



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes CNC, DRI, FF

Introduction

This hearing dealt with the tenant's application to cancel a *1 Month Notice to End Tenancy for Cause*, to dispute a rent increase and recover the filing fee paid for this application. Both parties appeared at the hearing and had an opportunity to be heard and respond to the other party's submissions.

Issues(s) to be Decided

1. Has the landlord established a basis to end the tenancy for repeated late payment of rent?
2. Has the landlord breached the Act with respect to a rent increase?
3. Award of the filing fee.

Background and Evidence

Upon hearing undisputed testimony of the parties, I make the following findings. The tenancy commenced in July 2005. At the commencement of the tenancy, the tenant was required to pay rent of \$550.00 on the 1st day of every month and shortly after the tenancy began the tenant offered and began paying \$600.00 per month. In July 2008 the tenant began paying rent of \$875.00 per month. On February 26, 2009 the landlord served the tenant with a *1 Month Notice to End Tenancy for Cause* (the Notice). The Notice has an effective date of March 31, 2009 and indicates that the reason for ending the tenancy is that the tenant has been repeatedly late paying rent. There is no written tenancy agreement and the landlord has not previously issued Notices of Rent Increase that comply with the requirements of the Act.

The landlord provided bank statements showing the deposits of rent made by the tenant since 2007. The landlord claimed that the tenant did not pay rent for March 2008. The bank statements show that the tenant has made deposits to the landlord's bank account on numerous occasions on dates other than the 1st day of the month. The landlord explained that there was no written tenancy agreement as the parties initially expected the tenancy to be short in duration. From the landlord's testimony it also appeared as though the parties were at one time friends and that this tenancy relationship was rather casual.

Residential Tenancy Branch
Ministry of Housing and Social Development

The tenant explained that the landlord telephoned the tenant in mid-February 2009 and required the tenant to vacate the rental unit by March 1, 2009. The tenant alleged that the reasons given to the tenant were that the landlord intended to fix up the property and list it for sale. When the tenant requested proper notification to end the tenancy the landlord served him with the 1 Month Notice.

The landlord explained that he had discussions with the tenant in 2008 about fixing up the rental unit and selling it because the rent payments were not paying the mortgage costs and the tenant had been late paying rent. The landlord told the tenant that the tenant would have to vacate. At that time, the tenant offered to increase the rent payments to \$875.00.

The tenant did not agree with the landlord's versions of the discussions in 2008 and contented that he felt he had no choice but to pay \$875.00 per month or be evicted. The tenant also claims to have paid the rent for March 2008 even though the landlord's bank statements do not reflect that.

The tenant acknowledged that he had been late paying rent on various occasions and indicated that he had issues with his bank limiting the dollar amount of his withdrawals and the inability to make deposits on the 1st due to work obligations, until such time the tenant learned he could make night deposits.

During the hearing, a mutual agreement was attempted between the parties. The tenant was willing to continue with the tenancy until the end of October 2009 and then vacate the rental unit. The landlord rejected the tenant's offer and stated that he wanted the tenant out by July 1, 2009. The landlord stated that he would be serving the tenant with a *2 Month Notice to End Tenancy for Landlord's Use of Property* so that he could use the property for his own accommodation while skiing if the Notice under dispute was cancelled. The landlord was cautioned about the strict criteria that must be met in order to end a tenancy for landlord's use, as specified under section 49 of the Act, as well as the requirement to pay the tenant compensation under section 51 of the Act.

The landlord insisted that he has followed all of the requirements of the Residential Tenancy Act.

Analysis

The landlords' reasons for ending the tenancy are based on the allegations that the tenant paid rent repeatedly late. In regards to that claim certain issues are contingent upon what specific terms were contained in the verbal tenancy agreement between the parties. Although the landlord contended that he has followed the requirements of the

Act, I found the evidence to indicate quite a significant level of non-compliance with the Act, as described below.

Section 13 of the Act places the responsibility for a written tenancy agreement onto the landlord. The landlord did not comply with this section of the Act. Terms contained in verbal tenancy agreement may still be recognized and enforced as the Act recognizes verbal tenancy agreements in the definition of a tenancy agreement.

Where verbal terms are clear and in situations where both the landlord and tenant agree, there is no reason why such terms can not be enforced. That being said, it is evident that, in relying on memory alone, the parties may end up interpreting verbal terms in drastically different ways. Where certain issues and expectations are verbally established between the parties, these terms are always at risk of being perceived in a subjective way by each individual. Obviously, by their nature, verbal terms are virtually impossible for a third party to interpret in order to resolve disputes as they arise.

Moreover, where:

- a. there is no tenancy agreement,
- b. the agreement is missing key provisions, or
- c. terms in an agreement do not comply with the Act,

then a Dispute Resolution Officer will have no choice but to base deliberations on provisions contained in the *Residential Tenancy Act* by default and not on the purported verbal agreement.

As mention above, the Act requires that residential tenancy agreements be in writing and this requirement applies to all residential tenancy agreements, no matter how short the expected length of the tenancy or the casual relationship between the parties. Among other things, a tenancy agreement must specify the amount of rent payable. The amount of rent payable by a tenant to a landlord may be changed where a tenancy agreement is ended in one of the ways permissible under the Act and the parties enter into a new tenancy agreement; however, in this case, I was not presented sufficient evidence to establish that the original tenancy ended and a new tenancy began. Therefore, I find that there has been only one tenancy agreement since the tenant moved in to the rental unit.

A tenancy agreement may be amended or changed with the exception of certain terms, including a rent increase. Rent increases must comply with Part 3 of the Act. The amount and timing of a rent increase and the requirements for notification are provided in sections 42 and 43 of the Act. A landlord may increase rent no more than once every

12 months starting 12 months after the tenancy commences. The landlord must provide the tenant with a Notice of Rent Increase on the proper form and serve the notice upon the tenant at least three months before the rent increase is to take place. The amount of the rent increase is limited to the amount prescribed by the Residential Tenancy Regulations. The Regulations provide that the allowable rent increase for 2008 was 3.7%. An increase that is more than the allowable amount must be either agreed to by the tenant, in writing, before the Notice of Rent Increase is issued or the landlord must make an application for an additional rent increase with the Residential Tenancy Office and have the additional rent increase approved by a Dispute Resolution Officer.

Section 43(5) provides that if a landlord collects a rent increase that does not comply with the Act, the tenant may deduct the increase from rent or otherwise recover the increase.

Since I do not have evidence that the landlord served any Notice of Rent Increase upon the tenant, I find that the landlord was not entitled to collect rent in excess of the rent agreed upon in the tenancy agreement, which was \$550.00 per month.

I have calculated the rent legally owed to the landlord and compared those amounts to the amounts paid by the tenant, based on the evidence provided to me, as follows:

Period	Rent payable @ \$550/mo	Rent paid	Overpayment (Diff between payable and paid)
August 2005	550.00	550.00	0.00
September 2005 – December 2005	2,200.00	2,400.00 (4 mo. x \$600)	200.00
January 2006 – December 2006	6,600.00	7,200.00 (12 mo x \$600)	600.00
January 2007 – December 2007	6,600.00	7,200.00 (12 mo x \$600)	600.00
January 2008 – June 2008	3,300.00	3,600.00 (6 mo x \$600)	300.00
July 2008 – December 2008	3,300.00	5,250.00 (6 mo x \$875)	1,950.00
January 2009 – February 2009	1,100.00	1,750.00 (2 mo x \$875)	<u>650.00</u>
Overpayment			\$ 4,000.00

For purposes of these calculations, I have assumed the tenant began paying \$600.00 per month two months after the tenancy commenced. As the issue of the rent for March 2008 was not a matter before me to determine at this hearing, I have presumed it was

paid as the landlord has not, to date, issued a *10 Day Notice to End Tenancy for Unpaid Rent*.

Based on the requirements of the Act with respect to the rent payable by the tenant and the obligations of the landlord to limit rent increases to amounts permissible by the Act and do so in the approved form, I find that the tenant has actually been overpaying his rent since September 2005 and I have applied the overpayments as pre-payments to the next month's rent. Therefore, I find the tenant has actually been significantly pre-paying the rent and has not been late paying rent in a significant period of time.

Where a landlord fails to act in a timely manner after the most recent late payment of rent, it is reasonable to conclude that the landlord has waived reliance on the provision in the Act that permits a landlord to end a tenancy for repeated late payment of rent. Accordingly, I find the landlord has waived this right and I find it more likely than not that the landlord wishes to end the tenancy for the reasons given by the tenant: that the landlord wishes to fix up and sell the property. Therefore, I grant the tenant's request to set aside the Notice to End Tenancy and this tenancy shall continue on a month-to-month basis with rent set at \$550.00 per month.

Furthermore, the tenant is legally entitled to recover the overpaid rent from the landlord. The tenant is authorized to reduce subsequent month's rent payments until such time the overpayment has been recovered. Where the tenant withholds rent in satisfaction of this award to the tenant, the landlord may not issue the tenant with a Notice to End Tenancy for Unpaid Rent until such time the overpayment has been recouped. Up until February 2009 I calculate the tenant has overpaid \$4,000.00 to the landlord. Overpayments made subsequent to February 2009 are also deductible from future rent payments.

In the event the tenancy ends before the tenant has recouped all of the rental overpayments I provide the tenant with a Monetary Order. The Monetary Order is in the total amount of \$4,000.00; however, the tenant may only enforce the amount not otherwise recovered from the landlord by way of direct payment or by way of not paying rent while residing in the rental unit. To clarify, as I have determined that the tenant is obligated to pay rent of \$550.00 per month, for each month the tenant resides in the rental unit and does not pay rent, the award is reduced by \$550.00.

As the tenant was successful with this application, I also award the filing fee to the tenant. The landlord is ordered to pay the tenant \$50.00. I have included this order on the Monetary Order enclosed with the tenant's copy of this decision.

To enforce payment, the tenant must serve the Monetary Order upon the landlord and may file it in Provincial Court (Small Claims) to enforce as an Order of that court.



Dispute Resolution Services

Page: 6

Residential Tenancy Branch
Ministry of Housing and Social Development

Conclusion

The Notice to End Tenancy is cancelled and the tenancy continues. The rent payable has been set at \$550.00 per month. The tenant is authorized to deduct rent overpayments, calculated to be \$4,000 as of February 2009, from future rent obligations. The tenant is also provided with a Monetary Order to ensure recovery of the rental overpayments.

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

Dated: April 24, 2009.

Dispute Resolution Officer