Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, LRE, OLC, FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- an order that the landlord comply with the Act, regulation or tenancy agreement pursuant to section 62;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $448.45 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
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenants testified, and the landlord confirmed, that the tenants served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord testified, and the tenants confirmed, that the landlord served the tenants with their evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Preliminary Issue – Severing Issues

Broadly speaking, the tenants' application related to two distinct issues:

1) the utilities; and
2) the loss of quiet enjoyment, including the landlord entering the rental unit without giving proper notice.

At the outset of the hearing, I advised the tenants that there would not be sufficient time to address both of these issues in the one hour we had allotted for the hearing. The tenants indicated that the issue of to the utilities was the more pressing. As such, and as the two issues were not related, I ordered the application be severed pursuant to Rule of Procedure 2.3. I dismissed the portion of the tenant's application relating to the tenant's loss of quiet enjoyment and the landlord's alleged improper entry of the rental unit with leave to reapply.

Issues to be Decided

Are the tenants entitled to:

1) a monetary order of $448.45;
2) an order that the landlord comply with the Act; and
3) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties and a third tenant entered into a written tenancy agreement starting September 1, 2020. The third tenant moved out of the rental unit on October 3, 2020, but the tenancy continued. All parties signed written a "change of tenancy agreement" on October 25, 2020, which stated:

> [The third tenant] is removing himself from the lease. All parties are in agreement to this.

The rental unit is the upper unit of a single-detached house (the "**house**"). The landlord rents the lower unit to another tenant. Monthly rent is $1,600 and is payable on the first of each month. The tenants paid the landlord a security deposit of $800 and a pet damage deposit of $800, which the landlord holds in trust for the tenants. The monthly rent does not include electricity, heat, or natural gas. The tenancy agreement has an addendum, signed by all parties, which includes the following terms:

- Upstairs tenant to pay landlord for oil used in furnace at the end of each month period usage will be calculated by flow rate of burner nozzle, runtime hour meter and cost of heating oil at time of fill.

- Upstairs tenant to have hydro in their name and landlord will cover 30% once provided with hydro bill.

The tenants testified that they put the hydro for the entire house in their names. They testified that they were charged a $408 deposit by BC Hydro to set up the service and that this deposit was non-refundable. They did not submit any documentation is support this assertion that the deposit is non-refundable. The landlord stated that, in his experience, such deposits are refundable.

The tenants have arranged with BC Hydro to have an equalize payment plan. That is to say, they pay a fixed amount every month, and then at the end of the year, depending on usage, BC Hydro will either debit or credit their account the difference in the cost of electricity used and the amount paid over the course of the year.

The tenants testified that, once they receive the BC Hydro bills, they forward them to the landlord, and the landlord pays them 30% of the *actual* cost of electricity used (not the

amount they paid to BC Hydro per the averaging agreement). The landlord's payment is not contingent upon him receiving payment from the occupant of the house's lower unit.

The tenants argue that this arrangement is unconscionable, relying on Policy Guideline 1 which, in part, states:

> A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable as defined in the [Residential Tenancy Regulation].

Section 6(3)(b) of the Act states:

> **Enforcing rights and obligations of landlords and tenants**
> 6(3) A term of a tenancy agreement is not enforceable if
> (b) the term is unconscionable, or

Section 3 of the Regulations states:

> **Definition of "unconscionable"**
> 3 For the purposes of section 6(3)(b) of the Act [*unenforceable term*], a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.

The landlord testified that he required the utilities to be in the tenants' name due to a past experience with another tenant failing to pay a hydro bill that was in the landlord's name, leaving the landlord to pay it in its entirety. He argued that the current arrangement is not unconscionable as his reimbursement of the tenants of 30% of the hydro bill is not predicated on receiving any money from the lower unit tenant, and that he does not require the tenants to collect this amount from the lower unit tenant.

The tenants' monetary claim is *not* based on the fact that they pay BC Hydro pursuant to an equal payment plan, but that the landlord based his 30% payments on the actual cost of electricity used during the billing period. Rather, they seek compensation in the amount of $408.00, representing the return of the security deposit they were required to pay BC Hydro, and $40.85 representing the return of 10% of the amount they have paid for hydro between September 1, 2020 and December 29, 2020.

The tenants argued that paying 70% of the hydro is too high, and that an equitable amount would be 60%, in light of the fact that there are now two, instead of three, people living in the rental unit. The tenants submitted statements from BC Hydro into evidence which indicate that they have paid $446.85 to BC Hydro (not including the security deposit) between September 1, 2020 and December 29, 2020. The tenants also seek a 10% reduction in the amount of the hydro they are required to pay going forward (that is, from 70% to 60%).

The parties also made submissions as to how the landlord calculated the cost of heating oil (which the landlord purchased himself and used to fill up the furnace). However, the parties agree that the landlord has recently installed a natural gas furnace, which will be fueled directly by Fortis, and that the issue of calculation of cost of fuel is now moot.

The landlord testified that the furnace only heats the upper unit, and that the lower unit is heated solely by base boards. The tenants largely agreed, but noted that at least one heating vent from the furnace goes into the lower unit.

Finally, the tenants seek an order that the landlord provide them with a new copy of the tenancy agreement, removing the name of the third tenant. At the hearing, the landlord agreed to do this.

Analysis

1. Unconscionability

The term the tenants allege is unconscionable states:

> Upstairs tenant to have hydro in their name and landlord will cover 30% once provided with hydro bill.

Policy Guideline 1 states:

> A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable

The landlord argued that the facts that the tenants are not responsible for collecting the lower unit occupant's portion of the hydro bill, and that the landlord reimburses the tenants 30% of the hydro bill regardless of whether the lower unit occupant pays his portion of the bill to the landlord cause the term not to be unconscionable.

While I agree that this causes the term to be less unconscionable than a term which requires a tenant to collect another occupant's portion of a hydro bill himself, I do not find that the absence of such a requirement makes the term conscionable.

Rather, I find the term remains unconscionable, as it improperly reallocates risk from the landlord to the tenants. The landlord testified that he required the tenants to put hydro in their name because a prior tenant of his failed to pay him the amount of utilities owed, and he had to pay it himself. It is understandable that the landlord would want to avoid such an occurrence from happening again. However, the method in which he has attempted to do this now places the tenants in the position of facing a possibility where they could be in the exact same position as the landlord was with his former tenant.

It is possible that the landlord could refuse to reimburse the tenants the 30% they are entitled to, thus leaving the tenant in a position where they must pay for a cost they did not incur.

It is unconscionable to allow for such a possibility. There are other ways the landlord could avoid having to pay for a tenant's unpaid utility (installing a separate meter, include the cost of utilities in the cost of rent, and charge more, for example). There is no such way for a tenant to avoid such a possibility, beyond not agreeing to such a term. Additionally, the role of a landlord is inherently commercial. Where a risk is to exist between a commercial and a non-commercial actor, it is preferable to assign that risk to the commercial actor, as they are better able account for that risk and arrange their affairs according.

I note that nothing in the evidentiary record suggests that the landlord has or intends to withhold the 30% reimbursement of the utility bill. My preceding comments are not intended to suggest that the landlord would act in such a way. However, this is not a relevant factor in determining the conscionability of the term in question. The conscionability of a term must be determined on the language of the terms, and not on the character of the parties.

As such, I find the term requiring the tenants to have the entire house's hydro bill in their name fits squarely in the scenario described in Policy Guideline 1 and is unconscionable. It is therefore unenforceable.

I order the landlord to, within 60 days of receiving decision, contact BC Hydro and arrange to have the hydro bill for the house put in his name. I order the tenants to promptly take all reasonable steps requested of them by either the landlord or BC Hydro to facilitate this change.

If the landlord fails to do this within 60 days of the landlord receiving this decision, the tenants may deduct an amount equal to the entire months hydro bill from each month's rent payment until such time the hydro ceases being in the tenant's name.

2. Apportionment of Hydro Bill

The tenants argued that the 70/30 hydro split was unfair and asked that it be readjusted to a 60/40. I do not find that such a split is so unfair as to be unconscionable. The tenants agreed to such a split at the start of the tenancy and I see no reason to alter it. I do not find that the fact the third tenant moved out to be a sufficient reason to reduce the portion of utilities the tenants should pay. At the time the third tenant moved out, the remaining tenants should have known that their financial burden would increase, and they could have negotiated with the landlord to reduce the amount when drafting the "change of tenancy agreement". It is not appropriate to foist such a reduction on the landlord at this time.

I note that, notwithstanding the fact I have found that the term requiring the tenants to have the entire house's hydro bill in their name to be unconscionable, the tenants are still required to pay for the hydro they use. The second page of the tenancy agreement explicitly states that hydro is not included in the monthly rent. Additionally, I understand the portion of the addendum requiring the tenants to have the hydro in their name and creating the 70/30 split, despite being written as a single term, to actually be two separate terms of:

1) Upstairs tenant to have hydro in their name; and
2) Landlord will cover 30% once provided with hydro bill.

As such, I find that my finding that the requirement to have the hydro in the tenants' name is unconscionable does not cause the 70/30 split to be unconscionable. It is a separate term which remains in force.

3. Monetary Order

The tenants have provided no evidence that the security deposit they provided to BC Hydro is non-refundable. Per Rule of Procedure 6.6, as this is their application, the tenants bear the onus to prove it is more likely than not that this is the case. The have failed to do so. Accordingly, I decline to order that the landlord pay the tenants this amount.

I have already found that the tenants are not entitled to a reduction in the percentage split of hydro that they are required to pay. As such, I decline to order the landlord to pay any amount representing a retroactive reduction of the amount of the hydro bill the tenants are required to pay.

4. Other orders

There is nothing in the Act requiring the landlord to provide an updated copy of a tenancy agreement to the tenants once one of the tenants vacates the rental unit. Neither party argued that the departure of the third tenant amounted to the ending of the original tenancy and the starting of a new tenancy. The "change of tenancy agreement" dated October 25, 2020 functions as an addendum to the tenancy agreement, and adequately documents the fact that the third tenant is no longer a party to the agreement. As such, I make no order on this point. However, if the parties agree, the landlord may issue an updated tenancy agreement. This would not be an opportunity to change or alter any of the terms of the tenancy, unless all parties expressly consent to the change or alteration.

The second page of the tenancy agreement indicates that natural gas is not included in the monthly rent. As such, the fact that the landlord has removed the oil furnace and installed a natural gas furnace has does not create any ambiguity as to the tenants'

responsibility for paying for heat. The rental unit is heated by natural gas, and natural gas is not included in the monthly rent. As such, the tenants are responsible for paying the natural gas bill, in its entirety. I have no evidence to support the tenants' testimony that there is a furnace duct venting into the lower unit or, if there is such a vent, that any more than a minimal amount of heated air is vented into it.

Pursuant to section 72(1) of the Act, as the tenants have been partially successful in the application, they may recover their filing fee from the landlord ($100).

Conclusion

The term in the addendum of the tenancy agreement requiring the hydro for the entire house to be in the tenants' name is unconscionable. I order the landlord to put it in his name within 60 days, or else the tenants may withhold a portion of their monthly rent as specified above.

The tenants continue to be responsible for 70% of the monthly hydro bill.

I dismiss the tenants' monetary claim, in its entirety, without leave to reapply.

Pursuant to section 72 of the Act, I order that the landlord pay the tenants $100, representing the reimbursement of the filing fee.

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: April 23, 2021

Residential Tenancy Branch