Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNR, CNC, MNDCT, OLC, FFT / OPR, OPC, MNRL-S, FFL**

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlord's application for:

- authorization to retain all or a portion of the security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- an order of possession for non-payment of rent pursuant to section 55;
- an order of possession for cause pursuant to section 55;
- a monetary order of $874 for unpaid rent pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

And the tenant's application for:

- the cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent (the "**10 Day Notice**") pursuant to section 46;
- the cancellation of the One Month Notice to End Tenancy for Cause (the "**One Month Notice**") pursuant to section 47;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62; and
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $250 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.
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The tenant attended the hearing. He was assisted by counsel ("**RL**") and his cousin ("**AO**"). The landlord was represented at the hearing by its property manager ("**AT**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The parties agreed that each had served the other with their respective notices of dispute resolution and supporting documentary evidence.

Issues to be Decided

Is the landlord entitled to:

1) an order of possession;

2) a monetary order for $874;
3) recover the filing fee; and
4) retain the security deposit and the pet damage deposit in satisfaction/partial satisfaction of the monetary orders made?

Is the tenant entitled to:
1) an order cancelling the 10 Day Notice;
2) an order cancelling the One Month Notice
3) a monetary order of $350; and
4) an order that the landlord comply with the Act?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The tenant moved into the rental unit on November 15, 2017. The tenant testified that the parties signed a new tenancy agreement every six months, until December 1, 2019, when they signed a tenancy agreement for a fixed-term ending November 30, 2020. After the end of the fixed term, the tenancy converted to a month-to-month tenancy, as per section 44(3) of the Act. Monthly rent was $1,972 and was payable on the first of each month. The tenant paid the landlord a security deposit of $986, which the landlord continues to hold in trust for the tenant.

1. Rent Increases

On September 29, 2021, the parties signed a "Notice of Rent Increase Agreement" which stated:

> The parties hereby mutually agree for a rent increase starting on January 1, 2022 to $2500/month for an increase of $528/month, which the parties agree is a fair market value and both parties are satisfied with this new rent increase.
>
> (the "**First Agreement**")

That same day, they signed a second "Notice of Rent Increase Agreement" which stated:

> The parties hereby agree that the rent increase will be waived for the months of January 2022 to October 2022, with the exception of a nominal increase of $51/month.
>
> (the "**Second Agreement**")

The landlord submitted copies of these two agreements into evidence. The tenant testified that he signed them, and entered copies of them into evidence as well. However, on the tenant's copies, the date of September 29, 2021 was crossed out and the date of July 8, 2022 was handwritten above it.

The tenant testified that he did this to his own copies of the First and Second Agreements, following a meeting with AS on July 8, 2022, when the parties signed a third "Notice of Rent Increase Agreement" which stated:

> The parties hereby mutually agree for a rent increase starting on May 1, 2023 to $2,900/month for an increase of $400/month, which the parties agree is a fair market value and both parties are satisfied with this new increase of rent.
>
> (the "**Third Agreement**")

Copies of all three Notices of Rent Increase Agreements (collectively, the "**RI Agreements**") were entered into evidence and the parties agreed that the documents were genuine.

The landlord served the tenant with a Notice of Rent Increase (form #RTB-7) on September 29, 2021, stating that a rent increase of $528 will be imposed starting January 1, 2022.

The tenant testified that AS pressured him into signing the RI Agreements, and he was worried he would jeopardize his tenancy if he did not. He stated that he was unaware of his rights under the Act regarding a permissible amount of rent increase. He testified that at the end of July 2022, a Member of Parliament advised him of these rights.

AS testified that he had conversations with the tenant during which time he advise the tenant that, with inflation rapidly rising, the tenant was paying below market rate for the rental unit, and the tenant agreed to pay more. He denied that he pressured the tenant into signing any of the RI Agreements.

The tenant paid rent in accordance with the First and Second Agreements until November 2022. On October 31, 2022, the tenant paid $2,023 for November's rent. On November 30, 2022, the tenant paid $2,103 in monthly rent. He testified that he arrived at that amount by adding a 2% rent increase (which he says is the permissible rent increase) for the months of November and December 2022 to the monthly rent of $2,023 established by the Second Agreement. AS testified that the tenant paid $2,063 in monthly rent for January 2023.

On November 2, 2022, the landlord served the tenant with the 10 Day Notice. It specified arrears of $477 due on November 1, 2022. The tenant disputed the 10 Day Notice on November 3, 2022.

AS agreed that the Act limits rent increases to 2% per year. However, he argued that section 43(1) of the Act explicitly authorizes a landlord and a tenant to enter into written agreements to increase the monthly rent beyond this amount.

AS also cited Residential Tenancy Branch (the "**RTB**") Policy Guideline 37, which states:

> A rent increase that does not exceed the permitted annual rent increase and complies with the timing and notice provisions cannot be disputed by a tenant. Likewise, tenant cannot dispute an amount the tenant has agreed to in writing.

AS argued that the tenant is not permitted to dispute the rent increase, and is bound by the RI Agreements.

The tenant argued that the RI Agreements are unconscionable.

The tenant seeks an order that the landlord comply with the Act and cancel the RI Agreements, and only raise his rent by 1.5% (the amount he says is permitted by the Act and Residential Tenancy Regulations). He also seeks compensation of $250 for the time he has spent making this application, in addition to the recover of his filing fee.

The landlord seeks a monetary order to recover the arrears it says is owing for November, December 2022 and January 2023 ($1,311).

2. <u>One Month Notice</u>

On October 14, 2022, the landlord served the tenant with the One Month Notice. It listed the reason for ending the tenancy as "tenant has assigned or sublet the rental unit without landlords written consent." The landlord provided the following details of the cause:

> The tenant rented the unit as a single person, without any roommates. Many times over the past 4 ½ years he sublet his unit without authorization, when we told him that we need to approve any subtenant. The tenant recently sublet the unit again and sent us an application of the subtenant after the subtenant had started living in the unit. Section 34(1) of the Act Read as follows: in less the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit, and the landlord did not consent in writing for the tenant to sublease the unit.

The tenant disputed the One Month Notice on October 17, 2022.

AS testified that the tenant allowed his cousin to move into one of the rental unit's bedrooms without the landlord's consent. The tenant continued to reside in the rental unit. AS made additional submissions on this point, but it is not necessary to repeat

them here as, for reasons explained in more detail below, the situation described by the landlord is neither a sublet or an assignment.

Analysis

1. One Month Notice

RTB Policy Guideline 19 states:

> Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.
> […]
> The use of the word 'sublet' can cause confusion because under the Act it refers to the situation where the original tenant moves out of the rental unit, granting exclusive occupancy to a subtenant, pursuant to a sublease agreement. 'Sublet' has also been used to refer to situations where the tenant remains in the rental unit and rents out space within the unit to others. However, under the Act, this is not considered to be a sublet

As such, the tenant did not "assign" tenancy agreement to his cousin and the tenant and his cousin's living situation is not a "sublet" for the purposes of the Act. Accordingly, the tenant did not breach section 34(1) of the Act. The One Month Notice was therefore issued for an invalid reason. I order the One Month Notice cancelled and of no force or effect.

2. Rent Increase

Section 43(1) of the Act states:

> **Amount of rent increase**
> **43**(1) A landlord may impose a rent increase only up to the amount
> (a) calculated in accordance with the regulations,
> (b) ordered by the director on an application under subsection (3), or
> (c) agreed to by the tenant in writing.

The current maximum allowable rent increase authorized by the *Residential Tenancy Regulation* (the "**Regulation**") is 2%. In 2022, it was 1.5%. The landlord is correct that parties can agree, in writing, to increase the monthly rent in an amount greater that the amount authorized by the Regulation. Policy Guideline 37 states:

> C. AGREED RENT INCREASE
>
> A tenant may voluntarily agree to a rent increase that is greater than the maximum annual rent increase. Agreements must be in writing, must clearly set

> out the rent increase (for example, the percentage increase and the amount in dollars), and must be signed by the tenant. A Notice of Rent Increase must still be issued to the tenant three full months before the increase is to go into effect. The landlord should attach a copy of the written agreement signed by the tenant to the Notice of Rent Increase given to the tenant.

I must first note that the RI Agreements fail to comply with the requirement to include the percentage increase the new amount of monthly rent represents (the First Agreement represents a roughly 27% increase and the Third Agreement represents a roughly 16% further increase).

While the lack of including a percentage increase may be enough to cause the RI Agreements to be invalid, I find it appropriate to consider the tenant's argument that the RI Agreements are unconscionable.

RTB Policy Guideline 8 addresses unconscionability. It states:

> Under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.
>
> Terms that are unconscionable are not enforceable. Whether a term is unconscionable depends upon a variety of factors.
>
> A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.

The RI Agreements are so-one sided as to oppress the tenant. Within a span of 18 months, the RI Agreements raise the tenant's rent by almost $1,000, representing a roughly 47% increase. For comparison, the Regulation would allow for an increase of almost $30 representing a 1.5% increase over this same time span (rent increases may only be imposed once every 12 months, per section 42(1) of the Act, and the Act does not allow parties to agree to lessen this period).

In exchange for this substantial increase, the tenant received no additional benefit. There is no evidence before me which would suggest why the tenant would be incentivized to enter into such an agreement. From this, I conclude that the tenant's testimony that he entered into the RI Agreements because he feared for his tenancy to be true. I cannot say whether this was due to an explicit threat from AS, or merely due to the tenant's own suppositions. Regardless, I am satisfied that the tenant experienced

this fear, and its existence explains why the tenant agreed to a grossly unfair rent increase.

I find that the landlord took advantage of the tenant's weakness and ignorance of his rights under the Act.

Furthermore, I do not find that, on their face, the RI Agreements accurately represent the intentions of the party. I cannot understand how, if parties agreed that an increase from $1,972 to $2,500 represented an increase to the "fair market value" as of September 29, 2021, that, less than two years later the "fair market value" (as set out in the Third Agreement) would be $400 higher.

I do not think it reasonable that, in July 2022, the parties would be able to determine what the "fair market value" for the rental unit would be in May 2023. Rather, I think it more likely that the language of the RI Agreements was crafted by the landlord in an attempt to mimic an agreement struck between parties of equal bargaining power. However, as I do not think that the content of the Third Agreement could reasonably reflect the true intentions of the parties, I find it more likely than not that the tenant signed the Third Agreement due to an imbalance in bargaining power and a genuine fear (either real or imagined) that a refusal to sign the Third Agreement could jeopardize his tenancy.

I find that the Third Agreement is unconscionable for this reason, and that it is also more likely than not that similar factors were at play when he signed the First and Second Agreements and are therefore unconscionable also.

Accordingly, I find that the RI Agreements are of no force or effect and I order them cancelled. The tenant's monthly rent will revert to $1,972. If the landlord wants to impose a rent increase in accordance with the Act, it must follow the provisions set out in the Act and Regulation.

My finding that the RI Agreements are invalid means that any amount of monthly rent that the tenant has paid in excess of $1,972 represents an overpayment of rent, and that amount may be deducted from a future rent due to the landlord pursuant to section 43(5) of the Act.

Based on the evidence presented at the hearing, I understand the tenant to have paid $2,023 for the months of January 2022 to November 2022 ($561 overpayment), $2,103 for December 2022 ($131 overpayment), and $2,063 for January 2023 ($91 overpayment). In total this amounts to $783 in overpaid rent. The tenant may deduct this amount, plus any amount of overpaid rent for February 2023 from a future month's rent.

The 10 Day Notice is cancelled and of no force or effect.

I dismiss the landlord's application, in its entirety, without leave to reapply.

3. Tenant's Monetary Claim

The Act and Regulation does not provide any authority which allows a party to be compensated for the time they spend preparing for an application. I dismiss this portion of the tenant's application without leave to reapply.

As the tenant has been substantially successful in his application, he may recover the filing fee ($100) from the landlord.

Conclusion

Both Notices are cancelled and of no force or effect. The tenancy shall continue.

The tenant's monthly rent is $1,972. Any amount the tenant paid in excess of this amount represents an overpayment of rent and may be deducted from a future month's rent.

Pursuant to section 72 of the Act, the tenant may deduct $100, representing the recovery of the filing fee, from a future month's rent.

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: February 8, 2023

Residential Tenancy Branch