Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, RP, RR, FFT

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution, filed on September 4, 2020, wherein the Tenant requested the following relief:

- an Order canceling a 1 Month Notice to End Tenancy for Cause issued on August 19, 2020 (the "Notice");
- an order that the Landlord make repairs to the rental unit;
- an order that the Tenant be permitted to reduce her rent by the cost of repairs, services or facilities; and,
- recovery of the filing fee.

The hearing of the Tenant's Application was scheduled for 11:00 a.m. on October 19, 2020. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

Preliminary Matter—Matters to be Decided

Hearings before the Residential Tenancy Branch are governed by the *Residential Tenancy Branch Rules of Procedure.* At all times an Arbitrator is guided by Rule 1.1 which provides that Arbitrators must ensure a fair, efficient and consistent process for resolving disputes for landlords and tenants.

Residential Tenancy Branch Rule of Procedure 2.3 provides that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Hearings before the Residential Tenancy Branch are also scheduled on a priority basis. Time sensitive matters such as a tenant's request for emergency repairs or the validity of a notice to end tenancy are given priority over monetary claims.

It is my determination that the priority claim before me is the validity of the Notice. I also find that this claim is not sufficiently related to the Tenant's request for a repair order or a rent reduction.

I therefore dismiss, with leave to reapply, the Tenant's request for a repair order and a rent reduction.

Preliminary Matter—Service of Evidence

At the outset of the hearing counsel advised that they did not receive the Tenant's evidence until two weeks prior to the hearing. The Tenant testified that she delivered her evidence to the Landlord at some point during the first week of October 2020. She stated that she did so via registered mail as well as dropping the materials off at the Landlord's lawyer's office.

The Tenant further stated that she contacted the Residential Tenancy Branch about service deadlines and was informed that so long as she had her evidence uploaded and served two weeks prior to the hearing it would be considered. The Tenant also stated that she had to wait for a contractor to come and assess the bathroom tiles. She stated that he arrived during the first week of October 2020 at which time she served her entire evidence package on the Landlord.

Additionally, the Tenant advised that she was not properly served with the Landlord's response materials as those materials were delivered by email. While email was, for a period of time, an acceptable form of service during the Provincial State of Emergency, service by email was not acceptable at the time of service.

Counsel for the Landlord stated that they did not receive any evidence from the Tenant in support of her Application until two weeks prior to the hearing such that they were very limited in terms of time to respond; consequently, they served their response materials by email to ensure the Tenant received them in time for the hearing.

From my review of the above evidence, I find that it primarily relates to the Tenant's request for a rent reduction as well as an Order that the Landlord make repairs to the rental unit.

Service of evidence is address in the *Rules* as follows:

The *Residential Tenancy Branch Rules of Procedure* provide in part as follows:

3.1 Documents that must be served

The applicant must, within 3 days of the hearing package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

a) the application for dispute resolution;

b) the notice of dispute resolution proceeding letter provided to the applicant by the Residential Tenancy Branch;

c) the dispute resolution proceeding information package provided by the Residential Tenancy Branch;

d) a detailed calculation of any monetary claim being made;

e) a copy of the Notice to End Tenancy, if the applicant seeks an order of possession or to cancel a Notice to End Tenancy; and

f) any other evidence, including evidence submitted to the Residential Tenancy Branch with the application for dispute resolution, in accordance with Rule 2.5 [*Documents that must be submitted with an application for dispute resolution*].

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch not less than 14 days before the hearing.

In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the Arbitrator will apply Rule 3.17.

3.15 Respondent's evidence

To ensure fairness and to the extent possible, the respondent's evidence must be organized, clear and legible.

The respondent must ensure documents and digital evidence that are intended to be relied on at the hearing are served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. In all events, the respondent's

evidence must be received by the applicant and the Residential Tenancy Branch not less than 7 days before the hearing.

In the event that evidence is not available when the respondent submits and serves their evidence, the Arbitrator will apply Rule 3.17 [*Consideration of new and relevant evidence*].

See also Rules 3.7 [*Evidence must be organized, clear and legible*] and 3.10 [*Digital evidence*]

3.16 Respondent's proof of service

At the hearing, the respondent must be prepared to demonstrate to the satisfaction of the Arbitrator that each applicant was served with all their evidence, as required by the Act.

3.17 Consideration of new and relevant evidence.

Evidence not provided to the other party and the Residential Tenancy Branch in accordance with Rules 3.1, 3.2, 3.10, 3.14 and 3.15 may or may not be considered depending on whether the party can show to the Arbitrator that it is new and relevant evidence and that it was not available at the time that their application was filed or when they served and submitted their evidence.

The Arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party.

Both parties must have the opportunity to be heard on the question of accepting late evidence.

If the Arbitrator decides to accept the evidence, the other party will be given an opportunity to review the evidence. The Arbitrator must apply Rule 6.3 [*Whether to adjourn the dispute*

Rule 3.1(f) provides that an Applicant must provide their evidence in support of their claim within three days of filing. The purpose of this Rule is to ensure the Respondent is able to respond to the totality of the claim. This is consistent with the *Principals of Natural Justice* which provide that a party to a dispute has the right to know the claim against them and is entitled to an opportunity to review and meaningfully respond to any evidence filed by the Applicant.

While *Rule 3.17* allows me to consider new and relevant evidence, that evidence must have not been available at the time the application was filed. In this case, the Tenant filed all of

her evidence two weeks prior to the hearing. Some of that evidence was available at the time of filing, but the quote from the tile contractor was not.

After some time addressing the issue of service of evidence, I informed the parties during the hearing that neither party served their evidence in accordance with the *Rules.*

Preliminary Matter—Landlord's Withdrawal of the Notice

Following the above discussion regarding service of evidence and a possible adjournment, the Landlord's confirmed he wished to withdraw the Notice.

The only issue left to be decided was the Tenant's request for recovery of the filing fee.

Issue to be Decided

Is the Tenant entitled to recover the filing fee?

Analysis and Conclusion

As discussed during the hearing, a Tenant who receives a notice to end tenancy has the option to either accept the end of the tenancy and move out, or apply to dispute the notice. Section 47(5) provides that a tenant who receives a notice to end tenancy for cause is *conclusively presumed* to have accepted the end of the tenancy if they do not make an application for dispute resolution.

In this case both parties had issues with respect to service of their evidence. However, when a tenant applies to dispute a notice, the *Rules* provide that it is the landlord who bears the burden of proving the notice on a balance of probabilities.

The priority claim before me was the validity of the Notice. Although the Landlord withdrew the Notice during the hearing, they only did so after the Tenant had paid the filing fee and the hearing commenced.

Section 72(1) of the *Act* gives me the discretion to award the filing fee. In this case, I find such an award to be appropriate. I therefore authorize the Tenant to withhold the sum of $100.00 from any rent owing 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: October 21, 2020

Residential Tenancy Branch