Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Introduction

The Tenant seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order pursuant to s. 51(2) for compensation equivalent to 12 times the monthly rent payable under the tenancy agreement; and
- return of the filing fee pursuant to s. 72.

The Landlords file their own application seeking the following relief under the *Act*:

- a monetary order pursuant to s. 67 for unpaid rent; and
- return of the filing fee pursuant to s. 72.

J.M. appeared as the Tenant. N.T. and N.T. appeared as the Landlords.

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.

Service of Documents

The Tenant advised having served her application and evidence on the Landlords. The Landlords acknowledge receipt of both, though argue that the evidence was served late.

The Tenant advises that she served all of her evidence on a USB stick sent via registered mail on October 17, 2023. The Landlords say they received the USB stick within the 14-day deadline imposed by Rule 3.14 of the Rules of Procedure but indicate that they could not access the information on the USB key due to a technical issue with the USB key itself. The Tenant testified that when she was informed of this by the Landlords and arranged for a friend to go to the Landlords' residence to correct the error in the USB key. The Landlords confirm they had access to the data on the USB key on or about October 26, 2023.

I find that the Landlords cannot be found to have "received" the Tenants evidence when they obtained the USB key since there is no dispute that the data was inaccessible to them until the issue was corrected on October 26, 2023.

I also note that the Tenant is both an applicant and a respondent in this matter since the Landlords filed their own application. This distinction is relevant because as an applicant, she must ensure her evidence is served at least 14-days prior to the hearing as per Rule 3.14, though as a respondent that deadline is 7-days prior to the hearing as per Rule 3.15.

Firstly, as the Landlords acknowledge receipt of the Tenant's application without objection, I find that pursuant to s. 71(2) of the *Act* it was sufficiently served on them.

Secondly, I find that the evidence served by the Tenant in support of her application was received late and in contravention of Rule 3.14 of the Rules of Procedure. This evidence, uploaded to the Residential Tenancy Branch in support of her application, shall not be considered by me as doing so would constitute a breach in the Landlords' right to procedural fairness.

Finally, with respect to the evidence uploaded by the Tenant in response to the Landlords' application, I find that it was received at least 7 days prior to the hearing, being on October 26, 2023. I find that this evidence was served in accordance with s. 88 of the *Act* and shall be included and considered by me.

The Landlords advise that the Tenant was served with their application and evidence, which the Tenant acknowledges receiving without issue. Based on its acknowledged receipt without objection, I find that pursuant to s. 71(2) of the *Act* that the Tenant was sufficiently served with the Landlords' application and evidence.

Issues to be Decided

1) Is the Tenant entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement after receiving a Two-Month Notice to End Tenancy for Landlord's use of the Property?
2) Are the Landlords entitled to a 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.

General Background

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

- The Tenant moved into the rental unit on June 1, 2021.
- The Tenant moved out of the rental unit on June 30, 2022.
- Rent of $1,000.00 was due on the first day of each month, though the Tenant received a maximum credit of $200.00 per month for landscaping performed on behalf of the Landlords.

I am provided with a copy of the tenancy agreement and the addendum by the Landlords.

1) ***Is the Tenant entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement after receiving a Two-Month Notice to End Tenancy for Landlord's use of the Property?***

Under to s. 51(2) of the *Act* and provided s. 51(3) does not apply, a tenant may be entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement if they received a notice to end tenancy issued under s. 49 and the landlord or the purchaser who asked the landlord to issue the notice, as applicable under the circumstances, does not establish:

- that the purpose stated within the notice was accomplished in a reasonable time after the effective date of the notice; and
- has been used for the stated purpose for at least 6 months.

The Landlords have provided me with a copy of a Two-Month Notice to End Tenancy for Landlord's Use of the Property signed on May 29, 2022 (the "Two Month Notice"). The Two Month Notice states that it was issued on the basis that the Landlords would occupy the rental unit.

I am advised by the Landlord that the rental unit is a suite above a detached garage and that they reside in a house at the property. The Landlord further advises that the rental

unit is a bachelor suite with a kitchenette that they used as a bed and breakfast prior to the Tenant moving into the rental unit.

The Landlord testified that he and his spouse moved into the rental unit to make use of the space as their own. The Landlord indicates that they moved some of their belongings into the rental unit on the long weekend of July 1, 2022. The Landlord testified that he and his spouse continue to occupy the rental unit and that they have turned the space into a recreation area with a home gym for his spouse and a video game area for himself.

The Landlords' evidence includes photographs, which I am told show the Landlords making use of the rental unit after the Tenant had vacated. The Landlords' evidence also includes a letter from S.B., who the Landlord says is his neighbour. S.B.'s letter states that they had seen the Landlords make use of the rental unit and that their son assisted the Landlords in moving a fridge out of the rental unit after the Tenant had vacated.

The Tenant argues that the Two Month Notice was issued in retribution to an argument she had with N.T.. The Tenant further argued that the Landlords were not credible given that the Two Month Notice was issued in bad faith. The Tenant also argues that the Landlords do not need the rental unit as their home is sufficient for their needs.

I have reviewed the Landlords' evidence and accept that they did move into the rental unit in early July 2022. I accept that they did so for the purposes of using the space for recreation, including a home gym and video game area, which is evidenced by the photographs provided. This is corroborated by the Landlords' neighbour, who confirm this in part. I further accept that they continue to occupy the rental unit for this purpose.

I find that the Landlords have demonstrated that they have occupied the rental unit within a reasonable time and have done so for at least 6 months. Accordingly, I find that the Tenant is not entitled to compensation under s. 51(2) of the *Act*.

The Tenant argued the Landlords do not need the space as their home was sufficient for their needs. With respect, that is an irrelevant consideration. The question is not whether the Landlords need the rental unit or whether their current accommodation is sufficient for their needs. It is whether they have demonstrated that they have occupied the space. I find that they have done so.

Though the Tenant argues that the Two Month Notice was improperly issued by the Landlords, that issue is now a moot point. The Two Month Notice is a valid and the Tenant was conclusively presumed to have accepted it under s. 49(9) of the *Act* as she never filed to dispute it. The question at this stage is not whether the Two Month Notice was issued in good faith, rather whether the Landlords did occupy and make use of the rental unit. I find that they have.

The Tenant argues the Landlords are not credible on the basis that the Two Month Notice was issued in retribution to a personal disagreement she had with the Landlords. In my view, that argument does not follow. Even if I accept that the Two Month Notice was issued in retribution, it does not negate the other evidence from the Landlords that they have provided showing they have occupied the rental unit. The Landlords could have served the Two Month Notice in retribution and still occupied the rental unit. The argument that the Two Month Notice was issued for ulterior purposes is mostly relevant if this were the Tenant's application to dispute and cancel the Two Month Notice. Again, that is not what this application is about.

As the Tenant is not entitled to compensation under s. 51(2) of the *Act*, I dismiss her claim without leave to reapply.

2) Are the Landlords entitled to a monetary 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.

The Landlords seek $547.60 in unpaid rent in their application, which is divided into two claims: lost rental income due to improper notice and compensation due to an alleged failure for the Tenant to perform work in lieu of rent.

With respect to the lost rental income claim, the Landlord says that the Tenant did not provide proper notice she would be vacating. I am told by the Landlord that the Tenant sent text messages she would be leaving, change them, and then change them again. The Landlord says that they were not certain the Tenant would vacate the rental unit until immediately prior to June 30, 2022.

The Landlords claim 10 days in lost rental income due to the Tenant's failure to give proper notice.

The Tenant states that she notified the Landlords in early June that she would be leaving on June 30, 2023. I am directed to a message in the Tenant's evidence dated June 11, 2022 in which states the following:

> "Just to confirm, I will moving out July 1st"

Tenants may end a tenancy by giving the Landlord a notice to end tenancy under s. 45 of the *Act*. As per s. 45(4) of the *Act*, all notices to end tenancy given by a tenant under s. 45 of the *Act* must comply with s. 52 of the *Act*, namely that the notices contain the following:

- be in writing;
- be signed and dated by the tenant;
- give the address for the rental unit; and
- state the effective date of the notice to end tenancy.

Section 50 of the *Act* permits a tenant who received a notice to end tenancy from a landlord issued under s. 49, such as the Two Month Notice, to end the tenancy by giving the landlord at least 10 days' written notice to end tenancy.

Section 50 of the *Act*, unlike s. 45, makes no reference to form and content requirements set out under s. 52 of the *Act*. This raises an ambiguity on whether a tenant's notice to end tenancy issued under s. 50 of the *Act* must comply with the form and content requirements set by s. 52.

I find that this ambiguity is resolved by s. 52 of the *Act*, which clearly states that "[i]n order to be effective, a notice to end tenancy must be…". By implication, all notices to end tenancy, regardless of the section they were issued under, must comply with s. 52 to be effective. In other words, a tenant's notice issued under s. 50 of the *Act* must comply with the form and content requirements set by s. 52.

I further find that this interpretation is consistent with all notices to end tenancy issued under ss. 45 to 49 of the *Act*, even though those sections specifically reference s. 52. It would be inconsistent, in my view, for a tenant who issues a notice to end tenancy under s. 50 of the *Act* to avoid the obligations of issuing a notice to end tenancy applicable to all notices to end tenancy issued elsewhere in the *Act*.

I find that the Tenant's text message of June 11, 2023 fails to comply with the formal requirements of s. 52 of the *Act*. It is not signed, dated, nor does it list the rental unit address and constitutes a breach of ss. 50 and 52 of the *Act*.

Despite the Tenant's breach of the notice requirements, the Landlords also have an obligation to mitigate their damages as per s. 7 of the *Act*. In this instance, the Landlord received the message of June 11, 2022 and responded with a thumbs up, thereby implying that they understood the tenancy would be coming to an end at the end of the month. Surely if the form and content of the June 11 message raised some form of ambiguity, the Landlords could have responded advising that they wished to receive proper notice from the Tenant. They did not do so. Rather, they accepted the message and only raised issue after the Tenant filed her application.

I find that by failing to raise the issue of the form and content of the Tenant's message of June 11, 2022, the Landlords failed to mitigate their damages. Given this, find that they are not entitled to compensation and dismiss this portion of their claim without leave to reapply.

The Landlord further testifies that the Tenant had deducted $200.00 from rent as permitted under the tenancy agreement but had failed to provide 9 hours of work. The tenancy agreement lists an hourly rate of $25.00 such that the Landlord claims $225.00 in rent for services not rendered.

The Tenant acknowledges that she was in arrears of work to be performed, though says that the Landlord waived this when the Two Month Notice was served. The Tenant directs me to a message in her evidence sent by N.T. to her which states the following:

> I think we can all agree that this is no longer working out for all of us, which is why we've decided that we need our space back.
> We are giving you two months notice, the papers have been attached to your door.
> In terms of the 8 extra hour you banked, we will call it square as of the end of May.

> For June pleas pay the full $1,000 rent.
> If course your deposit will be returned to you after you move out (subject to no damages).
> Thanks, [N.T.]

At the hearing, the Landlord acknowledged sending the message above, though argued that the Tenant did not accept the offer. The Tenant argued it was never withdrawn. Subsequent conversations show the Tenant responded on May 30, 2022 advising that she would be moving out and had no desire to escalate matters further. The Landlord went further and provided the Tenant with a reference to assist her in her search for alternate accommodations.

Viewed as a whole, the Landlords clearly waived their claim for unpaid rent for services not performed by the Tenant when they sent that message listed above. Whatever amount that may have been owed by the Tenant was waived in May 2022. They were "square" at that time.

I find that the Landlords are prevented from advancing this portion of their claim due to their clear waiver. This portion of the Landlords' claim is dismissed without leave to reapply.

I dismiss the Landlords' claim for unpaid rent without leave to reapply in its entirety.

3) Is either party entitled to their filing fee?

Neither party was successful, such that I find neither is entitled to the return of their filing fee. Both claims under s. 72 of the *Act* are dismissed without leave to reapply.

Conclusion

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

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

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: November 06, 2023

Residential Tenancy Branch