



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, CNR, OPC, CNC, OLC, MNR, FF,O

Introduction

This hearing dealt with two related applications. One was the landlord's application for an order of possession based upon a 1 Month Notice to End Tenancy for Cause and a 10 Day Notice to End Tenancy for Non-Payment of Rent and a monetary order. The other was the tenants' application for orders setting aside the notices to end tenancy and an order compelling the landlord to comply with the Act, regulation or tenancy agreement. Both parties appeared.

The tenant advised that they were almost finished moving out of the rental unit and they expected to be finished by January 31, 2017. This rendered the various applications relating to the notices to end tenancy moot. The parties agreed that the landlord would be granted an order of possession effective January 31, 2017.

The parties were advised that they should conduct a move-out inspection, arrange for the return of the keys, and deal with the security deposit in accordance with the *Residential Tenancy Act*.

The parties were not able to agree on the monetary claim so the hearing proceeded on that claim alone.

The tenants had submitted an amended application for dispute resolution and additional evidence to the Residential Tenancy Branch on January 16, 2017. The tenant stated that the documents had been sent to the landlord by registered mail on January 17 but was not able to provide the tracking number. The landlord said she had not received the item. The parties were able to cover all of the relevant information in the oral testimony so I did not consider this evidence package in my deliberations.

No other issues regarding the exchange of evidence were identified.

Issue(s) to be Decided

Is the landlord entitled to a monetary order and, if so, in what amount?

Background and Evidence

This tenancy commenced May 15, 2016 as a one year fixed term tenancy. The monthly rent of \$1000.00 included cable and Internet. The rent was due on the 15th day of the month. The tenants did not want cable services so the rent was subsequently reduced to \$980.00. The tenants paid a security deposit of \$500.00.

The written tenancy agreement included a clause that allowed either party to end the tenancy upon giving the other side 60 days notice.

On November 26 there was a grease fire in the rental unit. The landlords decided that this was an unsafe situation and they did not want to continue the tenancy.

On November 28 the landlord and the tenants had a conversation. The landlord's version is that she told the tenants she wanted to exercise the option contained in the tenancy agreement and give the tenants 60 days to find another place. The tenant's version is that the landlord told them that they wanted to have the rental unit for their own purposes.

The next day the landlord sent the tenants a letter documenting her version of the conversation, in particular, that the tenants agreed to terminate the tenancy on January 31, 2017. A Mutual Agreement to End Tenancy, or any other similar document, was not signed by both parties.

The tenants talked to friends and were advised that when a tenancy is being ended for landlord's use the tenant is not required to pay the last month's rent. They did not seek any advice from the Residential Tenancy Branch.

The tenant testified that in a text message exchange on or about December 16 she told the landlord that they had been advised that when a landlord breaks the contract for personal use the tenant did not have to pay the last month's rent. She asked the landlord if this was true as they had not been in the country for very long and they were not familiar with the law. She testified that the landlord never denied that they were going to use the rental unit themselves; they merely asked when the tenants would move out.

The tenants did not pay the rent that was due on December 15. On January 3 the landlord issued and posted a 10 Day Notice to End Tenancy for Non-Payment of Rent claiming arrears in the amount of \$980.00 that was due on December 15, 2016. They also issued and posted a 1 Month Notice to End Tenancy for Cause.

The tenants did not pay the rent that was due on January 15, 2017. In her oral testimony the tenant referred to a 10 Day Notice to End Tenancy for Non-Payment of Rent for the period January 15 to January 31 in the amount of \$490.00.

The Internet service for both units is provided by Telus at a monthly cost, including all applicable taxes, of \$70.56.

Beginning December 17, 2016, there were frequent interruptions in the Internet service. Some of the interruptions lasted for many hours. Both parties testified that they experienced problems in December and the first part of January. The landlord testified that Telus was upgrading the system and this was the cause of the problem. She testified that they were able to use their telephones when their computers were not working. She also testified that now they were thinking about changing their arrangements.

The tenant testified that they have had no Internet service at all for the last two weeks of January. When they try to connect they receive a message that they must enter a new code. She testified that the landlord has changed the code and refuses to provide it to them. She also testified that in separate conversations both the landlord and her partner told them that since the rent had not been paid they were not going to provide utilities such as Internet access.

Analysis

Section 44 of the *Residential Tenancy Act* sets out the various ways in which a tenancy may be ended. A clause like the 60 day clause contained in this tenancy agreement is not one of them. Section 6(3) states that a term of a tenancy agreement is not enforceable if the term is inconsistent with the Act or regulation so this clause of the tenancy agreement is not valid.

Section 44(c) does allow a tenancy to end, even before the end of a fixed term, if the landlord and tenant agree in writing to end the tenancy. A conversation followed by a letter confirming the conversation does not comply with the legislation and is therefore unenforceable.

Section 49 allows a landlord to end a tenancy if the landlord or a close family member of the landlord (as defined by the legislation) intends in good faith to occupy the unit. To end a tenancy on this ground that landlord must serve the tenant with the form prescribed by regulation, properly completed. The prescribed form is a 2 Month Notice to End Tenancy for Landlord's Use.

A tenant who has been served with a 2 Month Notice to End Tenancy for Landlord's Use may dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. Until the hearing has been completed and a decision rendered by the arbitrator, the tenancy continues.

If a tenant does not dispute the 2 Month Notice to End Tenancy for Landlord's Use and vacates the rental unit, sections 51(1) and 51.1(1) provide that the tenant does not have to pay the last month's rent. The sections are clear that it is only a tenant who has been served with a proper 2 Month Notice to End Tenancy for Landlord's Use that is entitled to this compensation.

The sections that allow a landlord to end a tenancy for non-payment of rent (section 46) or for cause (section 47) are similarly structured. After being served with a notice to end tenancy the tenant may dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch.

In all cases, once a tenant disputes a notice to end tenancy the tenancy, the tenancy continues. The tenant is entitled to use and occupancy of the rental unit and the landlord cannot force the tenant out of the rental unit until an arbitrator has decided that the notice to end tenancy is valid. During this same period, the landlord is entitled to the payment of rent in accordance with the tenancy agreement.

In this case the tenants had no legal obligation to move out of the rental unit by January 31, 2017. The 60 day clause in the tenancy agreement was unenforceable; the verbal agreement to move by January 31 was unenforceable; the tenants had not been served with a 2 Month Notice to End Tenancy for Landlord's Use; and no decision had been rendered on their application to set aside the 1 Month Notice to End Tenancy for Cause and the 10 Day Notice to End Tenancy for Non-Payment of Rent. Even if the 1 Month Notice to End Tenancy for Cause had been ruled valid, the effective date of that notice was February 14, 2017.

The tenants are not entitled to the section 51 compensation because they had not been served with a proper 2 Month Notice to End Tenancy for Landlord's Use. They were in possession of the rental unit and they are responsible for the rent for the period December 15, 2016 to January 31, 2017 in the amount of \$1470.00, the amount claimed by the landlord.

The evidence is clear that there has been an interruption in one of the services included in the rent, namely, an Internet connection. Legally, it does not matter whether the

service provider or the landlord is responsible for the interruption. As explained in *Residential Tenancy Policy Guideline 16: Claims in Damages*:

“Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. A landlord is expected to provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. If, on the other hand, the tenant is deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of an abatement of rent or a monetary award for the portion of the premises or property affected.”

Section 65(1) allows an arbitrator who has found that a landlord has not complied with the Act, regulation or tenancy agreement to order that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of the tenancy agreement.

Section 62(1)(b) gives an arbitrator the authority to determine any matters related to an application for dispute resolution and that arise under the *Act* or the tenancy agreement. Subsection (3) allows an arbitrator to make any order necessary to give effect to the rights, obligations or prohibitions under the *Act*.

If the tenants would have had to provide their own Internet connection the cost would have been \$70.56. I find that this amount represents the value of this service in this tenancy agreement. I find that the tenants were deprived of this service from mid-December to the end of January and, pursuant to section 62(1) and section 65(1) I award the tenants the sum of \$105.00 for the loss of this service.

As the landlord was substantially successful on her application I find that the landlord is entitled to reimbursement from the tenants of the \$100.00 fee she paid to file it. On the other hand, the tenants' decision to move out of the rental unit before this hearing rendered their application moot. It is for this reason that I am not ordering the landlord to reimburse the tenants for the \$100.00 they paid to file their application.

Setting these awards off against each other I find that the landlord is entitled to payment of \$1475.00 from the tenants and pursuant to section 67 I grant the landlord a monetary order in this amount. If necessary, this order may be filed with the Small Claims Court and enforced as an order of that court.

If the security deposit has not been returned to the tenants 38(3)(a) allows the landlord to retain the security deposit in partial settlement of the monetary order. In that case, the landlord may still file the monetary order with the Small Claims Court but will only be able to collect the balance owed.

Conclusion

- a. An order of possession has been granted to the landlord. If necessary, this order may be filed with the Supreme Court and enforced as an order of that court.
- b. A monetary order has been granted to the landlord. If necessary, this order may be filed with the Small Claims Court and 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: February 06, 2017

Residential Tenancy Branch