



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR

Introduction

On December 8, 2020, the Tenant made an Application for Dispute Resolution seeking to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "Notice") pursuant to Section 46 of the *Residential Tenancy Act* (the "Act").

The Tenant attended the hearing with R.W. attending as his translator, and A.K. attending as counsel for the Tenant. The Landlord attended the hearing as well, with R.P. attending as counsel for the Landlord. All parties in attendance, with the exception of A.K. and R.P., provided a solemn affirmation.

The Tenant advised that the Notice of Hearing package was served to the Landlord by registered mail on or around December 15, 2020, and the Landlord confirmed receiving this package. Based on this undisputed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was sufficiently served the Tenant's Notice of Hearing package.

The Tenant advised that he served his evidence to the Landlord by registered mail in early December 2020, on February 8, 2021, and on February 24, 2021. R.P. confirmed that this evidence was received, that it was reviewed, and that they were prepared to respond to it. As such, I have accepted the Tenant's evidence and will consider it when rendering this Decision.

R.P. advised that the Tenant was served with the Landlord's evidence package by registered mail and email on November 19, 2020. A.K. confirmed that the Tenant received this package, that it had been reviewed, and that they were prepared to respond to it. As such, I have accepted the Landlord's evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a Landlord, I must consider if the Landlord is entitled to an Order of Possession if the Application is dismissed and the Landlord has issued a notice to end tenancy that complies with the *Act*.

Issue(s) to be Decided

- Is the Tenant entitled to have the Landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities cancelled?
- If the Tenant is unsuccessful in cancelling the Notice, is the Landlord entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on June 15, 2015, that rent was currently established at an amount of \$1,700.00 per month, and that it was due on the first day of the month. A security deposit of \$800.00 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence.

A.K. advised that there was a new tenancy agreement that the parties engaged in. While she indicated that the entirety of this new tenancy agreement was submitted as documentary evidence, it appeared as if only the first page of this new agreement was provided. Regardless, all parties agreed that this new tenancy agreement was not signed by the Landlord. As such, I am not satisfied that the parties engaged into a new tenancy at any point.

All parties agreed that the Notice was served by registered mail on December 7, 2020. The Notice indicated that \$1,121.14 was owing for utilities on September 11, 2020. The effective end date of the tenancy was noted as December 17, 2020.

R.P. submitted that the tenancy agreement requires the Tenant to pay the utilities; however, the Tenant never made any payments to the Landlord for the utilities from the start of the tenancy to June 2018, despite the Landlord making requests for these payments. He advised that the Landlord requested that the Tenant pay these utilities over text message, but these messages were lost when she changed phones. He stated that she had been paying these utilities herself.

The Landlord advised that she asked the Tenant to open his own utility account at the beginning of the tenancy and that she sent pictures of the utility bills to the Tenant monthly.

R.P. advised that the Landlord served the Tenant with a written demand letter for the outstanding utilities on September 11, 2020 and a copy of this letter was submitted as documentary evidence. A copy of the electric billing history was submitted for consideration as well. He stated that, as the Tenant did not pay the outstanding utilities, the Landlord is seeking an Order of Possession for utilities owed in the amount as follows:

- August 2015 to December 2015 utilities: \$207.15
- February 2016 to December 2016 utilities: \$406.00
- February 2017 to December 2017 utilities: \$539.78
- February 2018 to July 2018 utilities: \$366.53
- Total utilities outstanding: **\$1,519.46**

Despite this total of the utilities outstanding, the Landlord only requested on the demand letter a payment of \$1,121.14. She referenced an email to the Tenant dated August 4, 2018 in which she reminded the Tenant that the rent does not include utilities and that he has not paid for these since the start of the tenancy.

A.K. advised that it is her “understanding” that the Landlord was not present at the signing of the tenancy agreement and that an agent of the Landlord entered into a verbal agreement with the Tenant that the utilities were included in the rent. She stated that the Tenant has difficulty with the English language, that he could not read the tenancy agreement, and that he did not understand what was written in the tenancy agreement. However, while there was no evidence submitted to support this verbal agreement specifically, she referenced a text between the agent for the Landlord and the Tenant. This person stated that the utility fee would be collected starting July 2018, that the Landlord “forgot about this matter in the past”, and that “never mind the old ones, will start from this month.” It is her position that it is implied in this message that

the Landlord was not thinking about the utilities owed prior to July 2018 and “not to worry about the past utilities”.

She submitted that the Tenant was “not aware” of any communication from the Landlord about utilities owed from 2015 to 2018 and that he was only advised that utilities were owed in July 2018. She provided a previous Decision of the Residential Tenancy Branch which she believes is relevant to this Application. As the Landlord did not request the utilities owed from 2015 until July 2018, the Landlord is estopped from asking for these amounts now.

The Tenant advised that he had a verbal agreement with the person he believed to be the agent of the Landlord where utilities were included in the rent. He submitted that the first time he received an invoice for utilities from the Landlord was in 2021 and that he has paid for the utilities since July 2018 by electronic transfer.

The Landlord advised that the reason she did not provide a demand letter for outstanding utilities from 2015 to 2018 until September 11, 2020 is because of personal circumstances with family, that she was busy, and that it was a difficult time. She submitted that she had a friend and her son helping her, but they gave up because it was difficult to communicate with the Tenant.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 46(6) of the *Act* states that if the tenancy agreement requires the Tenant to pay utilities, and those amounts remain unpaid more than 30 days after a written demand is given to pay those amounts, the Landlord may treat those amounts as unpaid rent and may serve the Notice.

Section 26 of the *Act* then states that rent must be paid by the Tenant when due according to the tenancy agreement, whether or not the Landlord complies with the tenancy agreement or the *Act*, unless the Tenant has a right to deduct all or a portion of the rent.

I find it important to note that when two parties to a dispute provide equally plausible 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 the case before me, the undisputed evidence is that the written tenancy agreement indicated that the “tenant will pay the utility fee.” While the Tenant claimed to have had a verbal agreement with an agent of the Landlord whereby the utilities were included in the rent, I find that there is little evidence to support the existence of this alleged verbal agreement. Rather, from the July 9, 2018 translated text that the Tenant submitted as documentary evidence, I find it more likely than not that the Tenant had been informed by the Landlord prior to 2018 that utilities were owed. In that text message, the person stated “never mind the old ones” in reference to past utilities. Had there been no conversations regarding past utilities, it does not make sense then what this would have been in reference to, or why this would have been stated at all.

Moreover, had the Landlord only started asking for utilities in 2018, had the Tenant believed that utilities were already included in the rent by way of some verbal agreement, it is not clear to me why the Tenant would then suddenly accept paying for utilities. Furthermore, the Tenant advised that he was only provided with a utility invoice in 2021; however, the email exchange from August 4, 2018 clearly indicates that a previous utility bill was attached and provided to the Tenant. Given the doubts created by these inconsistencies and contradictions, I find the Tenant’s submissions to be lacking in reliability or credibility. As such, I am satisfied that it is more likely than not that the Tenant was aware that he was responsible for the utilities from the start of the tenancy, and that he had been advised of such by the Landlord.

Regardless of the Tenant’s purported claims that he had difficulty with the language and that he was not aware of what he was signing, it is clearly stated and agreed upon in the tenancy agreement that utilities were to be paid by the Tenant. The Tenant should have sought assistance prior to signing any documents if he had doubts about what he was agreeing to. Consequently, I am satisfied that the Tenant was responsible for utilities owed from the start of the tenancy on June 15, 2015 until July 2018.

As the consistent evidence before me is that the Tenant was served with a demand letter for the utilities on September 11, 2020 and was then subsequently served the Notice by registered mail on December 7, 2020, Section 46(4) of the *Act* requires the Tenant to pay the overdue rent or to dispute this Notice within 5 days of being deemed to have received the Notice. Section 46(5) of the *Act* states that “*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 is conclusively*

presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit to which the notice relates by that date.”

The Tenant did not pay the amount on the Notice within five days of being deemed to have received the Notice. While the Tenant did dispute the Notice, as I am satisfied that the utilities were owed by the Tenant in accordance with the tenancy agreement, I do not find that there is sufficient or compelling evidence that the Tenant had a valid reason under the *Act* for withholding this amount.

In considering this matter, I have reviewed the Landlord's Notice to ensure that the Landlord has complied with the requirements as to the form and content of Section 52 of the *Act*. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 52. Therefore, I find that it is a valid Notice.

However, I also find it important to note the legal principle of estoppel. Estoppel occurs when one party to a legal claim is stopped from taking legal action that is inconsistent with that party's previous words, claims, or conduct. Estoppel is a legal doctrine which holds that one party may be prevented from strictly enforcing a legal right to the detriment of the other party, if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and has acted accordingly. In order to return to a strict enforcement of their right, the first party must give the second party notice (in writing), that they are changing their conduct and are now going to strictly enforce the right previously waived or not enforced.

In this case, while the utility issue appears to have been sorted out since July 2018, the Landlord only chose to serve the written demand for the utilities owed from June 2015 to July 2018 on September 11, 2020. The reasons the Landlord provided for waiting so long to serve this demand letter were related to hardship and personal circumstances. However, I do not find these reasons to be sufficient or reasonable in adequately justifying such a lengthy delay. In fact, if the Landlord was unable to act for such a long time in addressing the utility arrears issue, it causes me concern in how the Landlord would be able to address satisfactorily, or in a timely manner, any necessary duties that the Landlord would be expected to manage in regards to issues that may arise during a tenancy.

As I am not satisfied that the Landlord took any suitably timed action to address or to minimize the loss of utilities owed from June 2015 to July 2018, I find that the Landlord, through her delay and inaction, cannot reasonably be expected to be granted an Order of Possession for utilities owed from such a long time ago, that she only elected to

serve a Notice for years later. Consequently, I find that the Landlord is estopped from ending the tenancy for these outstanding utilities. However, as I am satisfied that the Tenant is still responsible for the utilities outstanding, the Landlord can make her own Application seeking a Monetary Order for the amount owed by the Tenant.

Based on my assessment of the totality of the evidence before me, I am not satisfied that the Landlord has sufficiently substantiated the grounds for ending the tenancy for unpaid utilities. As a result, I find that the Notice is of no force and effect.

Conclusion

Based on the above, I hereby Order that the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities of December 7, 2020 to be cancelled and of no force or effect. This tenancy continues until ended in accordance with the *Act*.

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 7, 2021

Residential Tenancy Branch