



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, RP, OLC

Introduction

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

- cancellation of the landlord's Ten Day Notice to End Tenancy for Unpaid Rent or Utilities, dated April 1, 2022 ("10 Day Notice"), pursuant to section 46;
- an order requiring the landlord to complete repairs to the rental unit, pursuant to section 32; and
- an order requiring the landlord to comply with the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 62.

The landlord and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. This hearing lasted approximately 71 minutes.

This hearing began at 11:00 a.m. with only me present. The landlord and the tenant both called in late at 11:02 a.m. The tenant disconnected from the hearing from 11:21 a.m. to 11:25 a.m. and from 11:30 a.m. to 11:32 a.m. The landlord disconnected from the hearing at 12:05 p.m. and did not return. I waited for the landlord to return to the hearing, but she did not, so I ended this hearing at 12:11 p.m.

The tenant claimed that their telephone kept disconnecting from the hearing because they were calling from a basement unit. They said that they had difficulty hearing me. The landlord stated that she could hear me properly. The tenant stated that they would talk on their telephone outdoors to hear properly and go back into the basement to check their application documents on their computer inside.

The landlord and the tenant provided their names and spelling. They provided their email addresses for me to send this decision to both parties after the hearing.

The landlord stated that she owns the rental unit. She provided the rental unit address.

Rule 6.11 of the Residential Tenancy Branch (“RTB”) *Rules of Procedure* (“Rules”) does not permit recording of this hearing by any party. At the outset of this hearing, the landlord and the tenant both separately affirmed, under oath, that they would not record this hearing.

I explained the hearing and settlement processes, and the potential outcomes and consequences, to both parties. They had an opportunity to ask questions, which I answered. They did not make any adjournment or accommodation requests. They confirmed that they were ready to proceed with this hearing, they wanted me to make decision, and they did not want to settle this application.

During this hearing, I was required to caution the tenant regarding their inappropriate behaviour, as they could be heard laughing repeatedly while the landlord was speaking. I informed the tenant that this was a serious legal proceeding to determine whether their tenancy would continue and that their laughing was inappropriate and disruptive. The tenant confirmed their understanding of same.

The landlord confirmed receipt of the tenant’s application for dispute resolution hearing package and the tenant confirmed receipt of the landlord’s evidence. In accordance with sections 88, 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant’s application and the tenant was duly served with the landlord’s evidence.

I informed the landlord that I did not receive any written evidence at the RTB from her for this hearing. She said that she only provided a copy of the tenancy agreement as evidence for this hearing. The tenant confirmed receipt of the tenancy agreement and stated that they provided it as evidence for this hearing. I notified the landlord that I received the tenant’s copy of the tenancy agreement, and I would consider that copy at the hearing and in my decision. The landlord confirmed her understanding of same and stated that she agreed with the contents of the tenant’s copy of the tenancy agreement.

The tenant confirmed receipt of the landlord’s 10 Day Notice. The tenant provided a copy of the notice for this hearing. The tenant confirmed that the effective move-out date on the notice is April 11, 2022. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was duly served with the landlord’s 10 Day Notice.

Preliminary Issue – Severing Portions of the Tenant's Application

The following RTB *Rules* are applicable and state (my emphasis added):

2.3 Related issues

*Claims made in the application must be related to each other. **Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.***

6.2 What will be considered at a dispute resolution hearing

The hearing is limited to matters claimed on the application unless the arbitrator allows a party to amend the application.

*The arbitrator may refuse to consider unrelated issues in accordance with Rule 2.3 [Related issues]. **For example, if a party has applied to cancel a Notice to End Tenancy or is seeking an order of possession, the arbitrator may decline to hear other claims that have been included in the application and the arbitrator may dismiss such matters with or without leave to reapply.***

Rules 2.3 and 6.2 of the RTB *Rules* allow me to sever issues that are not related to the tenant's main urgent application. The tenant applied for three different claims in this application.

The tenant was provided with a priority hearing date, due to the urgent nature of their application to cancel the landlord's 10 Day Notice. This is the central and most important, urgent issue to be dealt with at this hearing. After 71 minutes in this hearing, there was insufficient time to deal with the remainder of the two claims in the tenant's application. I informed both parties that the maximum time for this hearing was 60 minutes. This hearing exceeded 60 minutes, just dealing with the 10 Day Notice claim.

I notified the tenant that their application for repairs and an order to comply, were dismissed with leave to reapply. The tenant received a priority hearing date for the end of tenancy issue, and the remainder of the tenant's application are non-urgent lower priority issues, which can be severed at a hearing. This is in accordance with Rules 2.3 and 6.2 of the RTB *Rules* above. I notified the tenant that they could file a new application, if they want to pursue the remaining claims above, in the future. The tenant confirmed their understanding of same.

Issues to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an order of possession for unpaid rent?

Is the landlord entitled to a monetary order for unpaid rent?

Background and Evidence

While I have turned my mind to the tenant's documentary evidence and the testimony of both parties at this hearing, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claims and my findings are set out below.

Both parties agreed to the following facts. A written tenancy agreement was signed by both parties. A security deposit of \$200.00 and a pet damage deposit of \$100.00 were paid by the tenant and the landlord continues to retain both deposits. The tenant continues to reside in the rental unit.

The landlord testified regarding the following facts. This tenancy began on October 1, 2018. Monthly rent of \$920.00 per month is payable on the first day of each month, as per the tenancy agreement. The tenant is entitled to a discount of \$100.00 per month off the monthly rent, if they mow the lawn and take out the garbage. The tenant is also entitled to a further discount off the monthly rent, since a roommate left, and the tenant cannot pay the full rent alone. The landlord is required to pay someone else to mow the lawn and take out the garbage and she did not pursue the tenant regarding same because the tenant had an injury to their arm or hands and then the covid-19 pandemic occurred. The landlord is only seeking to recover \$100.00, rather than \$150.00, for the unpaid April 2022 rent. The landlord seeks an order of possession against the tenant. The landlord seeks a monetary order of \$100.00 for unpaid rent for April 2022. The landlord did not forge the tenant's signature or other information on the tenancy agreement and there is no other tenancy agreement, aside from the copy provided by the tenant for this hearing.

The tenant testified regarding the following facts. This tenancy began on November 7, 2018. The landlord falsified the tenancy agreement that the tenant provided for this hearing. The landlord forged the tenant's signature on the tenancy agreement. The landlord added the information regarding the discounted rent of \$100.00 for mowing the lawn, weeding, and taking out the garbage, on the tenancy agreement. The landlord did

not provide a copy of the correct tenancy agreement signed by both parties, showing that this tenancy began on November 7, 2018 for a rent of \$770.00 per month, to the tenant, despite the tenant's verbal and written requests. The landlord reduced the rent on her own accord to \$770.00 per month, which the tenant has been paying since October 2020.

Both parties agreed to the following facts. The tenant paid \$920.00 per month, for the first three months of tenancy, which included rent of \$820.00 per month plus an additional \$100.00 per month to pay for the \$300.00 total in security and pet damage deposits. Thereafter, the tenant paid \$820.00 per month in rent until October 2020, when the tenant began paying \$770.00 per month in rent, to the present date. The landlord issued a 10 Day Notice for unpaid rent of \$920.00 due on April 1, 2022, to the tenant. Rent of \$920.00 was due on April 1, 2022, and the tenant only paid \$770.00. The tenant paid rent of \$770.00 per month for April, May, June and July 2022, which the landlord accepted. The tenant provided an e-transfer confirmation showing that they paid \$770.00 to the landlord's son on March 31, 2022, for April 2022 rent, which was accepted. The tenant stopped mowing the lawn and taking out the garbage about three to four months into this tenancy and the landlord did not make an issue of same. The tenant used to mow the lawn and take out the garbage at the rental property, prior to moving in and beginning this tenancy, and the landlord used to pay the tenant \$50.00 per month to complete same.

Analysis

Burden of Proof

Rule 6.6 of the RTB *Rules* states the following (my emphasis added):

6.6 The standard of proof and onus of proof

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.*

The landlord has the burden of proof, on a balance of probabilities, to prove the details and reasons on the 10 Day Notice, as per sections 26 and 46 of the *Act* and Rule 6.6 above. The *Act*, *Regulation*, *RTB Rules*, and Residential Tenancy Policy Guidelines require the landlord to provide evidence of the 10 Day Notice and rent, in order to obtain an order of possession and a monetary order against the tenant.

The following *RTB Rules* are applicable and state the following, in part:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent...

...

7.17 Presentation of evidence

Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...

7.18 Order of presentation

The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...

I find that the landlord did not properly present her testimony, as required by Rule 7.4 of the *RTB Rules of Procedure*, despite having multiple opportunities to do so, during this hearing, as per Rules 7.17 and 7.18 of the *RTB Rules of Procedure*.

This hearing lasted 71 minutes so the landlord had ample opportunity to present her testimony. During this hearing, I repeatedly asked the landlord if she had any other information to present and provided her with multiple opportunities for same. The landlord provided confusing and inconsistent testimony throughout this hearing. I frequently had to ask the landlord questions to clarify the inconsistent information, particularly regarding the 10 Day Notice and the rent.

Findings

In accordance with section 46(4) of the *Act*, the tenant must file their application for dispute resolution within five days of receiving the 10 Day Notice. In this case, the tenant claimed in the online RTB dispute details that they received the 10 Day Notice on April 1, 2022, by way of posting to their rental unit door. The tenant filed this application to dispute the notice on April 5, 2022. Accordingly, I find that the tenant's application

was filed within the five-day time limit under the *Act*. Therefore, the burden shifts to the landlord to prove the reason on the 10 Day Notice.

Section 46(1) of the *Act* permits the landlord to issue a 10 Day Notice only after rent is unpaid and section 52(d) of the *Act* requires the landlord to state on a notice to end tenancy, the reason for issuing the notice.

The landlord indicated that \$920.00 in rent was due on April 1, 2022, on the 10 Day Notice. However, the landlord testified that the tenant paid rent of \$770.00 to her son on March 31, 2022, for the April 2022 rent. The tenant provided a copy of the e-transfer payment of \$770.00, made on March 31, 2022, indicating it was for April 2022 rent, which was accepted by the landlord's son.

The landlord testified that the rent payable for April 2022 was \$920.00. She said that since the tenant paid \$770.00, only \$150.00 was owed by the tenant, but she was only seeking \$100.00. I find that the tenant did not have proper notice of the correct amount of rent due on April 1, 2022. I find that the tenant did not have an opportunity to pay the rent in order to cancel the 10 Day Notice because the rent amount supplied by the landlord, was incorrect. The landlord indicated that rent of \$920.00 was due, even though the tenant already paid \$770.00 for April 2022 rent, prior to the notice being issued. I find that the 10 Day Notice does not comply with section 52 of the *Act* by stating the incorrect amount of rent due.

I also note that the landlord testified that she did not have the same copy of the 10 Day Notice in front of her during this hearing, that the tenant and I did. The landlord testified that her copy said that the notice was dated on April 10, 2022 and the effective move-out date was April 20, 2022. However, neither the tenant nor I had a copy of that notice in front of us during this hearing and the landlord did not provide a copy of it for this hearing. As noted above, the tenant and I had a copy of the 10 Day Notice that was dated for April 1, 2022, with an effective move-out date April 11, 2022. I find that the 10 Day Notice does not comply with section 52 of the *Act* by stating the incorrect date signed and the incorrect effective move-out date.

Residential Tenancy Policy Guideline 11 discusses waiver, in part (my emphasis added):

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and

unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

*For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. **However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” it could be implied that the landlord and tenant intend for the tenancy to continue.***

Intent may also be established by evidence as to:

- whether the landlord specifically informed the tenant that the money would be for use and occupancy only;*
- whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and*
- the conduct of the parties.*

I find that the landlord accepted the tenant's rent payments for May, June, and July 2022, after the effective date on the 10 Day Notice of April 11, 2022. The landlord did not testify or provide documentary evidence as to whether she issued rent receipts for “use and occupancy only,” or other documentation to tell the tenant that the tenancy was not reinstated. I find that the landlord did not provide sufficient documentary or testimonial evidence to show that the tenant's tenancy was not reinstated or that she was pursuing an end to this tenancy. Therefore, I find that the landlord waived her right to pursue the 10 Day Notice.

Accordingly, I grant the tenant's application to cancel the landlord's 10 Day Notice, dated April 1, 2022. The landlord's 10 Day Notice, dated April 1, 2022, is cancelled and of no force of effect. The landlord is not entitled to an order of possession against the tenant. This tenancy will continue until it is ended in accordance with the *Act*.

Pursuant to section 55 of the *Act*, I am required to determine whether the landlord is entitled to a monetary order for unpaid rent, if the tenant applies to dispute a 10 Day Notice, without the landlord being required to file a separate application for same.

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, which is the first day of each month, in this case, as per both parties' testimony. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

The landlord provided confusing, inconsistent, and unclear evidence regarding the monthly rent for this tenancy, at this hearing. I informed the landlord that I was confused by her testimony as it frequently changed throughout this hearing. At different times during this hearing, the landlord indicated that the rent was \$920.00, \$870.00, \$820.00, and \$780.00. The landlord also stated that the tenant paid rent of \$840.00 and \$770.00 at different times during this tenancy.

Both parties agreed that the tenant paid \$820.00 per month from the beginning of this tenancy in 2018 until October 2020. I find that the landlord agreed and accepted rent of \$820.00 per month from the tenant, since the additional \$100.00 per month for the first three months of tenancy, was used to pay for the security and pet damage deposits of \$300.00 total. The landlord agreed that the tenant did not mow the lawn or take out the garbage after the first three to four months of tenancy and that she did not follow up with it. I find that the rent was not \$920.00 per month, as indicated in the tenancy agreement provided by the tenant, as this amount was not paid by the tenant, from the beginning of this tenancy in 2018 to date. I find that the landlord waived her right to monthly rent of \$920.00 per month, because this has not been paid by the tenant or requested by the landlord during this tenancy.

I find that the landlord has been accepting rent payments of \$770.00 per month from the tenant from October 2020 to date. This hearing occurred on July 26, 2022. I find that the landlord did not pursue the tenant for any unpaid rent for a period of almost two years, from October 2020 to July 2022.

I find that the landlord did not pursue the tenant for any unpaid rent, issue any other notices to end tenancy to the tenant for unpaid rent, aside from the 10 Day Notice in April 2022, or file any RTB applications for unpaid rent against the tenant, as per the landlord's testimony at this hearing. At this hearing, the landlord did not indicate that she was pursuing a monetary order for the May, June or July 2022 unpaid rent, even

though the tenant only paid her \$770.00 for rent, rather than \$920.00 she claimed was owed.

For the above reasons, I declare that the legal rent for this rental unit and tenancy is \$770.00 per month, for the remainder of this tenancy, until the rent is legally changed in accordance with the *Act*. I find that the landlord has been accepting the above rent from the tenant, without dispute, from October 2020 to July 2022, a period of almost two years.

I find that the landlord is not entitled to a monetary order of \$100.00 for unpaid rent for April 2022. I find that the tenant paid the full rent due for April 2022, of \$770.00, to the landlord, as noted above.

Conclusion

The tenant's application to cancel the landlord's 10 Day Notice is allowed. The landlord's 10 Day Notice, dated April 1, 2022, is cancelled and of no force or effect. The landlord is not entitled to an order of possession against the tenant. This tenancy continues until it is ended in accordance with the *Act*.

The tenant's application for an order requiring the landlord to complete repairs to the rental unit and an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement, is dismissed with leave to reapply.

The landlord is not entitled to a monetary order for unpaid rent of \$100.00 for April 2022, against the tenant.

I declare that the legal rent for this rental unit and tenancy is \$770.00 per month, for the remainder of this tenancy, until the rent is legally changed in accordance with the *Act*.

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: July 26, 2022

Residential Tenancy Branch