



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNR, FFT

Introduction

This hearing occurred by conference call based on an Application for Dispute Resolution filed by the Tenant November 28, 2022 (the “Application”). The Tenant applied:

- To dispute a 10 Day Notice to End Tenancy Issued for Unpaid Rent or Utilities dated November 27, 2022 (the “Notice”)
- To recover the filing fee

The Tenant and Landlord appeared at the hearing. I explained the hearing process to the parties. I told the parties they are not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). The parties provided affirmed testimony.

Both parties provided evidence for the hearing. The Landlord confirmed receipt of the hearing package. The Landlord confirmed receipt of the Tenant’s evidence March 20, 2023, which was within time. The Tenant confirmed receipt of the Landlord’s evidence.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered all evidence provided. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Should the Notice be cancelled?
2. Is the Tenant entitled to recover the filing fee?

Background and Evidence

A written tenancy agreement was provided and the parties agreed it is accurate. The agreement shows utilities are included in rent. Term 6 of the addendum states:

6. **Utilities:** Utilities are included in the rent; however, will be metered and monitored to ensure that they are within historical averages. If the utilities exceed the historical average, the tenant will be responsible for any overage use and will be required to reimburse the measured amount within 3 months of notification. Any tenant who wishes to use an air conditioner understands that they are responsible for any increases in the hydro bill above the allotted amount.

The Notice was issued based on \$1,684.74 in unpaid utilities.

The Landlord submitted as follows. The Notice was issued because the Tenant has not paid for utilities as required by term 6 of the addendum. The utilities amount used by the Tenant exceeded the historical average and therefore the Tenant must pay for the increase in utility costs. There was no historical average for utility usage in the rental unit so the Landlord used the first year of the tenancy as the “historical average”.

The Tenant disputed that they owe the Landlord for utilities and stated as follows. There has been an increase in the cost of utilities that is not tied to usage amounts. The utilities usage includes usage by their rental unit and another unit. The only average for use is the first year of the tenancy which is not a good baseline given the circumstances.

In reply, the Landlord stated as follows. Term 6 of the addendum is not tied to increase in use and covers increase in utility rates. All units in the complex have proceeded with a sixty-forty split of utilities between units unless there is excessive use by one unit which is considered. The first year of the tenancy is an appropriate baseline.

Analysis

Section 6 of the *Act* states:

(3) A term of a tenancy agreement is not enforceable if...

(b) the term is unconscionable, or

(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

The Notice was issued for unpaid utilities.

Utilities are included in rent unless term 6 of the addendum applies.

Considering the arguments of the parties, I find term 6 of the addendum unenforceable for the following reasons.

The main point is what the parties knew and agreed to about utilities when the tenancy agreement was entered into. The Landlord cannot unilaterally change the terms of the tenancy agreement (see section 14(2) of the *Act*).

Term 6 is obviously not clear because the parties have different interpretations of it. I note that I disagree with the Landlord's interpretation of term 6 and find it is tied to usage. However, the point is the parties clearly disagree about what term 6 of the addendum means.

Further, the meaning of and how to apply term 6 is not clear because it refers to "historical averages" yet there were no historical averages when the tenancy agreement was signed. Term 6 does not state that the "historical averages" will be based on the first year of the tenancy and I do not find the Tenant knew or agreed to this.

Term 6 does not state that utility usage is calculated based on two separate rental units. The evidence before me does not show that the Tenant knew or agreed to term 6 with the understanding that usage would be calculated based on two separate rental units, one of which the Tenant has no control over. I find term 6 is unfair because the Tenant could be responsible to pay for increased utility usage by a separate unit, something they have no control over.

Term 6 is unclear and unfair and therefore unenforceable. Utilities are included in rent. The Landlord cannot require the Tenant to pay for utilities because they are included in rent and term 6 of the addendum is unenforceable. The Landlord did not have grounds to issue the Notice. The Notice is cancelled. The tenancy will continue until otherwise ended in accordance with the *Act*.

The Tenant is entitled to recover the \$100.00 filing fee and can deduct this from their next rent payment.

Conclusion

The Notice is cancelled. The tenancy will continue until otherwise ended in accordance with the *Act*.

The Tenant can deduct \$100.00 from their next rent payment.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: April 18, 2023

Residential Tenancy Branch