

Decision

Dispute Codes: CNR, MT, FF

Introduction

This hearing dealt with an application by the tenant for an order setting aside a notice to end this tenancy and an extension of time to file her application. Both parties participated in the conference call hearing.

Issue(s) to be Decided

Should the time be extended for the tenant to make her application?
Does the landlord have grounds to end this tenancy?

Background and Evidence

The parties agreed that the tenant was served with a 10-day notice to end tenancy (the "Notice") on September 4, 2009. Although the notice was placed in the tenant's mailbox, the tenant acknowledged having received the Notice on that date. The tenant testified that she telephoned the Residential Tenancy Branch and was told that she did not have to file an application to dispute the Notice until September 14 and waited until that date to do so as she did not have to be at work on that date.

The landlord testified that the tenant has been in arrears in her rent throughout much of her tenancy and that while she frequently made payments toward the arrears, she had not caught up. The landlord further testified that in many months, late payment charges had been added to the arrears. The landlord provided no documentary evidence showing the rent history.

Analysis

First addressing the tenant's claim for more time to make her application, I am empowered under section 59 to grant an extension of time where the applicant has proven that exceptional circumstances prevented her from acting within the statutorily prescribed timeframe, which in this case would have been Wednesday, September 9. While the Notice was placed in the tenant's mailbox on September 4 and would have been deemed to have been received on September 7, in this case the tenant acknowledged having received the Notice on September 4. It is unclear whether when

the tenant telephoned the Residential Tenancy Branch for information she told the Information Officer that she had actually received the Notice on September 4 or whether the Information Officer assumed that she had not received it until the date it was deemed to have been received under the provisions of the Act. Ordinarily I would be hesitant to consider such circumstances exceptional as the tenant may have misinformed the Information Officer which would have led to receiving incorrect advice. However, for the reasons given below I find that the landlord has not proven that she has grounds to end the tenancy and I find it just to grant an extension of time in these circumstances.

The landlord has the obligation of proving the amount of rent that remained unpaid at the time the Notice was served. The landlord testified that late payment fees had been added to the arrears throughout the tenancy. There is no provision in the Act whereby late payment fees may be characterized as rent and I find that the landlord has not proven that rent, rather than late payment fees, was owing at the time the Notice was served. Further, I find that the landlord has not prove that late payment fees were payable under the terms of the tenancy agreement as no agreement has been entered into evidence.

For these reasons I find that the landlord has not proven that there were rental arrears at the time the Notice was served and I therefore order that the Notice be set aside. As a result, the tenancy will continue.

The tenant is entitled to recover the \$50.00 paid to bring this application and may deduct this sum from future rent owed to the landlord.

Conclusion

The Notice is set aside. The tenant may deduct \$50.00 from a future rental payment.

Dated November 02, 2009.

