Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC-MT, OLC, RP

Introduction

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

- cancellation of the One Month Notice to End Tenancy for Cause (the "**Notice**") pursuant to section 47;
- more time to make an application to cancel the Notice pursuant to section 66;

All parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant attended the hearing. The landlords were represented at the hearing by the Property Manager.

The conference call hearing was scheduled for 11:00 a.m. The tenant called into the conference call at 11:25 a.m., apologized and explained that he was waiting for a phone call and did not account for the one-hour time difference until later.

At the start of the hearing the landlord confirmed that the tenant served the landlords with the notice of dispute resolution form. The supporting evidence package was not provided at the same time as the notice and was only recently provided on a thumb drive. Although the landlord strenuously objects to the non-consensual recorded conversations with staff that the tenant entered into evidence, she has no concerns or objections to inclusion of the information. I find that the landlord was served with the required documents in accordance with the *Act*.

I did not confirm with the tenant if he received the landlord's evidence. The evidence consisted of two emails the tenant sent to the landlord in January 2022 that do not pertain to the matter before me.

I advised both parties of rule 6.11 of the Rules of Procedure (the "**Rules**"), which prohibits participants from recording the hearing. The parties confirmed that they were not recording the hearing. I also advised the parties that pursuant to Rule 7.4, I would only consider written or documentary evidence that was directed to me in this hearing.

Section. 55 of the *Act* requires that when a tenant applies 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, and/ or a monetary order if the application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Preliminary Issue #1: Tenant late for hearing

The conference call was scheduled to start at 11:00 a.m. I was about to conclude the hearing when tenant dialed into the conference call at 11:25 a.m. - 25 minutes late. I explained the process and went over rules 6.11 and 7.4. I summarized the landlord's evidence for the tenant, with confirmation from the landlord that the precis accurately reflected her testimony. The hearing concluded at 12:18 to ensure the tenant was given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Preliminary Issue #2: Tenant's Application

The tenant applied for various and wide-ranging relief. Pursuant to rule 2.3 of the Rules, claims in an application must be related to one another. Where they are not sufficiently related, I may dismiss portions of the application that are unrelated. Hearings before the Residential Tenancy Branch are general scheduled for one-hour and rule 2.3 is intended to ensure that we can address disputes in a timely and efficient manner.

Upon review of the tenant's application and given that the tenant called into the hearing 25 minutes late, I find that the primary issue is whether the tenancy will continue or end pursuant to the One Month Notice to end tenancy that is subject to the application. Some of the additional relief is only relevant to the extent that the tenancy continues.

Accordingly, pursuant to rule 2. 3 of the Rules, I dismiss the tenant's following claims with leave to reapply:

- an order that landlords make repairs to the rental unit pursuant to section 32;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;

The hearing proceeded on the issue tied to the notice to end tenancy signed September 10, 2021.

Issues to be Decided

Is the tenant entitled to:

1) an order cancelling the Notice;
2) more time to make an application to cancel the Notice.

If the tenant fails in this application, is the landlord entitled to:

1) an order of possession?

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 entered into a written month to month tenancy agreement starting August 19, 2021. Monthly rent is $700.00 amount, payable on the first of each month. The tenant paid the landlords a security deposit of $350.00. The landlords still retain this deposit.

On September 10, 2021, the landlord served the tenant with a One-Month Notice to End Tenancy for Cause by posting it to the tenant's door.

The Notice gives the following reasons for ending the tenancy:

- the tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.

The tenant testified that he has uploaded written, audio, and photo evidence in support of his case. He disputes that he caused "extraordinary damage" to the rental unit as alleged in the Notice. He states that any "damage" to the unit happened before his tenancy.

The tenant stated that soon after he moved into the rental unit, he noticed that his lymph nodes were swollen, and his allergies were triggered. He called the office and asked if the previous tenants owned a cat and was told no. The tenant referred me to his "Introduction Letter" and reiterated the unfolding chronology of events as provided in the letter. The tenant testified his throat lymph nodes (filter glands), continued to swell and his lungs began to ache. He was unable to breathe and felt like he was choking. The reaction was most pronounced when he was in the kitchen and main room.

Concerned about his symptoms, the tenant looked to see if he could identify the source of his symptoms. Wearing a protective mask, the tenant used a flashlight to look under the sink in the kitchen. At the very back of the cabinet, under the faucet there was a water leak that extended the length of the countertop. The tenant saw mold growing and took pictures.

The tenant then put bleach in a spray bottle and sprayed under the sink. He continued to spray the area over the next 2-3 days. He then carefully removed the countertop because of worsening symptoms. The tenant states that removing the countertop worked and his symptoms cleared almost immediately. The tenant states that he did not damage the countertop but removed it professionally – his background is carpentry.

Prior to removing the countertop, the tenant confirmed he did not notify the landlord that there may be a mold problem in the unit. He stated that this was an emergency situation, and he could not wait for management to schedule a time to fix it. It was a health hazard and so he fixed the problem himself. The tenant also stated that he offered to pay for a replacement countertop, but the landlord refused the offer. The tenant stated that he found black mold in the bathroom and asked the maintenance man to look into the matter when the maintenance man was putting the countertop back.

The tenant stated that the maintenance man looked at the water damage and agreed that removing the countertops was justifiable given the visible water damage/mold. The maintenance man agreed that black mold was dangerous. The maintenance man took the countertops into his onsite workshop and painted over the water marks/damage to the underside of the countertops and then reinstalled the same countertops in the unit.

The tenant did not seek medical attention for his respirator symptoms, stating there was little if anything a doctor could do. No testing was done to confirm the presence of mold in the rental unit.

The landlord submitted two emails from the tenant into evidence. The email of January 7, 2002, referenced the reinstalment of the countertop and some ongoing problems associated with the installation.

The landlord testified that upon move in, the tenant and the landlord did a "condition inspection and report" and no concerns were raised by the tenant at that time.

On September 9, 2021, the landlord sent a maintenance man to the rental unit to repair leaking taps as reported by the tenant. When the maintenance man arrived, he discovered that the tenant had removed the kitchen countertops and placed it outside the apartment building. When the landlord was told what the tenant had done, she was shocked. The tenant had not mentioned his concerns to management and so the removal of the countertops, without management's authorization to do so, was a surprise. When asked why the tenant would remove the countertops the landlord explained that the tenant believed that the countertops were affecting his health. The landlord stated, "you can't just do something like that in the apartment".

The landlord testified that the maintenance man told her there was a "little water damage" but no mold. The maintenance man painted over the stains and the tenant told that the countertops must be put back. When the maintenance man came to reinstall the countertops, the tenant became aggressive and started yelling. The tenant then sent emails to the landlord accusing her of various transgressions. She states the tenant remains in the unit and is disruptive. She is concerned about additional damage to the rental unit based on written notes sent from the tenant.

The landlord provided no photos of the countertops removed or reinstalled or evidence of any damage to the countertops. The landlord reiterated her position that removal of the kitchen countertop constitutes "extraordinary damage" to the rental property.

Neither party called the maintenance man as a witness.

Analysis

Pursuant to sections 88 and 90 of the *Act,* I find that the tenant is deemed served with the One Month Notice to End Tenancy for Cause on September 13, 2021, three (3) days after it was posted to the tenant's door on September 10, 2021. The tenant filed to dispute the notice on September 20,2021.

Section 47 of the *Act* states that upon receipt of a Notice to End Tenancy for Cause, the tenant may, within ten (10) days, dispute it by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant files the application, the landlord bears the burden to prove on a balance of probabilities, the grounds for the One Month Notice as per rule 6.6 and reads as follows.

Rule 6.6 sets out the standard of proof and the onus of proof in dispute resolution proceedings, as follows:

> The standard of proof in a dispute resolution hearing is on a balance of

> probabilities, which means that it is more likely than not that the facts occurred as claimed.
>
> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.
>
> [emphasis added]

This means that the landlord must show on a balance of probabilities, it is more likely than not, that when the landlord gave Notice to the tenant, the tenancy should be ended for the reasons cited in the One Month Notice.

The ground, as it appears on page 2 of the Notice issued under s. 47(2)(f) of the *Act* states that a landlord may end a tenancy by giving Notice if the "tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park". In this case, the landlord must provide sufficient evidence to support, on a balance of probabilities, a conclusion that the tenant caused **extraordinary** damage to the rental property.

Policy Guideline #37 defines "extraordinary". The Guideline states, *"Extraordinary means very unusual or exceptional".*

Black's Law Dictionary (8th Edition) defines "damage" as *"loss or injury to person or property <actionable damage resulting from negligence>".*

During the hearing, the tenant admitted he removed the countertop and placed the countertop outside the apartment building. In his words, he "carefully" removed the countertop. The tenant states that his carpentry background gave him the expertise to remove the countertop without damaging it. Further, the tenant offered to purchase a new countertop (out of concern about mold contamination) and the landlord declined the offer.

The underside of the countertop was painted by the maintenance man because of the staining from long-standing water damage. The landlord and the tenant confirm that once the painting was finished, the very same countertop was reinstalled in the suite. The landlord provided no evidence of any "extraordinary" damage to the countertop. There were no photos, no witness statement from the maintenance man, nor was evidence of "extraordinary" damage provided in oral testimony.

The evidence from both parties indicates that this has become a problematic tenancy; however, I find that the landlord has only provided an allegation of "extraordinary damage", unsupported by reliable evidence. The tenant's application to cancel the Notice is granted.

The tenant should not have removed the countertop without prior consultation with the landlord, and although the resulting damage in this case did not meet the threshold of "extraordinary damage", I caution the tenant to not undertake any unauthorized actions/activities of this type going forward.

During his testimony, the tenant did not reference or request additional time to dispute the Notice, an issue which is now is moot. The tenant's application requesting more time to dispute the One Month Notice is dismissed without leave to reapply.

Conclusion

The landlord failed to provide sufficient evidence to meet the burden of proof on a balance of probabilities. The Notice is cancelled. The tenancy will continue until otherwise ended in accordance with the *Act.*

The tenant has leave to reapply for the issues that were severed and not heard.

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 16, 2022

Residential Tenancy Branch