



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the Tenant: CNR, FFT

For the Landlord: OPR-DR, MNR-DR, MNDCL, FFL

Introduction

The Tenants (hereinafter the “Tenant”) filed an Application for Dispute Resolution on February 9, 2022 seeking a cancellation of the 10-Day Notice to End Tenancy for Unpaid Rent or Utilities (the “10-Day Notice”), and reimbursement of the Application filing fee.

On February 15, 2022 the Landlord applied for an order of possession of the rental unit, and recompense of unpaid rent amounts. Additionally, they applied for reimbursement of their Application filing fee. The Landlord initially filed this as a Direct Request; however, this application cannot be considered by that method when there is a prior extant request from the tenant in place. They amended their Application on March 23, 2022, adding a claim for compensation of other monetary loss.

The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the “Act”) on May 13, 2022.

Preliminary Matter – disclosure

Both parties attended the hearing and confirmed they received each other’s prepared documentary evidence in advance.

The Tenant stated they did not receive notification of the Landlord’s March 4, 2022 amendment, wherein the Landlord added a claim for utilities amounts owing.

The record shows a direct communication from the Landlord to the Tenant dated February 8, 2022. The Landlord made their request to the Tenant to clear up outstanding utilities amounts before the imminent end of tenancy. The Tenant did not specifically present that they did not receive this communication from the Landlord. Because of this – which strictly speaking does not replace the need for disclosure in the hearing process – I find the Tenant is not prejudiced by consideration of the Landlord's amendment. I find the Tenant was aware of the amounts and had seen the particular bills in question well in advance of the hearing.

Preliminary Matter – end of tenancy

The Landlord served the 10-Day Notice to the Tenant on February 7, 2022. This set the final end-of-tenancy date for February 17, 2022. The Tenant applied to challenge this 10-Day Notice on February 9, 2022.

After this, the tenancy ended when the Tenant moved out on February 28, 2022. In the hearing, the Landlord confirmed this, and stated they had full possession of the rental unit.

I find the matter of an end to this tenancy is settled. I find this was the result of the Tenant's own initiative to move out from the rental unit, I find they are eligible for reimbursement of one-half of the Application filing fee because they effectively settled that matter. I factor the Application fee for the Tenant into the consideration of whether the Landlord is eligible for compensation.

Issues to be Decided

Is the Landlord entitled to monetary compensation for unpaid rent pursuant to s. 67 of the *Act*?

Is the Landlord eligible for compensation for compensation for monetary loss or other money owed, pursuant to s. 67 of the *Act*?

Is the Landlord entitled to recover the filing fee for their Application, pursuant to s. 72 of the *Act*?

Background and Evidence

Both parties provided a copy of the tenancy agreement in their evidence. The basic terms were known to the parties. The parties signed the agreement on September 15, 2021 for the tenancy that started on that same date. The rent amount was set at \$2,500 per month, payable on the first day of each month. The Tenant paid a security deposit amount of \$1,250 at the start of the tenancy; that deposit was still being held by the Landlord as of the date of this hearing.

Relevant to the Landlord's claim, the agreement page 2 has no indication that any of the basic utilities are included in the monthly rent amount. Neither water, nor electricity, nor natural gas were checked.

A flood in mid-November 2021, followed by a large flood on December 1 effectively ended the Tenant's use of the basement space. They had to remove all of their belongings from that entire area and immediately undertook efforts to remove the water from the area. This required constant communication with the Landlord at that time, and the Tenant soon thereafter had to stay in a hotel for a short time to remove themselves from the situation that entailed contractors uncovering hazardous materials in the remediation process.

The Landlord communicated to the Tenant that rent was reduced for the month of December 2021, this to \$1,500. On December 31, as appears in the Tenant's evidence, the Landlord informed the Tenant that this was no longer in place going forward. Evidently this was something to do with the Landlord's insurance for the rental unit. The Tenant's pointed to the Landlord's mid-December message to them that stated: "until renovations completed".

The Landlord confirmed they granted the reduced amount of rent in December; however, as they stated in the hearing, they "had no agreement going forward". The Tenant "paid \$1,500 only". They messaged this to the Tenant on December 31. In response to this, the Tenant responded they would hold the Landlord to the reduced rent agreement "until we have full use of the house."

The Tenant confirmed they did not pay rent for the final month of the tenancy for February 2022. This was the basis for the Landlord seeking to end the tenancy via the 10-Day Notice. On their Application, the Landlord listed the full amount of February rent \$2,500, for which the "Tenant did not make any attempt to pay." The Landlord added a \$50 late fee charged on top of the outstanding rent balance, making their claim for unpaid rent \$2,550.

In their Amendment to their Application, the Landlord added their claimed amount of \$1,309.98. This was the sum total of three utilities bills, as well as a \$50 late fee, presented to the Tenant in a written demand for payment on February 8, 2022:

- electricity: \$693.66
- gas: \$386.63
- water: \$179.69

The Landlord in the hearing presented that the water bill comes every three months, and there was no indication on the agreement that water was not to be paid by the Tenant. They stated there was no indication to them from their insurer that the Tenant would only be responsible for the normal amount of billing – *i.e.*, comparable to what they had previously paid – due to an increase in the amounts because of the flooding which necessitated use of high-powered fans and more gas consumption for heating than would normally occur.

The Tenant presented they queried to the Landlord “a number of times” about the correct amount, and “it is not [the Tenant’s] job to say what the insurer does or does not cover”. They presented that the insurer instructed them to only pay what they would normally pay; however, the normal amount itself was abnormally high because of the old furnace in place in the rental unit. That in itself meant the Landlord had to supply extra space heaters that would abnormally draw on power anyway. They had proposed paying to the Landlord what they had paid the previous month.

Additionally, the Tenant presented that they had not paid a water bill previous since the start of the tenancy. They submitted that the Landlord sent this water bill after the Tenant chose to challenge the 10-Day Notice. The Tenant submitted an image of their text response to the Landlord dated February 2 regarding this water bill, after the Landlord sent it to them via text on that same date: “Sorry, we don’t pay water. Never have. Not in the contract and we never agreed that this was on us. This is a city bill to be covered by the landlord.”

The Tenant submitted copies of the following bills from their records:

- gas, invoice date October 25, 2021, for the amount of \$58.91
- gas, invoice date November 22, 2021, for the amount of \$104 – this shows an increasing usage over the prior 2 months
- gas, invoice date January 25, 2022 for \$386.63 – the same invoice claimed by the Landlord – highlighting an increase in average daily gas usage to over 0.6 GJ/day, with the previous month being under 0.4 GJ/day – the previous bill amount was \$168.23

- electricity, invoice date January 26, 2022 for \$693.66 – the same invoice claimed by the Landlord – highlighting a daily average use over 72 kWh/day, with the previous usage in the previous billing period being under 48 kWh/day – this also shows the previous payment of \$349.22 paid on December 13, 2021

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act*.

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

The *Act* s. 26 requires a tenant to pay rent when it is due under the tenancy agreement whether or not the landlord complies with the *Act*, the regulations or the tenancy agreement, unless the tenant has a right under the *Act* to deduct all or a portion of the rent.

I find the Tenant withheld rent intentionally, with their rationale being the pending determination on what is fair in the circumstances. They made a previous claim to the Residential Tenancy Branch, filed on January 31, 2022, the day before rent was due. In that claim they asked for a reduction in rent because of living in half the rental unit space that is normally available to them, compounded with inconsistent messaging from the Landlord about an adjusted level of rent and whether the insurer would cover that for them. By December 31, the Landlord withdrew their prior concession of reduced rent.

I was the Arbitrator in that prior dispute resolution process and my decision was dated May 31, 2022. This present hearing occurred in the interim period between the hearing date of May 2 and the decision of May 31. I ordered the Tenant was not entitled to a reduced amount of rent retroactively, finding that they paid a reduced rent for December 2021 and January 2022, at \$1,500. I did not resolve the issue of February 2022 which I must do here.

I find the Tenant is only responsible for the amount of \$1,500 as they had paid for the 2 immediate months prior. This is due, primarily, to the reduced living space which is approximately one-half of the rental unit, and I find the Tenant was credible (along with their presentation of evidence in that matter) on overall reduced living space in the upstairs part because of all their belongings that had to be moved from the basement to upstairs. As well, I find them credible on the immediate situation they faced in having to remove the water and assist the Landlord in making tentative arrangements for remediation. I find here the Landlord was not clear in whether insurance would cover a shortfall in rent, and this carries over into my question of why the Landlord did not claim the return of that shortfall in January rent.

To be clear: in the previous decision I did *not* grant the Tenant a reduced rent for the 2 months prior because that was already in place. Into February, I now find the reduced rent amount is reasonable for that final month of rent. This does not excuse the Tenant for not paying February rent which would have meant an order of possession to the Landlord.

I award \$1,500 to the Landlord for the final month of rent. There was nothing to show \$50 was in the tenancy agreement for instances of late rent payments; therefore, I find that is a punitive element added by the Landlord to their claim. I do not grant that amount to the Landlord. The matter of rent shortfall which the Landlord faced for the months during this ordeal is a matter they may take up with their insurer.

For the utilities as well, I find the Tenant must pay their rightful share. There was no statement from the Tenant that they would not pay electricity and gas at all; rather, they await the determination of what the amount should be.

The flood of December 1st brought about the need for high-powered fans to reduce the moisture in the basement, and from the evidence presented by the Tenant I find that severely increased power consumption. In the hearing the Tenant stated they were prepared to pay what they had paid in the previous month, and I hold them to this, finding it fair in the circumstances.

I consider approximately half the living space available to them, and this is inverse to a power bill that is close to double the amount of the previous month's bill. I grant the Landlord \$350 compensation for the remaining electricity invoice. Anything beyond this may be a matter they can take up with their insurer.

Similarly, the gas consumption became more than doubled into the month of January when I trace the arc shown in the previous month's bills that the Tenant provided. Following that arc that I can only assume would remain uninterrupted save for a flood that reduced the living

space by half, and accounting for the onset of colder winter weather, I grant the Landlord \$200 for the gas bill compensation to them.

I find the Tenant credible when they submit they had not paid a water bill prior to the one the Landlord presented to them in February. That bill shows the previous bill amount to be \$158.52 – the Landlord did not claim for any of that amount, even though that bill was paid on November 2, 2021 which was well after this tenancy began. It is not known why the Landlord did not claim this amount from the Tenant as well, even to one-half the amount which would be the amount owing in a three-month billing cycle with the tenancy starting approximately six weeks prior to that bill's date.

The Landlord seeking payment for the water utility is contrary to what is implied by their earlier omission, otherwise not explained in the hearing or evidence. I find the Landlord is estopped from claiming that amount from the Tenant at this point, given this inconsistency. I award no compensation to the Landlord for the water bill amount.

As above, I find there was no provision in place for the Landlord to rely upon a \$50 penalty for non-payment of bills. That amount would be purely punitive in nature and not reflective of any admin costs the Landlord may have incurred as a result of a late payment, such as an NSF fee. Therefore, I do not grant that to the Landlord.

The *Act* section 72(2) gives an arbitrator the authority to make a deduction from the security deposit held by a landlord. The Landlord has established a claim of \$2,050. After setting off the security deposit amount of \$1,250, there is a balance of \$800. I am authorizing the Landlord to keep the security deposit amount and award the balance of \$800 as compensation for rent owing.

As the Landlord was moderately successful in this Application, I find that they are entitled to recover \$50 of the filing fee they paid for this Application. This is offset against the one-half amount I granted to the Tenant above.

Conclusion

Pursuant to sections 67 and 72 of the *Act*, I grant the Landlord a Monetary Order in the amount of \$800. I provide the Landlord with this Monetary Order in the above terms they must serve it to the Tenant as soon as possible. Should the Tenant fail to comply with this Monetary Order,

the Landlord may file it in the Small Claims Division of the Provincial Court where it will be 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 s. 9.1(1) of the *Act*.

Dated: June 8, 2022

Residential Tenancy Branch