Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL OLC ERP RP PSF

Introduction

This hearing dealt with an Application for Dispute Resolution filed on November 8, 2013, by the Tenant to cancel a Notice to end tenancy issued for landlord's use and to obtain Orders to have the Landlord: (1) comply with the Act, regulation or tenancy agreement; (2) make emergency repairs for health or safety reasons; (3) make repairs to the unit, site or property; and (4) provide services or facilities required by law.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process; however, each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Should the 2 Month Notice to end tenancy issued October 25, 2013 be upheld or cancelled?
2. Are emergency repairs required?
3. Should the Landlord be ordered to repair the unit, site or property?
4. Should the Landlord be ordered to comply with the Act, regulation or tenancy agreement?
5. Has the Tenant proven that Landlord has failed to provide services or facilities required by law?

Background and Evidence

The undisputed testimony confirmed the parties entered into a written month to month tenancy agreement that began on December 1, 2011. Rent is payable on the first of each month in the amount of $675.00 and on November 10, 2011 the Tenant paid $337.50 as the security deposit. No move in condition inspection form was completed or signed.

The Landlord testified that the rental unit is one of three suites located in a single detached house located on a large piece of property. He has owned the property since 2003 and has always used it for rental property. The Landlord resides in another city and has hired a local maintenance contractor to conduct repairs at the rental unit when required.

The Landlord testified that he served the Tenant two copies of a 2 Month Notice to end tenancy (hereinafter referred to as the Notice). The first copy was e-mailed to the Tenant on October 25, 2103 and the second copy was mailed on November 13, 2013. He argued that he had full authority to end this tenancy based on section 14(4) of the tenancy agreement; which stipulates as follows:

> *The landlord may end the tenancy only for the reasons and only in the manner set out in the Residential Tenancy Act and the landlord must use the approved notice to end a tenancy form available from the Residential Tenancy Office.*

The Landlord stated that he served the Tenant the Notice because he needs to use the Tenant's suite for a caretaker suite to house workers who will be redeveloping his property. He argued that because he used the proper Notice form that he has met the requirements of the tenancy agreement and would like the Tenant to vacate. Also, he returned the Tenant's December 2013 rent payment as compensation equal to one month's rent for issuing the Notice.

The Advocate argued that the Notice should be set aside because e-mail is not a form of service that complies with section 88 of the *Act* and because the Landlord has not met the burden of proof for the reasons indicated. She argued that section 49(6) of the *Act* requires that if the Landlord intends to develop the property he must have permits required by law and he must prove he intends in good faith to conduct the work. She noted that there was no evidence provided to support that a caretaker would be occupying the property; no proof of having the required permits in place; and the Landlord has not shown good faith that he truly intends to develop the property. Rather,

the evidence shows the Landlord has simply refused the Tenant's requests for repairs and then issued the eviction Notice.

The Landlord stated that he has a set of architectural plans with a legal survey which he could submit if required. He indicated that he needs the rental property to be able to continue with his development plans and that he has initiated communications with a prospective caretaker.

The Tenant questioned if the Landlord has issued Notice to the other tenants; to which the Landlord responded he had not. The Landlord stated that the other two units are occupied by an elderly couple who have resided in their unit for over ten years; and the other unit is occupied by a tenant who is disabled and who has made no complaints, has had no issues, and has his rent paid directly by the Ministry. He decided to evict this Tenant because he was on a month to month tenancy and was the easiest to move.

Upon review of the Tenant's application for Orders, the Tenant acknowledged that his request for emergency repairs may have been considered emergencies to him, in the past, because he has been dealing with the repair requests for so long. He acknowledged they do not meet the definition of emergency repairs as outlined in the *Residential Tenancy Act*. He also confirmed that he may have mis-understood the request for services required by law as he interpreted that to mean the requirement for the repairs to be completed.

The Tenant stated he is seeking Orders to have the Landlord repair or replace his kitchen fan. The Tenant pointed to the photos he provided in evidence and noted that the fan is installed beside the stove through an exterior wall. The fan cover is held up by two screws at one end and the other side is held up by the stove. The center screw and back screws are missing. There is no damper on the exterior and no grease screen on the fan; therefore, there is nothing to keep the cold weather and wildlife from getting inside. The fan is coated with grease. The Tenant stated that he keeps this fan covered to prevent the weather and wildlife from gaining access. At one time he found a wasp nest inside.

The Tenant argued that the manufacturer report indicates this fan should not be used as a kitchen exhaust fan. He is asking that the Landlord be ordered to install a hood fan under the cupboard and overtop of the stove. When asked what problems he is having with the fan, the Tenant indicated that he is not having any problem with the fan because he keeps it covered up.

The Landlord replied stating that the exhaust fan was installed at the time he purchased the house. He argued that this house was built in 1976, before exhaust codes were put into place, therefore he does not have to change this. He has told the Tenant that he cannot install a hood fan as this would required extensive renovations to the building envelope and roof; which he was not prepared to do.

The second repair the Tenant is seeking is to his kitchen sink and faucet. He pointed to a diagram of installation instructions for a sink. He argued that when the maintenance person installed his new sink he only used one clamp instead of two clamps as indicated in the instructions. The sink was not installed in accordance with the manufacturer instructions which resulted in the kitchen faucet being unstable and moves back and forth. There is also a space behind the sink because of the way the counter was previously cut out, which causes water to drip down under the sink. The Tenant submitted photos of water pooling under the sink.

The third item the Tenant would like fixed is his toilet. He stated that the maintenance person showed up at his door in January 2013, without proper notice, and said he would like to replace the toilet. They installed a toilet in his bathroom and installed the old toilet in the upstairs unit. The new toilet has a base that is shorter and narrower which sits inside the old caulking line. The Tenant stated that the maintenance person left the old caulking attached to the floor and said he would return later to clean it off but never did.

The Tenant stated that the maintenance person came back in March 2013 and simply put new caulking around the base of the toilet and left the old caulking there. The Tenant indicated that the toilet is flushing poorly requiring him to plunge it several times a week. He argued that it is the result of poor installation and a problem with the toilet. He confirmed that his rental unit is at ground level, not below ground, and the house is on municipal sewer not septic.

The Landlord testified that the maintenance person is a repair man and is a contractor whom he hires to maintain his property. The Landlord said they knew the kitchen sink was an issue so they agreed to replace it. He was at the rental unit with his contractor to install the sink and while they were doing the installation the Tenant grabbed the instructions away from them and began chastising them for not doing the installation correctly. Almost immediately after they left the Tenant had sent an e-mail saying the installation had failed.

The Landlord stated that they gave the Tenant a brand new low flush toilet, not a used one. He argued that the law requires that he install a low flush toilet and that he cannot purchase any other type of toilet. He noted that low flush toilets often require a second

flush. He could not comment on the caulking but indicated that the caulking would not affect the operation of the toilet. The toilet that was removed from the Tenant's suite was installed in the upstairs unit and there have not been any problems with that toilet plugging at all since it has been used by the upstairs tenant.

In closing, the Landlord stated the Tenant knew the condition of the rental unit and the condition of the fan when he rented the unit and he accepted the unit "as is". He has attempted to respond to the Tenant's requests as quickly as possible; however, the Tenant continues to chastise the work and the workers and prevents them access to the suite in a timely manner. They had to attend the unit six times before he would let them change his toilet. The Tenant now insists that they provide notice of entry on a form the Tenant created himself.

The Tenant submitted that the new caulking is weeping away from under the toilet and the caulking is weeping away from around the taps at the kitchen sink. The Landlord has not acted in good faith when issuing the Notice or for repairs; as supported by the e-mail provided in evidence where the Landlord states he will not be acting on the Tenant's list of requested repairs.

Analysis

Upon review of the 2 Month Notice to End Tenancy, I find the Notice to be completed in accordance with the requirements of section 52 of the Act. The Notice was served upon the Tenant, first by e-mail on October 25, 2013, and later by mail on November 13, 2013.

Section 88 of the Act does not provide for service by e-mail; however, it does provide for service by mail. Therefore, I find the Notice which was sent by mail on November 13, 2013, was served upon the Tenant in accordance with section 88 of the Act.

The Notice was issued pursuant to Section 49(6) of the Act for the following reasons:

- The landlord intends to convert the rental unit for use by a caretaker, manager or superintendent of the residential property.

When considering a 2 Month Notice to End Tenancy for Cause the Landlord has the burden to provide sufficient evidence to establish the reasons for issuing the Notice to End Tenancy.

When a Tenant has filed to cancel a notice to end tenancy for landlord's use and calls into question the "good faith" requirement, the onus lies on the Landlord to prove the two part test as follows:

1) The landlord must truly intend to use the premises for the purposes stated on the notice to end tenancy; and
2) The Landlord must not have an ulterior motive as the primary motive for seeking to have the tenant vacate the rental unit.

Residential Tenancy Policy Guideline #2 states that good faith is an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage.

Based on the foregoing, I find the Landlord has provided insufficient evidence to prove he intends to use the premises for the purposes stated on the Notice. I make this finding in part because there is no evidence to prove the Landlord has obtained the required permits to develop his property or that he has entered into an agreement to hire a proposed caretaker or that the caretaker requires on-site housing.

Furthermore, I find there is sufficient evidence to support an ulterior motive to evict this Tenant which is drawn from the evidence that indicates the Landlord no longer wants to deal with the Tenant's ongoing requests for repairs or deal with the manner in which the Tenant comments during and after the work has been performed. Accordingly, I uphold the Tenant's request to cancel the 2 Month Notice issued October 25, 2013.

During the course of this proceeding the Tenant acknowledged that he was seeking repairs to the unit and that those requests do not meet the definition of emergency repairs. He also clarified that he was seeking repairs which he interpreted as being a request for services required by law. The Tenant did not provide evidence of which services were not provided and required by law. Rather, he stated he was seeking repairs to services he has, primarily the toilet, fan, and kitchen sink. Based on the foregoing, I dismiss the Tenant's request for Orders to have the Landlord make emergency repairs or provide services required by law, without leave to reapply.

Section 32(1) of the Act stipulates that a landlord must provide and maintain residential property in a state of decoration and repair that (a) complies with the health, safety and housing standards required by law, and (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Section 32(5) provides that a landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

I do not accept the Landlord's argument that the Tenant agreed to rent the unit "as is" and therefore, he was not required to change or repair pre-existing items, pursuant to Section 32(5) of the Act, as listed above,.

That being said, I find there is insufficient evidence before me to prove that, given the age and construction of the building, that an over the range exhaust fan is required by law. While that may be a requirement for newly constructed units, I accept the Landlord's submission that there is no evidence to prove that that law would apply to a building that was constructed in 1976.

In the absence of evidence to prove the contrary, I do not accept the Tenant's assertion that this fan cannot be used to exhaust air from around a stove. Furthermore, there is no evidence that this fan must be equipped with a filter to catch grease.

Section 32(2) stipulates that a tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

The *Residential Tenancy Policy Guideline # 1* clarifies the responsibilities of a landlord and tenant regarding maintenance, cleaning, and repairs of residential property. With respect to cleaning, a tenant is responsible for washing surfaces of appliances, walls, baseboard heaters, and other items such as exhaust and ceiling fans. A landlord would be responsible for more involved or in-depth maintenance that would require the item to be taken apart, such as the removal of a fan cover.

Based on the above, if the exhaust fan is coated in grease, I find the Tenant would be required to clean the exterior cover of the fan and the Landlord would be required to conduct the cleaning of the interior fan blades. Furthermore, I find there is sufficient evidence to prove that the kitchen fan is lacking in maintenance; specifically, there is no flapper or exterior screen to prevent insects or cold air from coming inside the unit; there are screws missing from the center and side of the interior cover; and the fan blades need cleaning. Accordingly, I hereby order the Landlord to install a flapper and screen on the exterior side of the exhaust fan; install the required screws; and clean the fan blades, no later than **January 31, 2014.**

The Tenant has sought repairs regarding the installation of the kitchen sink and taps, and argued that the sink was not installed in accordance with the manufacturer's instructions causing the tap to move.

Installation instructions provided by a manufacturer are not necessarily health, safety and housing standards required by law. Rather, they are suggested installation methods. It is not uncommon for installation methods to be altered to adapt to the individual or unique setting or circumstance. That being said, there is sufficient evidence before me that proves the sink and taps were installed in a manner which causes or enables water to splash behind the taps and to run into the cupboard below the sink. Therefore, I hereby order the Landlord to amend the installation of the kitchen sink and taps, to close up the open space behind the tap, and prevent water from splashing and running into the cupboard below, no later than **January 31, 2014.**

The Tenant has requested that the toilet be repaired, and has argued that he has to plunge the toilet several times a week, even after it was replaced. He also argued that the toilet was not installed properly because caulking is seeping out and old caulking was left on the ground.

Upon review of the evidence, I find the Tenant's submission that there is a problem with the toilet installation to be unfounded. While old caulking may be unsightly, it does not affect the operation of a toilet. Furthermore, there is evidence that the previous toilet has not plugged since it was installed in the upstairs unit, which causing me to consider that the toilet is not the problem here.

I accept the Landlord's submission that a brand new low flush toilet was installed in the Tenant's unit and that low flush toilets may need to be flushed twice at times. None of the evidence before me proves that the problem lies with the toilet. Rather, it is reasonable to conclude that the sewer or drain pipe below the toilet may be partially plugged or have a problem. Therefore, I hereby order the Landlord to hire a licensed plumber to inspect the operation of the toilet and its drainage, and to make any required repairs, no later than **February 15, 2014.**

When a landlord and tenant enter into a tenancy agreement they usually enter into a mutually agreeable form of communication. In this technological world it is not uncommon for landlords and tenants to agree to communicate by e-mail, text, or by telephone, when arranging access to the unit to have repairs completed; especially if the parties reside in different cities. That being said, when the parties cannot mutually agree upon a method of communication a notice of entry must be provided in a manner stipulated by the *Act.*

Section 29 of the Act stipulates a landlord's right to enter the rental unit is as follows:

> **29** (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:
>
> (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
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> (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
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> (i) the purpose for entering, which must be reasonable;
>
> (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
>
> (c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
>
> (d) the landlord has an order of the director authorizing the entry;
>
> (e) the tenant has abandoned the rental unit;
>
> (f) an emergency exists and the entry is necessary to protect life or property.
>
> (2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

If a notice of entry is personally served upon a tenant, the landlord or agent may enter the rental unit 24 hours later. If the notice it posted to the door, it is deemed to be received by the tenant three days later and the landlord or agent may enter the rental unit 24 hours after the third day, pursuant to section 90 of the Act.

For example, if a landlord wants to enter the rental unit on a Thursday morning to conduct repairs and they are posting the notice of entry to the door, the notice must be posted by Monday morning, stating the landlord or agent will be entering the unit on Thursday morning between 8:00 a.m. to 12:00 p.m. to conduct repairs and list the repairs. The exact time of entry is not required as a long as the notice indicates a reasonable period of time of the expected entry.

There is no prescribed form for a notice of entry. Therefore, the Landlord is not required to use the form created by the Tenant to provide notice of entry. The Tenant cannot

refuse entry if notice has been provided in accordance with the Act. Accordingly, I order both the Landlord and the Tenant to comply with the Act.

Conclusion

The 2 Month Notice to end tenancy issued October 25, 2013, is HEREBY CANCELLED, and is of No force or effect.

I HEREBY ORDER the Landlord to conduct repairs to the rental unit, as stipulated above, pursuant to section 62 of the *Residential Tenancy Act*.

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: January 06, 2014

Residential Tenancy Branch