement for purposes that did not include living accommodation. I informed the parties that I was of the view the garage rental did not fall under the Act and I did not have jurisdiction to deal with any dispute concerning the garage.

The tenant, LH and their legal counsel had no objection to my finding that I did not have jurisdiction over the garage tenancy.

Despite having separate agreements that were independent of each other, the landlords were of the position the agreements were linked since they shared the same electrical supply. A shared utility in itself does not join tenancy agreements together for resolution under a single claim under the Act.

In light of the above, I declined to deal with any dispute concerning the garage rental and the parties are at liberty to pursue remedy concerning the garage in the appropriate forum. From this point forward, the "rental unit" refers to the house and land provided to the tenant under the house rental and excludes the garage.

3) Naming of parties

There was one tenant identified on the Tenant's Application for Dispute Resolution but the landlords named SH and LH as tenants on the landlord's Application for Dispute Resolution. The tenancy agreement the landlords seek to enforce names only one tenant, SH. Since LH was the tenant under the garage rental and I have found I do not have jurisdiction to resolve the dispute concerning the garage, I informed the parties that I would omit LH as a named party to this dispute.

The landlords testified that LH was a named tenant under a prior tenancy agreement, entered into in 2017. Since the landlords were intending to rely upon a subsequent tenancy agreement naming SH as the only tenant, I was unsatisfied that LH had agreed to the terms in the most recent tenancy agreement and without privity of contract I did

not consider LH as a tenant. Rather, I have considered LH an occupant of the rental unit under SH's tenancy agreement.

I also noted that the name of LH was different on the tenancy agreement than it is on the Applications for Dispute Resolution before me. The tenant explained that the name appearing on the tenancy agreement is her former name and the name on the Applications for Dispute Resolution is her married name and current legal name. I amended the style of cause to reflect the tenant's former name, as indicated on the tenancy agreement, and her married name, without objection of either party.

The tenant had named one landlord on her Application for Dispute Resolution (the female landlord identified on the tenancy agreement) whereas the landlords identified two landlords on their Application for Dispute Resolution. The male landlord affirmed that he is a registered owner of the property. As such, I was satisfied that the male landlord meets the definition of "landlord" under the Act and the style of cause to reflects both landlords.

4) Status of tenancy

The tenant's legal counsel raised as a preliminary matter that the tenant has vacated the rental unit and that the requests for cancellation of the Notice to End Tenancy and providing the landlords an Order of Possession were now moot. I proceeded to explore this issue further with both parties.

The tenant testified that starting the third week of December 2020 they were staying elsewhere but their possessions remained in the rental unit until February 18, 2021. The tenant or LH testified that on February 18, 2021 they left the keys for the landlord. The tenant or LH sent a text message to the landlord informing him that they had moved out and they left the keys under his tractor seat.

The landlord confirmed he received a text message from the tenant or LH on or about February 18, 2021 and he found the keys for the rental unit (with the exception of the key to the front door of the house) and he entered the rental unit. The landlord confirmed that it appears the tenant is no longer living in the house; however, the landlord stated there was a lot of debris left on the property and he has been taking loads to the dump.

I turned to the tenant and LH and they confirmed they do not intend to return to the rental unit or remove any more possessions from the rental unit. LH stated that they

returned all the keys they found in their possession. The tenant and LH stated that any possessions they left behind at the property may be considered abandoned.

When a tenant vacates or abandons a rental unit, possession automatically reverts back to the landlord and an Order of Possession is no longer required since an Order of Possession orders the tenant to vacate the rental unit. I was satisfied the tenant has vacated or abandoned the rental unit and the landlord has regained possession. Accordingly, I find an Order of Possession is no longer required and I do not provide one with this decision.

If a key has not been returned but the tenant has given up possession of the property, the landlord is at liberty to change the locks. I am satisfied the tenant has given up possession and the landlords are at liberty to change the locks. If the tenant has abandoned possessions, the landlord is at liberty to deal with the possessions as abandoned property. The Residential Tenancy Regulations provide rules with respect to dealing with abandoned property.

Since the tenancy has ended and the tenants have given up possession of the rental unit, I find the tenant's requests for cancellation of a Notice to End Tenancy, repair orders, orders for compliance, and, authorization to reduce future rent payments are now moot. The tenant and her legal counsel confirmed the only outstanding issue concerns the tenant's monetary claim.

5) Unrelated and insufficiently amended monetary claims

Both the tenant and the landlords filed Applications for Dispute Resolution seeking remedy with respect to unpaid rent and a Notice to End Tenancy issued for unpaid rent. As such, I considered those matters to be the primary dispute. I was also satisfied that the claim related to unpaid rent had been sufficiently set out on the landlords' Application for Dispute Resolution.

Both parties also made monetary claims against the other concerning termination of the electrical service to the property, and other damages or loss; however, I find those claims were not clearly set out, appeared to be evolving and increasing, and without service of an Amendment.

Rule 2.3 and Rule 6.2 of the Rules of Procedure provide:

> **2.3 Related issues**
> Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.
>
> **6.2 What will be considered at a dispute resolution hearing**
> The hearing is limited to matters claimed on the application unless the arbitrator allows a party to amend the application. The arbitrator may refuse to consider unrelated issues in accordance with Rule 2.3 [Related issues]. For example, if a party has applied to cancel a Notice to End Tenancy or is seeking an order of possession, the arbitrator may decline to hear other claims that have been included in the application and the arbitrator may dismiss such matters with or without leave to reapply.

Where a party seeks to amend their claim against the other party, the Rules of Procedure require the claimant to serve the other party with notification the claimant is amending the claim. This is done by serving an Amendment to an Application for Dispute Resolution as soon as possible but no later than 14 clear days before the hearing. Also, a monetary claim is to be accompanied by a detailed calculation so if the monetary claim is changing then a revised Monetary Order worksheet should accompany the Amendment along with evidence to support the amended claim.

The tenant's monetary claim appears related to loss of the electrical supply. On the tenant's Application for Dispute Resolution she applied for a rent reduction of $2250.00 but without a detailed calculation that equals this sum; and, other damages or loss in the amount of $16114.00 on the Application for Dispute Resolution. On December 12, 2020 the occupant LH submitted a Monetary Order worksheet dated December 12, 2020 and the total sought was $18626.00. Then LH submitted another Monetary Order worksheet on December 13, 2020, but the Monetary Order worksheet was still dated December 12, 2020 and the amount changed and a new sum of $24126.88. The tenant testified that she included a Monetary Order worksheet that was served upon the landlord in December 2020; however, the landlord testified that there was no Monetary Order worksheet in the package received in December 2020. The tenant then submitted additional copies of the December 12, 2020 worksheet with the sum of $18626.00 on December 30, 2020, February 10, 2021, and February 11, 2021. The tenant did not submit an Amendment to an Application for Dispute Resolution.

The landlord's monetary claim was comprised of two components: rent in the amount of $3150.00 and damage related to the installation of a new electrical connection in the amount of $15901.15, for a total claim of $19151.15 as indicated on the Application for Dispute Resolution. The landlord then submitted a Monetary Order worksheet dated December 18, 2020 indicating he was seeking compensation totalling $20,131.15. Then on February 26, 2021 the landlord submitted evidence entitled "additional damages" that included photographs of what appears to be garbage, abandoned property and areas requiring cleaning but no amounts associated to the "additional damages". The landlord stated that their losses are closer to $28,000.00 now and growing as he continues to clean up the property and get it ready to re-rent. The landlords did not submit an Amendment to an Application for Dispute Resolution.

As evidenced above, the tenant's monetary claim is varying, unclear and not accompanied by an Amendment. The landlord's monetary claim was also varying and appears to be premature as costs are continuing to be incurred. Further, I find the claims pertaining to the electrical service and the cleaning and junk removal are unrelated to the primary issue that caused the parties to file these Application for Dispute Resolution when they did, which is eviction for unpaid rent. Therefore, I proceeded to hear the landlord's claims for unpaid rent; however, the party's other monetary claims against each other are dismissed with leave to reapply.

6) Sending of decision

The tenant requested that her copy of the decision be sent to her via email. The tenant confirmed that the email address appearing on her Application for Dispute Resolution is correct.

The landlords requested that their copy of the decision be sent to them in the mail. The landlords confirmed that their service address, as it appears on their Application for Dispute Resolution, is correct.

This decision is being sent to both parties as requested.

Issue(s) to be Decided

1) Are the landlords entitled to a Monetary Order for unpaid and/or loss of rent and if so, what amount are they entitled to recover?
2) Are the landlords authorized to retain the tenant's security deposit?
3) Award of the filing fee.

Background and Evidence

The landlords testified that the tenant moved into the rental unit in 2017 although they were uncertain of the month. The tenant testified the first tenancy agreement commenced on October 1, 2017.

The parties entered into subsequent tenancy agreement indicating the tenancy was starting on November 1, 2018 the tenant was required to pay rent of $1450.00. The tenancy agreement indicates that no security deposit was collected although the landlord testified that they are hold a $700.00 security deposit that was collected under the first tenancy agreement so they did not indicate a security deposit was collected under the second tenancy agreement. The tenant could not remember if a security deposit was paid or not.

The landlord testified that despite the tenancy agreement providing for a monthly rent of $1450.00 the tenant was actually paying $1550.00 per month. The landlord attributed this to the rent being "tied" to the rental of the garage. The tenant testified that the landlord required the tenant to pay increased rent of $1550.00 starting November 1, 2019 and the tenant supplied the landlord with post dated cheques in that amount. The landlord then testified that the tenant orally offered to pay an increased rent of $1550.00 per month and the landlord orally agreed to that so they collected the increased amount.

The landlords are claiming unpaid rent as follows:

October 2020	$200.00
November 2020	$200.00
December 2020	$1550.00
January 2021	$1550.00
February 2021	$1550.00

The landlords stated they are also seeking loss of rent for March 2021 given the condition of the rental unit. I did not permit the landlord to pursue a claim loss of rent for March 2021 under this proceeding as the landlord's Application for Dispute Resolution indicated they were seeking rent until such time "they vacate" and it was undisputed that the tenant had vacated and returned possession to the landlord in February 2021. Loss of rent due to the tenant's alleged failure to remove garbage, abandoned possessions or clean the property may form part of another claim against the tenant if the landlords chose to make such a claim.

As for rental arrears, the landlord testified that the tenants did not pay $200.00 of the rent payable for October 2020 and $200.00 of the rent payable for November 2020. The landlord testified that he agreed to “deferral” of the $200.00 rent shortfall as the tenant was suffering financial distress but that they agreed the shortfall would be repaid to the landlord once “everything” was restored. The landlord stated that by “everything” he meant the electrical service. The landlord testified the electrical service was restored a couple of weeks ago so the rent deferral is now payable. The tenant testified that she recalls a verbal conversation with the landlord sometime in November 2020 whereby the landlord stated “going forward” and until the power was restored the tenant may deduct $200.00 from rent but there was no mention of having to pay back the rent reduction. Later in the hearing, the landlord expressed dismay over the tenant’s monetary claim against them, taking the position the tenant’s husband (the occupant) was responsible for the power outage, and stating he had also compensated the tenant for the loss of power.

The tenant testified that she paid $1550.00 for October 2020 rent as evidenced by the cheque that cleared her bank account and supported by her bank statement that was provided as evidence. The landlord acknowledged cashing the $1550.00 post-dated cheque but claims he returned $200.00, in cash, to the tenant. The tenant denied receipt of a $200.00 cash payment from the landlord. No receipt was issued to show a refund to the tenant.

As for November 2020 rent, the tenant testified that she also paid $1550.00 by way of a post-dated cheque; however, when I turned to the tenant’s bank statement, I noted that it shows a $1500.00 cash withdrawal but not a cheque being cashed in the amount of $1550.00 as she stated. The tenant then changed her testimony to say she paid $1500.00, in cash, to the landlord and that he agreed to reduce the rent $50.00 because she paid cash. The landlord testified that the tenant gave him $1350.00 in cash as he agreed to reduce the rent $200.00. Both parties provided consistent testimony that the landlord did not issue a receipt for the cash payment of rent.

For the month of December 2020 both parties provided consistent testimony that the tenant did not pay any rent. On December 3, 2020 the tenant gave the landlord notification that she was not paying rent and would be moving out as soon as possible but without a specific effective date. The landlord then served the tenant with a 10 Day Notice to End tenancy for Unpaid Rent with a stated effective date of December 14, 2020. The 10 Day Notice indicates the tenant failed to pay rent of $1550.00 on December 1, 2020. It was agreed by the parties that after serving the 10 Day Notice the

tenant did not pay the outstanding rent. Nor, did the tenant vacate the rental unit by the effective date. Rather, the tenant filed to dispute the 10 Day Notice.

As stated previously in this decision, the tenant and her family started staying elsewhere starting in the third week of December 2020 but left their possessions in the rental unit until they were removed and the keys were given up on February 18, 2020.

The tenant is of the position she does not owe the landlord rent because there was no power to the rental unit for several months and she spent money on gas for a generator. The landlords were of the position that LH was responsible for the loss of power.

Analysis

Under section 26 of the Act, a tenant must pay rent in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations, or tenancy agreement, unless the tenant has a legal right to withhold rent.

The landlords are claiming recovery of unpaid rent for the months of October 2020 through February 2021, and as the claimants they bear the burden of proof. The burden of proof is based on the balance of probabilities.

In this case, I was presented a written tenancy agreement executed by the tenant and the landlord that provides for a monthly rent of $1450.00. To legally increase the rent to $1550.00 (an increase of 6.9%) which was paid by the tenant starting November 2019 would require the tenant's written consent for such a large increase and the landlord to serve the tenant with a Notice of Rent Increase in the approved form at least three months in advance, as required under Part 3 of the Act.

I heard the rent increase was done orally and without a Notice of Rent Increase in the approved form which means the rent was not increased in accordance with Part 3 of the Act. As such, I find the rent the landlord was legally entitled to collect from the tenant was $1450.00 per month and as provided under section 43(5) of the Act, a tenant who pays an unlawful rent increase is permitted to recover the overpaid rent by deducting it from rent otherwise payable.
It was undisputed that the tenant paid $1550.00 for the months of November 2019 through September 2020. The parties were in dispute as to how much was paid for October 2020 and November 2020.

The landlord put forth that he cashed a $1550.00 cheque for October 2020 but refunded $200.00 in cash to the tenant; however, the tenant denied receipt of the $200.00 cash payment. Both parties testified that there was a conversation concerning a $200.00 rent reduction or deferral but there were inconsistencies as when this reduction or deferral commenced or whether the amount was repayable. When I turn to the email written by the landlord to the tenant on December 5, 2020 he speaks of “reducing” the rent by $200.00 for the past two months and I accept those statements, made so much closer to the subject time to be more compelling than the tenant’s denial in this proceeding. I also found the tenant’s testimony as to when the conversation took place to sound much less certain than the landlord’s testimony. Therefore, I accept the landlord’s position that he collected rent of $1350.00, net, from the tenant for the month of October 2020 and for the month of November 2020.

I also note that in the same email of December 5, 2020, the landlord makes no mention of requiring the tenant to repay the $200.00 rent reduction and during the hearing he referred to “compensating” the tenant which is inconsistent with a “deferral”. Further, the 10 Day Notice issued by the landlord on December 3, 2020 is in the amount of $1550.00, the monthly rent as the landlord believed it to be, and devoid of rental arrears for the previous months. Therefore, I find I am unsatisfied the landlord expected or required repayment of the rent reduction authorized for October 2020 and November r2020 and I dismiss the landlord’s request for recovery of those amounts.

It was undisputed that the tenant did not pay any rent for December 2020 and, as I found above, the lawful monthly rent was $1450.00. As such, I credit the landlords with unpaid rent for December 2020 in the amount of $1450.00. With respect to rent for January 2021 and February 2021, I find the landlords entitled to recover $1450.00 from the tenant for each of these months as the tenant did not vacate the rental unit in accordance with the 10 Day Notice and continued to hold possession of the rental unit for these months.

I turn my mind to whether the tenant had a legal right to withhold or make deductions from rent. The Act provides very specific and limited circumstances where a tenant may legally withhold or make deductions from rent. those circumstances are where: the tenant has overpaid a security and/or pet damage deposit; paid an unlawful rent increase; paid for emergency repairs to the property as provided under section 33 of the Act; or, as authorized by the landlord or an Arbitrator.

As I found previously, I find the landlord authorized a rent reduction for the months of October 2020 and November 2020 as this was supported by the landlord’s email of

December 5, 2020 and his testimony during the hearing. However, I was provided disputed oral testimony without any other corroborating evidence that the landlord authorized a rent reduction for December 2020 onwards and I find the disputed oral testimony is insufficient to conclude there was an authorized rent reduction for December 2020 onwards. Nor, did the tenant have the authorization from an Arbitrator to make deductions from rent payable. I was not provided evidence the tenant made emergency repairs to the property in accordance with section 33 of the Act and purchases of gas to run a generator do not constitute an emergency repair, as defined. There was no suggestion that the tenant overpaid a security deposit or pet damage deposit. The Act does provide that a tenant may deduct from rent payable any previously paid rent increase that did not comply with Part 3 of the Act. In this case, there is unopposed evidence that the tenant paid an extra $1550.00 in rent for each of the months of November 2019 through September 2020, and for reasons provided above, I find this amounts to paying an unlawful rent increase of $100.00 per month. Therefore, I find the tenant entitled to deduct the sum of the unlawful rent increase in the sum of $1100.00 from rent otherwise payable.

The landlord's claim had merit and I further award the landlords recovery of the $100.00 filing fee paid for the landlord's Application for Dispute Resolution.

I authorize the landlords to retain the tenant's security deposit in partial satisfaction of the amounts awarded to the landlords with this decision.

In keeping with all of the above findings and reasons, I provide the landlords with a Monetary Order to serve and enforce upon the tenant, calculated as follows:

Rent for December 2020	$ 1450.00
Recovery of illegal rent increase	(1100.00)
Rent for January 2021	1450.00
Rent for February 2021	1450.00
Filing fee	100.00
Less: security deposit	(700.00)
Monetary Order for landlords	$2650.00

Conclusion

The tenancy has already ended and most of the remedies sought by the parties are moot, with the exception of their monetary claims against the other.

By way of this decision, the landlords are authorized to retain the tenant's security deposit and are provided a Monetary Order in the net amount of $2650.00 for unpaid and/or loss of rent up to an including the month of February 2021.

The landlords' other damages or losses, including loss of rent for March 2021, if any, are dismissed with leave to reapply.

The tenant's monetary claim for damages or loss, if any, are dismissed with leave.

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: March 03, 2021

Residential Tenancy Branch