Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes

File #910097290: CNR, RR, RP, LRE, OLC, FFT
File #910098425: OPR-DR, MNR-DR, FFL

Introduction

The Tenant seeks 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 on January 5, 2023 (the "10-Day Notice");
- an order pursuant to s. 65 for a rent reduction;
- an order pursuant to s. 70 restricting the Landlord's right of entry;
- an order pursuant to s. 62 that the landlord comply with the Act, Regulations, and/or the tenancy agreement; and
- return of the filing fee pursuant to s. 72

The Landlord files his own application seeking the following relief:

- an order of possession pursuant to s. 55 after issuing the 10-Day Notice;
- a monetary order pursuant to s. 67 for unpaid rent; and
- return of the filing fee pursuant to s. 72.

The Landlord's application was filed as a direct request but was scheduled for a participatory hearing in light of the Tenant's application.

M.M. appeared as the Tenant. H.B. appeared as the Landlord and was joined by his agent, A.G..

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.

Preliminary Issue – Tenant's Claims

The Tenant seeks wide ranging relief in his application. Rule 2.3 of the Rules of Procedure requires claims in an application to be related to each other. Where they are not sufficiently related, I may dismiss portions of the application that are unrelated. Hearings before the Residential Tenancy Branch are generally scheduled for one-hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

I find that the primary issue in both applications is whether the 10-Day Notice is enforceable or not and the issue of unpaid rent. Indeed, if the notice is upheld and the tenancy end, some of the relief sought by the Tenant would no longer be relevant.

Accordingly, I find that the Tenant's claims under ss. 62 (order that the Landlord comply), 32 (repairs), and 70 (Landlord's right of entry) of the *Act* are not sufficiently related to the issue of unpaid rent and the enforceability of the 10-Day Notice. I dismiss these claims. The claim under s. 65 (past rent reduction) of the *Act* is dismissed with leave to reapply regardless the outcome of the hearing. The claims under ss. 62, 32, and 65 (future rent reduction) of the *Act* may be dismissed with or without leave to reapply depending on the outcome of the hearing.

The hearing proceeded strictly on the issue of unpaid rent and the enforceability of the 10-Day Notice.

Issue to be Decided

1) Is the 10-Day Notice enforceable?
2) If so, is the Landlord entitled to an order of possession and monetary order for unpaid rent?

3) Is either party entitled to their filing fee?

Evidence and Analysis

The parties were given an opportunity to present evidence and make submissions. I have reviewed all included written and oral evidence provided to me by the parties and I have considered all applicable sections of the *Act*. However, only the evidence and issues relevant to the claims in dispute will be referenced in this decision.

Background

The parties confirmed the following details with respect to the tenancy:

- The Tenant originally occupied the rental unit as an occupant beginning in September 2021.
- The Tenant then signed a tenancy agreement in September 2022 whereby he became a tenant.
- A security deposit of $1,325.00 was paid by the Tenant.

I am provided with a copy the previous tenancy agreement in which another individual, C.C., is listed as the tenant. I am told by the Tenant that C.C. was his former partner and that she has moved out of the rental unit. Rent under the previous tenancy agreement is listed as $2,050.00 per month due on the first.

I am also provided with a copy of the current tenancy agreement signed by the Tenant on September 3, 2022. It lists that it starts date on October 1, 2022, shows the Tenant is the sole tenant, and lists rent of $2,650.00 being due on the first of each month. It also shows the security deposit being $1,325.00.

Enforceability of 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 receiving 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.

The Landlord's agent advises that the 10-Day Notice was served on the Tenant via registered mail sent on January 5, 2023. The Tenant acknowledges receiving the 10-Day Notice on January 7, 2023. I find that the 10-Day Notice was served in accordance with s. 88 of the *Act*. I find that it was received by the Tenant on January 7, 2023.

As per s. 46(2) of the *Act*, all notices issued under s. 46 must comply with the form and content requirements set by s. 52 of the *Act*. I have reviewed the 10-Day Notice provided to me and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord's agent, states the address for the rental unit, sets out the grounds for ending the tenancy, and is in the approved form (RTB-30). The effective date of the notice is incorrect, though this is automatically corrected to January 17, 2023 by application of s. 53 of the *Act*.

The 10-Day Notice lists arrears of $4,450.00 as of January 1, 2023. The Landlord's agent tells me that the Tenant has deducted $600.00 from rent for October 2022, November 2022, December 2022, February 2023, March 2023, April 2022, and May 2023. The Landlord's agent further advises that $852.19 was paid by the Tenant as rent for January 2023, such that there is a shortfall of $1,797.81.

The Tenant does not dispute the payment history provided by the Landlord's agent. The Tenant, however, says that when he took over the tenancy, he also took on use of a garage at the property. The Tenant further tells me that the garage has been undergoing renovations and that he had an agreement with the Landlord that he could deduct $600.00 from rent until the garage renovations were complete. The Tenant acknowledges that there was no written agreement with respect to the rent reduction.

I am told by the parties that the garage was an illegal rental suite and had been tenanted. The Landlord's agent says that the Landlord took ownership of the property in May of 2021 and inherited the illegal suite. The garage's tenant left in July 2021 and the suite was reported to the municipality. The agent says that the Landlord was in touch with the municipality on steps to decommission the suite, applying for permits in March 2022, and received certification from the municipality on November 9, 2022 that it had been decommissioned.

The Tenant says the garage work has not yet been completed, specifically that a bathroom in the garage has not been connected. The Tenant says he agreed to taking on the garage so that he could make use of the space for mechanical projects and as a "man cave", such that the washroom was of some importance to him.

The issue I have with the Tenant's position is that I am provided with a copy of the tenancy agreement, signed by him on September 3, 2022, which shows rent of $2,650.00 is due on the first of each month. The security deposit, which the Tenant acknowledges paying, is listed as $1,325.00. Further, the tenancy agreement is marked as showing the "main house and garage is included". In other words, the Tenant contracted to rent the house and garage for $2,650.00.

Section 26(1) of the *Act* requires that "[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" (emphasis added). Further, clause 1, subclause 2, of the tenancy agreement states that "any change or addition to [the] tenancy agreement must be agreed to in writing and initialed by both the landlord and the tenant", barring which it is unenforceable. This term in the tenancy agreement is a standard term required by s. 12 of the *Act* and set out under the Regulation.

The combined effect of the rent obligation of the tenancy agreement, clause 1 of the tenancy agreement, and s. 26(1) of the *Act* is that the Tenant was obliged to pay rent as set out in the agreement, even if the garage was still undergoing renovations. Further, the tenancy agreement does not permit oral collateral agreements between the Landlord and Tenant altering its terms. Even if there was some understanding that the Tenant did not have to pay the $600.00, this arrangement would have to be in writing to be enforceable.

Further, and most significantly, I have been provided with no evidence by the Tenant, even in the form of text message or other informal communication, to suggest that the $600.00 deduction was permitted by the Landlord. There is a series of messages from the Tenant to the Landlord in which the matter is discussed and whether the Landlord would prefer to forget about the renovations and keep rent as it was originally. However, I do not have correspondence from the Landlord to the Tenant confirming the arrangement.

I have also not been told that the Tenant was permitted to deduct rent for loss of a service or facility under s. 65 of the *Act*. I appreciate the Tenant did make that claim in this application. However, the Tenant cannot deduct money from rent for loss of a service or facility without first obtaining an order from the director to do so. Deductions from rent by a tenant without authorization under the *Act* is clearly prohibited by s. 26(1).

The Tenant argues that $2,650.00 is above market rent and that he only agreed to this based on the use of the garage. Whether it is market rent or not is irrelevant. A landlord and tenant are generally free to agree to whatever they like when it comes to rent payments, provided duress and unconscionability are not present. Second, it is unclear to me how the garage cannot be used as a garage at the present time. I note that most garages do not have bathrooms. The Tenant tells me he cannot make use of the space due to municipal warnings on the door. However, there is no suggestion that the garage is unsafe to enter or that the Tenant does not currently have keys to enter the garage.

All this is to say that I am unpersuaded by the Tenant's argument that rent, as set out in the tenancy agreement, should not have been paid when it was due. I accept that it was not. I find that the Landlord has demonstrated that the tenancy agreement was issued in compliance with the *Act*. Accordingly, I dismiss the Tenant's application to cancel the 10-Day Notice without leave to reapply.

I grant the Landlord an order of possession pursuant to s. 55 of the *Act*. The Tenant shall provide vacant possession of the rental unit to the Landlord within two days of receiving this order.

Unpaid Rent Claim

The Landlord also seeks an order for unpaid rent. Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

In this instance, I accept that the Tenant improperly deducted $600.00 from rent for the months of October 2022, November 2022, December 2022, January 2023, February

2023, March 2023, April 2023, and May 2023. I permit the Landlord to seek the additional amounts since filing as permitted by Rule 4.2 of the Rules of Procedure. I find that the deductions were in contravention of the tenancy agreement and s. 26 of the *Act*, that the Landlord suffered a loss of rental income, and that he could not have mitigated this loss as the Tenant continues to reside within the rental unit. The Landlord shall receive an order for this amount.

Looking at rent payment in January 2023, I accept that the Tenant paid $852.19. The Tenant argues he deducted $1,197.81 from rent for the replacement of the front door, which he characterized as an emergency repair.

Section 33(7) of the *Act* permits a tenant to deduct the cost of an emergency repair from rent, though several conditions must first be met. First, emergency repairs, as defined by s. 33(1) of the *Act*, must be needed. I reproduce s. 33(1) below:

> (1) In this section, **"emergency repairs"** means repairs that are
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> (a) urgent,
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> (b) necessary for the health or safety of anyone or for the preservation or use of residential property, and
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> (c) made for the purpose of repairing
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> (i) major leaks in pipes or the roof,
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> (ii) damaged or blocked water or sewer pipes or plumbing fixtures,
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> (iii) the primary heating system,
>
> (iv) damaged or defective locks that give access to a rental unit,
>
> (v) the electrical systems, or
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> (vi) in prescribed circumstances, a rental unit or residential property.

The Tenant tells me that the glass for the door had broken and come loose to the point that there was an opening to the exterior. I find that this is not an emergency repair as defined by s. 33(1) of the *Act*. I have reviewed the photographs provided to me by the Tenant. The photograph shows a small hole in the glass that is within a small glass arch at the top of the door. Though I accept that it may be urgent due to heat loss, I do not find that the issue was so significant that it was a safety issue nor was the damage in relation to a damaged or defective lock.

As such, I find that the Tenant was not permitted to deduct money from rent as the door repair was not an emergency repair as defined by s. 33(1) of the *Act*. Accordingly, I also find that the Landlord is entitled to $1,197.81 for rent for January 2023.

In total, I find the Landlord has established unpaid rent totals $5,997.81 (($600.00 x 8 months) + $1,197.81).

Conclusion

I dismiss the Tenant's claim to cancel the 10-Day Notice without leave to reapply.

I grant the Landlord an order of possession pursuant to s. 55 of the *Act*. I order that the Tenant provide vacant possession of the rental unit to the Landlord within **two (2) days** of receiving the order of possession.

As the tenancy is over, those claims severed at the outset of the hearing, being those under ss. 62 (order that the Landlord comply), 32 (repairs), and 65 (future rent reduction), are dismissed without leave to reapply. The claim under s. 65 of the *Act* for a past rent reduction is dismissed with leave to reapply.

I grant the Landlord a monetary order for unpaid rent pursuant to s. 67 of the *Act* and find that unpaid rent totals $5,997.81.

As the Landlord was successful, I grant him his filing fee. I order pursuant to s. 72(1) of the *Act* that the Tenant pay the Landlord's $100.00 filing fee.

As the Tenant was unsuccessful, I deny him his filing fee. I dismiss the Tenant's claim under s. 72 of the *Act* without leave to reapply.

Pursuant to ss. 67 and 72 of the *Act*, I order that the Tenant pay **$6,097.81** ($5,997.81 + $100.00) to the Landlord.

It is the Landlord's obligation to serve these orders on the Tenant. If the Tenant does not comply with the monetary order, it may be filed by the Landlord with the Small Claims Division of the Provincial Court and enforced as an order of that Court. If the Tenant does not comply with the order of possession, it may be filed by the Landlord with the Supreme Court of British Columbia and enforced as an order of that Court.

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: May 11, 2023

Residential Tenancy Branch