Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR CNL OLC PSF

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution. A hearing by telephone conference was held on April 8, 2024. The Tenants applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "*Act*").

Both parties were present at the hearing. All parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me.

Both parties confirmed receipt of each other's evidence, and the Landlord confirmed receipt of the Tenant's application and Notice of Hearing packages.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence submitted in accordance with the rules of procedure and evidence that is relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Matters

The Tenants applied for multiple remedies under the *Act*, some of which were not sufficiently related to one another.

Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

After looking at the list of issues before me at the start of the hearing, I determined that the most pressing and related issues deal with whether or not the tenancy is ending. As a result, I exercised my discretion to dismiss all of the Tenants' application, with leave to reapply, with the exception of the following claim:

- to cancel the 10 Day Notice to End Tenancy for Unpaid Rent and Utilities (the 10 Day Notice).
- to cancel the 2-Month Notice to End Tenancy for Landlord's Use of the Property (the 2-Month Notice).

Issues(s) to be Decided

- Are the Tenants entitled to have the Landlord's 10 Day Notice or 2 Month Notice cancelled?
    - If not, is the Landlord entitled to an Order of Possession or a monetary order for the unpaid rent?

Background and Evidence

The Landlord explained the general background is as follows:

The people named as the Landlord's were in fact the purchasers of the rental unit (from the Tenants). This closed in June 2023, at which point the Tenant's rented the unit from the new owners and Landlord's for a term that was supposed to end at the end of September 2023. However, the Tenants remained living there and a series of issues started to arise. Notably, the original tenancy agreement specifies a $100,000.00 holdback in the security deposit section of the agreement. The Tenant then attempted to argue that this was in fact his security deposit, which is above the allowable amount under the Act (1/2 month's rent), which entitled them to retain this security deposit overpayment from future rent payments.

The Landlord has issued the 10 Day Notice because he asserts the Tenant has been improperly withholding rent as he tried to use his "security deposit overpayment" as means to pay his rent, since October 1.

The Tenants acknowledged receiving the 10 Day and the 2 Month Notices on March 1, 2024. Copies were provided into evidence.

The 2 Month Notice was issued under the following ground:

The rental unit will be occupied by the Landlord or the Landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse).

- *The Landlord or the Landlord's Spouse*

The 10 Day Notice was issued based on the unpaid rent in the amount of $27,500.00 that was due as of February 1, 2024 ($5,500.00 monthly rent spanning from October 2023 – February 2024). Since that time, the Landlord stated that no rent has been paid, and the Tenants now owe an additional $11,000.00 in rent for March and April 2024, totalling $38,500.00 in outstanding rent as of today's date. The Landlord has received no rent since October 2023 onwards.

The Landlord pointed out that as per a previous ruling (on February 25, 2024) at another hearing, an arbitrator found that the amount noted on the tenancy agreement ($100,000.00) was a "holdback" in relation to a contract of purchase and sale between the Landlord and the Tenant, and that it was not a security deposit under the Act. The Arbitrator made that determination after an analysis as to the specifics of the tenancy agreement, and the payments made. It was also noted that the $100,000.00 was a holdback pursuant to the contract of purchase and sale agreement, and that the RTB does not have jurisdiction over that agreement.

The Tenants' legal counsel asserts that I am entitled to reconsider the finding of the previous arbitrator on the issue of the security deposit, since I am not bound by previous decisions. The Tenants assert that the manner in which the Landlord is holding such a large deposit, is oppressive and unconscionable as laid out under the policy guidelines. The Tenants also assert that even if the $100,000.00 is not a security deposit, it is still a part of the tenancy agreement, and this is not fair to the Tenants. The Tenants assert they ought to be able to deduct this security deposit overpayment from any rent they owe, which means they do not currently owe any money for rent, since their initial security deposit was so large.

The parties both spoke to the 2 Month Notice issued. The Landlord asserts they plan on moving in because it is so close to their son. The Landlord stated that it was always their intention to move in, but since the Tenant's failed to vacate, it hasn't been possible.

The Tenants do not feel this has been issued in good faith, since it was not disclosed to them up front, and they assert the Landlord is trying to misuse the Act to evict them. The Tenants pointed to several of their documents to support the Landlord's bad faith.

Analysis

First, I turn to the 10 Day Notice.

In the matter before me, the Landlord has the onus to prove that the reason in the Notice is valid.

Section 26 of the *Act* confirms that a tenant must pay rent when it is due unless the tenant has a right under the *Act* to deduct all or a portion of rent. When a tenant does not pay rent when due, section 46 of the *Act* permits a landlord to end the tenancy by issuing a notice to end tenancy. A tenant who receives a notice to end tenancy under this section has five days after receipt to either pay rent in full or dispute the notice by filing an application for dispute resolution.

I find the Notice was received by the Tenants on March 1, 2024, which is the day they acknowledged receiving it. They disputed it by March 4, 2024, which was within time. Although the Tenants' counsel argued that I still have the authority to decide upon whether or not the security deposit is a valid security deposit, as defined under the Act, I find I do not agree. I cannot re-hear, change or vary a matter already heard and decided upon as I am bound by the earlier decision, under the legal principle of *res judicata*. Res judicata is a rule in law that a final decision, determined by an Officer with proper jurisdiction and made on the merits of the claim, is conclusive as to the rights of the parties and constitutes an absolute bar to a subsequent Application involving the same claim.

In this case, the arbitrator clearly made the finding that the $100,000.00 held by the Landlord was not a security deposit under the Act, and that it was part of a purchase and sale agreement, which was not within the RTB jurisdiction. That finding was made before the 10 Day Notice was issued. Since it is not a valid security deposit under the Act, I find the Tenants were not legally entitled to withhold rent pursuant to section 19(2) of the Act. Also, I find there is insufficient evidence that the Tenants had any other basis to legally withhold rent. As such, they were required to pay rent, in full, and on time. I am satisfied they have failed to do this since October 1, 2023, and that they have now accrued 7 months of rent as of the time of this hearing.

I note that the amount of rent due has increased since the application was filed. I turn to the following Rules of Procedure (4.2):

Amending an application at the hearing

> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.

In consideration of this, I allow the Landlord to amend their application to include rent that has accrued since the original application date. Further, I turn to policy guideline #27 – jurisdiction which states the following:

> *Under the RTA and MHPTA, if a tenant disputes a landlord's notice to end tenancy for unpaid rent and the director upholds the notice to end tenancy, the director must grant a monetary order for the unpaid rent to the landlord. The small claims monetary limit does not apply to monetary orders for unpaid rent that arise from a tenant's application to cancel a notice to end tenancy for unpaid rent. In these instances, the order results automatically from a dismissal of a tenant's application disputing a notice to end tenancy and does not require a landlord to make an application claiming any amount.*

Since this was the Tenants' application to cancel a 10 Day Notice, I find the small claims limit does not apply, and in this case, I may issue an order in excess of $35,000.00.

I note the Tenant's counsel stated that he is likely going to have the previous decision relating to the security deposit judicially reviewed. However, I am mindful that there is no evidence that this has been done yet or that this matter is substantially linked to a matter currently before the Supreme Court.

Overall, I am satisfied that the Tenant failed to pay rent, in full, within 5 days of receiving the 10 Day Notice. I also find there is no evidence they had any legal basis to withhold rent. As such, I hereby dismiss the Tenants' application to cancel the 10 Day Notice from March 1, 2024, without leave to reapply.

When a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with section 52 of the *Act*, section 55 of the *Act* requires that I grant an order of possession to a landlord. Having reviewed the 10 Day Notice, I find it complies with section 52 of the *Act*. Accordingly, I find the Landlord is entitled to an order of possession. Given the substantial amount of rent owing at this time, and the potential prejudice to the Landlord, I decline to delay the order of possession any further than 7 days after service. I hereby issue an order of possession to the Landlord which will be effective 7 days after service on the Tenants.

Next, I turn to the Landlord's request for a monetary order for unpaid rent. After considering the evidence before me, I find there is sufficient evidence to demonstrate that the tenants owe and have failed to pay rent for the months of October 2023 – April 2024 ($5,500.00 x 7), totalling $38,500.00.

Given my findings with respect to the 10 Day Notice, it is not necessary to consider the merits of the 2 Month Notice, since the tenancy is already ending.

Conclusion

The Landlord is granted an order of possession effective **7 days after service** on the Tenant. This order must be served on the Tenant. If the Tenant fails to comply with this order the Landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

The Landlord is granted a monetary order pursuant to Section 67 in the amount of **$38,500.00**. This order must be served on the Tenant. If the Tenant fails to comply with this order the Landlord may file the order in the Provincial Court (Small Claims) and be 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: April 08, 2024

Residential Tenancy Branch