Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding C-Smart Holding Company Ltd. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, DRI, FFT

Introduction

The tenants (hereinafter the "tenant") filed their Application for Dispute Resolution on June 15, 2021. They seek a cancellation or withdrawal of the 10-Day Notice to End Tenancy for Unpaid Rent (the "10-Day Notice") issued by the landlord on June 11, 2021. Additionally, they dispute a rent increase they deem illegal, and request reimbursement of the Application filing fee. The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*") on September 17, 2021.

Both parties attended the conference call hearing. I explained the process and both parties had the opportunity to ask questions and present oral testimony during the hearing.

Preliminary Matter

At the outset of the hearing, the tenant confirmed they received the document evidence of the landlord by registered mail.

The landlord confirmed they received the notice of this hearing from the tenant, as well as their evidence. They noted they received this on July 14, 2021, with evidence of a date stamp and the initials of an office agent at the time received. This was five days after the notice was generated at the Residential Tenancy Branch on July 9, and the landlord noted this runs counter to the *Rules of Procedure* and instructions provided with the notice of this hearing.

In the hearing the tenant confirmed they dropped the hearing package (including their evidence) in person at the landlord's place of business on July 14.

This is set out in the *Residential Tenancy Branch Rules of Procedure*, Rule 3.1. There is no remedy under the *Act* for an applicant's failure to adhere to this rule. It is listed as a requirement; however, in these circumstances I find there is no prejudice to the landlord resulting from two additional days added. The landlord has had ample time (over 60 days) with the tenant's evidence in advance of the hearing and was fully prepared in the hearing, having responded with their own prepared evidence to the tenants within an acceptable timeline.

With no remedy in place, I do not dismiss the tenant's Application for this reason. This also does not preclude my full consideration of the tenant's evidence, where I determine it is relevant.

Issues to be Decided

Is the tenant entitled to cancellation or withdrawal of the 10-Day Notice?

Should the tenant be unsuccessful in cancelling the Notice, is the landlord entitled to an order of possession, pursuant to s. 55 of the *Act*?

Did the landlord impose a rent increase above the amount allowed by law?

Can the tenant recover the Application filing fee, pursuant to s. 72 of the *Act*?

Background and Evidence

Both parties provided a copy of the extant tenancy agreement. The tenant signed a tenancy agreement with a prior landlord agency in 2011. The current landlord did not start managing the property until 2013.

The agreement was initially for a fixed term ending on March 31, 2020. Notation on the document initialled by the parties updates this year to "2031." The initial rent amount was $2,150. On the Application, the tenant listed the rent amount as $1,650 per month, payable on the first day of each month.

Another notation on the agreement states: "$2500 per month for last 11 years." This bears the initials of three individuals. The final 11 years of the agreement commenced on April 1, 2020. The landlord stated a $2,500 rent amount was the intention going

forward. They drew my attention to paragraph 12 of the agreement, which provides for a rent increase once per year, at no more than the amount set out by the Regulation.

The landlord issued and served the 10-Day Notice in person to the tenant on June 11, 2021. This gave the move-out date of June 21, 2021. The landlord issued this because the tenant failed to pay the outstanding rent amount of $10,066.66 due on June 1, 2021. An attached ledger in the evidence shows this tallied amount, with the majority of the balance being $850 short of the $2,500 rent amount, from May 2020 through to June 2021.

The ledger shows a reduction in rent for each of the subsequent months of April and May 2020. The landlord as of April 1 set the "contract rent" at $2,500 going forward, in line with the tenancy agreement "last 11 years." The tenant reduced $500 from the amount of $2,150 because of prior Arbitrator decisions, set out below. Conversely, the landlord added the balance for each month with a $2,500 rent amount; thus, the largest portion of the rent amount owing as of June 1, 2021, was $850 for each month, outstanding.

The landlord's evidence includes a repayment plan setting out the amounts owing, as reflected in the ledger. This was the landlord's proposed payment plan as of March 2021. The tenant's written response to the landlord on this is essentially their submissions on why the 10-Day Notice is not valid.

First, the tenant's position on this 10-Day Notice is that it is based on an illegal rent increase. They rely on an earlier 2018 ruling made by an Arbitrator in this branch. This was their dispute to the landlord's attempt to increase rent via the established Residential Tenancy Branch process, with use of a form, in 2018 within the allowable amounts for that year pursuant to s. 42 of the *Act*. The Arbitrator found that paragraph 12 of the tenancy agreement conflicted with the related provisions of the *Act*. The Arbitrator found this particular rental increase initiated by the landlord was of no effect.

From the August 2018 decision the tenant relied on the position that:

> the agreement for not increasing the rent was also set out in the conditions of the sale of the building as written up by a lawyer. The tenant provides this agreement for sale as evidence. The tenant states that the lawyer did not draft the tenancy agreement as this has been entered into prior to the document written by the lawyer. The tenant states that at the time of signing the tenancy agreement nobody put their mind to paragraph 12. The tenant argues that paragraph 12 does not apply as it is in conflict with the fixed term that is covered in the Act and the tenancy agreement

Because of this, here the tenant relied on the position, confirmed by the previous Arbitrator, that the landlord cannot impose any rent increase to the tenancy for the last 11 years because they had previously agreed to the fact that rent would be set at $2,500.

The landlord's position, as justification for issuing the 10-Day Notice, is that they have not increased the rent. The "rent increase freeze" stemming from Ministerial Order 89 (which the landlord provided for reference) does not apply here:

- s. 6(2) in the Ministerial Order 89 provides that the "rent increase freeze" does not apply to a rent increase where "authorized under the tenancy agreement by a term referred to in section 13(2)(f)(iv)" of the *Act*
- that subsection in the *Act* refers to an agreed term in the tenancy agreement for "the amount of rent payable for a specified period".

The landlord's point as justification for issuing the 10-Day Notice is precisely that this is not a rent increase; rather, the amounts are owing because of the agreed-upon term in the tenancy agreement. This is to refute the tenant's submission that the landlord cannot issue this 10-Day Notice on the pretext of rent amounts owing, those that accrued from an illegal rent increase by the landlord.

The tenant responded to this by pointing to s. 3(1) of Ministerial Order 89, showing this section is "categorial". At two points in the hearing, the tenant identified this section as showing that a landlord must NOT give a notice to increase rent.

Secondly, the tenant relies on the same earlier 2018 ruling, where the Arbitrator prescribed a $500 reduction in rent as of September 1, 2018, due to the landlord's failure to install a security gate. This was "for each month thereafter until the gate is installed by the landlord." In March 2020, another Arbitrator confirmed the installation was not completed to a satisfactory degree: though approved by the municipality, this "does not necessarily make the property suitable for occupation by the tenants." That Arbitrator authorized a $500 reduction in rent, going forward "until such time as the landlord has applied for and obtained an order from an arbitrator . . . as to whether the repairs have been completed in accordance with the previous arbitrator's decision."

The tenant maintains that repairs to the gate were still not completed when the landlord issued the 10-Day Notice; therefore, their reduction in rent amounts to $1,650 per

month was justified in line with previous decisions. The landlord did not follow the March 2020 ruling to obtain an order that states repairs are complete.

In response to this, the landlord presented that gate repairs were complete when they advised the tenant of this in May 2020. There was no other complaint from the tenant about a non-functioning gate since June 12, 2020 after additional repairs. In response to this, the tenant maintains the *security* issue of the gate is not resolved where it does not lock automatically. Further, the landlord did not obtain the necessary order from this branch to state definitively that repairs are complete.

Analysis

The *Act* s. 26 requires a tenant to pay rent when it is due under the tenancy agreement whether or not the landlord complies with the *Act*, the regulations, or the tenancy agreement, unless the tenant has a right under the *Act* to deduct all or a portion of the rent.

In reviewing whether the landlord's issuance of the 10-Day Notice is warranted and justified under law, I shall examine: a) what the rent amount was at the time of its' issuance; and b) the amount which the tenant was entitled to deduct from that rent amount.

I find the rent amount was $2,500 going forward, as of April 1, 2020. This is a set out in the tenancy agreement; both parties confirmed this extra notation in the agreement. This is the "last 11 years" as set out in the agreement, exactly to the day commencing on April 1, 2020. In the hearing, the tenant did not challenge this piece of the tenancy agreement to state it was legally invalid or of no effect. I find the tenant cannot say this was a form of rent increase. It appears they are making this submission when it suits their purposes, and in direct contradiction to their position in the 2018 hearing where they submitted a landlord-imposed rent increase was not allowed because of the set amount of rent.

This $2,500 is a rent amount the tenant agreed to. It is not a rent increase the landlord is imposing as per the *Act*, nor is it arbitrarily lying outside the *Act* or the tenancy agreement as a *form* of rent increase. I find the tenant signed the agreement in the proper area of the notation, making them fully aware of this amount going forward. Non-payment by the tenant here constitutes a breach of the tenancy agreement and a breach of s. 26.

This means it is not a rent increase that is subject to the provisions of the Ministerial Order 89. In these circumstances there is thus no "rent increase freeze", simply because this is not a situation of a rent increase. This stands in contrast to the 2018 Arbitrator decision where that Arbitrator *did* find the landlord imposed a rent increase, with their finding being that the particular clause in the tenancy agreement the landlord relied upon was in contrast to the *Act*. The landlord here did *not* attempt to increase rent via the s. 42 provisions of the *Act*, which *can* be interpreted as conflicting with what is set in the tenancy agreement.

I don't accept the tenant's submission that this is an imposed rent increase and I find they were not authorized to withhold a portion of the rent for this reason. The tenant's dispute of a rent increase, as per their Application, is dismissed without leave to reapply.

The tenant also submitted they were still paying reduced rent (by $500 per month) because the landlord had not yet fulfilled their obligation for full gate repair. This is following two prior Arbitrator decisions authorizing and confirming a reduced rent amount.

Above, I find the monthly rent was set – legally as per the tenancy agreement – to $2,500, and this was not pre-empted by a rent increase freeze as per Ministerial Order 89. The tenant continued with reduced rent payments by $500, from the $2,150 rent amount, without regard to the agreed-upon amount of $2,500. Given my finding of the $2,500 rent amount, the tenant has not been paying the required amount of rent even accounting for the Arbitrator-sanctioned $500 reduction.

The *Act* s. 46(1) states that a landlord may end a tenancy if rent is unpaid on any day after the rent is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the tenant receives the notice.

Following this, s. 46(4) states that within 5 days of receiving a notice a tenant may pay the overdue rent, thereby cancelling the Notice, or dispute it by filing an Application for Dispute Resolution.

I am satisfied that when the landlord issued the 10-Day Notice on June 11, 2021 the tenant had an extant amount of rent owing. In the hearing both parties confirmed the landlord served the 10-Day Notice in person on that date. They did not pay the rent

amount owing within 5 days. Because of this, the tenant's Application to cancel the 10-Day Notice is dismissed. The tenancy is ending.

Under s. 55 of the *Act*, when the tenant's Application to cancel a notice to end tenancy and I am satisfied the document complies with the requirements under s. 52 regarding form and content, I must grant the landlord an order of possession. On my review, I find that the 10-Day Notice complies with the requirements of form and content; therefore, the landlord is entitled to an order of possession.

The *Act* s. 55(1.1) specifies that I must grant an order requiring the payment of the unpaid rent. The landlord did not prove they applied to determine their compliance with the previous Arbitrator decision on required repairs. This was a specific provision that was explicit in the March 19, 2020 Arbitrator decision. I reduce the landlord's calculated rent amount owing by $500 per month for this reason, from April 2020 to May 2021. This also applies to the months of February and March 2021 which the landlord entered into the ledger as $2,150.

For the purpose of granting repayment of unpaid rent, this is money that is due and owing *during* the tenancy – this is up until the end of the tenancy. For this purpose, I apply s. 68(2) of the *Act* and order the end-of-tenancy date to be June 30, 2021. On the ledger, the landlord did not indicate payment, or lack thereof, for the months of July onwards through to the hearing month of September.

The tenant here was an "overholding tenant" and occupied the rental unit after the tenancy ended, as defined in the *Act*, s. 57. Compensation for overholding is not considered rent; this occurred after the tenancy ended. The landlord must make a separate application for this compensation for the tenant overholding.

In their total amount owing, the landlord factored in amounts owing in a payment plan. This was for amounts owing from April to August 2020. Above, I have based my calculation on the monthly rent of $2,500, before Arbitrator-ordered reductions. This covers the amount claimed by the landlord in their payment plan, and there is no addition for the three repayments.

Because tenant was not successful on their Application, I make no award for reimbursement of the Application filing fee.

Factoring in each of these pieces of the equation above, I grant the landlord a monetary order for the amount of $4,550. This is the rent amount owing as of the end-of-tenancy

date of June 30, 2021. The landlord must apply for compensation of other amounts owing beyond this in a separate dispute resolution process.

Conclusion

For the reasons outlined above, I dismiss the tenant's Application for cancellation of the 10-Day Notice, without leave to reapply. I dismiss the other grounds on their Application, without leave to reapply.

I grant an Order of Possession to the landlord **effective TWO DAYS after service of this Order to the tenant**. The landlord must serve this Order of Possession to the tenant. Should the tenant fail to comply with this Order, the landlord may file this Order with the Supreme Court of British Columbia where it may be enforced as an Order of that court.

I order the tenant to pay the landlord the amount of $4,550, pursuant to s. 55(1.1) of the *Act*. I grant the landlord a monetary order for this amount. The landlord may file this monetary order in the Provincial Court (Small Claims) where it will be 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 s. 9.1(1) of the *Act*.

Dated: October 4, 2021

Residential Tenancy Branch