



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: OPR, OPB, CNR, CNC, DRI, MNR, MNSD, OLC, FF

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent and utilities as well as to recover the filing fee for this proceeding. The Landlord also applied to keep all or part of a security deposit. The Tenant applied to cancel a Notice to End Tenancy for Unpaid Rent and Utilities and a Notice to End Tenancy for Cause as well as to dispute a rent increase and for an Order that the Landlord comply with the Act.

The Tenants argued that the Landlord did not serve them with his application and notice of hearing in this matter. The Landlord's agent claimed he left those documents at the front door of the Tenants' residence under a rock because the Tenants would not answer their door. Section 89(1) of the Act says that an application for a monetary order must be served in person or by registered mail. I find that the Tenants were not properly served with the Landlord's application for a monetary order and that part of the Landlord's application is dismissed with leave to reapply. I also find that the application for an Order of Possession was not served on the Tenants properly (ie. in one of the ways set out under s. 89(2) of the Act). However, section 55(1) of the Act allows a Landlord to request an order of possession if a Notice to End Tenancy is upheld. The Landlord indicated that he wished to seek an Order of Possession if one of the Notices served on the Tenants is upheld.

Issue(s) to be Decided

1. Is the Landlord entitled to end the tenancy?
2. Are there arrears of rent and if so, how much?
3. Has the Landlord imposed an illegal rent increase as alleged?
4. Is the Landlord entitled to keep all or part of the Tenant's security deposit?

Background and Evidence

This month to month tenancy started on December 8, 2005. According to the tenancy agreement rent is \$550.00 per month payable on the 1st day of each month. The Tenants paid a security deposit of \$275.00 at the beginning of the tenancy.

The Landlord issued a Notice of Rent increase dated September 4, 2008 that indicated rent was to be increased to \$570.00 effective October 1, 2008. The Landlord admitted that the Notice did not give 3 months advance notice required under the Act and therefore cannot take effect until January 1, 2009. The Landlord argued, however, that the Tenant had not paid anything for November, 2008 and therefore he served the Tenants with a 10 Day Notice to End Tenancy for Unpaid Rent and Utilities on November 10, 2008 by leaving it with their 14 year old son. The Landlord claimed the Tenant is still in arrears of rent for November and December, 2008.

The Landlord also served a One Month Notice to End Tenancy for Cause dated November 7, 2008 on the Tenants by leaving it with the Tenants' 14 year old son on November 10, 2008. That Notice alleges that the Tenants are repeatedly late paying rent. The Landlord claimed that the Tenants have for the past 2 years or more made bi-monthly payments without his consent. The Landlord provided a copy of a written notice made out to the Tenants and dated November 1, 2008 which stated that rent payments must be made in full on or before the 1st day of each month.

The Tenants claim that they tried to give the Landlord a payment in cash on November 28, 2008 for the full amount of November, 2008 rent but that the Landlord would not accept it. The Tenants claim they also tried to pay the Landlord November, 2008 and December, 2008 rent in full on December 1st and 3rd, 2008 but the Landlord would not accept payment.

The Tenants claim that for the past 2 ½ years, the Landlord has accepted bimonthly payments of rent from them and has only recently insisted on payment in full on the first of each month. The Tenants say this change of affairs came about as a result of a dispute with the Landlord about the number of vehicles the Tenants have on the rental property.

Analysis

Section 88 of the Act sets out the different ways a Notice to End Tenancy (and other documents other than an application for dispute resolution) may be served on a Tenant. Subsection (e) says that if it is served at a person's residence it must be served on an adult who apparently resides with the person. Consequently, I find that the 10 Day Notice to End Tenancy for Unpaid Rent and Utilities dated November 7, 2008 and the One Month Notice to End Tenancy for Cause dated November 7, 2008 were not properly served (because they were served on a minor) and as a result the Landlord's oral request for an Order of Possession is dismissed.

The Tenants' application to cancel the One Month Notice to End Tenancy for Cause is granted. In order to show there has been a repeated late payment of rent, a Landlord

must show there have been at least 3 late payments in the past one year period that were not agreed to or condoned by the Landlord. While both Parties agree the Tenants have made bimonthly payments of rent, the Tenants argue that they were made with the consent of the Landlord for almost 2 ½ years. The Landlord argued that he had no other choice. There is no evidence prior to the written notice dated November 1, 2008 that the Landlord was unwilling to accept bi-monthly payments of rent. Consequently, I find that up until November 1, 2008 the Landlord condoned late payments of rent and cannot now rely on those late payments in support of the Notice to End Tenancy. As a result, that notice is cancelled.

For similar reasons, the Tenants' application to cancel the 10 Day Notice is granted. The 10 Day Notice indicates that November rent was due on November 1, 2008. However, the Tenants had a long standing practice of paying rent in 2 bimonthly payments. Further there is no evidence that the Landlord told the Tenants prior November 1, 2008 that they would not longer be able to make bi-monthly payments. The Landlord provided a copy of a written notice dated November 1, 2008 demanding rent in full on the 1st of each month, however, there is no evidence when or if it was given to the Tenants. Consequently, I find that there is insufficient evidence that November rent was due on the 1st of November. I find that the Tenants attempted to pay November rent in full on November 28th, however the Landlord refused to accept it.

I find that the Tenants now have reasonable notice that rent is due in full on the 1st of each month and that the Landlord will no longer condone bimonthly payments. As the Landlord refused to accept the payment of December rent on December 1 and 3, 2008, I find that the Landlord is estopped from arguing that rent for December, 2008 is late as long as the Tenants pay the Landlord December, 2008 rent in full upon receipt of this Decision. If the Tenants fail to pay December, 2008 rent in full when they receive this Decision, the Landlord will be at liberty to re-issue a new Notice to End Tenancy for Unpaid Rent and Utilities.

Conclusion

The 10 day Notice to End Tenancy dated November 7, 2008 and the One Month Notice to End Tenancy for Cause dated November 7, 2008 are cancelled and the tenancy will continue. The Landlord's application for an Order of Possession is dismissed. The Landlord's application for a monetary order is dismissed with leave to reapply.