



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **CNR, FFT**
 CNC, FFT

Introduction

This hearing dealt with two applications filed by the tenant pursuant the *Residential Tenancy Act* (the “Act”) for:

- An order to cancel a 10 Day Notice to End Tenancy for Unpaid Rent/Utilities pursuant to sections 46 and 55;
- An order to cancel a 1 Month Notice to End Tenancy for Cause, pursuant to sections 47 and 55; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

Both parties attended the hearing. The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules") and that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation and potential fine under the Act.

Each party was administered an affirmation to tell the truth and they both confirmed that they were not recording the hearing.

Preliminary Issue 01

The landlord acknowledged being served with the tenant’s Notice of Dispute Resolution Proceedings, however denied receiving the tenant’s evidence. The tenant testified she provided the evidence to the landlord via email when she sent the Notice of Dispute Resolution Proceedings to him on March 9th. The landlord testified that tenant simply forwarded the email from the Residential Tenancy Branch, containing the Notice of Dispute Resolution Proceedings, the respondent instructions and the dispute resolution fact sheet. At the beginning of the hearing, I advised the parties that if the tenant

referred to any piece of evidence that the landlord did not have before him, the landlord was to interrupt the proceedings and advise me that he did not have it. Only documents specifically referred to during the hearing by the parties would be used in this decision pursuant to rule 7.4 of the Residential Tenancy Branch Rules of Procedure.

The tenant did not dispute receiving the landlord's evidence and whatever evidence the landlord referred to during testimony would also be used in this decision.

Preliminary Issue 02

The parties agree that the tenant moved out of the rental unit on May 31, 2023. As this tenancy has ended the tenant's applications seeking to cancel the 1 Month Notice to End Tenancy for Cause and the 10 Day Notice to End Tenancy for Unpaid Rent/Utilities are both dismissed without leave to reapply.

Pursuant to section 55(1.1), if a tenant's application to cancel a notice to end tenancy for unpaid rent is dismissed, the director must grant an order requiring the payment of unpaid rent. As the "rent" is actually unpaid utilities, the primary issue for this hearing was what percentage of the utilities is the tenant responsible for paying as set out in the landlord's 10 Day Notice to End Tenancy for Unpaid Rent/Utilities.

Issue(s) to be Decided

What percentage of utilities is the tenant responsible for paying?

Can the tenant recover the filing fee?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The rental unit is the lower unit in a home with both an upper unit and a lower unit. The tenancy began on September 01, 2020, with rent set at \$1,700.00 per month, payable on the first day of the month.

Attached to the tenancy agreement is an addendum that states the following at clause 16:

The tenant is responsible for 50% of the cost of hydro, gas, water, septic plumbing and cable/internet and agrees to pay the full balance by the due date that is presented by the main floor tenant.

Text messages were exchanged prior to the tenancy on August 18, 2020, and the landlord agreed to change the split from 50/50 to a per person rate so that the utilities owed were to be based on the number of people living in each unit. Based on the text exchanges, the tenant added the following to clause 16:

Portion amount can be adjusted when upstairs tenants have moved on to better represent usage of upstairs and downstairs.

The change to clause 16 appears to be initialled but not dated by the parties.

The landlord testified that from September 1, 2020, to August 15, 2021, the tenant had the entire house to herself. The upper unit remained vacant, and the tenant paid 100% of the utilities herself. When the upper unit became occupied with new tenants on August 15, 2021, the utilities were paid as 60% by the upper unit and 40% by the lower unit tenant, (the applicant in this dispute). This worked successfully throughout the time the upper unit was tenanted, from August 15, 2021, to November 1, 2022.

The landlord testified that from the time the upper unit tenants vacated the unit on November 1, 2022 to the time he sent the tenant a written demand for utilities on February 4, 2023, the tenant had not paid any utilities. A copy of the written demand, sent by text message indicates the following:

Gas:	<u>\$749.72 @ 75%</u> = \$562.29
Hydro:	\$673.00
Sewer:	\$300.00
Total:	\$1,535.29.

The landlord testified that he lowered the percentage of gas payable by this tenant to 75% in an effort to be reasonable.

The tenant testified that when she was paying 100% of the utilities, the landlord never provided of the bills for her to review. These added up to over \$3,000.00. It was next to impossible to calculate how much of the amounts owing were for the rental unit and how much was for the landlord's own personal property which was also shown on some of

the bills. The tenant argued that she had no choice but to pay the full 100% of the utilities if she wanted to continue to reside in the unit and have heat, water and hydro.

The tenant argued that the entire house is heated by a combination of gas and electricity. The house is old, and the windows don't retain much heat. The tenant testified she didn't have access to the thermostat that was upstairs and couldn't control the heating except when the landlord allowed her to go up. The furnace was kept on in both units to prevent the pipes from freezing in the winter, even though the upper unit was empty. When there are people living upstairs the house is naturally warmer. The tenant argues she should not be responsible for paying to heat the empty unit.

The tenant further argued that the tenancy agreement addendum shows the most she would have to pay for utilities is 50%. The landlord gave the tenant no written notice that she would be required to start paying 100% of the utilities again when the upper unit occupants moved out or at any time thereafter. The last written notification about what percentage the tenant would pay was the August 2021 text message that reduced her percentage to 40%.

Analysis

I begin with the premise that the utilities as of February 4, 2023, the date of the demand letter is \$1,722.72 which includes 100% of the hydro, not 75%. The tenant did not dispute these figures during the hearing, and I accept that the figures are correct.

The issue before me is what percentage of these utilities is the tenant responsible for?

A tenancy agreement is defined under section 1 of the Act as follows:

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

The tenancy agreement is a legal contract between a landlord and a tenant. As such, the rights and obligations of the parties must be clearly laid out so there is no ambiguity. In clause 16 of the addendum, the tenant's responsibility for paying utilities is clearly laid out and I repeat them here:

The tenant is responsible for 50% of the cost of hydro, gas, water, septic plumbing and cable/internet and agrees to pay the full balance by the due date that is presented by the main floor tenant.

In the original term, there is no ambiguity as to the percentage of utilities the tenant is to pay. It is clearly set at 50%.

The parties both acknowledge the change to clause 16 that says:

Portion amount can be adjusted when upstairs tenants have moved on to better represent usage of upstairs and downstairs.

Though it adds ambiguity to clause 16 of the addendum, I do not find this change to clause 16 has any bearing on the tenant's responsibility to pay 50% of the utilities. The change does not imply that the tenant is responsible for paying 100% of the utilities when the upper unit is vacant. It is clear to me that the purpose of the change to clause 16 is meant to better reflect what happens when the number of occupants in the two units is unequal.

The changed clause also doesn't provide insight into how and when the adjustment will commence. Is the change in percentage unilateral, determined by the landlord alone, or do the parties have to come to an agreement before the changes take place? How is the tenant notified of the change in the percentage of utilities she is expected to pay?

The landlord never provided the tenant with any written notification that she was expected to pay 100% of the utilities when the upstairs tenants moved out in November of 2022. Had the landlord given the tenant written notification that he expected the tenant to pay 100% of the utilities, the tenant would have the ability to dispute the request. I cannot rely on the landlord's undated verbal request to pay all the utilities as a reasoning to uphold an unenforceable unwritten clause in the tenancy agreement addendum.

While I accept that she paid 100% of the utilities from the commencement of her tenancy until August 15, 2021, close examination of clause 16 to the tenancy agreement addendum reveals she was not required to do so. The landlord cannot rely on the fact that she once paid all the utilities as reasoning for her to start doing it again. Nor can the landlord reinterpret clause 16 to insinuate that the tenant must pay all the utilities when the upper unit is empty. If the intent was for the tenant to pay 100% of the utilities for the entire house during periods when the upper unit was empty, the tenancy agreement must clearly reflect that.

Contra proferentem, also known as "interpretation against the draftsman", is a doctrine of contractual interpretation providing that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording.

The tenancy agreement was drafted by the landlord. The wording of clause 16 to the tenancy agreement works against the landlord in fixing the tenant's responsibility for paying the utilities at 50%. Consequently, I order that the tenant is to pay the utilities up to February 4, 2023 at 50% of the amount stated on the demand letter. [\$1,722.72 / 2 = \$861.36].

The decision to order the recovery of the filing fees is discretionary upon the arbitrator under section 72 of the Act and I decline to order that they be returned to the tenant.

Conclusion

I issue a monetary order against the tenant in the amount of \$861.36.

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: June 07, 2023

Residential Tenancy Branch