Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant's Application: MT, CNC, CNL, MNR, MNDC, AAT, LAT, RR, O
Landlord's Application: OPC, MNR, MNSD, MNDC

Introduction

This hearing was scheduled to deal with cross applications. The tenant had applied for numerous remedies, including: cancellation of a 1 Month Notice to End Tenancy for Cause and a 2 Month Notice to End Tenancy for Landlord's Use of Property and more time to dispute the Notices; monetary compensation for emergency repairs and damage or loss under the Act, regulations or tenancy agreement; access to the rental unit; authorization to change the locks to the rental unit; authorization to reduce rent payable; and, other remedies. The landlords applied for an Order of Possession for cause and a Monetary Order for unpaid rent; other damages and losses; and, authorization to retain the security deposit and pet damage deposit. The tenant subsequently filed an Amendment seeking to increase her monetary claim. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

Both parties confirmed that the tenant returned possession to the rental unit to the landlords on July 22, 2016. The tenant confirmed that she does not seek to return to the rental unit. As such, I found the majority of the remedies sought by the parties had become moot with the exception of their respective monetary claims.

Prior to the scheduled hearing date the landlords had submitted a request for substituted service, indicating they were having difficulties serving the tenant. I proceeded to explore service of hearing documents and service addresses.

The tenant acknowledged that the service address she provided on her Application was incorrect and she could not receive mail at that address. The parties provided consistent testimony that the tenant had sent the landlord a forwarding address for return of the security deposit on July 22, 2016. The landlords responded via email to the tenant indicating they would use the forwarding address for purposes of sending the tenant documents related to this

dispute. The landlords sent their response to the tenant's claims to that address on July 23, 2016 but the documentation was returned as being unclaimed despite two notice cards being left by Canada Post. The tenant acknowledged that the address provided to the landlords via email is not an address at which she resides and that she expected the landlords would only use that address for return of the security deposit and pet damage deposit only. The tenant did not indicate that she made attempts to retrieve mail sent to that address and it is important to consider that when registered mail is sent, Canada Post will only hold the registered mail a limited number of days before it is returned to the sender. Accordingly, when a party has made a claim against the other party, the applicant should provide a service address at which they will receive mail in a timely manner as service of hearing documents is time sensitive.

The tenant submitted to the Branch an Amendment to her Application on August 10, 2016 and I noted that it did not provide for a change to her service address. I heard that the Amendment was posted to the landlords' door on August 11, 2016 and the landlords found it on August 12, 2016. Where a party makes a monetary claim against another, the Application and any amendment to the monetary claim must be served in person or by registered mail. Posting an Application or Amendment that pertains to a monetary claim does not comply with the service provisions of section 89(1) of the Act.

I declined to consider the tenant's monetary claim, or the amended monetary claim, further for several reasons. Firstly, a party that makes a claim against another party has an obligation to provide the respondent with a service address on the application so that the respondent may serve the applicant with a response. The tenant did not provide a valid service address on her original application and did not provide one with her Amendment. Secondly, the Amendment was served upon the landlord outside of the service deadline which is no less than 14 days before the scheduled hearing and using a method of service that is insufficient for monetary claims. Thirdly, I noted that the tenant's claims and amended claims appeared to include double counting with respect to certain allegations and was not sufficiently organized and clear. For all of these reasons, I dismissed the tenant's monetary claims with leave to reapply.

As for the landlords' monetary claims against the tenant, I heard that the landlords' Application was sent to the tenant via registered mail on July 23, 2016 using the forwarding address she provided for return of the security deposit. Providing a forwarding address is necessary if a tenant seeks return of their security deposit or pet damage deposit; however, upon receipt of a forwarding address, the landlord may serve the tenant with a claim against the deposit(s). The landlords did just that, they filed an Application to claim against the deposits and sent it to the tenant using the forwarding address she provided to them. Where a party sends documents in a manner that complies with the Act, section 90 of the Act deems a person to have received documents five days after mailing so that a person cannot avoid service by refusing to accept or pick up their mail. I was satisfied that the landlords fulfilled their obligation to make a claim against the deposits by serving the tenant with their Application at the forwarding address she provided and I deemed her to be served with the landlords' Application.

Having dismissed the tenant's monetary claims against the landlord and having deemed the tenant sufficiently served with the landlord's monetary claims, I found it unnecessary to further consider the landlords' request for a Substituted Service Order.

In recognition that the tenant had not seen the landlords' Application, I read aloud the details of dispute as provided on the landlords' Application. The landlords' monetary claim was comprised of three components. Two of the claims pertained to the landlord's time spent responding to the tenant's claims, and preparing and participating in this proceeding, which are not recoverable under the Act and I dismissed them summarily. As such, only one claim remained which was a claim for unpaid rent for the month of July 2016. The tenant indicated she was prepared to respond to the claim for unpaid rent.

The landlords indicated that they have other claims against the tenant with respect to cleaning and damage. Such claims were not in the Application filed by the landlords and their claim had not been amended in accordance with the Rules of Procedure. The landlords were informed that they remain at liberty to file another Application to seek recovery of any other damages or loss if they so choose.

In light of the above, the only matters addressed during the remainder of the hearing pertained to the landlord's entitlement to rent for July 2016 and disposition of the security deposit and pet damage deposit.

Issue(s) to be Decided

1. Are the landlords entitled to rent from the tenant for July 2016?
2. Disposition of the security deposit and pet damage deposit.

Background and Evidence

The tenancy started in May 2015 for a fixed term that expired on December 1, 2015 and then continued on a month to month basis. The tenant had paid a security deposit of $485.00 and a pet damage deposit of $275.00. The tenant's monthly rent obligation was $975.00 payable on the first day of every month. The landlords did not prepare a move-in inspection report. The tenant did not pay rent for July 2016. The tenant claims to have stopped residing in the unit in June 2016; however, her possessions remained in the unit until July 22, 2016 when she had them moved out and she left the key to the rental unit for the landlords.

The parties provided consistent testimony that the landlords had served a total of four Notices to End Tenancy in the months of June and July 2016, as follows:

1. A 2 Month Notice to End Tenancy for Landlord's Use of Property on June 13, 2016 with an effective date of August 31, 2016.
2. A 1 Month Notice to End Tenancy for Cause on June 20, 2016 with an effective date of July 31, 2016. This Notice was subsequently withdrawn by mutual agreement.

3. A 1 Month Notice to End Tenancy for Cause on June 26, 2016 with a stated effective date of July 31, 2016.
4. A 10 Day Notice to End Tenancy for Unpaid Rent on July 8, 2016 indicating rent was outstanding for July 2016.

The landlords were of the position that the 1 Month Notice issued on June 26, 2016 superseded the 2 Month Notice previously served, negating the compensation the tenant may have been entitled to receive pursuant to a 2 Month Notice.

The tenant submitted three reasons for not paying rent for July 2016, as follows:

- The tenant stayed in alternative accommodation while there was construction at the residential property and wanted to recover the cost from the landlords by withholding rent.
- The tenant had been dealing with an infestation of mice.
- The landlord had agreed that she would get two months of free rent if she moved out by the end of July 2016, which she did. The tenant testified that this was a conversation that took place on June 25, 2016 that she captured it on video which was included in her evidence package.

The tenant acknowledged that the landlord did not authorize her to withhold rent to offset costs for alternative accommodation or a mice infestation and that she did not have the prior authorization from an Arbitrator to do so before she withheld rent. As the tenant was informed during the hearing, the Act provides very specific and limited circumstances when a tenant may legally withhold rent. A tenant does not have the authority to decide that she is entitled to compensation and will obtain the compensation by withholding rent unless there is a specific provision for such in the Act. Being disrupted by construction or having mice is not a basis for withholding rent unless the tenant has the prior authorization of the landlord or an Arbitrator, which she did not. The tenant is at liberty to seek compensation by way of a monetary claim now that the tenancy has ended, but I did not permit further submissions regarding the first two reasons. I informed the parties that I would further consider the third reason given by the tenant.

The landlord acknowledged that he agreed to give the tenant free rent for July 2016 and pay her the equivalent of one month's rent if she vacated by the end of July 2016 but that there was a requirement that this be put in writing and it was not. The landlord was also of the position that he made this offer after feeling manipulated by the tenant and her threats that she would not leave. The landlord stated that after having the subject conversation with the tenant he spoke with his wife and after hearing his wife's viewpoint the landlords decided to issue the tenant a 1 Month Notice to End Tenancy for Cause on June 26, 2016. The landlord requested that I listen to the recording of June 25, 2016 in its entirety and pointed to the recording marked "105" on the tenant's USB stick.

The tenant agreed that there was discussion about the agreement being put in writing but she was of the impression that the landlord would put it in writing but instead he served her with a 1 Month Notice the following day.

I informed the parties that I would view and listen to the relevant recording of June 25, 2016 to determine whether the landlord had waived entitlement to rent for July 2016.

Analysis

Under section 26 of the Act a tenant is required to pay rent even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right to withhold rent. As mentioned previously, the Act provides very specific and limited circumstances that would provide the tenant with the legal right to withhold rent. Having to stay in alternative accommodation and having pest issues do not entitle a tenant to withhold rent unless the tenant has obtained the authorization to do so from an Arbitrator or the landlord. In this case, the tenant acknowledged that she did not have an Arbitrator's authorization or the landlord's authorization to withhold rent for July 2016 due to alternative living costs or losses associated to a mice infestation. Accordingly, I found these reasons to be without legal basis for withholding rent under the Act and I did not consider them further.

Where a landlord has agreed that a tenant may withhold rent, or otherwise waives entitlement to receive rent from the tenant, I see no reason not to uphold such an agreement. As I stated during the hearing, one party cannot unilaterally withdraw an otherwise binding agreement. However, the parties were in dispute as to whether a binding agreement had been reached and I was referred to a video recording made by the tenant. As requested by the landlord, I watched the video marked "105" in the tenant's evidence in its entirety. I also watched the video marked as "106" in the tenant's evidence. I found that video 105 contained discussions between the tenant and the male landlord just prior to a discussion concerning free rent which was actually captured in the video marked 106.

While I appreciate that conversation heard in video 105 was entirely difficult and frustrating, especially for the landlord when the tenant often interrupted the landlord before he finished a sentence, I would not consider it manipulative or threatening. Certainly the tenant expressed her viewpoint that she would argue the landlord's Notices to End Tenancy were not valid and that it would take months for the landlord to evict her; however, the landlords had a legal remedy available to them, which was to apply for an Order of Possession.

Having listened very carefully to the conversation regarding free rent in the video marked 106, I describe the pertinent statements below.

- The landlord offers to the tenant free rent for July 2016 and he would give the tenant back the $975.00 she already paid for June 2016 if she moves out by the end of July 2016.

- The tenant pauses, and confirms: “ok then, and be gone by the end of July.”
- The landlord then says “Do we have him witness it or do you have it on video?” A few seconds later a male RCMP officer can be seen standing near the parties and I assume “him” refers to the RCMP officer.
- The tenant responds to the landlord by stating “Ya, if you put that in writing to me, 2 month’s [rent] and my damage deposit, then I will go and I won’t take you to Arbitration.”

Based upon the tenant’s last response, I consider the tenant to have conditionally accepted the landlord’s offer. The condition was that the landlord would draft a written agreement in order for it to be binding. However, as both parties testified, the landlord did not put it in writing for the tenant and did not satisfy her condition. Therefore, I find that the parties did not enter into an unconditional agreement that is binding.

In light of the above, I find the evidence does not support the tenant’s position that the landlord waived entitlement to July 2016 rent pursuant to a agreement between the parties.

Although I have rejected the tenant’s submissions that the landlord waived entitlement to receive rent for July 2016 based on their conversation on June 25, 2016 I cannot ignore the fact that the landlords also issued a 2 Month Notice to End Tenancy for Landlords Use of Property to the tenant. Issuance of a Notice to End Tenancy, whether it is a 1 Month Notice, or a 10 Day Notice, after a 2 Month Notice has been served does not have the effect of negating or cancelling the 2 Month Notice. Although the landlord took this positon I can find no provision in the Act to support his position. Rather, a Notice to End Tenancy may only be withdrawn by mutual agreement or cancelled by an Arbitrator. I was not presented evidence to suggest the 2 Month Notice was withdrawn by mutual agreement. Nor, did I cancel the 2 Month Notice. Accordingly, I find the tenant remained entitled to the compensation every tenant is entitled to receive for receiving a 2 Month Notice. Section 51(1) and (1.1) provide:

51 (1) A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord

[Reproduced as written with my emphasis added]

While the tenancy may have ended earlier than the effective date stated on the 2 Month Notice because the 1 Month Notice was served, I there is no basis to deny the tenant the compensation she is entitled to receive under section 51(1) of the Act. Since the landlords took

action to end the tenancy as of July 31, 2016, I find that July 2016 became the last month of tenancy. Therefore, I find section 51(1.1) applies and the tenant was entitled to withhold rent for July 2016 under this provision.

It should be noted that by way of my findings above, the tenant is considered to have received tenant's compensation under section 51(1) of the Act.

Since the landlords' claim for unpaid rent and other claims made as part of this Application have been denied and the landlords have not made any other claims against the deposits and more than 15 days have passed since the tenancy ended and they received the forwarding address, I order the landlords to return the security deposit and pet damage deposit to the tenant in keeping with Residential Tenancy Branch Policy Guideline 17. Provided to the tenant with this decision is a Monetary Order in the sum of $760.00 which represents her security deposit and pet damage deposit.

Conclusion

The landlords' claim for unpaid rent for July 2016 has been denied as the tenant had a right to withhold the last month's rent under section 51(1.1) of the Act. The remainder of the landlord's monetary claims were dismissed. The landlords remain at liberty to file another Application to pursue the tenant for any other damages or losses not addressed by way of this decision.

The landlords are ordered to return the security deposit and pet damage deposit to the tenant and the tenant has been provided a Monetary Order in the sum of $760.00.

The tenant's monetary claims as originally filed and as amended were dismissed with leave to reapply.

All other remedies sought by the parties were considered moot as the tenant had vacated the rental unit before the date of this hearing.

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: August 25, 2016

Residential Tenancy Branch