



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

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; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenant and an agent of the landlord (the "agent") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The tenant's advocate attended this hearing and made submission on behalf of the tenant. The landlord called witness M.O. who provided affirmed testimony.

Both parties confirmed their email addresses for service of this Decision.

Section 55(1) and section of the *Act* states that if the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice, the director must grant the landlord an order of possession.

Preliminary Issue- Service

The advocate submitted that the tenant served the landlord with the tenant's application for dispute resolution via registered mail within three days of receipt of the dispute resolution materials from the Residential Tenancy Branch. The agent testified that the above package was received around that time and is post marked June 1, 2022. I find

that the landlord was served with the above package in accordance with section 89 of the *Act*.

The advocate submitted that the landlord was served with the tenant's evidence approximately three weeks ago via registered mail. The tenant entered into evidence a registered mail receipt dated September 6, 2022. The agent testified that the tenant's evidence was in the package with the tenant's application for dispute resolution and that the landlord did not receive the September mailing. The tenant entered into evidence the following evidence:

- the Notice,
- Residential Tenancy Policy Guideline #40, and
- September 6, 2022 registered mail receipt.

The landlord testified that he had received a copy of the Notice. I find that the Residential Tenancy Policy Guidelines are always considered when rendering a decision and are not required to be served on the other party. As both parties agree that they have a copy of the Notice which both parties agree is the subject of this hearing, I find that the Notice is accepted for consideration.

Both parties agree that the tenant was served with the landlord's evidence in person on September 18, 2022. I find that the landlord's evidence was served on the tenant in accordance with section 88 of the *Act*.

Issues to be Decided

1. Is the tenant entitled to cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47 of the *Act*?
2. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
3. Is the landlord entitled to an Order of Possession, pursuant to section 47 and 55(1) of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced

here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on August 1, 1983 and is currently ongoing. Monthly rent in the amount of \$1,035.00 is payable on the first day of each month. A security deposit of \$197.50 was paid by the tenant to the landlord. A written tenancy agreement was submitted for this application.

Both parties agreed that the tenant was personally served with the Notice on May 13, 2022.

The Notice was entered into evidence by both parties and states the following reasons for ending the tenancy:

- Tenant or a person permitted on the property by the tenant has:
 - put the landlord's property at significant risk.
- Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.

It is undisputed that when plumbers hired by the landlord attended at the subject rental property to replace pipes in the walls, the tenant advised them of rust in his bathtub. The agent testified that the rust in the bathtub was not visible because the tenant put a bathmat over it. The agent testified that when the bathmat was removed, the large rusted area, roughly the size of the bathmat, was immediately visible. The landlord entered into evidence photographs of the bathtub which show a large rusted patch covering the majority of the bottom of the bathtub.

The agent testified that the plumbers could not repair the bathtub and that it had to be repaired which cost over \$4,000.00. The landlord entered into evidence a receipt for the bathtub replacement in the amount of \$4,546.50.

Both parties agree that the landlord told the tenant that if the tenant paid the above bill, the Notice would be rescinded. Both parties agree that the tenant initially agreed to the above, but later changed his mind.

The tenant testified that the tub was not new when he moved into the subject rental property 39 years ago and has not been replaced since he moved in. The agent testified that he does not know how old the bathtub is.

The agent testified that the bathtub at the subject rental property is made of steel and has a life expectancy of 50 to 60 years. No documentary evidence establishing same was entered into evidence. The agent called witness M.O. (the "witness") who testified that he is a project manager and owner of a construction company and has over 50 years of construction experience. The witness testified that he has not seen the bathtub in question in person but has seen photographs of it. The witness testified that the lifespan of a steel bathtub is around 30 years and that if it receives good care, it may last longer, up to 50 to 60 years.

The witness testified that he has never seen such extensive rust damage in a bathtub before and that the bathtub looks like it was neglected for years. The witness testified that he has replaced other bathtubs in better condition and that the condition of the bathtub goes beyond regular wear and tear.

The agent testified that the tenant neglected the bathtub and failed to report the damage when it first became noticeable. The agent testified that had the problem been reported when there was a spot of rust the size of a quarter, the landlord would have been able to repair the bathtub at 10th the cost of replacing it.

The advocate submitted that the tenant has lived at the subject rental property for 39 years and that the bathtub is at least 39 years old. The advocate submitted that the tenant has used the bathtub in a normal manner for 39 years. The advocate submitted that the useful life of a bathtub in Residential Tenancy Branch Policy Guideline #40 is 20 years and that the bathtub is passed its useful life and the tenant did not willfully or deliberately damage the bathtub.

The agent testified that the Residential Tenancy useful life for a bathtub is likely for a fiberglass bathtub and not a steel bathtub which has a useful life of 50-60 years.

The advocate submitted that the bathmat was not intended to conceal the condition of the bathtub but to provide stability in the bathtub. The advocate submitted that the Notice was unnecessary and that if the landlord wished to sue tenant for damages for the cost of replacing the bathtub, they should have filed a monetary claim, and not served an eviction notice.

The agent testified that he made a mistake and should have filed a monetary claim instead of serving the tenant with the Notice. The agent testified that the landlord was originally not looking to evict the tenant, they just wanted the tenant to cover the cost of

the bathtub replacement. The agent testified that if the tenant had paid, “we wouldn’t be here today”.

The agent testified that the tenant was obligated to report damages and failed to do so which made the damages larger than they would otherwise have been.

The agent testified that the tenant put the landlord’s property at significant risk because if the bathtub leaked due to the rust, water damage could have resulted to the subject rental building and the ceiling of the unit below tenant could have collapsed.

The witness testified that the rusted bathtub could have leaked and created rot and mould and could have caused structural problems. The witness testified that the bathmat made the condition of the bathtub worse.

Analysis

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure (the “Rules”) states that 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.

Pursuant to Rule 6.6 of the Rules, I find that the burden of proof is on the landlord. The landlord must prove, on a balance of probabilities, the reason they wish to end the tenancy.

Sections 47(1)(d)(iii) and 47(1)(f) of the *Act* state:

47 (1)A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

(d)the tenant or a person permitted on the residential property by the tenant has

(iii)put the landlord's property at significant risk;

(f)the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

The photographs entered into evidence by the landlord show a large rust patch, but it is not clear how thick the bathtub was, how deep the corrosion extended and what the structural integrity of the bathtub was at the time it was removed as no evidence on these points were presented.

The witness testified that the damage was extensive, but the witness did not see the bathtub in person and did not make any statements on the structural integrity of the tub at the time it was replaced. The witness provided testimony on what might happen if the bathtub failed but did not provide a full assessment of the integrity of the bathtub when it was replaced. I find that the agent has not proved, on a balance of probabilities, that the bathtub was near failure and that the tenant's delay in informing the landlord of the problem put the landlord's property at significant risk.

Pursuant to my above findings, I find that the landlord has not proved the grounds for ending the tenancy set out in section 47(1)(d)(iii) of the *Act*.

Residential Tenancy Policy Guideline #40 states that the useful life of a bathtub is 20 years. The witness testified that the useful life of a steel bathtub is 30 to 60 years depending on how it is maintained. While I accept that the witness has many years of expertise in construction, I find the useful life assessment of 30 to 60 years to be problematic given the wide scope of years provided and little evidence as to what may make a steel bathtub last only 30 years versus 60 years. I find that the landlord has not proved that the useful life of a steel bathtub is up to 60 years.

Based on the undisputed testimony of the tenant, I find that the bathtub was at least 39 years old when it was replaced. I find that the rust in the bathtub, at the age of 39 plus years, cannot be said to be caused primarily by the neglect of the tenant and is more likely a function of age.

I find that the landlord has not proved, on a balance of probabilities, that the bathtub had any useful life remaining when it was preplaced. I find that the landlord has not proved that the damage in the bathtub was primarily caused by the tenant and not wear and tear over 39 or more years. I find that the damaged bathtub is not extraordinary damage that is above and beyond what one might expect for a very old bathtub, which may be significantly older than 39 years.

Pursuant to my above findings, I find that the landlord has not proved the grounds for ending the tenancy set out in section 47(1)(f) of the *Act*.

As the landlord has not proved either of the grounds for ending the tenancy set out in the Notice, I find that the Notice is cancelled and of no force or effect. This tenancy will continue in accordance with the *Act*.

As the tenant was successful in this application, I find that the tenant is entitled to recover the \$100.00 filing fee from the landlord.

Section 72(2) of the *Act* states that if the director orders a landlord to make a payment to the tenant, the amount may be deducted from any rent due to the landlord. I find that the tenant is entitled to deduct \$100.00, on one occasion, from rent due to the landlord.

Conclusion

The Notice is cancelled and of no force or effect.

The tenant is entitled to deduct \$100.00 on one occasion from rent due to the landlord.

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: September 26, 2022

Residential Tenancy Branch