Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FFT

Introduction

The Tenants seek the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order pursuant to s. 46 cancelling a 10-Day Notice to End Tenancy signed January 4, 2023 (the "10-Day Notice"); and
- return of the filing fee pursuant to s. 72.

N.V. appeared as the Tenant. E.R. also appeared and identified himself as the sub-Tenant. M.B. appeared as 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. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other's application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other's application materials.

Issues to be Decided

1) Is the 10-Day Notice enforceable?
2) Is the Landlord entitled to an order for unpaid rent?
3) 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. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The Tenant and Landlord confirm the following details with respect to the tenancy:

- The tenancy began on March 31, 2015.
- Rent of $2,700.00 is due on the first day of each month.
- A security deposit of $1,200.00 was paid by the Tenant.

The sub-Tenant advises that he began to occupy the rental unit on or about October 1, 2022. The Landlord indicates she is unaware of when the sub-Tenant moved into the rental unit but confirms that she did agree with the Tenant to permit the sub-tenancy. The parties advise the sub-tenancy is for one year.

The Landlord advises that she served the 10-Day Notice on the Tenant via email on January 4, 2023. The Tenant acknowledges its receipt on that date, though further indicates that email was only an approved form of service on January 8, 2023, a point which was confirmed by the Landlord. During the hearing, the Tenant advises that she is out of country.

The sub-Tenant denies receiving the 10-Day Notice except as forwarded to him from the Tenant herself. The Landlord advises that the sub-Tenant had been served via registered mail sent on January 4, 2023 and provides tracking information with respect to this package. The sub-Tenant advises that he was out of country at the time and that he returned to Canada on January 13, 2023.

The Tenant provides a copy of the 10-Day Notice in her evidence. In it, it lists that the Tenant failed to pay rent of $2,700.00 on December 1, 2022. The Landlord confirms that rent for December 2022 and January 2023 has not been paid by the Tenant.

The Tenant and the sub-Tenant confirm that rent had not been paid, though argue that this was done to offset the replacement cost for a washer and dryer paid for by the sub-Tenant. The Tenant directs me to emails respecting issues with the laundry machines in the rental unit, which appear to have begun acting up in September 2022. The emails detail attempts by the Landlord to repair then replace the laundry machines, though the replacement that was purchased was too large such that they were returned.

In the email exchange, the Tenant sent the Landlord an email on November 17, 2022 which states, among other things, the following:

> [The sub-Tenant] is now forced to arrange and purchase a washer/dryer set that will fit along with the time expenses incurred to do that and previous time expenses incurred thus far. This situation without working in-suite laundry cannot go on another day. We can forward you the receipts/invoices and deduct from the next rent payment.
>
> Please confirm if you approve of the suggested resolution written above.

I have redacted personal identifying information in the interest of the parties' privacy.

The Landlord responds to the November 17, 2022 email above on the same day, listing various points with respect to the washer and dryer issue, though concludes as follows:

> Go ahead and order a washer and dryer and sent (sic) the receipt to me.

I am advised by the sub-Tenant that he did go and find a replacement washer/dryer and paid for it himself. The Tenant's evidence includes an invoice dated November 21, 2022 showing the cost for the replacement appliances was $7,983.00. I understand from the parties that the purchase was made without first communicating the same with the Landlord beforehand.

The emails between the parties continue, with the Landlord asking for rent on December 5, 2022 as it had not been received and the Tenant responding on December 7, 2022 stating:

> Apologies for the delayed rent just waiting on the invoices. [The sub-Tenant] paid and organized to have the washer/dryer bought and installed.
> There was very little inventory on the market so the only models available were not cheap.
> He is organizing the invoice and his time/labour hours which we will deduct from the rent as soon as we know what it is.

I am advised by the Landlord that she did not receive the invoice for the appliances until January 2023, with an email in the Tenant's evidence suggesting that this was done on

January 3, 2023. In that January 3, 2023 email, the Tenant states the following to the Landlord:

> Thank you for your patience while we organized the new washer and dryer and have the invoice for you. The invoice has been paid and appliances deliversed (sic) (and old one removed) as such we can remove from the rent which would mean the following: Dec Rent: $0.00, Jan Rent: $0.00, Feb Rent: $117.00, March Rent: $2700.00 (back to full rent).

The Landlord argues that she did not consent to the expense incurred and further argues that she takes issue with rent being deducted unilaterally despite not being given the invoice until January 2023.

Analysis

The Tenants apply to cancel 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(4) of the Act, a tenant has 5-days from received a 10-day notice to end tenancy to either pay the overdue rent or file an application to dispute the notice. If a tenant files to dispute the notice, the burden of proving it was issued in compliance with s. 46 of the Act rests with the respondent landlord.

Leaving aside the issues with respect to the sub-tenancy and service of the notice to end tenancy, I find that the 10-Day Notice is unenforceable in any event. This dispute largely hinges on two issues: first, is there a settlement agreement with respect to the appliances; and second, if so, what were the terms.

Review of the email correspondence clearly demonstrates that the parties did settle the maintenance issues on November 17, 2022 and that the Landlord accepted the Tenant's offer that it be replaced and the cost be deducted by rent. The Tenant's initial email of November 17 is a settlement offer and the Landlord's reply the same day constitutes an acceptance of this without condition. The Landlord did not say in her reply to the Tenant words to the effect of please consult with me on the cost before incurring it or I do not agree that it be deducted from rent. It stated as follows: "Go ahead and order a washer and dryer and sent (sic) the receipt to me". I find that this

constitutes the Landlord's acceptance of the Tenant's settlement offer. Accordingly, the Tenant acted on the settlement and told the sub-Tenant to proceed on that basis.

I mention this because the Landlord cannot now argue that the Tenant incurred an expense without first consulting her beforehand or that the expense was too high. Though I agree that it would have been prudent for the parties to communicate beforehand, which would have had the practical effect of keeping the peace, the terms of the agreement did not oblige the Tenant to do so. Nor did the terms of the settlement set an upper limit on the expense. It was for the Tenant to replace the appliances and that it be deducted from rent. That is what was agreed to.

On this basis, I find that the Landlord is estopped from resiling from the settlement and cannot now insist that rent be paid in full for December 2022 and January 2023. The evidence provided to me by the Tenant clearly shows the cost of replacing the appliances was $7,983.00. As rent for two months has not been paid, the balance to be refunded to the Tenant is $2,583.00 ($7,983.00 – ($2,700.00 x 2)). Pursuant to the settlement, I direct that the Tenant's rent obligation to the Landlord for February 1, 2023 is $117.00 ($2,700.00 - $2,583.00), after which point rent will be due in full for March 1, 2023.

As the Landlord is estopped from demanding rent as per the November 17, 2022 settlement, I find that the 10-Day Notice was not properly issued and is of no force or effect.

Conclusion

The 10-Day Notice is hereby cancelled and is of no force or effect. The tenancy shall continue until ended in accordance with the *Act*.

The Tenants were successful in the application. I find they are entitled to the return of their filing fee. Pursuant to s. 72(1) of the *Act*, I direct that the Landlord pay the Tenants' $100.00 filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Tenant withhold $100.00 from rent due to the Landlord on **one occasion** in full satisfaction of the filing fee.

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: January 31, 2023

Residential Tenancy Branch