Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Introduction

This hearing dealt with the Tenants' Application for Dispute Resolution under the *Act* (the "*Act*") for:

- to dispute a 10-Day Notice to End Tenancy for Unpaid Rent (the "10-Day Notice")
- to dispute a One-Month Notice to End Tenancy for Cause (the "One-Month Notice")
- an order regarding the Tenant's dispute of a rent increase by the Landlord under s. 41 of the *Act*
- an order to allow the Tenant to reduce rent for repairs, services or facilities agreed upon but not provided, under s. 27 and s. 65 of the *Act*
- an order for the Landlord to make repairs to the rental unit under s. 32 and s. 62 of the *Act*
- an order for the Landlord to provide services or facilities required by law under s. 27 of the *Act*
- an order requiring the Landlord to comply with the *Act*, regulation or tenancy agreement under s. 62 of the *Act.*

Service of the Notice of Dispute Resolution Proceeding

The Landlord acknowledged service of the Notice of Dispute Resolution Proceeding, stating they received this information on September 1. Though the Landlord submits this was after the Tenants' required timeline for service, I find the Tenants (hereinafter, the "Tenant") correctly served this information to the Landlord – to the address the Landlord provided as the address for service -- as the *Act* requires.

Service of Evidence

The Tenant set out that they provided evidence to the Landlord with their original package containing the hearing information, *i.e.*, the Notice of Dispute Resolution Proceeding. As above, the Landlord confirmed they received this information from their own mailbox on September 1. I find the Tenant properly served evidence as required; therefore, I give all evidence submitted by the Tenant full consideration.

The Landlord at the start of the hearing stated they could only provide a "power of attorney" document and two other pieces of evidence to the Residential Tenancy Branch on September 1. There is no proof from the Landlord that they served this evidence separately to the Tenant in advance of the hearing, as set out in the *Residential Tenancy Branch Rules of Procedure*; therefore, I give this evidence no consideration in this matter.

The Landlord stated they provided more evidence to the Residential Tenancy Branch on September 5, 2023; however, this evidence did not appear in the record. The Landlord gave no proof that they provided this evidence to the Tenant in time for the hearing. I find the Landlord was not prejudiced by the Tenant using the address for service that the Landlord provided on the One-Month Notice.

Further, I provided an Interim Decision on September 8, stating "There is no opportunity to provide more evidence in this matter." Despite this, the Landlord provided documents to the branch on September 20, 2023, though did not refer to these documents in the hearing. There is no proof they provided these documents directly to the Tenant; therefore, I give the Landlord's documents no consideration in this matter. I find the Tenant served the Landlord the Notice of Dispute Resolution Proceeding, and their evidence, within the required timeline – it is the Landlord's shortcoming that they were not able to check the postal service they provided as an address for service in this matter. I find that the Tenant would be prejudiced by inclusion of evidence from the Landlord, and the Landlord did not provide that evidence to the Residential Tenancy Branch for the first scheduled hearing on September 7, 2023.

Preliminary Matter – 10-Day Notice

As set out in my Interim Decision of September 8, I find there was no proper 10-Day Notice served by the Landlord to the Tenant. In the September 7 hearing the Landlord confirmed they did not serve a 10-Day Notice to End Tenancy. I dismiss this issue from the Application, without leave to reapply. There was no 10-Day Notice to End Tenancy in proper form served by the Landlord; therefore, there is no associated Order of Possession to the Landlord for this reason.

Preliminary Matter – other issues provided by Tenant on the Application

As set out in my Interim Decision of September 8, I remove two other issues from the Tenant's Application: the provision of services/facilities (actually related to repairs, listed below); and the Landlord's compliance with the legislation/tenancy agreement (non-specific on the Tenant's Application and covered by other included issues). The authority for this administrative measure is set out in Rule 2.3. and Rule 6.2 of the *Residential Tenancy Branch Rules of Procedure*.

The Tenant also applied on the issue repairs in the rental unit. At the conclusion of the second hearing, I asked the Tenant whether their written submissions would adequately summarize that issue; however, this measure would not afford the Landlord an adequate chance to respond to the issues raised by the Tenant on that topic. Given that the Landlord's evidence is excluded from consideration, I am unable to provide a decision on that discrete issue; it would be fundamentally unfair to the Landlord should I arrive a conclusion on that issue without a hearing on that issue. For these reasons, I separate this issue from consideration, and remove it from this present Application. The Tenant has leave to reapply on this issue.

The three relevant issues for my consideration in this hearing are listed below.

Issues to be Decided

- Should the Landlord's One Month Notice be cancelled? If not, is the Landlord entitled to an Order of Possession?
- Did the Landlord impose a rent increase that was above the amount allowed by law?
- Is the Tenant entitled to a reduction in rent for repairs, services or facilities agreed upon but not provided?

Background and Evidence

The Tenant provided a copy of the tenancy agreement. This began on June 1, 2018 for an initial one-year fixed term, then reverting to a month-to-month agreement. This initial agreement, for the basement rental unit, continued until June 2020. The Tenant moved to the upstairs of the rental unit property (the "rental unit") in June 2020.

- **Should the Landlord's One Month Notice be cancelled? If not, is the Landlord entitled to an Order of Possession?**

The Landlord issued the One-Month Notice on August 2, 2023, setting the move-out date of September 2, 2023. On page 2 of the document, the Landlord indicated the following reasons:

□ Tenant or a person permitted on the property by the tenancy has significantly interfered with or unreasonably disturbed another occupant or the landlord

□ Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The Landlord added a written description after the second issue listed above: "(Late payment for the gas and receiving 3 notice of disconnect from fortis)"

The Landlord provided written details on page 2 of the One-Month Notice:

> My tenant who lives on the upper floor creates noise that disturbs the tenant in the basement. The upper floor tenant has two kids who are toddlers. They run, jump, and cry all the time (according to my lower floor tenant). Additionally, the upper floor tenant has too many parties, and their parents visit . . . multiple times. On one occasion, they came and stayed for a couple of months (4 people, according to the complaint from the tenant on the lower floor).
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> The lower floor tenant . . . has respectfully requested that the noise be addressed, it hasn't made any difference. Our lower floor tenant loses roommate within one or two months of staying, and she has given us notice that she will be moving out. Our previous tenant . . . also moved out due to the noise and the same problem.
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> Further more, the upper floor tenant is constantly late in paying the utility (gas) bill, and we have received three notices of disconnection during their tenancy. We initially informed them about these issues through a phone conversation in February 2023 (about the late payment of the utilities and noise), but they noted problems above haven't been resolved. I sent them another notice by email on May 7th, 2023, and we are still experiencing the same problem.

In the hearing, the Landlord's witness, who lives on the lower level of the rental unit property underneath the Tenant, described the following points:

- they lived in the lower level of the rental unit property since December 2021 – the Tenant was already present upstairs
- the issue from the beginning is "screaming, running and lots of people upstairs", for example gatherings until midnight and moving furniture
- in the morning, there is running around, screaming and crying

- after asking the Tenant to keep it quite a couple of times, the message from the Tenant was ‘it is what it is’ and the Tenant was not willing to cooperate
- they lost 3 roommates because of this situation
- “really annoying” when kids start, when the grandmother starts to yell, then the kids cry and scream because of that
- the Tenant denies this situation is a problem and don’t accept this
- on one occasion the Tenant left the children for 10 days with their grandmother and the grandmother was not able to handle them
- moving furniture in the middle of the night

In response to this, the Tenant provided the following points:

- they did not request to the Landlord for the downstairs tenant (i.e., the witness in the hearing) to leave
- they suggested their own friend to be a replacement to the witness, at the time the witness lost one roommate
- they lived in the basement previously for almost 2 years (2018 – 2020), then had children and needed to move upstairs at the rental unit property
- when living downstairs, they had the same issue with a noisy-structured house, with noise from upstairs – “even walking creates noise”
- they explained to the witness that infant children can’t talk and can only communicate in this way – they repeated to the witness that they can’t control this issue
- the children are now in daycare, from 8am to 5pm all day, with activities after that, for the past 1.5 years, including when the witness moved in – the Tenant provided records of enrollment for the children in other activities
- they are out of the home most of the day, and sleep from approximately 9pm onwards

The Landlord, in directly describing the situation, noted the Tenant basically denies the situation and is “dismissive of communication”. The witness who attended, from the Landlord’s recollection, did not complain initially for 9 months after they moved in. The Landlord changed the flooring in 2006 in the home; however, the wood frame of the structure won’t alleviate the problem. The Landlord also recalled they had no issues prior to this Tenant being upstairs, with earlier upstairs tenants who also had children not proving to be a problem.

On the issue of utilities, the Landlord presented that they continued to receive notifications from the utility provider about unpaid utilities for the rental unit. Within the last 2 months prior to the hearing, the utility in question was then changed directly to the account of the Tenant. After that time, the Landlord did not have any notice from the utility provider.

The Tenant confirmed they changed the utility account to their own name, after it was temporarily changed to the Landlord's name when they moved upstairs. Any delay in the past was occasioned by the bills going directly to the Landlord, who then asked the Tenant for payment. With the Tenant paying a percentage of the monthly amounts as billed to them, they require payment from the downstairs resident (*i.e.*, the witness) which has been delayed.

- **Did the Landlord impose a rent increase that was above the amount allowed by law?**

The Tenant on their Application did not provide a current amount of rent they pay. The tenancy agreement in the evidence they provided shows the amount of $1,350, from 2018 when the tenancy started.

In the September 7 hearing, the Tenant stated they moved upstairs in the rental unit property in June 2020. The rent amount was $1,875. The Landlord verified the rent amount of $1,875. The Tenant also stated the amount of $1,900 and the Landlord confirmed this amount in the second hearing.

The Tenant stated they paid $2,000 per month starting in June 2021. They paid $2,100 per month from June 2023 onwards, and in the more recent months before the hearing they paid $2,100 per month.

They stated there was no email or other communication from the Landlord to increase the rent amount officially: "the Landlord told me to increase". The Tenant recalled a telephone discussion about a rent increase, and queried more generally in the hearing: "why does the Landlord accept all those amounts for more than one year?" in reference to the Tenant paying more than required, as the Landlord stated in the hearing.

In response, the Landlord stated that it was a "lie" that they imposed a rent increase. Instead, it was the Tenant who stated they would pay $100 more each year. The Landlord stated: "it was nice of the Tenant to do that, but the Tenant offered, and we accepted that." The Landlord confirmed that they were receiving $2,100 per month from the Tenant more recently.

At the conclusion of the first scheduled hearing, that Landlord stated the amount was $1,875, with nothing on paper to show the rent amount had increased. By the second hearing, the Landlord confirmed the amount required was $1,900.

- **Is the Tenant entitled to a reduction in rent for repairs, services or facilities agreed upon but not provided?**

On the Application, the Tenant provided the following description: “The increase is almost %10. We asked it should be %3.5.” The Tenant provided an amount they request: $1,967.07.

Analysis

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

- **Should the Landlord’s One Month Notice be cancelled? If not, is the Landlord entitled to an Order of Possession?**

The *Act* s. 47 sets out that a landlord may issue a Notice to End Tenancy for Cause to a tenant if a landlord has grounds to do so. Upon receipt of a One-Month Notice, a tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If a tenant files an application, that landlord bears the burden of proving the reasons indicated on the One-Month Notice.

As the Tenant disputed this One-Month Notice on August 9. Because the Landlord served the One-Month Notice to the Tenant on August 7, I find that the Tenant applied to dispute the One-Month Notice within the timeframe allowed by s. 47 of the *Act*. I find that the Landlord here has the burden of proving that they have sufficient grounds to issue the One-Month Notice.

Based on the evidence before me, the testimony of the parties, and on a balance of probabilities, I find the Landlord failed to prove that they have sufficient cause -- on either of the 2 reasons listed -- to issue the One-Month Notice to the Tenant.

The specific ground indicated on page 2 of the One-Month Notice refers to significant interference or unreasonable disturbance to another occupant or the Landlord. The Landlord via their witness in the hearing set out the chief issue of noise emanating from the rental unit.

I find this was not ‘interference’ which connotes ‘intrusion’ or ‘restriction’ of some sort to the Landlord/witness. I find the Tenant was not deliberate in their actions to interfere with the witness who resides in the lower level. I find the Tenant is not creating the sounds on purpose, and not consciously continuing noise without consideration to the Tenant below. The witness was consistent in mentioning about the Tenant’s children, and in response to this the Tenant stated that because of the children’s age, this is simply how they act and communicate.

I find the evidence shows that the Tenant mitigated the impact of sound from the children by having them in daycare, and there is evidence from the Tenant that they are enrolled in a fair number of other activities. This is all time that the children are out and away from the rental unit during the weekdays. I find this further shows the sound coming from the rental unit is not deliberate or intentional. I find the Tenant is not purposefully causing the situation, and there is no evidence that the Tenant is allowing the situation to continue without attention to the Landlord or witness. I find it is too much of an expectation that controlled silence is possible in this situation with two children in the upper level, and a tenant in the lower level, in this older-structure home.

With the situation of a family with two young children upstairs, and a single-occupant tenant downstairs, I find this is not an unreasonable disturbance. I find it is not unreasonable for the Tenant to have children, and other family members who visit on a regular basis. To end a tenancy more simply focused on this reason would be fundamentally unfair. For the Tenant's reference, this is not an entitlement to unrestricted noise of all sorts emanating from their rental unit.

In addition, I framed my question to the witness at the start of their testimony in terms of specific information, inquiring on notable incidents or specific dates that stood out. The witness did not provide such information in their account. I find there is no specific information present in this account to show neither an interference, nor an unreasonable disturbance. For this reason, the more general description such as the Landlord/witness presented here, is not sufficient to end this tenancy, minus evidence repeated, deliberate occurrences of <u>significant</u> interference, or <u>unreasonable</u> disturbance.

In sum, any cause to end the tenancy for this reason would fundamentally center on the Tenant having children, and there is nothing that can preclude that from happening, or a tenancy not continuing for that reason.

Concerning the other reason provided by the Landlord, I find the matter of late utility payments does not constitute a breach of a material term of the tenancy agreement. As provided in the *Residential Tenancy Branch Policy Guidelines*, which give a statement of the policy intent of the *Act*, particularly '8. Unconscionable and Material Terms', a material term is one which both parties agree is so important that "the most trivial breach of that term gives the other party the right to end the agreement."

Further, ending a tenancy because of such a breach means the party alleging the breach must inform the other party in writing that there is a problem. Then, they must set out that they

believe the problem is a breach of a material term – in explicit terms – and set a reasonable deadline for the other party to resolve the issue, and specify that if the problem is not fixed by the deadline, they will end the tenancy. The Landlord provided no evidence of such communication to the Tenant on the issue of utilities invoice payments. For the time in question, I find the Landlord was the account holder; therefore, it was their responsibility entirely to keep the account up-to-date in their own name.

I find the issue of utilities was resolved before the hearing, and the Landlord testified that more recently, with the account in the Tenant's own name, this was not an ongoing issue. For this reason, I find the Landlord has no valid reason to end the tenancy for breach of a material term of the agreement. The tenancy shall not end for this reason.

In sum, this tenancy is not ending by reason of the Landlord serving the One-Month Notice. I find the reasons the Landlord's reasons are not valid.

- **Did the Landlord impose a rent increase that was above the amount allowed by law?**

There is confusion between the parties about the amount of rent to be paid each month. I find the Tenant was under the false assumption that the Landlord increased the rent unilaterally. The Landlord submitted that the Tenant was simply paying an increased amount of rent, and they have been accepting that. Why the Landlord has not, to date, chosen to rectify this issue remains unanswered; however, I find the Landlord did acknowledge that the Tenant has been paying more than what was in place with the agreement.

I find, conclusively, that the Landlord did not impose a rent increase to the Tenant. The Tenant has simply been paying too much rent, since approximately June 2021. This is a situation where the Tenant may be eligible for a refund; however, the Tenant did not present specific information on overpayments, and the I find rent amount was still not clear – either $1,875 or $1,900 – after two hearings. Given the uncertainty, the Tenant must present a separate application for compensation to the Residential Tenancy Branch in a separate process. This requires a strict and clear accounting from the Tenant, which the Landlord must be given the opportunity to respond to.

I dismiss this piece of the Tenant's Application, without leave to reapply. This does not preclude the Tenant from seeking compensation for overpayment of rent.

- **Is the Tenant entitled to a reduction in rent for repairs, services or facilities agreed upon but not provided?**

I find what the Tenant refers to on the Application is what they feel is the legal rent increase that the Landlord is allowed to ask for: 3.5%. I find the Tenant referred to what they have been paying for approximately the last two years as being a 10% increase. This does not refer to repairs, services or facilities that the Landlord is allegedly not providing which is the intent of this part of the Application; therefore, I dismiss this piece of the Tenant's Application and I am not ordering a rent reduction.

I find the Tenant used this issue to rectify the amount of rent they should be paying which is incorrect. For the record, the Landlord stated the amount was $1,875 in the September 7 hearing, then stated $1,900 in the October 16 hearing, and this is less than what the Tenant has been paying.

I dismiss this piece of the Tenant's Application, without leave to reapply. My dismissing this piece does not preclude the Tenant from seeking compensation for overpayment of rent.

Conclusion

I grant the Tenant's Application for cancellation of the One-Month Notice. The tenancy continues in accordance with the *Act*.

I dismiss the Tenant's Application for an order regarding a rent increase, without leave to reapply.

I dismiss the Tenant's Application for a reduction in rent for repair/services/facilities, without leave to reapply.

I make this decision on the authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: October 18, 2023

Residential Tenancy Branch