Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNR OPR RR MNDC MNSD FF

Introduction:
Both parties attended the hearing and gave sworn testimony. The landlord said he served the Notice to End Tenancy dated December 2, 2016 to be effective December 12, 2016 by posting it on the door. He said he served the Application also by posting it on the door, and then changed his mind when I said this was not an acceptable means of service for an Application. The tenant's caregiver said he got it posted on the door. I find pursuant to section 89 of the *Residential Tenancy Act* (the Act) that the landlord did not legally serve the Application for Dispute Resolution as required by section 89 of the Act so I dismiss the landlord's Application and give him leave to reapply within the legislated time limits.

The tenant provided proof of service of her Application by registered mail on December 6, 2016 which I find is within the time limits prescribed by section 46 to dispute the Notice. I find her Application was legally served pursuant to section 89 of the Act. However the landlord said he did not receive her evidence package until yesterday and says it should not be considered as he has not had time to consider and reply to it. I find the information on file is that the bulk of the tenant's evidence including the USB stick was filed late. Therefore I decline to consider or give much weight to it. The tenant applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

a) To cancel a Notice to End Tenancy for unpaid rent;
b) To obtain an Order for emergency repairs to the property;
c) To limit the landlord's entry into the suite pursuant to section 29; and
d) A monetary order or rent rebate as compensation for an illegal rent increase and repairs to the property that were not done.

Issue(s) to be Decided:
Has the landlord proved on the balance of probabilities that rent is owed and they are entitled to an Order of Possession and a monetary order for rental arrears and to recover the filing fee for this application?

Or is the tenant entitled to any relief? Has the tenant proved on the balance of probabilities that they are entitled to repair orders and to compensation?

Background and Evidence:

Both parties attended the hearing and were given opportunity to be heard, to present evidence and to make submissions. It is undisputed that the tenancy commenced October 1, 2008, that rent is $1000 a month and a security deposit of $470 was paid on October 1, 2008. It is undisputed that the tenant has not paid the balance of rent for December in the amount of $658 and the rent for January 2017. She said she deducted $400 for a mould investigation and $78 for a refrigerator repair which she classified as emergency repairs. The landlord said according to the report which he scanned in the hearing, that the report notes levels of spores were less on the inside than on the outside of the building. He said his handyman went in about one and half months ago and found nothing wrong in the unit. He said she complains a lot and is in hospital a lot. He noted that she has many animals in the unit and uses many drugs and that may be the cause of her breathing problems, if any. The landlord also said there was nothing wrong with her refrigerator. She has been asking for a larger one. After she called a repair person and he wrote on his invoice there was nothing wrong with the refrigerator, the landlord sent his electrician into the unit and he fixed an outlet. The tenant confirmed this was correct.

The tenant contends there was an illegal rent increase in 2014 and in 2016 and she has overpaid rent in the amount of $152.80. She also claims $2,687.59 for emergency housing in a hotel due to her unit problems affecting her health and a further $2,000 for breach of her quiet enjoyment. She asks also for $500 which was documented by a promissory note from the landlord which was not paid and $57.09 for the cost of USB sticks. She also requests her security deposit refunded. Her witness friend said he did environmental work in another province and he disagrees with the report submitted by the tenant. He said he did a spray test and saw lots of visual mould which is dangerous to a person's health as evidenced by the tenant's hospital admissions. .

The landlord said she was not living in the hotel and did not have an invoice with her name on it. He said she was residing in the unit and he had some witnesses with him to testify to that. He agreed he signed a promissory note but it was dependent on a good tenant being obtained for a certain unit. He said a tenant was never obtained and it is vacant to this day. Regarding the claim of an illegal rent increase, he said the tenant lived there many years with no rent increase. Neither party knew what the legislated amounts were for the years in question so I agreed to research that for this decision.

In evidence is the Notice to End Tenancy for unpaid rent, Notices of Rent Increases, hospital reports, a laboratory analysis from an Environmental Mould Specialist and statements of parties and witnesses. On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

Analysis

Order of Possession:

Although the landlord's application is dismissed due to lack of legal service, I find his Notice to End Tenancy was valid. I find the tenant disputed the Notice in time but has not paid the rent due. Section 26 of the Act provides a tenant must pay rent when due whether or not the landlord fulfills their obligations under the Act. The tenant submitted she made deductions of $400 for a mould inspection and report and $78 for repair of a refrigerator and these would be authorized deductions as "emergency repairs". I find section 33 of the Act sets out definitions and procedures for dealing with emergency repairs. Section 33(3) states emergency repairs may only be undertaken when certain steps are followed. I find insufficient evidence that the items deducted by the tenant would qualify as emergency repairs and I find, even it they were, that she followed the procedure of making two attempts to contact the landlord and giving him a reasonable time to make the repairs. Therefore, I find the $478 was an unauthorized deduction from her rent. I find even if it was an authorized deduction, after taking it, there was still a balance of rent owing for December 2016 ($658-448 = $180). Therefore, I dismiss the application of the tenant to cancel the Notice to End Tenancy. I find the tenancy ended on December 12, 2016 pursuant to the Notice. I find the landlord entitled to an Order of Possession effective two days from service.

The tenant disputed illegal rent increases in 2014 and 2016. I find the Residential Tenancy Branch website sets out the allowable rent increases. I find the landlord has not been following these guidelines. The following table outlines the maximum allowable rent increases for the past few years:

Maximum Allowable Rent Increase

2016 2.9%

2015 2.5%

2014 2.2%

Landlords may not retroactively apply a rent increase. If a landlord did not issue a rent increase in the previous year, or issued a rent increase that was less than the amount allowed by law, they cannot later apply a rent increase to catch up.

Unlawful Rent Increase

A tenant does not have to pay an increase that is higher than the amount allowed by law. Instead, the tenant can give the landlord documents showing the allowable amount or apply for dispute resolution asking for an order that the landlord comply with the law, as long as the increase wasn't granted through dispute resolution.

Tenant's Application for Dispute Resolution (PDF)

The tenant may deduct from future rent any overpayment – only if the tenant has already paid an increase higher than the legal amount. The tenant should attach a note to the rent to explain the reason for not paying the amount that the landlord has asked for.

In respect to the tenant's claim for a refund of overpayment, I find the legal rent increase for 2014 was 2.29%. Her current rent then was $940 and the legal increase was $20.68. The landlord increased it by $40 so she overpaid her rent for that year in the amount of $19.32 a month. I find her entitled to a refund of $231.84 for 2014. In 2015, the legal increase was 2.5%. I find her rent should have been $960.68 in 2015 and with a legal increase of 2.5%; the increase would have been $24.01 resulting in a rent of $984.69. However, the landlord increased her rent to $1000. I find her entitled to a rent refund of $15.31 a month for 12 months for a total of $183.72 for 2015. In 2016, I find the legal increase was 2.9% which should have resulted in a legal rent of $1013.25. ($28.55 increase on legal rent of $984.69) I find instead the landlord raised the rent by $50 to $1050 as of December 1, 2016. However, she has paid no rent for December or January so I find she is not entitled to a further refund. In total I find her entitled to a refund of $415.56.

Regarding the other claims of the tenant, I find the onus is on her as the applicant to prove on a balance of probabilities her claim. Awards for compensation are provided in sections 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,

4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Director's orders: compensation for damage or loss
67 Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.
Section 67 of the Act does not give the director the authority to order a respondent to pay compensation to the applicant if damage or loss is not the result of the respondent's non-compliance with the Act, the regulations or a tenancy agreement.

I find insufficient evidence to support the tenant's claim for a monetary order for mould assessment or repair of a refrigerator. I find the professional mould assessment report notes that the spore count outside the unit is more than that inside the unit. The report noted no mould that would produce health hazards but only some around the sink and a shelf. I find the landlord's evidence credible that the building is in good repair and his handyman had inspected the unit for mould and found no visible mould but evidence of many animals living in the unit. I find the refrigerator repair person's invoice notes there was nothing wrong with the refrigerator and the tenant agreed the landlord's electrician fixed a plug just after that. While the tenant's friend said he was a professional and saw evidence of mould hazardous to health, I prefer the documentary evidence provided on a professional report which minimized the amount of spores and mentioned no hazards to health in the unit. I dismiss this portion of the tenant's claim.

I find insufficient evidence to support her claim for compensation for emergency housing. I find no evidence that her unit was unhealthy or unfit for living. While she provided evidence of several hospital visits, I find the doctor's notes list multiple health issues of the tenant and a long list of drugs she takes but I find insufficient evidence that any of them found her health issues were related to her housing. I find insufficient evidence that the landlord failed to protect her right to peaceful enjoyment of her unit so I dismiss this portion of her claim. In respect to her claim on the promissory note, I find the landlord's evidence credible that it was based on her obtaining a tenant for a certain unit which she never did. His evidence is supported by the fact that she did not contradict his testimony in the hearing by naming a specific tenant that she might have acquired. I dismiss this portion of her claim.

Section72 of the Act limits recovery of the expenses of an Application to recovery of the filing fee. Therefore, I find she is not entitled to recover costs for her USB sticks.

In respect to her claim for her security and pet damage deposits, I find this is premature as she has not vacated the unit. I find her deposits will remain in trust with the landlord to be dealt with in accordance with section 38 of the Act after she has vacated and provided her forwarding address in writing.

Conclusion:

I dismiss the application of the landlord and give him leave to reapply for a monetary order for unpaid rent and other costs. I find he is not entitled to recover his filing fee due to his lack of success.

I dismiss the application of the tenant to cancel the Notice to End Tenancy. The tenancy terminated on December 12, 2016 and I find the landlord entitled to an Order of Possession effective two days from service as requested.

In respect to the other claims of the tenant, I find her entitled to a rent refund of $415.56 due to illegal rent increases. I dismiss her other claims in entirety without leave to reapply. Her filing fee was waived.

I HEREBY ORDER that the tenant may deduct $415.56 from the unpaid and over holding rent she owes the landlord for December 2016 and January 2017. The balance owing is payable to the landlord.

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 11, 2017

Residential Tenancy Branch