



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

CNQ

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant to cancel a *Landlord's Notice that the Tenant Ceases to Qualify for the Subsidized Rental Unit*. Both parties appeared.

The landlord had issued a Ten-Day Notice to End Tenancy for Unpaid Rent dated February 24, 2009 and effective March 12, 2009 stating that the tenant was in rental arrears.

The parties testified that the reason for the rental arrears was that the landlord had recently determined that the tenant no longer qualified for the federal rental subsidy of \$796.00 on the \$1,200.00 per month unit. The landlord testified that the tenant's entitlement to the subsidy was terminated based on the tenant's failure to comply with several material terms contained in the lease agreement and therefore the subsidy was withdrawn by the landlord requiring the tenant to start paying full rent of \$1,200.00 as of February 1, 2009.

However, the tenant continued to only pay the tenant's portion of the rent, which was \$404.00 and fell into arrears. A Ten-Day Notice to End Tenancy for Unpaid Rent was then issued by the landlord on February 24, 2009.

Preliminary Issues

Landlord's Agent

The tenant made an objection to the individual appearing at the hearing and representing the landlord in the proceedings on the basis that this individual was no longer an employee of the housing society and is not associated its business operations. The person appearing on behalf of the landlord testified that she was duly authorized as an agent of the landlord for the purpose of these proceedings.

The issue raised by the tenant about the landlord's right to have an agent of its choice appearing at the hearing is discussed in the Residential Tenancy Rules of Procedure, Rule 8, *Conduct of The Dispute Resolution Proceeding*, which states that, "*A party to a dispute resolution proceeding may be represented by an agent or a lawyer and may be assisted by an advocate, an interpreter, or any other person whose assistance the party requires in order to make his or her presentation.*" I find that this rule applies equally to both a landlord and a tenant and that there is no reason why the landlord would be restricted in regards to representation at a hearing. I note that both the tenancy agreement and the Ten-Day Notice to End Tenancy were signed by the individual in question. I find that, given that the tenant had served the Notice of Hearing addressed directly to the landlord at its place of business, it is evident that the individual who appeared must have been duly assigned to do so by the landlord.

Tenant's Application to Cancel Notice to End Tenancy

In the application for dispute resolution, the tenant has requested that the *Notice to End Tenancy Because the Tenant Does Not Qualify For Subsidized Rental Unit*, be cancelled. Section 49.1 of the Act does permit a landlord, if provided for in the tenancy agreement, to terminate the tenancy of a subsidized rental unit by giving a two-month notice if the tenant ceases to qualify for the unit. The Act also provides that a tenant may dispute a notice under this section by making an application for dispute resolution within 15 days after the date the tenant receives the notice.

However, I find that the landlord did not issue this kind of notice. The Notice issued by the landlord was a Ten-Day Notice to End Tenancy for Unpaid Rent based on the

tenant failing to pay rent. The cause for the rental arrears was the landlord's termination of the subsidy in response to the tenant's failure to comply with terms of the lease.

It is evident that the Notice the tenant seeks to cancel is the Ten-Day Notice to End Tenancy for Unpaid Rent dated February 24, 2009. Being that no Notice was ever issued by this landlord under section 49.1, I find that the dispute before me actually relates to the Ten Day Notice issued under section 46 of the Act, and I find that this is the matter under consideration before me.

Jurisdiction

The burden of proof was on the landlord to establish that the Notice was justified and that the alleged rental arrears were genuinely owed under the Act. The landlord's position was that the Ten Day Notice was supported by the fact that the tenant did not pay rent owed.

According to both parties, the tenant's \$1,200.00 rent was subsidized by CMHC in the amount of \$796.00 and the tenant's portion was \$404.00. This subsidy was pursuant to an agreement between CMHC and the Landlord under the Rural and Native Rental Program. The Contract between the federal government and the landlord delegated complete authority to determine the tenant's eligibility for the subsidy to the landlord. The landlord stated that under the Rent Subsidy Agreement, in order to be approved for the subsidy. the tenant was obligated to meet six conditions as follows:

1. *The tenant abides by the House Lease.* (my emphasis)
2. The details the tenant has provided to CMHC's Agent...regarding household income and household composition is correct.
3. The tenant remains in continuous residence in the premises specified by the House Lease and this Appendix.
4. The tenant agrees that the level of subsidy indicated below is subject to reassessment annually and from time to time as deemed necessary by CMHC's agent....(the landlord)

5. The House Lease is specific to those tenants indicated herein. Subsidy is calculated on the specific individuals and family composition indicated. Prior notification as to any changes must be provided. Where there is a reduction in the family composition and this is below the National Occupancy Standards...(landlord)...reserves the right to terminate tenancy and offer the unit to alternative tenants where appropriate for that particular dwelling.

6. A working Telephone where the tenant can be accessed is to be provided.

The rental rate, according to the landlord, had reverted to the full \$1,200.00 because the tenant did not comply with item 1 above and after the full rent was required without subsidy, the tenant had still only continued to pay \$404.00, leaving \$796.00 outstanding.

The landlord has accepted the jurisdiction of the Dispute Resolution Officer in regards to determining whether the tenancy should end based on unpaid rent under section 46 of the Act.

However, the landlord challenged the authority of the Dispute Resolution Officer in regards to the tenant's eligibility for a subsidy, the issue of whether or not the subsidy was to be granted and flowing from that, what the rental rate to be paid by the tenant should be under the lease agreement. The landlord pointed out that the contract between the landlord and the government gives the landlord the absolute right to determine whether or not the tenant is entitled to a subsidy. The landlord testified that if it was determined that a tenant did not comply with the lease, then the tenant was not entitled to receive the subsidy. The landlord's position was that if the landlord made a determination that the tenant did not comply with the lease, the subsidy would be withheld and the full amount of rent would be due and payable following that determination.

Analysis of Jurisdiction

Section 2 (1) states that, despite any other enactment but subject to section 4 [*what this Act does not apply to*], this Act applies to tenancy agreements, rental units and other residential property.

In regards to interpreting disputed terms in a tenancy agreement or whether or not there was compliance with the terms of a contract, the Act requires that this must be determined through dispute resolution process. The Act does not permit a landlord or a tenant to unilaterally make a determination that a breach has occurred by the other party and that consequences for the breach prescribed under the contract or the Act would then be invoked, particularly if the consequence entailed the ending of the tenancy.

Section 62 (1) gives a dispute resolution officer authority to determine:

- (a) disputes in relation to which the director has accepted an application for dispute resolution, and
- (b) any matters related to that dispute that arise under this Act or a tenancy agreement.

Section 62 (2) states that a dispute resolution officer may make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act and may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and grant an order that this Act applies.

Section 58 of the Act allows a person to make an application to the director for dispute resolution in relation to a dispute with his or her landlord or tenant in respect of any of the following:

- (a) rights, obligations and prohibitions under this Act;
- (b) rights and obligations under the terms of a tenancy agreement that
 - (i) are required or prohibited under this Act, or

(ii) relate to the tenant's use, occupation or maintenance of the rental unit, or the use of common areas or services or facilities.

In this instance, while the contract between the landlord and the government may grant the landlord total authority to determine the eligibility for subsidy, the determination of whether or not one party or the other has violated the Act or any terms in a tenancy agreement can not be included as part of this authority. This is subject is specifically identified in the legislation as being under the jurisdiction of the Act. However, the landlord is at liberty to determine any matter relating to the eligibility for subsidies, provided that the applicable question is not one that the legislation states must be determined through dispute resolution. What subsidy, if any, the tenant should get; is determined by the landlord. But the question of whether or not one party or the other was guilty of non-compliance with the Act or an interpretation of what tenancy agreement terms mean, must be determined through dispute resolution whenever the parties can't agree.

The landlord's argument that the contract signed by all parties would grant the landlord certain authorities that supersede the authority of the Act, is addressed in section 5 which states that landlords and tenants may not avoid or contract out of this Act or the regulations and that any attempt to avoid or contract out of this Act or the regulations is of no effect. The Residential Tenancy Act prevails over contract terms.

Issue(s) to be Decided

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord's issuance of the Ten-Day Notice to End Tenancy for Unpaid was warranted. The questions to be answered include:
 - Did the tenant violate the agreement by failing to pay rent validly owed when it was due?

- Did the tenant have a valid reason under the Act or the agreement not to pay the rental amount in full?

Background and Evidence

The landlord testified that the following steps were taken:

- The landlord determined, (without first obtaining an decision or order through dispute resolution), that the tenant's conduct was in violation of several material terms of the tenancy agreement.
- The landlord made a unilateral decision based on the above conclusion that the tenant was therefore ineligible for the subsidy granted under the contract.
- The landlord acted on this determination by rescinding the rent subsidy effective February 1, 2009 and imposed the requirement that the tenant pay the full amount of \$1,200.00 without subsidy.
- When the tenant did not pay the full amount, the landlord considered this a rent shortfall and issued a Ten-Day Notice to End Tenancy for Unpaid Rent in the absence of the former subsidy.

The tenant was seeking to continue the tenancy and to cancel the Notice to End Tenancy issued for unpaid rent. The tenant's position was:

- that he did not violate the tenancy agreement,
- that the subsidy was wrongfully withheld and should have been continued
- therefore the tenant was not technically in arrears for rent as he was still entitled to the subsidy and properly paid the tenant's portion of the rental amount specified under the lease agreement.

Analysis

I find that in order to determine whether the tenant is in arrears for rent, it must first be determined what rent is owed. In order to determine what rent is owed, it must be

established how much rent the tenant is actually required to pay under the tenancy agreement. The terms of the tenancy agreement state that rent is \$1,200.00. However, the rental agreement also contains Appendix A and Appendix B that provides additional provisions relating to the subsidy of rent and also makes the entitlement to the subsidy contingent upon compliance with the terms of the tenancy agreement amongst other things. Therefore, since the rental rate to be paid by the tenant, or owed by the tenant, is linked to other provisions also contained within the tenancy agreement, any determination that the tenancy must end due to the tenant's failure to pay rent purportedly owed, would first necessitate a determination in regards to whether or not the tenant has violated terms contained in the tenancy agreement.

While I accept that there is no direct authority for a dispute resolution officer to decide whether or not the tenant meets all elements to receive a subsidy, the matter of whether or not the tenant has violated the terms of the tenancy agreement is a question that, under the Act, truly does require a dispute resolution hearing to resolve.

Moreover, I also find that because the consequences of the tenant's non-compliance with the tenancy agreement inescapably determines the end of the tenancy, the level of the violation of the agreement justifying such consequences would have to meet the same standards imposed under section 47 which could support ending the tenancy for cause.

Conclusion

It was my original intent to adjourn this matter to allow the parties to address the issue of whether or not the tenant had complied with the agreement which is directly related to the matter of how much rent the tenant owed.

However, on further examination, I find that an adjournment would serve no purpose. Regardless of any other factor, I find that the Ten-Day Notice must be cancelled because it was issued prematurely by the landlord without going through the critical steps required.

The hearing before me was being held on the tenant's application, not the landlord's application and for this reason, how and why the landlord had determined that a breach of the tenancy terms had occurred would not be relevant to the issue of whether or not the Notice was warranted.

I find that, under this particular tenancy agreement, before the landlord may act to terminate the subsidy based on non-compliance with the terms of the tenancy agreement, the landlord would first need to make its own application for dispute resolution to obtain a decision concluding that the tenant had actually breached the terms of the agreement. .

Then, if the landlord was successful in establishing that the agreement was breached, the landlord would be within its right to end the subsidy and impose the full rental rate onto the tenant. Following that, if the tenant failed to pay the established rent owed in full, a Ten-Day Notice for Unpaid Rent could finally be issued and enforced.

The landlord's failure to follow all of the steps required under the agreement and the Act serves to invalidate the Notice. Therefore, I grant the tenant's application to set aside the Ten-Day Notice to End Tenancy for Unpaid Rent and order it of no force nor effect.

DT

Date of Decision

Dispute Resolution Officer