Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

File #310067499: CNR, OLC, LRE, FFT
File #310068217: OLC, CNR, FFT

Introduction

The Tenants file two applications under the *Residential Tenancy Act* (the "*Act*"). In the first application, the Tenants seek the following relief under the *Act*:

- An order pursuant to s. 46 to cancel a 10-Day Notice to End Tenancy signed on March 25, 2022 (the "First 10-Day Notice");
- An order pursuant to s. 62 that the Landlord comply with the *Act*, tenancy agreement, and/or the Regulations;
- An order pursuant to s. 70 setting restrictions on the Landlord's right of entry into the rental unit; and
- Return of the filing fee pursuant to s. 72.

The Tenants' second application involves the following claims under the *Act*:

- An order pursuant to s. 46 to cancel a 10-Day Notice to End Tenancy signed on April 2, 2022 (the "Second 10-Day Notice");
- An order pursuant to s. 62 that the Landlord comply with the *Act*, tenancy agreement, and/or the Regulations;
- Return of the filing fee pursuant to s. 72.

E.T. appeared as the Tenant. His co-tenant, M.T., was also present though provided no evidence at the hearing. R.T. appeared as agent for the Landlord.

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 advised that both applications and all his evidence were served on the Landlord via registered mail. The Landlord acknowledges receipt of all the Tenant's application materials. I find pursuant to s. 71(2) of the *Act* that the Landlord was sufficiently served with the Tenant's application materials as acknowledged by its agent at the hearing.

The Landlord's agent advises that the Landlord's responding evidence was served on the Tenant by leaving it in their mailbox. The Tenant acknowledged receipt of the Landlord's evidence and raised no objections to the method of service. I find pursuant to s. 71(2) of the *Act* that the tenants were sufficiently served with the Landlord's response evidence as acknowledged by the Tenant at the hearing.

Preliminary Issue – Tenants Claims

The Tenant applies for various and wide-ranging relief in the applications.

Pursuant to Rule 2.3 of the Rules of Procedure, 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 generally scheduled for one-hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

I find that the primary issue raised in the tenants' applications are whether the tenancy will continue or not based on the two 10-Day Notices. Indeed, orders under ss. 62 and 70 are not relevant if an order for possession is granted in the Landlord's favour.

Accordingly, I sever the tenants' claims under ss. 70 and 62 pursuant to Rule 2.3 of the Rules of Procedure as I find they are not sufficiently related to the primary issue raised by the two 10-Day Notices. If the tenancy continues, they shall be dismissed with leave to reapply. If the tenancy is over, they shall be dismissed without leave to reapply.

The hearing proceeded strictly on the basis of the enforceability of the First 10-Day Notice and the Second 10-Day Notice.

Issues to be Decided

1) Should the First 10-Day Notice be cancelled?
2) Should the Second 10-Day Notice be cancelled?
3) Is the Landlord entitled to an order for possession?
4) Is the Landlord entitled to an order for unpaid rent?
5) Are the tenants entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. Rule 7.4 of the Rules of Procedure requires a party to present the evidence they submitted at the hearing. I have reviewed all written and oral evidence presented to me at the hearing. However, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The tenants took occupancy of the rental unit on December 1, 2017.
- An security deposit of $730.00 was paid by the tenants.

The rental unit is located within a multi-unit residential property. The Landlord's agent advised that the Landlord recently purchased the property and took possession of the residential property in June 2021.

A copy of the written tenancy agreement was put into evidence by the parties. It is signed and dated on November 25, 2017. The tenancy agreement has had various amendments over the years, which are noted and initialed by the parties within the original tenancy agreement. The most recent amendment is initialed on October 19, 2020. Rent appears to have been increased annually and is noted as an amendment, which is initialled by the Tenant and the former landlord. The most recent amendment with respect to rent indicates $1,578.00 is to be paid on the first day of each month.

The Tenant acknowledges initialling the tenancy agreement and confirmed that the tenancy agreement correctly lists $1,578.00. The Tenant raised no argument that the rent increase was above that permitted by the *Act* and the Regulations. However, the Tenant argues that rent payable under the tenancy agreement is $1,556.00, which is the amount that had been paid prior to the most recent amendment of October 2020.

According to the Tenant, he had a conversation with the previous landlord in which the issue of the rent increase in the context of the Covid-19 rent freeze was discussed. I was directed to an email between he and the building's former manager dated November 11, 2020 which he indicates that rent is frozen until July 2021, that he had issued 6 post-dated cheques for $1,578.00, and that he would deduct the overpayment from June 2021 rent. The previous landlord replied, "Yes agreed with your idea on the current rent freeze."

The Tenant advised at the hearing that he paid the increased amount of $1,578.00 until the post-dated cheques had cleared out and then indicates he paid $1,424.00 for June 2021 to correct the overpayment over the proceeding months. The Tenant further advised that he has continued to pay $1,556.00 thereafter.

The Landlord's agent advised that the issue of the underpayment of rent was brought to light during an accounting completed by the Landlord in March 2022. The Landlord's agent pointed me to a letter written by the Landlord outlining the underpayment that he says was taped to the Tenant's door on March 15, 2022. The Tenant denies receiving that letter on March 15, 2022 and advised he first saw it in when the Landlord's evidence was served.

The Landlord's agent questioned the veracity of the Tenant's email evidence as it was not a direct copy of the email but appeared to involve the Tenant copying and pasting the body of the emails as line numbers are attached. The Tenant advised that the emails were accurate. I enquired with the Landlord's agent whether the current property manager for the building is a A.T.. The Landlord's agent confirmed this was correct. The Landlord provides no copies of the emails they have had with the Tenant in support of their argument that the emails provided by the Tenant are somehow inaccurate.

The Landlord's agent argues that the Tenant had taken advantage of the change in ownership to pay rent in a revised amount contrary to what was stated within the tenancy agreement. The Landlord's agent emphasized that rent had been paid in the amount of $1,578.00 up until May 2022 and that the revised rent payments in June 2021, the same month the Landlord took ownership of the residential property.

The Landlord's agent advised that the 10-Day Notices were posted to the Tenant's door, with proof of service forms showing service on March 25, 2022 and April 2, 2002. The Tenant acknowledges receiving the First 10-Day Notice on March 26, 2022 and the Second 10-Day Notice on April 3, 2022.

The Landlord indicates that $418.00 remains outstanding in unpaid rent from June 1, 2021 to date and provides a rent ledger in its evidence in support of their position.

The Tenant drew my attention to an emails he sent to the current Landlord's property manager. The first is dated May 31, 2021, which summarizes the Tenant's discussions with the previous landlord regarding rent from November to June and that June 2021 rent would be paid in the amount of $1,556.00.

The Tenant further drew my attention to an email he says he received from the current property manager on January 15, 2022. The current property manager offers her interpretation of the tenancy agreement and states the following:

> Furthermore, the arrangement you had with [redacted] to pay $1,556 ended in November which means that you should have been paying $1,578 for the following months (December 2021, January 2022).

I have redacted personal identifying information from the passage above.

The Landlord's agent argued that even if there were an agreement with respect to rent payments with the previous owner, the current Landlord should not be responsible for satisfying this agreement. The Tenant argued that the tenancy runs with the land.

Analysis

The tenants look to cancel the First and Second 10-Day Notices.

I find that the First 10-Day Notice and the Second 10-Day Notice were served on the tenants in accordance with s. 88 of the *Act* by having them posted to the door. I further find that the First 10-Day Notice was received by the tenants on March 26, 2022 and the Second 10-Day Notice was received on April 3, 2022, as acknowledged by the Tenant at the hearing.

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.

The issue in the present matter has resulted due to a transfer in ownership of the residential property in June 2021. The current Landlord feels as though the tenants have taken advantage of them to obtain reduced rent contrary to the tenancy agreement.

There is little dispute with respect to the relevant payment history, being that the Tenant paid $1,424.00 for June 2021 and has paid $1,556.00 thereafter. Assuming rent was payable in the amount of $1,578.00, total arrears to date would be $418.00.

I have reviewed the tenancy agreement and make note that the previous landlord's practice with respect to its amendments from 2017 to 2020 are unorthodox. I note that the original tenancy agreement is a fixed 1-year term lease after which point the tenants were to vacate the rental unit. There is no explanation within the tenancy agreement why it would not revert to a month-to-month tenancy and by outwards appearances seems to contravene ss. 13 and 44 of the *Act* and s. 13.1 of the Regulations. That issue is not before me.

I provide this context because the primary issue here is whether the rent increases imposed via amendments to the tenancy agreement by the previous landlord were valid. Sections 40 to 43.1 of the *Act* govern rent increases. Section 42 sets out the timing and process for increasing rent. Section 42(2) provides that a tenant must be given at least 3 months notice of the rent increases and, most critically here, s. 42(3) provides that a notice of rent increase must be in the approved form. The approved form in this instance is RTB-7.

Section 42 of the *Act* governs the timing and notice for rent increases and states as follows:

> 42 (1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:
>
> (a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first payable for the rental unit;
>
> (b) if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this Act.
>
> (2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.
>
> (3) A notice of a rent increase must be in the approved form.

> (4) If a landlord's notice of a rent increase does not comply with subsections (1) and (2), the notice takes effect on the earliest date that does comply.

Section 43 sets out the amount rent can be increased and specifically provides under s. 43(1)(c) that a landlord may impose a rent increase up to the amount agreed to by the tenant in writing.

Both ss. 42 and 43 are to be read complimentarily. Section 42 sets the timing and method for increasing rent and s. 43 sets the limit to which rent can be increased. This is supported by Policy Guideline #37, which provides guidance on rent increases. It states the following with respect to the notice requirements imposed by s. 42(3):

> **3. *Notice Requirement***
>
> The landlord must give the tenant a completed Notice of Rent Increase form at least three months before the effective date of the rent increase. This applies to annual rent increases, agreed rent increases and additional rent increases. The approved form must be used.
>
> (Emphasis Added)

There are no notices of rent increase put into evidence by the parties. I am left with a tenancy agreement with a series of rent increases brought about by the parties' initialling the document over a series of years.

Despite the Tenant signing and initialling the tenancy agreement, thus arguably triggering s. 43(1)(c), the previous landlord failed to comply with the requirements imposed by s. 42, specifically s. 42(3). In other words, the mere fact that the Tenant agreed to a rent increase to a specific amount, in this case $1,578.00 on October 19, 2020, does not remove the previous landlord's obligation to issue a notice of rent increase in the approved form as required by s. 42(3).

The *Act* exists, in part, to modify the contractual relationship between landlords and tenants in residential tenancies. It imposes obligations on the parties and provides certain rights that do not exist at common law. Further, it cannot be avoided as made clear by s. 5 of the *Act* and that any attempt to avoid or contract out of the *Act* is of no effect.

I find that the former landlord's practice of imposing rent increases via amendment to the tenancy agreement is indefensible and in clear contravention of s. 42(3) of the *Act*. The language of the section is not permissive: a notice of rent increase **must** be in the approved form. That was not done here. Further, the last amendment was signed on October 19, 2020 and the Tenant provided post-dated cheques in the revised amount starting on December 1, 2020. That is in clear contravention of the three-month notice required under s. 42(2). Again, the previous landlord appears to have sought the rent increase in clear contravention of the rent freeze brought about by the Covid-19 Pandemic.

I do not consider the annual renewal of the fixed term lease gave rise to "new" tenancy agreements. Rather, it appears that the previous landlord issued fixed term lease renewals such that it could circumvent the rent increase process set out under ss. 40 to 43.1 of the *Act*. As mentioned above, the *Act* cannot be avoided in residential tenancies. Further, a landlord may not prey upon the ignorance of its tenants to avoid their obligations under the *Act*.

This raises an issue with respect to the previous rent increases as there does not appear to have been any notice of rent increase issued since the tenancy agreement was signed in 2017. Under the original tenancy agreement, the tenants were to pay $1,460.00. I pause to note that the current Landlord is innocent of the mistakes made by the previous landlord. However, as the Tenant rightly pointed out, residential tenancies run with the land. The rights and obligations of a previous landlord are inherited by the new landlord upon purchase of the property.

In balancing the interests of the parties and in the face of the uncertainty brought about by my findings that the rent increase in October 2020 was improper, I believe it is appropriate to exercise my discretion under s. 62(2) of the *Act*, which permits me to make any findings of fact or law necessary or incidental to making a decision or order under the *Act*.

It is clear based on the evidence and as acknowledged by the Tenant, both at the hearing and through his conduct, rent was payable in the amount of $1,556.00. The Tenant does not apply to dispute the rent increases over the course of his tenancy, only to dispute the First and Second 10-Day Notices. The current Landlord is innocent of the mistakes made by the previous landlord. In the face of this, I find pursuant that **only** the purported rent increase from October 2020 is invalid and further find that rent is payable in the amount of $1,556.00 as per the tenancy agreement, a point acknowledged by the

Tenant at the hearing. I order pursuant to s. 62(2) of the *Act* that rent payable under the tenancy agreement is properly set at $1,556.00. This order shall not be construed as a limit on the right of the Landlord to issue a future rent increase, provided it complies with ss. 42 and 43 of the *Act*.

As there was no notice of rent increase issued by the previous landlord with respect to the increase in October 2020, rent never increased above $1,556.00. Pursuant to s. 43(5) of the *Act*, if a landlord collects a rent increase that does not comply with the *Act*, a tenant may deduct the increase from rent that is owed to the landlord.

I accept the undisputed evidence of the parties that the Tenant had paid $1,578.00 to the previous landlord through a series of post-dated cheques from December 2020 until May 2021. This would mean there was an overpayment of $132.00 (6 x $22.00). Accordingly, I find that the Tenant was permitted to deduct $132.00 from rent as per s. 43(5) of the *Act*. I further accept based on the parties undisputed testimony that the Tenant paid $1,424.00 in June 2021, which was permitted under the *Act* (($1,556.00 - $132.00). It is undisputed that the tenants have paid $1,556.00 from July 1, 2021 to date.

I find that the tenants have paid rent as per the tenancy agreement such that there were no arrears in rent when the First and Second 10-Day Notices were issued. As there was no proper rent increase in October 2020, the First and Second 10-Day Notices were not properly issued. Accordingly, I grant the tenants' application and cancel the First and Second 10-Day Notice. The tenancy shall continue until it is ended in accordance with the *Act*.

Conclusion

The previous landlord's rent increase from October 2020 was invalid and I find that rent payable under the tenancy agreement remained fixed at $1,556.00. I further accept that the tenants overpaid $132.00 in rent from December 2020 until May 2021 and were permitted to deduct this amount on from their rent as per s. 43(5) of the *Act*. It is undisputed that the tenants have paid $1,556.00 for rent from July 1, 2021 to date.

Therefore, there were no rent arrears when either the First or Second 10-Day Notices were issued. Accordingly, I cancel the First and Second 10-Day Notices as they are of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

As the tenancy has continued, those aspects of the tenants' application that were dismissed, specifically their claims under ss. 62 and 70, are dismissed with leave to reapply.

As the tenants were successful in their applications, I find that they are entitled to the return of his filing fees. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay $200.00 to the tenants for their filing fees, representing the filing fee of $100.00 for the tenants' two applications. Pursuant to s. 72(2) of the *Act*, I direct that the tenants withhold $200.00 from rent on **one occasion** in full satisfaction of their filing fees.

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: June 15, 2022

Residential Tenancy Branch