



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNC RR RP AS OLC FFT**

Introduction

This hearing by teleconference dealt with the Tenant's application for dispute resolution ("Application") pursuant to the *Residential Tenancy Act* (the "Act") in which the Tenant seeks:

- cancellation a One Month Notice for Cause dated July 25, 2022 ("1 Month Notice") pursuant to section 47;
- an order to allow the Tenant to reduce rent for repairs, services or facilities agreed upon but not provided by the Landlord pursuant to section 65;
- an order requiring the Landlord to complete repairs to the rental unit pursuant to section 32;
- an order to allow the Tenant to assign or sublet the rental unit when the Landlord has unreasonably withheld or denied permission pursuant to section 65;
- an order for the Landlord to comply with the Act, *Residential Tenancy Regulations* ("Regulations") and/or the tenancy agreement; and
- authorization to recover the filing fee for the Application from the Landlord pursuant to section 72.

The Landlord, the Landlord's wife ("CW") and the Tenant attended this hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure* ("RoP"). The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The Tenant stated he served the Notice of Dispute Resolution Proceeding for the Application and his evidence (collectively the "NDRP Package") on the Landlord in-person on August 22, 2022. The Landlord acknowledged receipt for the NDRP

Package. I find the Landlord was served with the NDRP Package in accordance with the provisions of sections 88 and 89 of the Act.

The Landlord stated he served this evidence on the Tenant by registered mail on August 25, 2022. The Landlord provided the tracking number for service of the Landlord's evidence on the Tenant to corroborate his testimony. The Tenant acknowledged receipt of the Landlord's evidence. I find the Landlord's evidence was served on the Tenant in accordance with the provisions of section 88 of the Act.

Preliminary Matter – Severance and Dismissal of Tenant's Claims

At the outset of the hearing, I observed the Application included claims for (i) an order to allow the Tenant to reduce rent for repairs, services or facilities agreed upon but not provided by the Landlord; (ii) an order requiring the Landlord to complete repairs to the rental unit and; (iii) an order to allow the Tenant to assign or sublet the rental unit when the Landlord has unreasonably withheld or denied permission (collectively the "Tenant's Other Claims").

Rule 2.3 of the Rules states:

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.

Where a claim or claims in an application are not sufficiently related, I may dismiss one or more of those claims in the application that are unrelated. Hearings before the Residential Tenancy Branch ("RTB") are generally scheduled for one hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

This hearing was scheduled for one hour. At the outset of the hearing, I advised the parties the primary issues in the Tenant's Application was whether the tenancy would continue or end based on the 1 Month Notice and whether the Tenant was entitled to recover the filing fee for the Application from the Landlord. Accordingly, I find the Tenant's Other Claims were not sufficiently related to the primary issue of whether the 2 Month Notice would be cancelled and whether the Tenant was entitled to recover the filing fee for the Application. Based on the above, I will dismiss the Tenant's Other Claims, with or without leave, depending upon whether I cancel the 1 Month Notice.

Issues to be Decided

- Is the Tenant entitled to cancellation of the 1 Month Notice?
- Is the Tenant entitled to recover the filing fee for the Tenant's Application from the Landlord?
- If the Tenant is not entitled to cancellation of the 1 Month Notice, is the Landlord entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony, only the details of the respective submissions and/or arguments of the parties relevant to the issues and findings in this matter are reproduced here. The relevant aspects of the claims made in the Application and my and my findings are set out below.

The parties agreed the tenancy commenced on July 1, 2020 with rent of \$1,800.00 payable on the 1st day of each month. The Tenant paid the Landlord a security deposit of \$800.00 and a pet damage deposit of \$800.00. The Landlord acknowledged receiving the security and pet damage deposits from the Tenant and that he is still holding them in trust for the Tenant. Based on the foregoing, I find there was a residential tenancy between the parties and that I have jurisdiction to hearing the Application. The Tenant stated that, although he was not served with a Notice of Rent Increase, the Landlord required he pay an additional \$50.00 per month for two months. The Tenant and Landlord agreed the Landlord reimbursed the Tenant \$100.00 for the payments made to the Landlord that did not comply with the provisions of the Act relating to rent increases.

The Tenant submitted into evidence a copy of the 1 Month Notice. The Landlord stated he served the 1 Month Notice on the Tenant by registered mail on July 25, 2022. The Landlord provided the Canada Post tracking number for service of the 1 Month Notice on the Tenant to corroborate his testimony. I find the 1 Month Notice was served on the Tenant pursuant to the provisions of section 88 of the Act.

The 1 Month Notice stated the reason for ending the tenancy was the Tenant was repeatedly late paying the rent. The details of the cause provided in the 1 Month Notice were:

Dates of Late Payments:

July 2/2021
Aug 31/201
Oct 4/2021
Mar 2/2022
April 4/202
May 2/2022
July 4 - 2022

The Landlord stated the Tenant was late paying the rent seven times. The Landlord submitted into evidence a copy of his bank statement ("Bank Statements") that disclosed seven payments from the Tenant were deposited on the dates that corresponded to the dates set out in the details of the 1 Month Notice. The Landlord acknowledged that all payments of rent made by the Tenant were by e-transfer.

The Tenant stated he e-transfers all of his rent payments on the last day of the month before the month the rent is due or on the day the rent is due. The Tenant stated the Landlord did not advise him that his e-transfers were being received after the due date for the rent payment.

The Landlord acknowledged he did not serve any 10 Day Notices on the Tenant in respect of any of the late rent payments or give the Tenant a written notice that he would require the Tenant to pay the rent in full by the due date. The Landlord stated that the party sending an e-transfer receives an email that confirms the date the e-transfer payment was made.

Analysis

Rule 6.6 of the RoP states:

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.

Based on Rule 6.6, the Landlord has the onus to prove he is entitled to end the tenancy pursuant to the 1 Month Notice on a balance of probabilities.

Subsections 47(1)(b), 47(1)(c), 47(1)(d) and 47(1)(e)(ii) and section 47(4) state:

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

[...]

(b) the tenant is repeatedly late paying rent;

[...]

(4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

The Landlord stated he served the 1 Month Notice on the Tenant by registered mail on July 25, 2022. Pursuant to section 90 of the Act, the Tenant was deemed to have received the 1 Month Notice on July 30, 2022, being five days after the 1 Month Notice was posted. Pursuant to section 47(4) of the Act, the Tenant had 10 days, or until August 9, 2022, to make an application for dispute resolution to dispute the 1 Month Notice. The records of the RTB indicate the Tenant made the Application on August 4, 2022. As such, I find the Tenant made the Application within the 10-day dispute period required by section 47(4) of the Act.

Section 26(1) of the Act states:

26(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Section 26(1) of the Act makes it clear that payment of rent when it is due is a material term of a tenancy is mandatory unless the tenant has a right under the Act to deduct all or a portion of the rent.

Residential Tenancy Policy Guideline 38 (“PG 38”) provides guidance on when a landlord may end a tenancy when a tenant is repeatedly late paying the rent. PG 38 states in part:

Three late payments are the minimum number sufficient to justify a notice under these provisions.

It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments.

However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late.

The Landlord stated the Tenant was late paying the rent seven times. The Landlord provided the Bank Statements that disclosed seven payments from the Tenant were deposited on the dates that corresponded to the dates set out in the details of the 1 Month Notice. Two of the seven rent payments were made on July 2, 2021 and August 3, 2021. The Landlord acknowledged that all payments of rent made by the Tenant were by e-transfer.

The Tenant stated he always sent an e-transfer on the last day of the month before the rent was due or on the 1st of each month. The Tenant stated the Landlord did not advise him that his e-transfers were being received after the due date for the rent payment.

The Landlord acknowledged he did not serve a 10 Day Notice on the Tenant in respect of any of the rent payments or give the Tenant a written notice that he would require the Tenant to pay the rent in full by the due date. The Landlord stated that the party sending an e-transfer receives an email that confirms the date the e-transfer payment was made.

Residential Tenancy Policy Guideline 52 (“PG52”) provides guidance, among other things, on payment of rent during the COVID-10 pandemic and the Act. PG 52 states in part:

Section 10.1(1) of the *Emergency Program Act* (EPA) provides that after a declaration of a state of emergency is made, and for the duration of the state of emergency, government may make regulations to prevent, respond to or alleviate the effects of an emergency or a disaster by:

- making an exception to an enactment;
- establishing limits on the application of an enactment;
- establishing powers, duties, functions or obligations that apply in place of or in addition to an enactment;
- establishing conditions in relation to anything done or established under the above bullets.

Section 10.2 of the EPA provides for a regulation specifying that the failure to comply with a provision of a regulation made under section 10.1(1) is to be treated as though it were a failure to comply with the legislation to which that section 10.1(1) regulation relates.

The *COVID-19 Related Measures Act* (“C19 Act”) allows for regulations made under section 10.1 of the EPA to remain in force for up to one year after the C19 Act came into force (July 10, 2020). The *COVID-19 (Residential Tenancy Act and Manufactured Home Park Tenancy Act) (No. 2) Regulation* (“C19 Tenancy Regulation”), was made under sections 10.1 and 10.2 of the EPA on August 14, 2020.

Sections 3 and 12 of the C19 Tenancy Regulation provide that a landlord must not give a tenant notice to end a tenancy in respect of **affected rent** that is unpaid under sections 44(1)(a)(ii) and 46 of the *Residential Tenancy Act* (RTA) and sections 37(1)(a)(ii) and 39 of the *Manufactured Home Park Tenancy Act* (MHPTA). Notices to end tenancy for affected rent may only be issued when the conditions set out in the C19 Tenancy Regulation have been met.

“Affected

“Affected rent” means

- rent that becomes due to be paid by a tenant in accordance with a tenancy agreement during the “specified period” between March 18, 2020 and August 17, 2020, and
- utility charges that become due to be paid by a tenant during the “specified period” between March 18, 2020 and August 17, 2020, if a tenancy agreement requires the tenant to pay utility charges to the landlord.

The “specified period” is the period between March 18, 2020 and August 17, 2020 (as this date was earlier than the date on which the state of emergency expires or is cancelled). If, for example, the tenancy agreement stipulates that rent is paid on the first of each month, then the following rent payments were due within the specified period and are affected rent:

- • April 1, 2020
- • May 1, 2020
- • June 1, 2020
- • July 1, 2020
- • August 1, 2020

All of the payments made by the Tenant were after the end of the effect of section 3 of the C19 Tenancy Regulation. As such, there was no legislative deferral for any of the rent payments made by the Tenant.

Although the Landlord provides the Bank Statements, he did not submit copies of the e-transfer notifications he would have received stating the date and amount of the e-transfers made by the Tenant. In the absence of this evidence, I am unable to determine whether the Tenant sent the e-transfers for a payment of rent after the due date or whether the Landlord accepted the e-transfer for deposit into his bank account until one or more days after the Tenant actually made the e-transfer. As such, I find the Landlord has not proven, on a balance of probabilities, that the rent payments made by the Tenant were made on the dates set out in the 1 Month Notice and the Bank Statements. Based on the foregoing, I order the 1 Month Notice cancelled. The tenancy will continue until it is lawfully ended in accordance with the provisions of the Act.

As the Tenant has been successful in the Application, I grant the Tenant recovery of the filing fee of \$100.00 pursuant to subsection 72(1) of the Act. Pursuant section 72(2)(a) of the Act, the Tenant is allowed to enforce this order by deducting \$100.00 from the next month's rent, notifying the Landlord when this deduction is made. The Landlord may not serve the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent when this deduction is made by the Tenant.

As I have cancelled the 1 Month Notice, I dismiss the Tenant's Other Claims with leave to reapply. The Tenant has the option of making a new application for dispute resolution to make the Tenant's Other Claims.

The Tenant is warned that any payment of rent to the Landlord after the due date may have dire consequences.

Conclusion

The 1 Month Notice is cancelled and of no force or effect. The tenancy will continue until it is lawfully ended in accordance with the provisions of the Act.

The Tenant is ordered to deduct \$100.00 from next month's rent in satisfaction of his monetary award for recovery 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 4, 2023

Residential Tenancy Branch