Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes RR, RP, FFT, CNR

Introduction

The Tenant applies for the following relief under the *Residential Tenancy Act* (the "*Act*"):

- An order for rent reduction for loss of facilities or services pursuant to s. 65;
- An order for repairs pursuant to s. 32; and
- An order for return of her filing fee pursuant to s. 72.

The Tenant filed an amendment to her claim to dispute a 10-Day Notice to End Tenancy signed April 6, 2021 (the "10-Day Notice") pursuant to s. 46 of the *Act* and to amend her rent reduction claim to $200.00 per month.

X.L. appeared as Tenant. She was assisted by her agent and translator S.H. S.H. made submissions on behalf of the Tenant. The Tenant's primary language is Mandarin and S.H. translated on behalf of the Tenant. S.H. certified that he had knowledge of Mandarin and could translate English to Mandarin, and vice versa, on behalf of the Tenant.

H.L. and P.K. appeared as agents for the Landlords.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Tenant's agent advised that the Tenant's application, amendment, and evidence was served on the Landlords by way of registered mail. The Landlords' agents confirm receipt of the Tenant's application materials. Based on their acknowledged receipt, I find that pursuant to s. 71(2) of the *Act* the Landlords were sufficiently served with the Tenant's Notice of Dispute Resolution, amendment, and evidence.

The Landlords' agent advises that the 10-Day Notice was served on the Tenant by way of registered mail sent on April 6, 2022 and provided a tracking number. The Tenant's agent acknowledges that the 10-Day Notice was received by the Tenant but could not confirm the day the Tenant received it. I advised the parties that I would review the tracking information, which indicates it was received on April 12, 2022. Accordingly, I find that the Landlords served the 10-Day Notice in accordance with s. 88 of the *Act* and it was received by the Tenant on April 12, 2022 as indicated by the tracking information provided by the Landlords.

Preliminary Issue – Joining the Landlords' Application

I was advised by the Landlords' agents that the Landlords have filed an application of their own on April 29, 2022 for an order for possession, a monetary order, and return of the filing fee, all of which relate to the 10-Day Notice. I was provided with a file number for the Landlords' application.

The Landlords' agent advised that the Tenant was served with the application and evidence, which the Tenant acknowledges receiving on May 2, 2022. The Landlords' agent further advised that their evidence was provided to the Residential Tenancy Branch but through the Landlords' file rather than the Tenant's file.

I had not reviewed the Landlords application prior to the hearing. I canvassed the possibility of joining the applications and advised that the Tenant's claim to cancel the 10-Day Notice opened the possibility of an order for possession and order for unpaid rent pursuant to ss. 55(1) and 55(1.1), which were essentially the same as what the Landlords' agents say was claimed with the exception of the Landlords' claim for their filing fee. I further noted that the service timelines under Rule 3.14 of the Rules of Procedure for the Landlords application could not have been complied given the purported application on April 29, 2022.

I indicated that I could join the applications but would only do so if it was with the consent of the parties. The parties did consent to the applications being joined. I canvassed adjourning the hearing with the Tenant if the matters were to be joined. The Tenant's agent confirmed they were prepared to proceed and that no adjournment would be necessary.

The Landlords' application raises issues with respect to service. Dealing first with respect to the service of the Landlords evidence, based on the Tenant's acknowledged receipt, I am satisfied that it was properly served and in compliance with the timeline imposed on application respondents under Rule 3.15 of the Rules of Procedure. Though uploaded to the Residential Tenancy Branch under a different file number, I find that it was received and that it would not be prejudicial to the Tenant to include the Landlords' evidence as part of the hearing given that they are respondents to the Tenant's claim. I find that pursuant to s. 71(2) of the *Act* that the Landlords' evidence was served on the Tenant by virtue of its acknowledged receipt on May 2, 2022.

Secondly, Rule 3.1 of the Rules of Procedure requires an applicant to serve the Notice of Dispute Resolution on the respondent within three-days of receiving from the Residential Tenancy Branch. At the hearing and as mentioned above, the Landlords agents say the application was served and the Tenant acknowledges receiving the application. However, upon review of the Landlord's file, I note that the Notice of Dispute Resolution was only provided to the Landlords on May 11, 2022. Therefore, it was impossible to serve the Notice of Dispute Resolution on May 2, 2022 and that the parties were incorrect in their evidence that it had been.

This raises a procedural issue. On the one hand, the Tenant consented to the applications being joined and acknowledged receiving the Landlords' application on May 2, 2022. On the other hand, the Notice of Dispute Resolution could not have been served in compliance with Rule 3.1 of the Rules of Procedure as the Notice of Dispute Resolution was provided to the Landlords on May 11, 2022.

In the face of the fact that the Notice of Dispute Resolution could not have been served, I cannot proceed with the joining of the two applications. I appreciate that the determination of the Tenant's application under s. 46 to cancel the 10-Day Notice will render the Landlord's application moot. However, it would be procedurally unfair to proceed with the Landlords' application when it was not served.

Issues to be Decided

1) Should the 10-Day Notice be cancelled?
2) If not, is the Landlord entitled to an order for possession and an order for unpaid rent?
3) Should the Landlords be ordered to undertake repairs?
4) Is the Tenant entitled to a rent reduction?

5) Is the Tenant entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

The Tenant provides a copy of the tenancy agreement, which indicates that they took occupancy of the rental unit on October 1, 2019, that rent is set at $4,500.00 per month, and that a security deposit of $2,250.00 was paid to the Landlords.

The Landlords' agent advises that municipal utilities were the responsibility of the Tenant under the tenancy agreement. The Landlords' agent further advises that the Tenant paid a flat rate of $150.00 for municipal utilities each month and that at the end of the calendar year, a reconciliation would be made between what had been billed on the utilities against the $1,800.00 ($150.00 x 12) paid by the Tenant over the year. If there was a credit, the Landlords would return it to the Tenant. If there was a deficit, the Tenant would be responsible for paying an additional amount to the Landlords. The Landlords agent directed me to page 1 and 9 of the tenancy agreement that outlines this arrangement, specifically subclause 48(c).

The Landlords' agents indicate that the Tenant had paid municipal utilities in accordance with the tenancy agreement. However, the dispute arose when the Landlords conducted their reconciliation in December 2021. I was directed to a letter dated March 3, 2022 that had been sent by the Landlords to the Tenant. The letter is a demand that the Tenant pay $1,972.50 for municipal utilities and that the Tenant had 30-days to pay the amount or the Landlord would issue a 10-day notice to end tenancy. A copy of the March 3, 2022 demand letter was put into evidence by the Tenant.

The Landlords' agent indicated that the demand was in relation to a reconciliation of the municipal utility account from October 2020 until December 2021. It was not explained why the months of October to December 2020 were not part of the reconciliation for 2021. Copies of the relevant utility statements were put into evidence by the Tenant and the amounts claimed in the March 3, 2022 demand letter correspond with the utility statements.

The Landlords' agents indicate the amount went unpaid and the 10-Day Notice was issued on the basis that the Tenant owed $1,972.50 for municipal utilities.

The Tenant indicated that the amount for the utility payments is exorbitant given the amount of individuals that live within the rental unit. The Tenant argues that the toilets within the rental unit leak and that the excess water usage is tied to improper maintenance by the Landlords. I was advised that the Tenant notified the Landlords in May 2021 with respect to the leaky toilets but that no repairs were undertaken. The Landlords' agent says that the Tenant has a greenhouse at the property, which may account for the additional water usage. The Tenant indicates that the greenhouse was built in December 2021.

The Tenant further argued that portions of the municipal utility should be the responsibility of the Landlords. The Tenant's argument is that she is only responsible for the usage fees, not the base fees associated with service. The Landlords' agent disagreed with the argument and emphasized that the Tenant had previously paid the utility account.

The Tenant further described additional repair issues, including the following:

- A broken showerhead;
- The forced air furnace is no longer functional;
- A power outlet and light in the living room are no longer functional;
- A closet door in the basement had fallen and was loose; and
- The door to the balcony did not function properly.

The Tenant says the forced air furnace does not work. However, the Tenant indicates that there are electric baseboard heaters in the house such that it is heated. It was argued that the baseboard heaters were less efficient and thus more expensive. The Tenant further explained that the balcony door would not open and that she notified the Landlords, who sent a repairperson to the rental unit. It was explained that the lock for the balcony door was removed such that the door now operates.

The Tenant seeks $200.00 prospectively for future rent reduction and $1,000.00 for past rent reduction.

The Landlords agents respond by indicating that the Landlords send repair-people to the rental unit when notified of any issues. H.L. indicates that when he attended the rental unit in the spring of 2022, he found it to be warm and that it was heated. It was

argued that if there is an issue with the furnace it could likely be remedied by replacing a battery in the control unit. They further indicate that the closet door has been repaired previously by the Landlords, though it continues to fall off. The Landlords' agents argue that many of the complained of issues are the responsibility of the Tenant and are the type of general maintenance one would expect of an occupant.

Analysis

The Tenant applies to cancel the 10-Day Notice and for orders for repairs and for a rent reduction.

The primary issue in the Tenant's application is whether the tenancy would end or continue by virtue of the 10-Day Notice.

Pursuant to s. 46(1) of the *Act*, where a tenant fails to pay rent when it is due, a landlord may elect to end the tenancy by issuing a notice to end tenancy that is effective no sooner than 10-days after it is received by the tenant. Pursuant to s. 46(6) of the *Act*, a landlord may treat unpaid utilities as unpaid rent if:

a. the tenancy agreement requires the tenant to pay utility charges to the landlord; and
b. the utility charges remain unpaid more than 30 days after the landlord provides the tenant with a written demand that they be paid.

I have reviewed the tenancy agreement and the submissions of the parties. There is little doubt that paying municipal utilities is the responsibility of the Tenant under the tenancy agreement. The Tenant argues that a portion ought not be paid by the Tenant, in particular the base fees. However, the tenancy agreement makes no distinction that the Tenant is only responsible for usage fees. The wording is clear, the "Tenant will pay for the city utilities". Further, the Landlords' agents advise and I accept that the Tenant did, in fact, pay utilities in full during the prior reconciliation. The Tenant did not dispute this point and I find the Tenant's prior conduct to be highly relevant in interpreting their obligation to pay the municipal utilities. I find that the tenancy agreement requires the Tenant to pay municipal utilities and that it draws no distinction between usage and base fees as argued by the Tenant at the hearing.

Further, I accept the Landlords submissions with respect to how the municipal account was to be paid. The tenancy agreement specifies that the Tenant was to set up hydro and natural gas accounts to pay for those utilities. Municipal utilities, however, were to

be paid monthly in the amount of $150.00 and an annual reconciliation conducted in accordance with clause 48(c) of the tenancy agreement. The Tenant did not dispute the Landlords interpretation of the reconciliation process and I find that the wording in the tenancy agreement is clear with respect to the process.

I further find that the Landlords served the Tenant with a written demand by way of the letter dated March 3, 2022. The letter was put into evidence by the Tenant. The letter clearly specifies the nature of the utility demand and how it was calculated. Municipal utility statements were also provided, corroborating the amounts claimed in the MArch 3, 2022 demand letter. The municipal utility statements were put into evidence by the Tenant, thus she had them to review the authenticity of the demand. I find that the unpaid municipal utilities could properly be treated as unpaid rent pursuant to s. 46(6) of the *Act* given the March 3, 2022 demand letter and the Tenant's obligation to pay municipal utilities under the tenancy agreement. The Landlords were permitted to issue a notice under s. 46 after the 30-day demand period had lapsed. In this case, the 10-Day Notice was signed on April 6, 2022 and received by the Tenant on April 12, 2022, which is more than 30-days after the March 3, 2022 letter was issued.

The Tenant does not deny that utilities were unpaid, only that the usage is excessive and that she should not be responsible for the excess use that she attributes to leaking toilets that were not properly maintained by the Landlords.

Pursuant to s. 26(1) of the *Act*, a tenant must pay rent when it is due whether or not the landlord complies with the *Act*, the Regulations, or the tenancy agreement unless the *Act* grants the tenant the right to deduct all or a portion of the rent. As mentioned above, unpaid utilities are treated as unpaid rent provided the process set out under s. 46(6) of the *Act* has been complied with, as happened here. Even if I were to accept the Tenant's argument that the Landlords failed to maintain the rental unit as required under s. 32(1) of the *Act*, that does not excuse the Tenants failure to pay the utilities when the demand was issued on March 3, 2022 as made clear by s. 26 of the *Act*. The argument that the amount is high because of alleged toilet leaks is not relevant once the demand was made.

The *Act* proscribes a set of limited circumstances in which monies claimed by the Tenant can be deducted from rent, which include:

1. Where a tenant has paid a security deposit or pet damage deposit above that allowed by s. 19(1), then the amount that was overpaid may be deducted from rent (see s. 19(2)).
2. The reimbursement of costs borne by a tenant for emergency repairs after the process contemplated by s. 33(5) have been followed (see s. 33(8)).
3. Where a landlord collects rent following a rent increase that does not comply with the amount proscribed by the regulations, then the tenant may deduct the overpayment from rent (see s. 43(5)).
4. As ordered by the Director pursuant to ss. 65 and 72.

None of these circumstances are presently applicable.

Accordingly, I find that the Landlord had the right to treat the unpaid municipal utilities as unpaid rent and were permitted to issue the 10-Day Notice under s. 46. I further find that the Tenant had no lawful reason for withholding payment beyond the 30-day demand period having regard to the *Act*, their obligations under the tenancy agreement, and s. 26 of the *Act*. Therefore, I find that the 10-Day Notice was properly issued and that the Tenant failed to pay utilities as required by the tenancy agreement. The Tenant's application to cancel the 10-Day Notice is dismissed without leave to reapply.

Section 55(1) provides that where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with s. 52, then I must grant the landlord an order for possession. I have reviewed the 10-Day Notice and find that it complies with the formal requirements of s. 52 of the *Act*. The Landlords are, therefore, entitled to an order for possession under s. 55(1) of the *Act* and I grant them that order.

Pursuant to s. 55(1.1) of the *Act*, if a tenant's application to cancel a notice to end tenancy for unpaid rent or utilities is dismissed and the notice complies with the formal requirements of s. 52, then I must grant an order for unpaid rent. Presently, there is no dispute with respect the amount calculated, being $1,972.50 as set out in the March 3, 2022 demand letter. The Tenant disputes their underlying responsibility to pay the amount, not how it was calculated. I have reviewed the relevant utility statements and the method the Landlords calculated the demand based on the tenancy agreement. The amount is correct. Again, as mentioned above, utilities may be treated as unpaid rent if the process under s. 46(6) of the *Act* has been followed, which is what occurred here. Therefore, I grant the Landlords an order pursuant to s. 55(1.1) of the *Act* for unpaid rent and find that this be in the amount of $1,972.50.

As the tenancy is over, I need not consider the Tenants application for repairs under s. 32 or their request for a future rent reduction under s. 65 of the *Act*. The issues are moot now that the tenancy is over. These portions of the claim are dismissed without leave to reapply.

I note that the Tenant seeks an order for past rent reduction repairs, services, or facilities that were agreed to but not provided. The past rent reduction claim is in the amount of $1,000.00. Policy Guideline #22 provides the following guidance with respect to rent reduction claims:

> Where it is found that there has been a substantial reduction of a service or facility, without an equivalent reduction in rent, an arbitrator may make an order that past or future rent be reduced.
>
> Where the tenant claims that the landlord has restricted or terminated a service or facility without reducing the rent by an appropriate amount, the burden of proof is on the tenant.
>
> There are six issues which must be addressed by the landlord and tenant.
>
> - whether it is a service or facility as set out in Section 1 of the Legislation;
> - whether the service or facility has been terminated or restricted;
> - whether the provision of the service or facility is a material term of the tenancy agreement;
> - whether the service or facility is essential to the use of the rental unit as living accommodation or the use of the manufactured home site as a site for a manufactured home;
> - whether the landlord gave notice in the approved form; and
> - whether the rent reduction reflects the reduction in the value of the tenancy.

Having regard to s. 1 of the *Act* and the Tenant's submissions, the only aspect that could possible be construed as a service or facility would the forced air service. However, the Tenant has not proven any of the relevant points highlighted by Policy Guideline #22. Also, the Tenant acknowledges that the rental unit has heating in the form of baseboard heaters. There was argument that this is less efficient, however, the Landlord is not obliged to provide the most efficient form of heating. Their obligation is to provide heating facilities having regard to health, safety, and housing standards. I find that they did so under the circumstances.

The other aspects are issues with respect to alleged repairs and are not services or facilities as considered by s. 1 of the *Act*. As mentioned above, the tenancy is ending making these issues moot. Therefore, I find that the Tenant has failed to establish their claim for past rent reduction and dismiss it without leave to reapply.

Conclusion

The Tenant's application to cancel the 10-Day Notice is dismissed.

The Landlords are entitled to an order for possession. Pursuant to s. 55(1) of the *Act*, I order that the Tenant provide the Landlords vacant possession of the rental unit within **two (2) days** of receiving this order.

The Landlords are further entitled to an order for unpaid rent under s. 55(1.1) of the *Act* as the utilities are treated as unpaid rent pursuant to s. 46(6) of the *Act*. I order that the Tenant pay the Landlords $1,972.50 for the unpaid utilities. I exercise my discretion under s. 72(2) of the *Act* and direct that the Landlords retain $1,972.50 from the security deposit they hold in full satisfaction of the unpaid utilities owed by the Tenant.

As the tenancy is over, I dismiss the Tenant's claims for repairs and future rent reductions. I further find that the Tenant has failed to establish a claim for past rent reduction. Theses portions of the Tenant's claim are dismissed without leave to reapply.

As the Tenant was unsuccessful, I find that they are not entitled to the return of their filing fee. I dismiss the Tenant's application under s. 72 of the *Act* without leave to reapply.

It is the Landlords' obligation to serve the order for possession on the Tenant. If the Tenant does not comply with the order for possession, it may be filed by the Landlords with the Supreme Court of British Columbia and enforced as an order of that Court.

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: May 11, 2022

Residential Tenancy Branch